Journal of Civil Rights and Economic Development

Volume 27, Spring 2014, Issue 2 Article 4

Reshaping the Last Mile: Amending the Telecommunications Act to Spur Competition in the Broadband Internet Market

Andrew Lipkowitz

RESHAPING THE LAST MILE: AMENDING THE TELECOMMUNICATIONS ACT TO SPUR COMPETITION IN THE BROADBAND INTERNET MARKET

ANDREW LIPKOWITZ*

INTRODUCTION

Idaho was recently designated the slowest state in the United States ("U.S.") in terms of Internet connection speeds.[1] The Internet is so slow in Idaho that it takes its residents nearly three times as long to download a standard music file as residents of Rhode Island, the state with the fastest Internet speeds in the country.[2] Slow download and upload speeds make it difficult to use any video conferencing technology such as Skype, or to stream any high-resolution video. Unfortunately, this disparity in Internet connection speeds between rural and urban areas is common in the U.S. because of the difficulty of building infrastructure in rural locations.[3]

One result of this situation is that the U.S. has begun to lag behind other countries in the performance of broadband.[4] A survey of the thirty-four countries that comprise the Organisation for Economic Co-operation and

* J.D., St. John's University School of Law, June 2013; B.A., State University of New York at New Paltz, December 2008.

[1] Katharine Q. Seelye, *For Idaho and the Internet, Life in the Slow Lane,* N.Y. TIMES, Sept. 14, 2011, at A24. According to the article, the average download speed for residential customers in Idaho is 318 kilobytes per second. *Id.*

[2] *See id.* ("In Idaho, it would take you 9.42 seconds to download a standard music file compared with 3.36 seconds in Rhode Island, the state with the fastest average speeds, at 894 kilobytes per second.").

[3] *See id.* ("Idaho encapsulates some of the challenges for mountain states. . . . [T]he state is crisscrossed by a series of peaks, ridges, forests, high plateaus and river valleys, making it expensive to lay cable or build towers."). Because of such expenses, broadband Internet providers often have little financial incentives to provide high-speed access to residents in rural areas. *See id.*

[4] The term "broadband" as used in this Note refers specifically to broadband Internet access. This is merely for the sake of brevity. It should be noted that "broadband" encompasses other means of communication as well. *See* JOHN THORNE ET AL., FEDERAL BROADBAND LAW 2 (1995) (defining broadband as "the technology for transmitting huge volumes of information through wireline and wireless media."). This Note focuses upon wireline broadband, and does not address many issues surrounding competition among wireless broadband providers.

Development ("OECD")[5] ranked the U.S. at fourteenth in percentage of households with broadband access.[6] A 2011 study of broadband connection speeds worldwide ranked the U.S. twenty-sixth in that category.[7] In a survey of the median prices of monthly broadband subscriptions per country, the U.S. was ranked thirty-first.[8]

These statistics are alarming given the important economic and social benefits that broadband provides.[9] For example, companies in South Korea have benefitted economically by achieving nearly universal broadband adoption.[10] A majority of American adults are now using social networking sites like Facebook or LinkedIn, making broadband an important method of social interaction.[11]

Broadband connection speeds are important because they affect the

[5] The OECD is an international organization that was founded in 1960 with the goal of promoting economic development. Its membership includes nearly half of Europe, as well as Canada, Japan, South Korea, and the United States, among others. *See Members and Partners*, ORGANISATION FOR ECON. CO-OPERATION & DEV., http://www.oecd.org/pages/0,3417,en_36734052_36761800_1_1_1_1_1,00.html (last visited Mar. 14, 2014).

[6] *OECD Broadband Portal*, ORGANISATION FOR ECON. CO-OPERATION & DEV. Figure 2a, http://www.oecd.org/sti/broadband/oecdbroadbandportal.htm#Usage (last updated Jan. 9, 2014) [hereinafter *OECD Broadband Portal*]. Specifically, the OECD found that 68.2% of United States households have access to broadband, compared to 97.5% in the top ranked country, South Korea. *Id.*

[7] *See* Ed Zitron, *Pando Networks Releases Global Internet Speed Study*, PANDONETWORKS.COM (Sept. 22, 2011), http://www.pandonetworks.com//company/news/pando-networks-releases-global-internet-speed-study (accessed at http://archive.is/eZ2j6).

[8] *OECD Broadband Portal*, supra note 6, Figure 4e. Other studies have also indicated that the United States is behind in these and other categories measuring broadband markets. *See infra* Part IB.

[9] *See* Robert Crandall, William Lehr & Robert Litan, *The Effects of Broadband Deployment on Output and Employment: A Cross-Sectional Analysis of U.S. Data*, ISSUES IN ECON. POL'Y 1, 2 (July 2007), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2007/06labor_crandall/06labor_crandall.pdf ("[F]or every one percentage point increase in broadband penetration in a state, employment is projected to increase by 0.2 to 0.3 percent per year."); Lee Rainie, Dir., Pew Research Ctr. Internet & Am. Life Project, *The Perfect People Meter: My Beautiful Fantasy About Understanding Audience in the Digital Age*, Speech at the Advertising Research Foundation Conference 6.0 (June 13, 2011), *available at* http://pewinternet.org/Presentations/2011/Jun/Advertising-Audience-Measurement.aspx ("[The Internet has led] to proliferation of niches and communities – literally countless numbers of them.").

[10] *See* Eric Pfanner, *Expanding Broadband to Bail Out Economies*, N.Y. TIMES, Dec. 5, 2009, http://www.nytimes.com/2009/02/25/technology/25iht-broadband.4.20433456.html?pagewanted=all ("For South Korea, the benefits of nearly universal broadband . . . have been significant. With a population of 50 million highly wired – and wireless – consumers as a test market for new devices, South Korean consumer electronics manufacturers like Samsung and LG have transformed themselves from lumbering makers of low-end products to the most dynamic players in their industry."). The article also states that investments in telecommunications networks generally result in positive economic returns. For example, the article states that economic models show that for every $1 spent on network improvements, there is an increase in gross domestic product of $1.30. *Id.*

[11] *See* Mary Madden & Kathryn Zickuhr, *65 % of Online Adults Use Social Networking Sites*, PEW RES. CENTER INTERNET & AM. LIFE PROJECT (Aug. 26, 2011), http://pewinternet.org/Reports/2011/Social-Networking-Sites.aspx. The amount of adults using social networking sites rose 4 percent between 2010 and 2011. Among people ages 50-64, usage of such sites rose 60 percent during that time. *Id.*

quality and usefulness of a person's Internet experience.[12] Faster speeds allow users to run applications such as streaming video, and also permit faster file transfers.[13] For the U.S. to compete economically with the rest of the world, it is essential that it offer consumers fast speeds.[14] High-speed broadband also contributes to the development of new services and business models.[15] For example, high-speed Internet allows for advanced applications such as real-time two-way videoconferencing.[16] These applications allow for real-time collaborations on data intensive projects, such as building computer-aided designs for engineering or manufacturing.[17] Finally, broadband prices matter because they have a significant impact on the amount of people who can afford access.[18]

In light of the importance of broadband, other countries have implemented policies designed to promote competition between broadband providers, which have resulted in faster connection speeds and lower prices.[19] Yet in the U.S., the Federal Communications Commission ("Commission") has taken a hands-off approach in its regulatory policy towards broadband, not imposing any similar mandates designed to achieve greater competition. Instead, it has deregulated broadband by classifying it as an "information service" within the meaning of the Telecommunications

12 *See* Cecilia Kang, *Survey Maps Out Digital Divide*, WASH. POST, Feb. 18, 2011 at A16 ("Speed matters, experts say, because consumers with better Internet connections can be more productive and get more out of the Web.").

13 Stephen Ezell et al., *The Need for Speed: The Importance of Next-Generation Broadband Networks*, INFO. TECH. & INNOVATION FOUND. 5 (Mar. 2009), *available at* http://www.itif.org/files/2009-needforspeed.pdf.

14 *See* Kang, *supra* note 12 ("[President] Obama has said that networks with at least 10 megabit-per-second download speeds are key to competing economically with countries that have cutting-edge Internet services, such as South Korea and Germany.").

15 *See* Ezell et al., *supra* note 13, at 27 ("Next-generation broadband will be crucial for the competitiveness of small businesses and large corporations alike. Furthermore, next-generation broadband contributes to the development of new business models, services, and forms of corporate organization.").

16 *See id.* at 29. Another example of an application that takes advantage of high-speed Broadband is South Korea's use of real-time transfers for Internet shopping. South Korea's banking system has installed a real-time direct settlement capability, allowing banking transactions to go through the Internet using this payment system. This system eliminated the need to use credit cards to shop on the Internet. *Id.* at 29.

17 *See id.* at 28. Such "telepresence" applications also reduce travel costs insofar as they create an adequate substitute for real face-to-face interaction, allowing for high definition audio and video. One company that has adopted this technology, Cisco, reported that it expected to save $400 million in travel expenses in 2009. *Id.* at 28.

18 *See Summary of Final National Broadband Plan Reply Comments*, FREE PRESS (Jan. 2010), http://www.freepress.net/files/Summary_of_Free_Press_Final_National_Broadband_Plan_Reply_Comments.pdf ("Lower prices . . . will go a long way towards closing the adoption gap.").

19 *See* Leila Abboud, *How France Became a Leader in Offering Faster Broadband*, WALL ST. J., Mar. 28, 2006, at B1 (explaining that French regulators were able to spur competition between broadband companies by requiring bigger companies to make their infrastructure available to smaller competitors), *available at* http://online.wsj.com/article/SB114351413029509718.html.

Act of 1996 ("1996 Act").[20] This allows broadband providers to avoid many of the regulations that are enforced on entities classified as "telecommunications services" under that law.[21] A "telecommunications service" is a service that transmits information between users, while an "information service" transforms or alters information that is transmitted between users in some way.[22] The former category is subject to the common carrier regulations of the 1996 Act, while the latter is not.[23] Common carriers are regulated under Title II of the 1996 Act, which includes provisions allowing the Commission to implement policies designed to increase competition in their market.[24] As a result of the decision to classify broadband as an "information service," the Commission is now without any significant statutory authority to regulate competition among broadband providers.[25]

Without the Commission regulating competition in the broadband

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

21 *See* FEDERAL TRADE COMMISSION, BROADBAND CONNECTIVITY COMPETITION POLICY 3 (2007) [hereinafter *FTC Report*], *available at* http://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf ("[S]ince about 2000, the FCC has undertaken a substantial and systematic deregulation of broadband services and facilities, concluding that cable, wireline, powerline and wireless broadband Internet access services are 'information services' . . . .").

22 *See id.* at 42, n.179 ("In brief, to act simply as a transmitter or transducer of information is to provide a telecommunications service, whereas to act as a transformer of information is to provide an information service.").

23 *See id.*

24 *See* JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 70 (2005) (stating that there is some consensus that Congress designed the Telecommunications Act to produce long term, local competition); THORNE ET AL., *supra* note 4, § 3.1 at 70 (noting that Title II of the Communications Act sets forth the Commission's authority over common carriers).

25 *See* Marc S. Martin, Martin L. Stern & Peter W. Denton, *FCC Seeks Comment on Its "Third Way" Approach to Regulating Broadband Internet Service*, 15 CYBERSPACE LAW. 17, at 17 (2010) ("[T]he Commission, based on its prior decision classifying cable modem service as an unregulated information service, lack[s] direct statutory authority to regulate broadband Internet service . . . ."). As this Note was going to press, the D.C. Circuit Court of Appeals decided another case involving the Commission's authority to regulate broadband. In *Verizon v. Fed Commn'cs Comm'n*, No. 11-1355 (D.C. Cir. Jan. 14, 2014), the D.C. Circuit again overturned Commission rules that were designed to promote "net neutrality." *See id.* at 4. In deciding the case, the D.C. Circuit for the first time recognized that Section 706 of the Telecommunications Act grants the Commission substantive authority to enact regulations promoting the deployment of broadband infrastructure. *Id.* Nonetheless, this new substantive authority could not contravene express prohibitions in the Communications Act. *Id.* With respect to the net neutrality rules at issue in Verizon, the Court held that the Communications Act prohibited "information services" from being regulated as common carriers. *Id.* Thus, the Commission's decision to classify broadband as an "information service" rather than a "telecommunications service" prevented it from using Section 706 to impose any sort of common carrier regulations. To the extent Verizon is relevant to this Note, it does not represent a significant change in the law governing the Commission's authority to carry out the sort of policies proposed herein. Whatever authority Section 706, as currently written, now provides to the Commission, the classification of broadband as an "information service" still provides a barrier to the implementation of any significant measures designed to promote competition.

market, the results have been predictable. According to a survey by the Commission in 2010, most residents in the United States have a choice between only two different broadband providers – a duopoly.[26] Lack of competition has been a significant cause in the failure of the U.S. to provide its citizens with speeds and prices that compare to those of other OECD nations.[27]

This Note proposes that the Commission should reverse its current approach to broadband and instead implement specific regulatory policies that would promote competition, and thus faster connection speeds and lower prices. This Note further advocates that Congress amend Section 706[28] of the 1996 Act to provide the Commission with the express authority to implement such policies.

Part I of this Note examines broadband markets in the U.S. and abroad, providing a brief description of the technology and comparing broadband performance, prices and adoption rates among various countries. Part II describes the current legal and regulatory framework governing telecommunications in the United States, and explains where broadband has fit within that framework. Part III discusses the Commission's "Third Way" proposal, and compares it to various regulatory actions the Commission could take under Section 706 that would promote competition and be consistent with the policies underlying that provision. Part IV proposes an amendment to Section 706 of the 1996 Act that would grant the Commission express authority to implement these policies. Part IV also examines several alternative proposals that have been offered that would grant the Commission authority to regulate broadband, and explains why those proposals would be less effective.

I. BROADBAND INTERNET ACCESS IN THE UNITED STATES AND ABROAD

A. Broadband Technology

The Internet allows computers to share information.[29] The "physical

26 *See* FED. COMMC'NS COMM'N, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 37 (2010) (noting that 78 percent of United States residents live in markets with only two wireline broadband providers) [hereinafter *National Broadband Plan*].

27 *See id.* at 36 ("Competition provides consumers the benefits of choice, better service and lower prices.").

28 42 U.S.C. § 1302 (2012).

29 *See* GEORGE B. DELTA & JEFFREY H. MATSUURA, LAW OF THE INTERNET § 1.02 (2011) (noting that the Internet allows computers to be "interconnected" in the sense that they can share information). This information is sent and received by computers in the form of binary digits (or "bits"), which are used as a mathematical code for all kinds of media, including sounds and images. *See* NUECHTERLEIN

layer"[30] of the Internet consists of the actual means of communication over which computers send and receive information.[31] The physical layer consists of transmission "pipes," such as copper wires or fiber-optic cables, through which the information travels, and "switches," which route transmissions of information from one pipe to another.[32] The "pipes" that connect end users to the nearest "switch" are often referred to as "last mile" facilities.[33]

When residential Internet access was first made commercially available, most users connected by using dial-up telephone connections.[34] However, dial-up's connection speed limits the kinds of applications it can support.[35] By contrast, broadband connections offer much faster speeds,[36] allowing for applications such as streaming high-resolution video.[37]

Broadband technology can be provided to consumers in a variety of ways.[38] The types of broadband include coaxial cable wirelines, digital subscriber lines (DSL), fiber-optic wirelines, wireless, satellite, and broadband-over power lines.[39] Increasing use has been made of fiber-optic lines rather than traditional copper lines through the entire physical layer of the Internet.[40] Fiber has exceptionally high bandwidth, or data carrying capacity, as compared to copper wires, which have much more limited bandwidth.[41]

& WEISER, *supra* note 24, at 115.

30 Nuechterlein and Weiser use this term as shorthand for the physical infrastructure through which bits travel. *See* NUECHTERLEIN & WEISER, *supra* note 24, at 120.

31 *Id.* at 120–21.

32 *Id.*

33 *Id.* at 131.

34 *FTC Report*, *supra* note 21, at 19. Dial-up technology permits computers to transmit data at maximum speeds of 56,000 bits (or 56 kilobits) per second. *Id.* Transmission speeds are measured in bits per second (bps). As used in this Note, "Kbps" refers to kilobits per second, where 1 Kbps denotes a transmission speed of 1,000 bits per second. "Mbps" refers to megabits per second, where 1 Mbps denotes a transmission speed of 1,000,000 bits per second.

35 *See* NUECHTERLEIN & WEISER, *supra* note 24, at 134.

36 *FTC Report*, *supra* note 21, at 19. The Commission has defined broadband as a service that permits transmission speeds of at least 200 kbps. *Id.* at 19 n.54.

37 NUECHTERLEIN & WEISER, *supra* note 24, at 139.

38 *See FTC Report*, *supra* note 21, at 24.

39 *Id.* at 2. DSL is provided over traditional copper telephone lines in which portions of those facilities are dedicated to the transmission of bits. *See* NUECHTERLEIN & WEISER, *supra* note 24, at 141. Cable wirelines permit users to access the Internet using wires created for traditional cable television service. *See id.*

40 NUECHTERLEIN & WEISER, *supra* note 24, at 141.

41 *See id.* at 35-36. Verizon's FiOS service is one example of a broadband connection that uses fiber-optics in its last-mile facilities, often referred to as fiber-to-the-premises. *See National Broadband Plan*, *supra* note 26, at 20.

B. Broadband Markets

Broadband adoption rates in the U.S. have steadily risen over the last decade.[42] An estimate from August 2013 provided that approximately 70 percent of American adults (ages 18 and older) have home broadband connections.[43] In 2011, the U.S. Department of Commerce released a report that stated that Internet adoption overall stands at 68 percent of all households in the U.S.[44] Approximately 18 million Americans live in areas with no broadband access.[45] It is also estimated that approximately 80 million adults do not use broadband at home.[46] This data suggests that for a substantial number of Americans, while there is access to infrastructure that would provide broadband, they simply have chosen not to purchase access.[47]

Further support for the assertion that price has a significant impact on broadband adoption is provided by the 2011 Commerce Department report. The report states that low-income individuals were less likely to use broadband at home than those with higher incomes.[48] In particular, those families earning less than $15,000 annually had a 32.1 percent adoption rate, while the adoption rate for families earning more than $150,000 was 89.6 percent.[49] Although this correlation might be caused by other factors in addition to income, a significant number of households that did not have home broadband surveyed in the report, 25.3 percent, listed "too expensive" as their reason for not adopting broadband, while only 3.1 percent of those surveyed stated that their reason for not adopting broadband was because they did not have access to infrastructure.[50] Again, this data suggests that for a significant amount of residents in the U.S., the

42 *See* Katheryn Zickuhr & Aaron Smith, *Home Broadband 2013*, PEW RES. CENTER INTERNET & AM. LIFE PROJECT (Aug. 26, 2013), http://www.pewinternet.org/2013/08/26/home-broadband-2013/.

43 *Id.*

44 NAT'L TELECOMMS. & INFO. ADMIN., U.S. DEP'T OF COMMERCE, DIGITAL NATION: EXPANDING INTERNET USAGE 2 (2011), *available at* http://www.ntia.doc.gov/files/ntia/publications/ntia_internet_use_report_february_2011.pdf [hereinafter *U.S. Department of Commerce Report*]; *see* Kang, *supra* note 12.

45 Julius Genachowski, Chairman, Fed. Commc'ns Comm'n, Remarks on Broadband Adoption (Oct. 12, 2011), *available at* http://www.fcc.gov/document/chairman-genachowski-broadband-adoption.

46 Deployment of Advanced Telecomms. Capability to All Americans, 26 FCC Rcd. 8008, 8037 ¶ 58 (2011) (Seventh Broadband Progress Report and Order on Reconsideration).

47 *See U.S. Department of Commerce Report*, *supra* note 44, at 5 ("For households that do not connect to broadband, the reason given most frequently for non-adoption was 'don't need/not interested,' followed by 'too expensive.'").

48 *Id.* at 8.

49 *Id.*

50 *Id.* at 20.

problem is not lack of access, but rather prohibitive cost.[51]

Another troubling aspect of broadband adoption in the U.S. is the racial and ethnic disparity among those with broadband and those without. The Commerce Department report, for example, estimated broadband adoption rates of white non-Hispanics at 68.3 percent, while black non-Hispanics had an adoption rate of only 49.9 percent.[52] A 2010 survey of home broadband adoption rates among various demographics by the Pew Internet & American Life Project estimated an 11 percentage-point gap between adoption rates among whites (67 percent) and African-Americans (56 percent).[53] The group noted that the broadband adoption rate among African-Americans had grown by 10 percent between 2009 and 2010, from an adoption rate of 46 percent in 2009 to 56 percent in 2010.[54] Among Latino/Hispanic citizens, there is a disparity in broadband adoption between native-born Latinos and foreign-born Latinos. While 85 percent of native-born Latinos surveyed in a 2010 Pew study had used the Internet, only 51 percent of foreign-born Latinos used the Internet.[55] Unfortunately for some Latinos, language has been a significant barrier to broadband adoption.[56] Overall, Hispanics had a broadband adoption rate of 45.2 percent.[57] Although reduction in disparities in broadband adoption among racial/ethnic groups is an encouraging sign, further action by the Commission should be taken to ensure that there is no gap in broadband adoption among racial or ethnic demographics.

[51] The Commission's 2010 National Broadband Plan also surveyed broadband adoption rates among various income levels, with results similar to those of the Commerce Department's study. The Commission's research showed that approximately 40 percent of adults making less than $20,000 per year had adopted broadband at home, while 93 percent of adults making more than $75,000 had broadband at home. *National Broadband Plan*, *supra* note 26, at 23.

[52] *U.S. Department of Commerce Report*, *supra* note 44, at 11. The rate of adoption was lowest among Hispanics, who had an adoption rate of 45.2 percent. *Id.* The report did note, however, that disparities in adoption rates among different racial and ethnic groups seemed to be slightly narrowing, as the adoption rates among black non-Hispanics, American Indian/Alaskan Native non-Hispanics, and Hispanics all increased from 2009 to 2010. *Id.*

[53] AARON SMITH, PEW INTERNET & AM. LIFE PROJECT, *Home Broadband 2010* 2 (2010), *available at* http://www.pewinternet.org/~/media//Files/Reports/2010/Home%20broadband%202010.pdf.

[54] *Id.*

[55] Gretchen Livingston, *The Latino Digital Divide: The Native Born versus the Foreign Born*, PEW RES. CENTER HISP. TRENDS PROJECT (July 28, 2010), http://www.pewhispanic.org/2010/07/28/the-latino-digital-divide-the-native-born-versus-the-foreign-born/.

[56] *See* Susannah Fox & Gretchen Livingston, *Latinos Online: Hispanics with Lower Levels of Education and English Proficiency Remain Largely Disconnected from the Internet*, PEW RES. CENTER INTERNET & AM. LIFE PROJECT i (Mar. 14, 2007), http://web.pewinternet.org/~/media//Files/Reports/2007/Latinos_Online_March_14_2007.pdf.pdf. Specifically, the report noted that 78 percent of Latinos who are English-dominant and 76 percent of bilingual Latinos used the Internet, compared with 32 percent of Spanish-dominant Hispanic adults. *Id.* at 9.

[57] *U.S. Department of Commerce Report*, *supra* note 44, at 11.

Comparing adoption rates in the United States to other nations evidences that the U.S. is behind. As stated above, the OECD data rank the United States at fourteenth among member countries in terms of the percentage of residents who have home broadband access.[58] As to particular technologies, the OECD ranks the United States as twenty-seventh out of thirty in DSL coverage, first out of twenty-eight in cable modem coverage, and sixth out of sixteen in fiber-to-the-premises coverage.[59]

Connection speeds are another important measure of broadband markets. Advertised download speeds for broadband in the U.S. have increased by approximately 20 percent per year over the past decade.[60] Additionally, American broadband providers plan future upgrades to their facilities that they anticipate will raise adoption rates and speeds.[61] In 2010, the Commission predicted that these upgrades would allow 90 percent of the country to have access to advertised download speeds of more than 50 Mbps by 2013.[62]

However, again, international comparisons indicate the U.S. is behind a number of other countries in this category. One recent study estimated the average worldwide download speed as 580 Kbps, with the United States only slightly higher at 616 Kbps, placing it at a rank of twenty-sixth worldwide.[63] By contrast, the top four countries were South Korea (2.2 Mbps), Romania (1.9 Mbps), Bulgaria (1.6 Mbps) and Lithuania (1.4 Mbps).[64] Even in studies where the U.S. did more favorably, they were not within the top ten in connection speeds.[65] While some critics of these types of studies fault them for failing to take into account disparities between more rural and urban countries, others argue that greater investments in infrastructure and competition among broadband providers have allowed other countries to surpass the U.S. in terms of connection speeds.[66]

58 In the Matter of International Comparison Requirements Pursuant to the Broadband Data Improvement Act, 26 FCC Rcd. 7378, 7381 para. 9 (2011).

59 *Id.* at 7831 para. 8.

60 *National Broadband Plan*, *supra* note 26, at 20.

61 *See id.*

62 *Id.* at 20-21.

63 Zitron, *supra* note 7.

64 *Id.*

65 *See* Catharine Smith, *Top 19 Countries With the Fastest Internet Connection Speeds Ranked by Akamai*, HUFFINGTONPOST.COM (Nov. 18, 2010, 7:32 AM), http://www.huffingtonpost.com/2010/11/18/fastest-internet-connection-speed_n_783865.html#s182459&title=19__France (last updated May 25, 2011) (ranking the United States at #12).

66 *See* Nate Anderson, *Broadband: Other Countries Do it Better, But How?*, ARSTECHNICA.COM (May 11, 2008, 8:37 PM), http://arstechnica.com/old/content/2008/05/broadband-other-countries-do-it-better-but-how.ars (noting a common criticism of the OECD broadband rankings is that they cover countries with greater population density than the United States, but that the countries ranked ahead of

Current prices for broadband subscriptions in the U.S. range from $27.49 per month to $221.52 per month, with a median price of $54.35 per month .[67] For connections with a 2.5 Mbps speed, the median price per month paid by American consumers is $43.95, while the median monthly price for connections that provide speeds of 30 Mbps is $73.32.[68]

A recent study has indicated that prices in the U.S. for broadband have remained fairly steady between 2007 and 2009, rising by two percent,[69] while in most other OECD countries prices have fallen.[70] In countries like France and Belgium, prices fell over 40 percent during that period, with decreases in prices of at least 10 percent occurring in Spain, Japan and Sweden.[71]

The OECD also measures the median prices per country for various broadband connection speeds, which further reveals the significant price differences between the U.S. and other countries. For example, a September 2012 study by the OECD revealed that the median monthly subscription price for a connection speed faster than 45 Mbps in the U.S. was $89.82, while in Japan, the median monthly subscription price for speeds faster than 45 Mbps was $30.18.[72] Out of the thirty-four countries surveyed, the U.S. was ranked thirty-first in terms of countries offering the cheapest median monthly subscription price for a connection speed faster than 45 Mbps.[73] This disparity in prices between the U.S. and other countries decreases as the speed of the broadband connection offered decreases. For example, for connection speeds of at least 15 Mbps, the median monthly subscription price in the U.S. was $43.99, while in Korea, the top country for that category, the median monthly subscription price was $16.35.[74] In the 15 Mbps category, the U.S. was ranked twenty-sixth

the United States also have greater investment and competition in their broadband markets).

67 *OECD Broadband Portal*, *supra* note 6, List of broadband offers used for prices and speeds.

68 *Id.* Figures 4e, 4g. The OECD measures the price of broadband subscriptions based on a "basket" approach whereby they survey different types of users and calculate the cost of broadband for each type of user. Thus, the OECD provides data on cost for both low and high usage of broadband. All references in the text are to the cost of "low" broadband usage.

69 Matthew Lasar, *Broadband Prices Dropping Around the World, But Not US*, ARSTECHNICA.COM (Dec. 15, 2010, 7:40 PM) http://arstechnica.com/tech-policy/news/2010/12/residential-broadband-prices-falling-but-not-in-us.ars.

70 *Id.*

71 SCOTT WALLSTEN & JAMES L. RISO, TECHNOLOGY POLICY INSTITUTE, RESIDENTIAL AND BUSINESS BROADBAND PRICES PART 2: INTERNATIONAL COMPARISONS 27 (2010), *available at* http://techpolicyinstitute.org/files/residential%20and%20business%20broadband%20prices%20pt2.pdf.

72 *OECD Broadband Portal*, *supra* note 6, Figure 4h. Other countries with the lower prices for these high-speed connections include Iceland ($48.93per month), Finland ($46.81 per month) and Sweden ($ 41.01 per month). *Id.*

73 *Id.*

74 *Portal*, *supra* note 6, Figure 4f.

out of thirty-four countries in terms of the cheapest median monthly subscription price.[75] The U.S. had the third most expensive median monthly subscription rate for broadband connection speeds of at least 2.5 Mbps, out of thirty-four countries surveyed by the OECD in September 2012.[76] What is troubling about this information is the fact that the U.S. is much farther behind the rest of the OECD countries in offering low cost, yet high-speed connections.

The disparity in broadband speeds and prices between the U.S. and other OECD nations can partly be explained by a variety of factors that are beyond the control of the Commission – geography, population density, and housing, to name a few.[77] However, differences in population density and geography cannot explain all of the differences in broadband performance. The Commission's 2011 International Broadband Data Report compared data on download speeds among a number of U.S. cities and foreign cities, concluding that "mean actual download speeds in some European and Asian cities are substantially higher than in comparably sized U.S. cities."[78] Moreover, some countries with lower population density than the U.S. nonetheless have greater broadband adoption rates.[79] Thus, population density and geography cannot account for all of the differences in broadband performance among various countries.

One factor that affects speeds and prices is competition, which is within the Commission's ability to promote. Studies have demonstrated that the U.S. broadband market has little competition, and is currently an oligopoly, with only a small number of firms in the market. For example, the Commission, in its National Broadband Plan, stated that 78 percent of Americans live in areas that are served by only two broadband providers.[80] A 2010 study of the state of broadband competition in the U.S. concluded that in half of the U.S. the broadband market is a duopoly.[81] Even some

75 *Id.*

76 *Id.* Figure 4e.

77 *See* ROBERT D. ATKINSON, THE INFORMATION TECHNOLOGY & INNOVATION FOUNDATION, THE TRUTH, AND NOTHING BUT THE TRUTH ABOUT U.S. INTERNATIONAL BROADBAND RANKINGS 1 (2010), *available at* http://www.itif.org/files/2010-BB-rankings.pdf (arguing that some of the disparity in international rankings between the United States and countries like Japan or South Korea can be explained by the fact that they are more densely populated than the United States).

78 *International Broadband Data Report*, *supra* note 58, at 7384 para. 15. As an example, the Commission noted that download speeds were measured at 24.8 Mbps in Paris and 35.8 Mbps in Seoul versus 6.9 Mbps in San Francisco and 9.4 Mbps in Chicago. *Id.*

79 *Id.* at 7400-11. To take two examples, Norway and Iceland both have lower population density than the United States, but have a higher broadband adoption rate. *Id.*

80 *National Broadband Plan*, *supra* note 26, at 37.

81 ADAM ELLIOTT & CRAIG SETTLES, THE STATE OF BROADBAND COMPETITION IN AMERICA – 2010 8-9 (2010), *available at* http://gigaom.files.wordpress.com/2010/04/pdf-broadband-competition-

states that have two providers have a 30 percent gap in market share between the two providers, which is closer to a monopoly.[82]

C. *Effects of Broadband Usage on Society*

These statistics have serious economic and societal consequences for the U.S. Broadband connections must be fast and reliable if companies are going to continue to create applications and content for consumers who make use of those connections.[83] The rising speed of broadband connections has been closely correlated with increasing use of the Internet.[84] The average Internet user today consumes 9,000 Megabytes of data per month over his/her connection.[85] Moreover, the Commission estimates that total data use per fixed residential connection is growing by roughly 30 percent per year.[86] If broadband usage is to continue to grow, it is necessary that speeds continue to increase to meet demand for data consumption.

But what types of data are people consuming? The Commission's 2010 National Broadband Plan surveyed home broadband users to determine how they use their connections, and the results show that broadband serves important functions. For example, 83 percent of all broadband users have bought a product online, 80 percent have obtained local news, 79 percent have visited a local, state or federal government website, and 60 percent obtained information on or applied for a job.[87] It can hardly be disputed that these activities both help to fuel the economy and provide access to important information, and encouraging more people to use these services would benefit society and the economy as a whole.

In addition, new applications are being developed that require significantly higher bandwidth.[88] To name just two examples, streaming live video for classroom lectures and two-way video teleconferencing are

research-report-4-22-10-final.pdf ("Contrary to claims of those who feel the U.S. has 'robust broadband competition,' it is clear that half of the states have a duopoly rather than true competitive markets. . . . Even in the most competitive states, the bottom five competitors have 3% market share or less.").

82 *Id.* at 8.

83 *See National Broadband Plan*, *supra* note 26, at 15 ("Networks, devices and applications drive each other in a virtuous cycle. If networks are fast, reliable and widely available, companies produce more powerful, more capable devices to connect to those networks. These devices, in turn, encourage innovators and entrepreneurs to develop exciting applications and content.").

84 *Id.* at 16. Specifically, the Commission notes that average home broadband use increased from roughly 1 hour per month in 1995 to almost 29 hours per month today. *Id.*

85 *Id.*

86 *Id.*

87 *Id.*

88 *See id.* at 17 (noting, for example, that consumers are increasingly using high-bandwidth applications such as videoconferencing and cloud computing).

both applications that require faster connections than those needed for traditional e-mail and web browsing applications.[89] Only access to high-speed broadband connections will allow for users to enjoy the benefits of these applications.

Adoption rates also have serious economic consequences. A February 2006 study showed that communities that have access to broadband experience more rapid growth in employment and business development than communities that do not have broadband access.[90] Another study indicated that for every one percentage point increase in broadband adoption in a state, employment in that state increases by 0.2 to 0.3 percent.[91] Broadband usage provides significant benefits both to consumers and society. To promote further broadband adoption and economic development, it is necessary to achieve faster connection speeds and lower subscription prices.

II. FEDERAL REGULATION OF BROADBAND

To understand how the federal government could achieve greater broadband competition, it is necessary to explore the legal framework in which federal regulators operate.

A. Common Carrier Regulation and the Communications Act of 1934

The modern framework of telecommunications law was created with the passage of the Communications Act of 1934 ("1934 Act").[92] The 1934 Act established the Commission, an independent federal agency charged with "regulating interstate and foreign commerce in communication by wire and radio."[93] This Act is the principal source of the Commission's authority,

89 *Id.*

90 LENNARD G. KRUGER & ANGELE A. GILROY, CONG. RESEARCH SERV., RL 30719, BROADBAND INTERNET ACCESS AND THE DIGITAL DIVIDE: FEDERAL ASSISTANCE PROGRAMS 6 (2011) ("A February 2006 study done by the Massachusetts Institute of Technology . . . found that 'between 1998 and 2002, communities in which mass-market broadband was available by December 1999 experienced more rapid growth in employment, the number of businesses overall, and businesses in IT-intensive sectors, relative to comparable communities without broadband at that time.'").

91 *Id.*

92 *See* Communications Act of 1934, Pub. L. No. 73-416 (codified in scattered provisions of 47 U.S.C.); *see also* THORNE ET AL., *supra* note 4, at 30. The 1934 Act, as amended, is divided into seven titles. Under Title I are "general provisions," which includes the purposes of the Act, definitions, the establishment of the Commission and the structure and operations of the Commission. Title II are "Common Carriers" provisions, Title III are provisions relating to radio, Title IV are administrative and procedural provisions, Title V are penal provisions, Title VI are provisions related to cable, and Title VII contains miscellaneous provisions. Communications Act of 1934, Pub. L. No. 73-416.

93 47 U.S.C. § 151 (2012).

allowing it to regulate with the purpose of making available to all the people of the U.S. "a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[94] The Act also charges the Commission with responsibility for enforcing its provisions.[95]

Title II of the 1934 Act authorized the Commission to regulate common carriers.[96] A common carrier is an entity that offers a service to the general public. It merely transports information; it does not control the content of what it transmits.[97] When Congress enacted the 1934 Act, common carriers included telephone and telegraph companies.[98] The Commission enjoyed significant authority over common carriers; for example, Title II allowed the Commission to control entry and exit of common carriers into the market,[99] and even prescribe depreciation rates and accounting systems used by common carriers.[100] Common carriers could charge only reasonable rates[101] and could not discriminate between customers in terms of their prices.[102]

Newer technologies like cable eventually emerged, and although the 1934 Act did not give the Commission express authority to regulate this technology, the doctrine of "ancillary jurisdiction" was used initially to allow the Commission to regulate it.[103] Under 47 U.S.C. § 154, "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."[104] In *United States v. Southwestern Cable Co.*,[105] the Supreme Court construed this provision to give the Commission the authority to take regulatory action "reasonably ancillary to the effective performance of the Commission's various

94 *Id.*

95 *Id.*

96 THORNE ET AL., *supra* note 4, at 31.

97 *Id.* The Communications Act does not define the term "common carrier" except to state that a common carrier means "any person engaged as a common carrier for hire . . ." 47 U.S.C. § 153(11) (2012).

98 THORNE ET AL., *supra* note 4, at 31.

99 47 U.S.C. § 204 (2012); 47 U.S.C. § 214 (2012).

100 47 U.S.C. § 220 (2012).

101 47 U.S.C. § 201 (2012).

102 47 U.S.C. § 202 (2012).

103 *See* Comcast Corp. v. Fed. Commc'ns Comm'n, 600 F.3d 642, 646 (D.C. Cir. 2010) (describing a series of cases in which the Supreme Court held that the Commission may use its ancillary authority to regulate cable television despite the Commission's lack of express statutory authority).

104 47 U.S.C. § 154(i) (2012).

105 392 U.S. 157 (1968).

responsibilities."[106] Eventually the Commission was given direct statutory authority over cable with the Cable Communications Act of 1984.[107]

B. Telecommunications Act of 1996

The next major telecommunications reform occurred when Congress passed the 1996 Act.[108] A basic understanding of the policies and provisions of this Act is necessary before exploring how broadband has been applied to this framework.

The 1996 Act amended the 1934 Act,[109] with the ultimate purpose of encouraging greater competition in telecommunications markets.[110] Congress eventually hoped to encourage long term competition that is "facilities based," which means that each company offering telecommunications services would provide services over facilities that it owns, as opposed to leasing facilities from incumbent (existing) service providers.[111] The idea was to use regulation to help new start-up telecommunications service providers entering the market by overcoming barriers to entry. Eventually the telecommunications market was deregulated once multiple companies were competing in local markets using their own facilities.[112] To encourage competition, Congress added several provisions to Title II of the 1934 Act that contained additional regulatory tools for the Commission to use.[113]

Section 251 of the 1996 Act allows start-up companies to lease existing facilities from incumbent service providers. This leasing arrangement is designed to allow new companies to enter the telecommunications market and overcome the high barriers to entry and economies of scale that exist in the market.[114] By leasing an incumbent's facilities, the start-ups would

106 *Id.* at 178.

107 *See* Pub. L. 98-549, 98 Stat. 2780 (codified in Title VI of 47 U.S.C.).

108 *See* Pub. L. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.).

109 *FTC Report*, *supra* note 21, at 37 n.151.

110 *See* NUECHTERLEIN & WEISER, *supra* note 24, at 70.

111 *Id.*

112 *Id.*

113 47 U.S.C. § 251 (2012); NUECHTERLEIN & WEISER, *supra* note 24, at 70 ("Congress added a Part II, entitled 'Development of Competitive Markets' to Title II of the Communications Act of 1934."). The 1996 Act left in place the various Titles of the 1934 Act. At the time of the 1996 Act, those Titles included Title I (General Provisions), Title II (Common Carriers), Title III (Radio), Title IV (Procedural and Administrative Provisions), Title V (Penal Provisions), Title VI (Cable Communications). *See* NUECHTERLEIN & WEISER, *supra* note 24, at 74.

114 *See* NUECHTERLEIN & WEISER, *supra* note 24, at 81; *see also* 47 U.S.C. § 251 (2006). Specifically, that Section provides that incumbent telecommunications service providers have "[t]he duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible

avoid the high costs of building infrastructure. Over time, as the competitor leasing these facilities gains its own customers, it might raise enough capital to build its own network.[115] Sections 251 and 252 govern this process of leasing existing infrastructure, and require the incumbents to lease facilities on an unbundled basis to new competitors– meaning the competitor may choose which elements of the incumbent network they wish to lease.[116]

It should be noted, however, that the policy of allowing start-ups to lease facilities from incumbents, sometimes referred to as "local loop unbundling" was developed as a policy to promote competition in the telephone industry, not broadband.[117] Sections 251 and 252 were originally intended by Congress to apply to telephone companies.[118] The provisions place a number of obligations on "incumbent local exchange carriers" (ILECs).[119] These were essentially incumbent telephone companies.[120] The start-up companies seeking to enter the telephone market were referred to as competitive local exchange carriers, or CLECs.[121]

Although the competition enforcing provisions of Sections 251 and 252 were not intended to apply to broadband, the policies they provide for – particularly local loop unbundling – have been part of the broadband policy debate. In particular, a number of OECD countries have applied unbundling provisions to broadband in the hopes of ensuring greater

point on rates, terms and conditions that are just, reasonable and nondiscriminatory . . .An incumbent local exchange provider shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." *Id.*

115 NUECHTERLEIN & WEISER, *supra* note 24, at 81.

116 *Id.* The 1996 Act also provided the Commission with a number of other powers. For example, the Commission was given forbearance authority, which allowed it to exempt a telecommunications service provider from any Title II regulations if it determined that the regulation was not necessary to promoting just and reasonable rates, protection of consumers, and that forbearance would be consistent with the public interest. 47 U.S.C. § 160 (2012).

117 OECD, DEVELOPMENTS IN LOCAL LOOP UNBUNDLING 4 (2003), *available at* http://www.oecd.org/dataoecd/25/24/6869228.pdf [hereinafter *Developments in LLU*] ("Although LLU began as a policy to promote competition in local telephony, recently it has received attention because of its role in stimulating broadband development in a number of countries.").

118 *See* NUECHTERLEIN & WEISER, *supra* note 24, at 69 ("[T]he statutory drafters did not fully anticipate the Internet's radical reordering of the telecommunications industry.").

119 *See generally* 47 U.S.C. § 251 (describing the various duties of incumbents pursuant to that provision).

120 *See* NUECHTERLEIN & WEISER, *supra* note 24, at 71 (noting that the Bell companies and other incumbent telephone companies were ILECs for purposes of the 1996 Act).

121 *Id.* It should also be noted that the policy of encouraging more CLECs to enter the telephone market was unsuccessful and largely abandoned by the Commission. *See* COMMON CAUSE EDUC. FUND, THE FALLOUT FROM THE TELECOMMUNICATIONS ACT OF 1996 8 (2005), *available at* http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/FALLOUT_FROM_THE_TELECOMM_ACT_5-9-05.PDF ("They also resulted from the failure of new companies that raised hundreds of billions of dollars to enter the local telephone business . . . .").

competition.[122] In addition, some groups have advocated applying the competition enforcing provisions of Sections 251 and 252 to broadband in the U.S.[123] It is unclear whether the Commission could apply these provisions to Broadband in the absence of Congressional action.[124]

C. Regulation of Broadband Internet Access

Central to the current debate over the proper legal and regulatory theory to apply to broadband is the "telecommunications services" and "information services" distinction created by the 1996 Act.[125] The term "telecommunications services" denotes a transmission of information whose destination and content are controlled solely by the user, while "information services" means the offering of a capability for obtaining information.[126] "Telecommunications services" are subject to the common carrier regulations of Title II, while "information services" are exempt.[127] It was generally assumed, however, that products classified as "information services" could still be regulated by the Commission under its ancillary jurisdiction.[128]

122 *See Developments in LLU*, *supra* note 117, at 4 ("[M]ost OECD governments have based their policies for expanding broadband infrastructures and services on the development of competition based on a framework which ensures fair and non-discriminatory conditions of access to network resources . . . . [M]any regulators have in recent years expanded these frameworks to ensure that new facility-based entrants and Internet service providers can compete with incumbents in offering broadband access and services.").

123 *See* Michael Weinberg, *The FCC's Berkman Study is Clear: Broadband Unbundling Expands Competition, Increases Access, and Creates Jobs*, PUB. KNOWLEDGE (Nov. 18, 2009), http://www.publicknowledge.org/news-blog/blogs/fccas-berkman-study-clear-broadband-unbundlin ("[C]reating conditions for real competition between broadband providers benefits consumers. Not only that, but it encourages the construction of the infrastructure required to bring true high-speed Internet to more people. . . . [O]ne of the most important elements of successful broadband regulation is something called 'unbundling.'") (emphasis omitted).

124 *See* Austin Schlick, *A Third-Way Legal Framework for Addressing the* Comcast *Dilemma*, BROADBAND.GOV (May 6, 2010), http://www.broadband.gov/third-way-legal-framework-for-addressing-the-comcast-dilemma.html.

125 *FTC Report*, *supra* note 21, at 42.

126 *See* 47 U.S.C. § 153(43) ("The term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."); *id.* § 153(46) ("The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used."); *id.* § 153(20) ("The term 'information service' means the offering of a capability for generating, acquiring, storing, processing, retrieving, utilizing, or making available information via telecommunications . . . but does not include any use of any such capability for the management, control, or operation of a telecommunications system . . . .").

127 *FTC Report*, *supra* note 21, at 42.

128 *See* Julius Genachowski, *The Third Way: A Narrowly Tailored Broadband Framework*, BROADBAND.GOV (May 6, 2010), http://www.broadband.gov/the-third-way-narrowly-tailored-broadband-framework-chairman-julius-genachowski.html [hereinafter *FCC Third Way*] (As a result of classifying broadband as an "information service," "broadband became a type of service over which the Commission could exercise only indirect 'ancillary' authority . . . .").

When broadband Internet connections first became available, the Commission had to determine whether to classify these connections as "telecommunications services," and thereby subject them to Title II regulations. The Commission first addressed the issue in 2002 when it issued an order classifying cable modems as "information services."[129] The Supreme Court upheld this order.[130] For a brief period, then, cable was exempt from Title II requirements, while DSL companies were subject to unbundling requirements in the 1996 Act.[131] The Commission later determined that both cable and DSL should be classified as "information services," eliminating any difference in regulatory treatment between the two services.[132]

The Commission subsequently expanded this policy of classifying broadband as "information services" to additional platforms. In 2005, the Commission issued an order classifying all facilities-based wireline broadband as an "information service."[133] This order applied to all broadband service providers, regardless of platform or technology used.[134] This policy of deregulation was further extended when Verizon filed a petition for forbearance from Title II regulations of broadband services, which was granted by the Commission in 2006.[135] The Commission has also classified wireless broadband as information services.[136] The result of all of these actions has been to create a unified status across all platforms for broadband as "information services" that are exempt from Title II regulations.[137]

However, the Commission did not leave broadband completely

129 In re Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities, 17 FCC Rcd. 4798, 4832 (2002), *aff'd in part, vacated in part sub nom.* Brand X Internet Servs. v. Fed. Commc'ns Comm'n, 345 F.3d 1120 (9th Cir. 2003), *rev'd sub nom.* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

130 Nat'l Cable & Telecomms. Ass'n , 545 U.S. at 996-97.

131 Kevin Werbach, *Off The Hook*, 95 CORNELL L. REV. 535, 544 (2010).

132 *Id.*

133 In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 20 FCC Rcd. 14853, 14856 (2005). This order was subsequently challenged in the courts, and was upheld in Time Warner Telecom, Inc. v. Fed. Commc'ns Comm'n, 507 F.3d 205, 224 (3d Cir. 2007).

134 *FTC Report, supra* note 21, at 45 n.205.

135 *FCC Announces that Verizon Petition for Forbearance is Deemed Granted*, TECH L.J., (Mar. 21, 2006), http://www.techlawjournal.com/topstories/2006/20060321.asp. Verizon had needed to ask for forbearance from common-carriage requirements because some of its commercial broadband services had not been expressly addressed in the 2005 Wireline Order. *See FTC Report, supra* note 21, at 46.

136 *FTC Report, supra* note 21, at 139.

137 *Id.* Of course, as the Commission had the power to classify broadband as an "information service" it could validly reverse itself and reclassify broadband as a "telecommunication service." Such action would likely be challenged in the courts, and the Commission would need to defend its decision in order to have it sustained.

unregulated, rather it attempted to exercise some authority over broadband pursuant to its ancillary jurisdiction.[138] A test of the extent of this authority came in *Comcast v. FCC*,[139] in which the Commission asserted its ancillary jurisdiction to issue an order requiring Comcast, a provider of broadband, to disclose the details of how it planned to handle traffic over its network.[140] Just as in *Southwestern Cable*, the Commission argued that while it did not have direct statutory authority to regulate broadband, this order fell within its authority under 47 U.S.C. § 154. The court in *Comcast* rejected the Commission's argument that it had authority to issue the order under its ancillary jurisdiction.[141] The court reasoned that the Commission's ancillary authority is limited to actions that allow it to carry out its responsibilities under the Communications Act – in other words, the ancillary authority can be used only to carry out or to further an express provision of the Communications Act.[142] The Commission asserted that the ancillary authority invoked in *Comcast* carried out the responsibilities of several statutes,[143] but the Court rejected each of these arguments, stating that the statutes cited by the Commission were merely statements of Congressional policy, which could not be used to sustain a claim of ancillary jurisdiction.[144]

For example the Commission cited 47 U.S.C. § 230(b),[145] which expresses Congress' goal that technologies should be developed to give Internet users control over their personal information.[146] The Commission argued that its order in *Comcast* was "ancillary" to carrying out this statutory provision.[147] However, the court rejected this argument, finding that § 230(b) is a "statement[] of policy that . . . delegate[s] no regulatory

138 Lee L. Selwyn & Helen E. Golding, *Revisiting the Regulatory Status of Broadband Internet Access: A Policy Framework for Net Neutrality and An Open Competitive Internet*, 63 FED. COMM. L.J. 91, 100 (2010).

139 600 F.3d 642 (D.C. Cir. 2010).

140 *Id.* at 644-45.

141 *Id.* at 644.

142 *Id.* at 646 ("The Commission . . . may exercise ancillary jurisdiction only when . . . the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities.").

143 *Id.* at 652.

144 *Id.* at 654. Of course, as was noted above, the D.C. Circuit reversed itself in the recent *Verizon* case, holding that the Commission's interpretation of Section 706 of the Telecommunications Act to provide some substantive authority to the Commission to regulate broadband was reasonable. *Verizon*, No. 11-1355, at 4. Nonetheless, the D.C. Circuit did not clarify the limits of this authority.

145 Section 230 provides, in relevant part, "[I]t is the policy of the United States . . . [to] maximize user control over what information is received by individuals, families, and schools who use the Internet." 47 U.S.C. § 230 (2012).

146 *Id.*

147 *Comcast*, 600 F.3d at 651.

authority."[148] Other statutes cited by the Commission, including Section 706(a) of the Telecommunications Act, were similarly rejected as mere statements of policy that did not grant substantive regulatory authority to the Commission over Broadband.[149] The court therefore rejected the Commission's assertion of ancillary jurisdiction, stating "policy statements alone cannot provide the basis for the Commission's exercise of ancillary authority."[150] As a result of *Comcast*, it is uncertain whether the Commission has any authority to regulate broadband given the current legal framework.

III. FCC "THIRD WAY" APPROACH AND SECTION 706 – TWO ALTERNATIVES

This section begins by discussing the Commission's "Third Way" proposal in response to *Comcast*, and describing where it falls short in addressing the need for faster broadband speeds and lower prices. It then discuses Section 706 of the Telecommunications Act of 1996, and why it could be used to solve the current uncertainty surrounding the appropriate legal framework to apply to broadband described in the preceding section.

A. Examining the "Third Way"

The aftermath of the *Comcast* decision has led to a crossroads for the Commission, in that it is now faced with the task of finding a new legal basis for regulating broadband, and has two very different approaches it could take.[151] It could continue to assert ancillary authority as justification for regulatory measures like the one at issue in *Comcast* and risk having reviewing courts overturn any action the Commission takes, or it could reverse the course it began in 2002 and reclassify broadband as a "telecommunications service."[152] However, the Commission identified and proposed a "third way" approach.[153]

Under the "Third Way" approach that the Commission announced in 2010, the Commission would first issue an order reclassifying broadband as a "telecommunications service," subjecting it to Title II regulation.[154] This

148 *Id.* at 652.
149 *Id.* at 658.
150 *Id.* at 654.
151 *FCC Third Way*, *supra* note 128.
152 *Id.*
153 *Id.*
154 *Id.*

would give the Commission the solid legal foundation it would need to regulate broadband, as broadband would now be subject to the express provisions of Title II.[155] Second, the Commission would then use its forbearance authority under Section 160 to exempt broadband from most of the Title II regulations it would have otherwise been subject to due to the reclassification.[156] Only a handful of Title II provisions would then be applied to broadband, but those provisions would be enough for the Commission to achieve its regulatory goals.[157]

Under the Title II provisions that the Commission would apply to broadband under the Third Way plan, the Commission would be able to require broadband providers to charge reasonable rates to customers and prevent discrimination in charges or access among customers. It would not have the authority, however, to require incumbent broadband providers to permit unbundled access to competitors, or to allow competitors to purchase other telecommunications services from incumbents for resale. Thus, while it would protect consumers from direct discrimination by broadband providers, it would not foster competition under the "Third Way" approach.

The Commission argued that this "Third Way" would allow it to have sound legal authority to impose regulations applicable to broadband, while leaving the market largely de-regulated and exempt from the burdensome common carrier provisions in Title II.[158] The Commission is of the opinion that this approach provides a solid middle ground between over-regulation and deregulation.

The major shortcoming with this approach, however, is that it does little to promote greater competition in broadband markets, and thus, faster speeds and lower prices. In fact, in proposing the "Third Way" approach, the Commission expressly disclaimed any intent or authority to implement measures that would introduce new competitors into the broadband market.[159] While § 201 does allow the Commission to ensure that telecommunications services charge rates that are "just and reasonable"[160]

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.*

159 *See* Schlick, *supra* note 124. This proposal would not give the Commission the authority to implement unbundling requirements on incumbent providers. *See id.* In fact, the Commission specifically noted that classifying broadband as a Title II service would still not give it the authority to require network unbundling under Section 251(c). *Id.* Thus, even if it wanted to implement unbundling under its Third Way plan, it could not.

160 47 U.S.C. § 201 (2012).

the Commission explained that they would not use this authority to implement "monopoly era price regulation."[161] Without the authority to take measures that directly promote competition in the broadband market, the Commission will not be able to work towards providing consumers with faster speeds and lower prices. As a result, a different approach is needed.

B. Legislative History of Section 706

Rather than follow the Third Way approach, this Note proposes an alternative, that Congress should amend Section 706 of the Telecommunications Act. Among the arguments made by the Commission in *Comcast* was that Section 706[162] of the 1996 Act gave it authority over broadband.[163] That statute provides, in relevant part:

> The Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[164]

The term "advanced telecommunications capability" includes broadband access.[165]

On its face, Section 706 would seem to provide the Commission with the authority to regulate competition in the broadband market. However, as the *Comcast* court explained, the Commission was bound by an earlier order it had made that construed this provision as merely a statement of policy, which did not confer any substantive regulatory authority on the Commission.[166] Section 706 merely required that the Commission use its authority granted under other statutes to encourage the deployment of advanced telecommunications.[167] The *Comcast* court did not engage in any

161 Schlick, *supra* note 124.

162 47 U.S.C. § 1302.

163 Comcast v. Fed. Comms'ns Comm'n, 600 F.3d 642, 659 (D.C. Cir. 2010).

164 47 U.S.C. § 1302(a).

165 *See* In Re Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 FCC Rcd. 24012, 24016 (1998) (discussing "advanced services," as including "faster access to the Internet"); *see generally* 47 U.S.C. § 1302(d).

166 *Comcast*, 600 F.3d at 658-59. The Commission stated specifically that "[S]ection 706(a) does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods." *Id.* at 659.

167 *Id.* at 658.

independent analysis of Section 706 to determine if this interpretation of Section 706 was warranted, because it asserted that the Commission had never overruled its earlier interpretation construing Section 706 as a statement of policy, and that agencies "may not . . . depart from a prior policy *sub silentio*."[168] The Commission was therefore bound by its earlier interpretation. Section 706 alone was insufficient to grant the Commission authority to regulate broadband and thus to enact policies that can encourage faster speeds and lower broadband prices.

The legislative history of Section 706 supports the Commission's initial conclusion that the statute was merely a statement of Congressional policy. A Senate Report discussing the provision explained that it "is intended to ensure that one of the primary objectives of the bill – to accelerate deployment of advanced telecommunications capability – is achieved."[169] The report states further "this provision is a necessary fail-safe to ensure that the bill achieves its intended infrastructure objective."[170] These statements focus not on any substantive regulatory authority, but rather discuss furthering "objectives," which underscores the idea that the Section 706 merely sets forth policies Congress wanted to encourage.

Furthermore, much of the legislative history focuses on the substantive provision in Section 706, contained in paragraph (b), which requires the Commission to issue an annual notice of inquiry concerning the availability of advanced telecommunications capability to all Americans.[171] Consequently, little legislative history exists to suggest that this provision grants any independent statutory authority for the regulation of competition. Therefore, Section 706, as currently interpreted by the *Comcast* court, does not do anything beyond collecting information that would promote faster speeds or lower prices.

C. Section 706 Policies as Applied to the Broadband Market

Section 706, as has been noted by courts, is broadly worded.[172] Accordingly, several policies could be implemented consistent with the statute that would serve to help promote competition, and consequently

168 *Id.* at 659.

169 S. Rep. No. 104-23, at 50 (1995).

170 *Id.*

171 *See, e.g.*, Sen. Conf. Rep. 104-23, *50 ("[Section 706] ensures that advanced telecommunications capability is promptly deployed by requiring the Commission to initiate and complete regular inquiries to determine whether advanced telecommunications capability . . . is being deployed in a 'reasonable and timely fashion.'").

172 *See* Ad Hoc. Telecom. Users Comm. v. Fed. Commc'ns..Comm'n, 572 F.3d 903, 906 (D.C. Cir. 2009) ("Section 706 speaks in very broad terms . . . ."); *Comcast*, 600 F.3d at 659.

reduce prices and increase speeds for broadband access.

One measure the Commission should use to promote greater competition in the market for broadband is mandating that incumbent broadband providers allow competitors to lease their facilities on an unbundled basis, as "telecommunications services" are required to do under Section 251.[173] One of the particularly compelling reasons to consider unbundling of broadband network elements is that the broadband market is currently characterized both by high levels of demand from consumers, and high market shares held by incumbent broadband providers.[174] As a result, new companies that enter the market for broadband will have a chance to take advantage of this growing demand and prevent existing providers from further dominating the market. If new broadband providers are able to overcome the barriers to entry with the use of unbundling, and compete with incumbents over market share for existing broadband customers, that would discipline incumbents into reducing their prices or improving their speeds to compete for market share. Finally, to ensure that start-ups are able to gain access to all the facilities necessary to enter the broadband market, a provision should be added that allows for regular access to incumbent facilities, allowing them to lease any other facilities that cannot be accessed on an unbundled basis. The provision should apply to any facilities necessary to providing a broadband service.

Another provision that would encourage greater competition in the broadband market is to allow competitors to purchase broadband services from incumbents at wholesale rates, and then re-sell them to their own customers. Such a provision is similar to the duty imposed on ILECs under Section 251(4). Once the start-up is able to resell the incumbents' broadband service, the start-up can try to compete with the incumbent by improving some other aspect of the service, such as administrative efficiency, customer service, billing, or marketing.[175] By lowering the high entry barriers in the creation of broadband, start-ups would better be able to compete and improve non-technical aspects of the service. This competition will cause incumbents to ensure their non-technical services are just as efficient as their competitors, and will most likely result in lower prices for customers.

173 See *supra* Part II.B.

174 *FTC Report*, *supra* note 21, at 152.

175 BERKMAN CTR. FOR INTERNET & SOC'Y, NEXT GENERATION CONNECTIVITY: A REVIEW OF BROADBAND INTERNET TRANSITIONS AND POLICY FROM AROUND THE WORLD, 77 (2009), *available at* http://transition.fcc.gov/stage/pdf/Berkman_Center_Broadband_Study_13Oct09.pdf [hereinafter *Berkman Center Report*].

For these policies to be effective, the Commission must have the authority to ensure that incumbent providers do not charge unreasonable rates to their competitors for access to the incumbents' facilities. Sections 251 and 252 impose obligations on incumbents to negotiate in good faith with start-ups, and to set rates, terms and conditions for access that are just, reasonable and nondiscriminatory. Similarly, any provision for broadband should ensure that the Commission can require incumbents and start-ups to negotiate in good faith for the purpose of reaching leasing or resale agreements, and to make sure that the terms of such agreements are just and reasonable. In this way, incumbents could not stifle competition by simply charging excessively high rates for unbundled access or resale.

Adding new competitors to the market will cause prices to decline. For example, as DSL broadband providers tried to take market share from cable companies, one tactic they used was to decrease prices.[176] A 2003 report by the OECD concluded that most countries believe local-loop unbundling has the potential to enhance competition and thereby reduce broadband prices.[177] By adding new competitors to the broadband market, those competitors act as a sort of "catalyst," encouraging incumbent providers to lower prices and improve broadband performance.[178]

Finally, the Commission should also have the authority to prevent incumbent broadband providers from unjustly discriminating among customers. For example, a broadband provider should not be able to provide service at a certain rate for one customer, while charging a higher rate for a different customer for no reason. A provision similar to Section 202,[179] if adopted, would prevent incumbent broadband providers from "unjust or unreasonable discrimination" in providing services or setting prices for customers. Of course, incumbents should be allowed to charge higher costs to those customers to whom providing infrastructure would be more costly. However, they should not be permitted to simply deny access or charge higher rates to a customer without a legitimate, cost-related purpose for doing so.

176 *FTC Report*, *supra* note 21, at 101.

177 *Developments in LLU*, *supra* note 117, at 5.

178 *Berkman Center Report*, *supra* note 174, at 12 ("We find that in countries where an engaged regulator enforced open access obligations, competitors that entered using these open access facilities provided and important catalyst for the development of robust competition which, in most cases, contributed to strong broadband performance across a range of metrics.").

179 47 U.S.C. § 202.

IV. PROPOSED AMENDMENT TO SECTION 706

This Section will discuss a proposed amendment to Section 706 that would grant the Commission the authority to implement the policies discussed in the previous section.

A. Proposed Amendment to Section 706

To grant the Commission authority to impose the regulations described in the previous section, Congress should amend Section 706 of the 1996 Act to provide the Commission with express jurisdiction over broadband. The following is the proposed text of the amendment to Section 706, which would be inserted as subsection (e):

> (e) Broadband Internet Service.
>
> (1) If the Commission determines that taking regulatory action would promote competition, it shall have the authority to take such action with respect to Broadband Internet Service. Such regulatory action may include requiring that incumbent broadband providers: i) provide access to their facilities to competitors on an unbundled basis, ii) offer for resale to competitors at wholesale rates their broadband service that they provide at retail to subscribers, iii) provide access to any other facilities necessary for the provision of Broadband Internet Service. Such unbundled access or resale rates shall be on rates, terms and conditions that are just, reasonable, and nondiscriminatory. Incumbent broadband providers shall negotiate in good faith with competitors with respect to the terms and conditions of such access or resale rates.
>
> (2) If the Commission, having implemented such regulatory action, subsequently determines that sufficient competition in the market for Broadband Internet Service exists, it shall forbear from applying any of the regulatory actions to incumbent broadband service providers.
>
> (3) It shall be unlawful for any Broadband Internet Service to make any unjust or unreasonable charges, practices, classifications, regulations, facilities or services, directly or indirectly, or to unjustly or unreasonably discriminate in the provision of any service, 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.

The Commission would presumably be able to implement any of these policies using its standard rulemaking procedures. In addition, the legislation would also give the Commission regulatory flexibility, allowing it to use its forbearance authority to exempt a company from regulations if it determined such regulations were no longer necessary to ensuring sufficient competition in the broadband market. The last two sentences of paragraph (1) provide that incumbent broadband providers cannot discriminate or charge unreasonable rates to competitors in granting access to their facilities, and that they must negotiate in good faith with respect to the terms of such access. The Commission would be able to ensure that the incumbents abide by this requirement by reviewing and voiding any agreements reached between incumbents and start-ups that violate the statutory requirements. Finally, paragraph (3) includes a non-discrimination provision that tracks the language of Section 202, and would allow the Commission to ensure that broadband providers do not unreasonably discriminate among customers or charge unreasonable or unjust rates. Because the language used in paragraph (3) is general, it would allow for the Commission to enact rules or regulations prohibiting all sorts of discrimination that is unjust. Of particular interest is prohibiting discrimination based on income, so that broadband providers could not charge higher rates to higher income levels merely because that group can afford to pay more. Paragraph (3) would also allow the Commission to ensure that broadband providers do not charge unjust or unreasonable rates to customers.

This amendment would be consistent with the policies underlying Section 706. As has been noted, Section 706(b) contains a provision mandating that the Commission take regulatory action if it determines that deployment of advanced telecommunications capabilities has stalled.[180] The legislative history of the Act further explains that the purpose of the provision is to employ incentives to spur competition in advanced telecommunications markets where such competition is lacking.[181] Similarly, the Commission would be required to make a predicate factual

180 *See* 47 U.S.C. § 1302(b).

181 *See NTIA Letter on Section 706 of the Telecommunications Act of 1996*, NAT'L TELECOMM. INFO. ADMIN. n.6 (July 17, 1998), http://www.ntia.doc.gov/fcc-filing/1998/ntia-letter-section-706-telecommunications-act-1996 ("Incentives for deployment of advanced telecommunications will be employed in areas where competition does not occur."); *see also* 142 Cong. Rec. S700 (daily ed. Feb. 1, 1996), *available at* http://www.ntia.doc.gov/fcc-filing/1998/ntia-letter-section-706-telecommunications-act-1996 (Statement of Sen. Burns) ("If competition is stalled, the [bill] gives the FCC authority to quicken the pace of competition and deregulation to accelerate the deployment of advanced telecommunications infrastructure.").

determination that taking regulatory action would spur competition before implementing any of the actions listed in the amendment. This requirement ensures that all parties that have an interest in broadband services – telecommunications companies, consumer groups, local governments – may be heard before any regulation is issued by mandating that notice and comment procedures are followed.

This amendment would also be consistent with the broader policies underlying the Telecommunications Act of 1996. As has already been discussed, the underlying purpose behind the Act is to promote competition and deregulation by granting the Commission the authority to use regulations to promote long-term facilities based competition, eventually rolling back regulations once this has been established.[182] Here, the Commission can use its authority under the provision to stimulate competition by taking regulatory actions, and also has the authority to repeal such regulations either by promulgating new rules or by using its forbearance authority.

Finally, it would also most likely promote greater adoption rates, a central concern underlying Section 706, by promoting competition, which would reduce prices and increase connection speeds, addressing the reasons cited for low U.S. adoption rates.

B. Comparison to Alternative Proposals

In light of the importance of Broadband to the 21st century economy, it is not surprising that scholars and commentators have proposed a number of recommendations that have the same overall goal – as amending Section 706 – granting the Commission express authority over broadband.

a. Option One: Status Quo

One option that has been advocated by broadband providers and others has been to simply keep things the way they are.[183] Proponents of this

182 *See supra* Part II.B.

183 *See* Tony Bradley, *FCC "Third Way" Compromise Challenged*, PCWORLD (May 7, 2010 11:23 AM), http://www.pcworld.com/businesscenter/article/195848/fcc_third_way_compromise_challenged.html (noting that Broadband providers affected by the FCC Third Way proposal have voiced opposition to reclassifying Broadband); Ivan Seidenberg, Chairman & Chief Exec. Officer, Verizon Communications, *A Conversation with Ivan Seidenberg* (Apr. 2010), *available at* http://www.cfr.org/technology-and-foreign-policy/conversation-ivan-seidenberg/p21840 [hereinafter *A Conversation with Ivan Seidenberg*] ("[W]e have to be careful that well-intentioned, high-level policy issues don't turn into burdensome rules and regulations that will just stifle growth and innovation.").

approach argue that regulation would stifle growth and innovation.[184] The argument provides that imposing regulations increases costs for broadband providers, which reduces the incentives of companies to make investments in the United States.[185] However, the broadband market is currently characterized by increasing data consumption and hence, increasing demand.[186] The Commission has pointed out that increased demand fuels creation of new applications, which in turn require greater bandwidth, and hence requires increased capacity to meet this growing demand. Accordingly, broadband providers will have adequate incentives to continue to invest in infrastructure so long as this demand continues to rise, because it promises increased profits. Moreover, the regulatory flexibility built into this proposed amendment gives incentives for long-term facilities based competition by requiring that the Commission eliminate these regulations once sufficient competition has been achieved. Therefore, once a broadband market in a certain area has robust competition among several broadband providers, the Commission would be mandated by the statute to forbear from applying any further competition-forcing provisions.[187]

b. Option Two: Full Title II Regulation

It has also been proposed that the Commission should reclassify broadband as a telecommunications service and apply the full range of Title II regulations to broadband.[188] Proponents of this approach argue that the full range of Title II provisions is necessary to achieve greater deployment of broadband.[189] However this approach has too many detrimental consequences to be preferable to amending Section 706. First, applying Title II would subject broadband to a statutory scheme that was not designed for broadband, and which as a result is not as well suited to the

184 *See A Conversation with Ivan Seidenberg, supra* note 182.

185 *Id.*

186 *See supra* Part I.

187 This concept of only regulating if the market is lacking in effective competition is not novel. In fact, Congress has already used this approach in regulating Cable Television. The Cable Television Consumer Protection and Competition Act of 1992 provides that "[i]f the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission . . . ." 47 U.S.C. § 543(a)(2) (2012). By contrast, if the Commission finds that a cable system is not subject to effective competition, either the Commission or a local franchising authority may set rates for the provision of cable service. *Id.* The approach under this amendment would be the same. If competition was found to be sufficient using a measure prescribed by the Commission, then it would not have the authority to take regulatory action, although the action taken here would be different than setting rates for services.

188 *See generally* Craig Aaron, *FCC Action Will Not Protect Free Speech Online*, FREE PRESS (Feb. 19, 2014), http://www.freepress.net/blog/2014/02/19/fcc-action-will-not-protect-free-speech-online.

189 *Id.*

task of regulating the broadband market.[190] For example, cable modems provide an array of services that resemble services that were traditionally governed under various titles in the Communications Act prior to broadband. Cable modem services are provided through cable facilities, which are governed by Title VI of the Act, and they allow for applications such as voice telephone services and streaming video that were traditionally regulated under Titles II and III, respectively.[191] The distinctions reflected in the various titles of the Communications Act are largely arbitrary in the age of convergence – where different services can be provided over different technologies.[192] Therefore, reclassifying broadband as a "telecommunications service" and subjecting it to the full array of Title II provisions perpetuates an outdated scheme that was not designed to address the current convergent marketplace.

Moreover, Title II regulations have been shown to be particularly burdensome, and imposing these regulations risk higher costs for consumers. Traditional common carrier regulation under Title II imposes a number of regulations on "telecommunications services" that essentially allows the Commission to manage the internal affairs of a company,[193] including prescribing accounting systems to be used,[194] and regulating who can hold the position of an officer or director of a common carrier.[195] Such regulations are unduly burdensome and are not necessary to achieve the goals of increasing competition in the broadband market. Finally, as noted before, it is not even clear that the Commission would have the authority to apply the competition-forcing provisions of the 1996 Act even if it did

190 *See* NUECHTERLEIN AND WEISER, *supra* note 24, at 73 ("Because Congress [in passing the 1996 Act] did not foresee that cable and telephone companies would compete in this market, [for broadband internet access] it did not set forth a clear regulatory framework for that market – let alone how to ensure regulatory parity between these competing platforms . . . ."); Alan Pearce et al., *Telecom Act Rewrite is Needed to Return Real Competition To Broadband Sector*, BLOOMBERG L., http://about.bloomberglaw.com/practitioner-contributions/telecom-act-rewrite-needed/ (last visited, Feb. 20, 2013).

191 NUECHTERLEIN AND WEISER, *supra* note 24, at 162-63.

192 *Id.* at 73 ("[In the 1996 Act] Congress largely left in place the arbitrarily compartmentalized regulation of the industry reflected in the multiple "Titles" of the Communications Act. That approach . . . subjects distinct last mile transmission platforms to radically different forms of regulation on the assumption that those platforms will not be used in competition with one another. Now that the growth of Internet technologies has undermined that assumption for good . . . ."). Consequently, further relying on the outdated distinctions made by the various Titles of the 1934 Act serves to further perpetuate an outdated scheme.

193 *See supra* Part II.A. Section 218 provides that "[t]he Commission may inquire into the management of the business of all carriers subject to [Title II], and shall keep itself informed as to the manner and method in which the same is conducted." 47 U.S.C. § 218.

194 *See* 47 U.S.C. § 220(a).

195 *See* 47 U.S.C. § 212 (2012).

apply the full range of Title II regulations.[196]

c. Option Three: Commission's Third Way

Another proposal is the Commission's Third Way Plan, which would reclassify the transmission aspect of broadband as a telecommunications service and apply limited provisions of Title II to broadband.[197] However, the Commission has emphasized that it would not apply many of the provisions in Title II that promote competition, such as Section 251.[198] As a result this proposal would not accomplish the specific task of allowing the FCC to encourage lower prices or faster speeds.

d. Option Four: New Title of Communications Act

It has also been proposed that Congress should draft more comprehensive legislation that would create a new Title of the Communications Act specifically addressing broadband.[199] One commentator has proposed, "Congress should amend the Communications Act to add a new Title that creates a limited and specific set of regulatory requirements applicable to Internet access providers."[200] Such requirements proposed under the new Title would presumably include some mandate that the Commission regulate competition among broadband providers.[201]

It is true that were Congress to enact such legislation it would be able to grant the Commission firm authority to regulate the broadband market while also avoiding the outdated framework of Title II. However, such legislation likely would take a much greater amount of time to enact than the legislation proposed here. First, Congress is notoriously slow to act with comprehensive reforms – for example, it took nearly twenty years between the time cable television was developed and the time when Congress granted the Commission express authority to regulate Cable with the Cable Act of 1984, adding a new Title to the Communications Act.[202] As mentioned before, Congress's failure to act to give the Commission authority over cable led to its usage of ancillary jurisdiction to regulate the

196 *See supra* note 158 and accompanying text.

197 *See supra* Part II.

198 *See FCC Third Way*, *supra* note 128.

199 *See* Rob Frieden, *Legislative and Regulatory Strategies for Providing Consumer Safeguards in a Convergent Information and Communications Marketplace*, 33 HASTINGS COMM. & ENT. L.J. 207, 240 (2011).

200 *Id.*

201 *Id.*

202 *See* THORNE ET AL., *supra* note 4, at 12 ("For two decades, the FCC made up its own jurisdictional theories for cable. Congress finally took charge with the Cable Act of 1984.").

medium.[203] The legislation proposed here would be much less comprehensive and hence would be able to be enacted much more quickly.[204] While it could be argued that a less comprehensive statute would give too much authority to the Commission, because of the importance of the problem as described in Part I, it is essential that government act quickly to address it, and more comprehensive legislation is a difficult task politically, which will take more time.

In addition, a less comprehensive statute provides more flexibility to the Commission to change regulatory approaches. A comprehensive statute passed by Congress that provides a detailed list of measures for the Commission to implement can only be altered by another act of Congress. However, a less comprehensive statute allows the Commission to change policies by either an order or issuing a rule, since a less comprehensive statute like the one proposed here gives the Commission discretion over what measures to implement in regulating broadband.

CONCLUSION

Broadband is an important and increasingly essential product that consumers must have access to in order to fully participate in modern society. However, recent studies have indicated that the United States is behind many other advanced countries in providing consumers with higher speed broadband connections, and in providing access at lower prices. The result is that home broadband adoption among citizens of the United States is at lower rates than many other countries that make up the OECD. In addition, potential new economic advantages and advanced applications that result from high-speed broadband access risk becoming lost to other nations if the United States fails to keep up. While some of the disparity in broadband performance between the United States and other nations can be explained by differences in geography and population density, some research by the Commission has suggested that even when these factors are taken into account, the United States is still behind.

An important factor that does account for some of this disparity in broadband performance is competition. Robust competition between broadband providers would create incentives for providers to offer the best service possible (by, among other things, investing in infrastructure to

203 *See supra* Part II.A.

204 *See, e.g.*, Matthew M. Greenberg, *The Communications Act: The Need for Tariff Reform*, 9 ADMIN. L.J. AM. U. 847, 895 ("Enacting comprehensive telecommunications legislation is a politically awesome task.").

allow for higher connection speeds) and the lowest prices. Unfortunately, the broadband market in the United States currently shares the characteristics of an oligopoly – with the majority of Americans living in markets with two providers. Because broadband, like the telephone before it, is a service that has high barriers to entry because of the enormous initial investments required to create infrastructure, new competitors will not be able to enter the market without assistance from the government. Therefore, the Commission should be given the authority to implement several measures to encourage greater competition in the broadband market. Such measures should include allowing new start-up companies to lease access to incumbent providers' facilities both on an unbundled and regular basis, and allow start-ups to re-sell entire services provided by incumbents on a wholesale basis.

The best way to provide such tools given the current legal framework is to adopt new legislation amending Section 706 of the Telecommunications Act of 1996. Section 706 already contains Congress's stated objective that the Commission encourage the deployment of high-speed broadband access to all Americans by using "measures that promote competition." Hence, an amendment that would grant the Commission substantive regulatory authority over competition in the broadband market would be consistent with the text and purpose of the statute. In addition, amending this provision avoids the pitfalls of other proposals to reform the Act by circumventing the "telecommunications service" and "information service" distinction, which does not provide an adequate middle ground between complete deregulation and overly burdensome regulation. It would also be much simpler and efficient than enacting more comprehensive legislation.