

## The Third Through the Fifty Fourth Ways

by Gregory J. Vogt

The Federal Communications Commission (“FCC”) deregulated broadband services in the 2000s because it believed that they were competitively provided and not in need of traditional regulation. After court reversal, concerns in some circles are leading regulators to conclude that regulatory authority needs to be re-established. Although the FCC has dubbed this effort “The Third Way”—the way between deregulatory and regulatory paths—there are some serious problems with the approach. In particular, the prospect of new state regulation could produce not only the FCC’s “Third Way” but the Third through the Fifty-Fourth Ways<sup>1</sup> as states impose new and potentially conflicting broadband regulations. Given the political firestorm currently raging on this issue, the best solution would be federal legislation that defines both the FCC’s and the states’ jurisdictions over broadband.

### Deregulated Broadband

The FCC has declared that most broadband services are not regulated telecommunications services. It arrived at this conclusion through a series of rulemakings adopted between 2002 and 2007 that applied to each major method of providing broadband: cable TV, telephone, wireless, power lines.<sup>2</sup> The FCC concluded that broadband should be classified as a unified “information service,” with no separate “telecommunications service” component. The consequence of categorizing broadband services as “information services” subject only to Title I ancillary authority is that traditional “common carrier” regulations found in Title II of the Communications Act do not apply to broadband services. Rather, the FCC has decided to regulate broadband only with respect to a limited set of areas including emergency calling,<sup>3</sup> law enforcement monitoring,<sup>4</sup> some interconnection rights,<sup>5</sup> and access by persons with disabilities.<sup>6</sup>

<sup>1</sup> Besides the states, the District of Columbia and territorial commissions could also impose regulations.

<sup>2</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 38 n.153 (2002), *vacated in part and remanded*, *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir 2003), *FCC aff’d*, *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1000 (2005); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 19 n.15 (2005), *aff’d sub nom. Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, ¶¶19-26, 29-33 (2007) (Wireless Broadband Order); *United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281, ¶¶ 1-2 (2006) (BPL-Enabled Broadband Order).

<sup>3</sup> Wireline Broadband Order, ¶ 116.

<sup>4</sup> *Id.*, ¶¶ 114-15.

<sup>5</sup> *Id.*, ¶¶ 119, 126.

<sup>6</sup> *Id.*, ¶ 121.

Pursuant to such “ancillary authority” the Commission established four principles that informed its policies for broadband services in a deregulated environment:

- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to access the lawful Internet content of their choice.
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement.
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to connect their choice of legal devices that do not harm the network.
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to competition among network providers, application and service providers, and content providers.<sup>7</sup>

Some policymakers criticized these principles, believing that greater control of broadband providers was necessary, but many providers argued strenuously that the principles would adequately protect consumers. These broadband providers believed that the FCC correctly concluded there was sufficient competition to ensure that rates, terms, and conditions were just and reasonable.

Pursuant to those Internet principles, the FCC took enforcement action against Comcast for using a network management practice known as “deep packet inspection.”<sup>8</sup> Comcast argued that it was entitled to take legitimate steps to manage its network, particularly with respect to high capacity users during peak network usage. Comcast’s management techniques, however, “kicked off” certain heavy uploaders using peer-to-peer services. Peer-to-peer services, such as BitTorrent, are often used to access video content. When disconnected by Comcast’s actions, the users had to delay or re-download the materials, thus degrading their Internet experiences. Largely because of the competitive suspicions that this practice engendered, the FCC held that the practice was unreasonable, and ordered it to be terminated.<sup>9</sup>

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<sup>7</sup> *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986, ¶ 4 (2005) (*Internet Policy Statement*). Despite the title of this Order, the application of the policy does not appear limited to wireline broadband services.

<sup>8</sup> Once deep packet inspection occurred, it would interrupt transmissions for high bandwidth users during peak network usage in order to prevent those users from slowing service to other users.

<sup>9</sup> *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices et al.*, WC Docket No. 07-52, Memorandum Opinion and Order, 23 FCC Rcd 13028, ¶ 5 (2008) (*Comcast Order*), *vacated sub nom., Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

On appeal, the D.C. Circuit Court of Appeals held that the Commission did not have ancillary authority to take its enforcement action because it had not established that such a policy was reasonably ancillary to one of its “statutorily mandated responsibilities.”<sup>10</sup> The Court indicated that there might be some legal theory under which the FCC could exercise jurisdiction over broadband, but the enforcement order at issue did not articulate such a permissible theory.<sup>11</sup> The court decision was technically a “win” for Comcast, but the ruling set off a storm of controversy in Washington that has sucked the oxygen out of almost every other telecommunications issue debate since. Some secretly wish that Comcast had lost its court appeal because broadband deregulation might have had a chance to remain a reality.

But that’s not what happened. Given the court defeat, the leadership at the FCC and in Congress have indicated that the Commission’s regulatory authority over broadband must be restored. Senators have exhorted Chairman Genachowski to regulate broadband to the full extent possible under its current authority.<sup>12</sup>

### **The Third Way Announcement**

After considerable internal FCC debate and industry lobbying, and in order to regain regulatory authority over broadband, Chairman Genachowski announced that he was going to pursue a rulemaking that would adopt the “Third Way” approach to broadband regulation.<sup>13</sup>

The First Way would continue to regulate broadband services pursuant to “ancillary authority” under Title I, notwithstanding the *Comcast* decision. The consequences of this decision would be for the FCC to decide on a case-by-case basis when and how to regulate specific practices of broadband providers. As the *Comcast* case proved, sometimes the FCC would lose these decisions, although sometimes it might win. It is true that the court indicated there were some theories of regulation that would be upheld if there were specific provisions of the Act which gave the Commission the authority to use its ancillary authority, even though the regulations were not strictly within the four corners of a particular provision. There are a large number of cases where the FCC has successfully imposed regulations pursuant to its ancillary authority under this approach,<sup>14</sup> although there are other decisions that reject such ancillary authority in other situations.<sup>15</sup>

The Second Way would re-regulate broadband services as a Title II telecommunications service. Such an approach would apply to broadband services every Title II regulation that has

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<sup>10</sup> *Comcast Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010)(citing *Am. Library Ass’n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005)).

<sup>11</sup> *Id.* at 659-61.

<sup>12</sup> Statement of Sen. John D. Rockefeller IV, Committee on Commerce, Science & Transportation, U.S. Senate, Reviewing the National Broadband Plan (Apr. 14, 2010, last viewed at <http://commerce.senate.gov/public/hearings>) (Aug. 31, 2010).

<sup>13</sup> Chairman Julius Genachowski, Federal Communications Commission, *The Third Way: A Narrowly Tailored Broadband Framework* (rel. May 6, 2010).

<sup>14</sup> See, e.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) (cable regulations); *Computer & Comm’n’s Indus. Ass’n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (enhanced services).

<sup>15</sup> See, e.g., *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979); *Nat’l Ass’n Regulatory Util. Commr.s v. FCC*, 533 F.2d 601 (D.C. Cir. 1976).

been applicable to telecommunications services in the past, such as the requirements to charge just and reasonable rates and not to engage in unreasonable discrimination. Title II also imposed a large number of pricing, accounting, and entry/exit regulations, as well as a whole host of other regulations the Commission has imposed on “common carriers” over the years.

Chairman Genachowski announced that he did not like either way. The First Way, he argued, made the Commission’s jurisdiction too uncertain, and made questionable other FCC broadband initiatives, such as implementing the National Broadband Plan<sup>16</sup> and providing universal service support for broadband. He did not like the Second Way either because heavy handed price regulation was inappropriate in a competitive broadband market and posed the risk of deterring investment. Therefore, he proposed a Third Way, often called “Title II Lite”, which would hold that the transmission component of a broadband service would fall under Title II, but most Title II provisions would not be enforced through FCC forbearance authority on such transmission component.<sup>17</sup>

This approach would resemble the bifurcated analysis that was employed in *Computer II*.<sup>18</sup> Such an approach would make clear that the information service component, the Internet access service and related computer applications such as surfing the net, would remain unregulated and that the Commission would continue its often-stated refusal to “regulate the Internet.” With respect to the Title II component, however, the FCC would forbear from applying all but Sections 201, 202, 208, 222, 254, and 255 of the Communications Act.<sup>19</sup> And rather than relying on specific rules adopted pursuant to such sections, it would decide issues on a case-by-case basis such as it does under its Section 208 complaint authority.<sup>20</sup>

## Notice of Inquiry

As promised, on June 17, 2010, the FCC released a Notice of Inquiry requesting comment on how the FCC should regulate Internet services in the future.<sup>21</sup> In particular, it sought comment on whether the FCC should adopt Chairman Genachowski’s Third Way proposal. In particular it sought comment on whether it should classify the “Internet connectivity service” as a telecommunications service.<sup>22</sup> At the same time, it would forbear from

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<sup>16</sup> Federal Communications Commission, Connecting America: The National Broadband Plan, GN Docket No. 09-51 (rel. Mar. 16, 2010)(“National Broadband Plan”).

<sup>17</sup> 47 U.S.C. § 160(a).

<sup>18</sup> *Amendment of Section 64.702 of the Comm’n’s Rules & Regs, Second Computer Inquiry*, Final Decision, 77 FCC 2d 384, ¶¶ 86-132, 201-31 (1980) (*Computer II Final Decision*), *aff’d sub nom., Computer & Commc’ns Indus. Ass’n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

<sup>19</sup> 47 U.S.C. §§ 201(unreasonable practices), 202 (unreasonable discrimination), 208 (complaints), 222 (consumer privacy), 254 (universal service), 255 (disability access).

<sup>20</sup> The announcement was somewhat cagey on this point since it did not altogether rule out that there would be some regulations adopted with respect to broadband services, as the Commission had already done in this area even under its ancillary authority.

<sup>21</sup> *Framework for Broadband Internet Service*, Notice of Inquiry, FCC 10-114 (rel. June 17, 2010)(“Notice”).

<sup>22</sup> “Internet connectivity service” would essentially be the bare transmission path for connecting the customer’s premise that the broadband service provider’s first end office. “Internet access service,” on the other hand, is the service provided to the end user that provides all of the capabilities to the consumer for accessing email, the web, etc.

applying most Title II regulations, except for Sections 201, 202, 208, 222, 254, and 255. The Internet access component of the service, and presumably all other aspects of the customer’s Internet service, would remain unregulated.

The FCC justified its proposed new approach by citing the *Comcast v. FCC* decision. It stated its belief that when the FCC deregulated broadband during the 2000s, it believed it would have continued Title I authority to address certain basic aspects of broadband services. When it learned under the *Comcast* decision that it did not, it tentatively concluded that its original policy decision had been undermined, justifying a change in course.<sup>23</sup> The Notice also questioned whether the market has changed since customers now frequently purchased transport separately from the “information service” aspects of the Internet access service. Many customers might use different browsers and other services not offered by their Internet access provider.<sup>24</sup> The FCC did not address whether the level of competition for Internet access had changed since its original deregulatory actions, although it did ask whether the broadband competition had “developed as expected.”<sup>25</sup> The FCC also asked whether other provisions of Title II should remain in place, such as Section 214, extension of lines, and Section 225, telecommunications relay services.<sup>26</sup>

The comments filed with respect to the *Notice* were predictable. Proponents such as Google, Internet application providers, broadband resellers, and consumer groups, largely supported the Third Way proposal,<sup>27</sup> but many urged even greater regulation than proposed. Free Press, by far the most vocal of the pro-regulation parties, argued that Title II regulation should be applied to the Internet connectivity aspect of broadband, with only “judicious application of forbearance.”<sup>28</sup> Free Press has also argued that if the Commission does not have jurisdiction to regulate broadband, much of its plans to expand broadband availability and usage, including supporting broadband through the universal service fund, may not be possible.

Opponents such as cable, telephone, and wireless companies, argue that no change in reclassification is necessary. In particular AT&T, Verizon, and cable TV providers argue that the policy and market bases for deregulating broadband continue to apply today.<sup>29</sup> They argue that there is no justification for a change of course. They argue that the overhang of vague regulations, particularly the “anti-discrimination” proposal, will chill investment, thereby undermining the Commission’s broadband expansion goals as enunciated in the National

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<sup>23</sup> *Notice*, ¶¶ 23-24, 28.

<sup>24</sup> *Id.*, ¶¶ 54-56.

<sup>25</sup> *Id.*, ¶ 61.

<sup>26</sup> *Id.*, ¶ 86.

<sup>27</sup> *See, e.g.*, Comments of Google, GN Docket No. 10-127, 1 (filed Jul. 15, 2010).

<sup>28</sup> Comments of Free Press, GN Docket No. 10-127, 47-48 (filed Jul. 15, 2010).

<sup>29</sup> Comments of Verizon & Verizon Wireless GN Docket No. 10-127, 46 (filed Jul. 15, 2010); Comments of National Cable & Telecommunications Association, GN Docket No. 10-127, 8 (filed Jul. 15, 2010); Comments of AT&T, GN Docket No. 10-127, 70 (filed Jul. 15, 2010)(“AT&T Comments”).

Broadband Plan.<sup>30</sup> Wireless carriers are among the most vocal in claiming that the Third Way is unworkable as applied to wireless networks.<sup>31</sup>

### **Is There A Need For The Third Way?**

There is no doubt that the *Comcast* decision has stymied broadband regulation, even those types of regulations that are not particularly controversial. The *Comcast* Court cast doubt on whether any of the Internet “principles” announced by the FCC can be enforced, including the basic principle that customers be able to gain access to any lawful web site or application that they desire. The FCC’s basic emergency communications, law enforcement, and customer privacy rules based on Title I are also at risk.

Many of the largest players, however, have already indicated that they will voluntarily follow these principles. If voluntary compliance occurs, is formal FCC action needed, especially given the penchant for “mission creep” in government regulatory authority? On the other hand, in the absence of government regulations, what will happen if some players decide not to follow the principles?

The FCC has also indicated that it might not be able to promote the availability of broadband if it does not have jurisdiction to regulate broadband under Title II.<sup>32</sup> The most serious issue here is the FCC’s ability to employ the universal service program to promote broadband in rural and high cost areas of the country. Its authority under Section 254 of the Communications Act requires at one point that the FCC promote availability of “advanced telecommunications and information services”<sup>33</sup> but at another point provides that universal support mechanisms specifically support an ever “evolving level of telecommunications services.”<sup>34</sup> This latter provision might be read to only support telecommunications services, not other services regulated pursuant to Title I. Some of the largest broadband providers reject this concern and believe that the FCC can interpret this ambiguous statutory language to successfully fund broadband under the universal service program.<sup>35</sup> Notwithstanding, the fact that some parties have raised this concern before the FCC<sup>36</sup> indicates some vulnerability should the FCC ever adopt rules to support broadband with USF money under Title I, or adopts any interpretation of Section 254 that pushes the envelope.

A more difficult question for the FCC to answer is: What existing problems need rectifying? There are scant few existing problems when the rhetorical dust all settles. The particular practice that Comcast was using to manage its network, deep packet inspection, was an

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<sup>30</sup> See, e.g., AT&T Comments at 93 & n.160.

<sup>31</sup> See, e.g., Comments of CTIA-The Wireless Association®, GN Docket No. 10-127 (filed Jul. 15, 2010).

<sup>32</sup> Notice, ¶ 32.

<sup>33</sup> 47 U.S.C. § 254(b).

<sup>34</sup> *Id.*, § 254(c).

<sup>35</sup> See, e.g., Letter from Gary L. Phillips, General Attorney & Associate General Counsel, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-51, 09-47, 09-137, WC Docket Nos. 05-337, 03-109, attachment at 2 (Jan. 29, 2010) (*AT&T USF White Paper*).

<sup>36</sup> Comments of USA Coalition, WC Docket No. 10-90, 5 (filed July 12, 2010); Comments of COMPTTEL, WC Docket No. 10-90, 5 (filed July 12, 2010).

entirely dubious issue upon which to build a justification for regulation, since industry negotiations probably could have settled that dispute.<sup>37</sup> Although consumer groups complained about the practice and BitTorrent was unhappy, the main pro-regulation players such as Google were relatively silent on the issue. Pro-regulation forces often cite to the *Madison River* case, where a wireline telephone company was allegedly blocking ports used to access Voice over Internet Protocol (“VoIP”) services, to argue that some broadband providers will restrict customer access to content.<sup>38</sup> However, although the facts of that case are somewhat shrouded in mystery, the dispute centered more on whether a VoIP service provider should pay access charges instead of free-riding, than on attempts to reduce customer choice. Although some consumer groups believe the regulatory void leaves consumers unprotected, this argument is more about the groups’ philosophy of the proper role of government than about real-world problems with Internet access.

The dispute is also closely related to the question whether the FCC should impose “net neutrality” regulations on broadband services. The FCC has proposed to adopt as rules the four Internet principles previously adopted by the Commission, plus a fifth regulation prohibiting discrimination and a sixth requiring transparency as to network management practices.<sup>39</sup> The FCC might not have the authority to adopt these net neutrality regulations if it does not have Title I authority. Thus, the FCC may feel it has no choice but to adopt a reclassification effort if it is going to adopt net neutrality rules.

### **Is The CMRS Model That Bad?**

For close to two decades, wireless services have been regulated under a version of “Title II Lite”, where wireless voice services are classified as telecommunications services, but the FCC has forborne from all Title II regulations other than Sections 201, 202, and 208.<sup>40</sup> This regulatory scheme was adopted pursuant to legislative direction in Section 332 of the Communications Act.<sup>41</sup> That statutory provision specifically preempted states from adopting “entry or price regulation,” but they could impose “other terms and conditions” regulation.<sup>42</sup> One statutory provision allows the FCC to grant states waivers of the preemption, but the FCC has never approved a waiver.<sup>43</sup> This regulatory scheme has widely been credited with allowing

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<sup>37</sup> There is a long historical success rate for solving technical engineering problems through industry fora instead of FCC regulations. *See, e.g., Local Number Portability Porting Interval and Validation Requirements*, WC Docket No. 07-244, FCC 10-85 (rel. May 20, 2010).

<sup>38</sup> *Madison River Communications, LLC and affiliated companies*, Order, 20 FCC Rcd 4295 (Enf. Bur. 2005) (adopted consent decree).

<sup>39</sup> *See Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Notice of Proposed Rulemaking, 24 FCC Rcd 13064, 13101, ¶ 91 n.209 (2009) (*Open Internet NPRM*).

<sup>40</sup> *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Second Report & Order, GN Docket No. 93-252, 9 FCC Rcd 1411 (1994).

<sup>41</sup> 47 U.S.C. § 332(c).

<sup>42</sup> *Id.* § 332(c)(3).

<sup>43</sup> *See, e.g., Petition of the People of the State of California and the Public Utilities Commission of the State of California To Regulatory Authority over Intrastate Cellular Service Rates*, PR Docket No. 94-105, 10 FCC Rcd 7486 (1995).

the wireless market to enjoy explosive growth and nationwide coverage with minimal regulations.<sup>44</sup>

Outside of spectrum allocation issues, the biggest regulatory issue arising in the wireless context has concerned state attempts to protect consumers. Under the guise of “other terms and conditions” regulation, states continue to handle consumer complaints about wireless service. States have filed suit against wireless companies about a variety of issues, but most center on the ability of a carrier to include line item government fees on bills and on the legality of early termination fees. The wireless industry eventually entered into consent decrees with state attorneys general about best consumer practices that covered a large number of these issues, which served as the basis for a Consumer Code that was followed by the significant wireless companies.<sup>45</sup>

The courts reversed the FCC’s decision to preempt states’ prohibition of line items on bills, finding that this fell under the states’ “other term and conditions” authority<sup>46</sup>. At one later point, the FCC moved toward regulating early termination fees, but interest in that issue has since waned. The FCC seeks information from various wireless companies from time to time, on various issues, such as charges for texting, VoIP accessibility from wireless handsets, and other issues raised by the public, but these inquiries have not to date served as the basis for adopting any rules.<sup>47</sup> The FCC has eliminated rules that prohibited the bundling of wireless service and handsets<sup>48</sup> and the resale rules.<sup>49</sup> Although the FCC theoretically can regulate the reasonableness or discriminatory nature of pricing, it has never done so.

Chairman Genachowski frequently compares the Third Way for broadband services with the CMRS regulatory scheme. While there could be similarities, one huge difference is that nothing in the federal statutory language would limit state regulation to “other terms and condition” regulation. In addition, there has never been any political will to regulate wireless service, often viewed as a “secondary service” to wireline services provided by traditional telephone companies, and therefore not in need of regulation. Broadband, on the other hand, has become a political football that some in government believe it needs to encourage and regulate, although there is no coherent sentiment that any particular player enjoys market power with respect to providing broadband.

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<sup>44</sup> There are now more wireless subscribers than wireline telephone lines in the United States. *Compare Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 09-66, FCC 10-81, ¶ 4 (May 20, 2010), with *Local Telephone Competition: Status as of December 31, 2008*, 3 (Wir. Comp. Bur. June 2010).

<sup>45</sup> See Comments of CTIA–The Wireless Association®, CG Docket No. 09-158, Appendix C (filed Oct. 13, 2009).

<sup>46</sup> *Nat’l Ass’n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, modified on reh’g, 468 F.3d 1272 (11th Cir. 2006), cert. den., 552 U.S. 1165 (2008).

<sup>47</sup> See, e.g., *Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling that Text Messages and Short Codes are Title 11 Services or are Title 1 Services Subject to Section 202 Non-Discrimination Rules*, Public Notice, WT Docket No. 08-7DA 08-78 (rel. Jan. 14, 2008).

<sup>48</sup> *Bundling of Cellular Customer Premises Equipment and Cellular Service*, CC Docket No. 91-34, Report & Order, 7 FCC Rcd 4028 (1992).

<sup>49</sup> *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, First Report & Order, 11 FCC Rcd 18455 (1996).

## The Problems with the Third Way

Theoretically there are not a lot of serious downsides to the Third Way. If implemented as promised, broadband would continue to be basically unregulated, with some notable exceptions made for some basic consumer protections issues, such as consumer privacy, law enforcement, and possibly discontinuance regulations. In addition, it is true that without reclassification on some level, the FCC will have a difficult time imposing even limited consumer protection or network management regulations to address problems.

A major problem with the Third Way is that carriers do not trust the Democratic administration to maintain light-handed regulations. The current administration is widely viewed as anti-business and the incidences of regulations in general have been on the rise. Proof that this concern is valid lies in the anti-discrimination proposal in the “net neutrality” rulemaking. An all-out ban on discrimination is different from the normal Title II limitation on *unreasonable* discrimination, making carriers very nervous about what the FCC might do with newly proposed broadband regulations.<sup>50</sup> These fears of “mission creep” are not unfounded, and probably do have some marginal deterrent on making investments in broadband.

The largest problem with declaring even a portion of broadband as a “telecommunications service”, regulable under Title II, is the prospect of state regulation. Many states have been more aggressive in adopting regulations than the FCC. Even the state regulatory commissions have staked out a claim that states be given a broader role in broadband regulation, apparently interested in engaging in new regulatory areas.<sup>51</sup> In fact, the specter of state regulation has been the most difficult regulatory issue that wireless carriers face, notwithstanding the statutory state preemption scheme. And the CMRS state jurisdictional limitation would not exist for broadband. Wireless carriers have expressed most concern because the wireless business operates in regional and national markets, making compliance with fifty sets of regulations very difficult. That same criticism would apply equally in the broadband environment where services are marketed regionally and nationally.

From an entirely legal standpoint, however, it will be more difficult to re-regulate broadband than the FCC believes. In order to justify a change of course in regulation, the FCC needs to provide a reasoned basis for doing so.<sup>52</sup> Since the original wireline deregulatory decision was based in large part on the existence of competition,<sup>53</sup> the FCC is going to be hard-pressed to demonstrate that any change in competitive circumstances. The *Comcast* decision that the FCC lacks regulatory jurisdiction is not the kind of “changed circumstances” that courts

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<sup>50</sup> In fact, Free Press argues that an all out ban is absolutely necessary and no rationale is sufficient to justify discrimination. Reply Comments of Free Press, GN Docket No. 09-191, 11 (filed Apr. 26, 2010). This position is quite extreme, and jettison’s over fifty years of common carrier law, even at its strictest. Notwithstanding, Democrats have unwittingly given credence to by not condemning it at the outset. *Open Internet NPRM*, ¶ 109. Notwithstanding, even this NPRM recognizes that “reasonable” network management practice should be allowed, *id.* at ¶ 108, and that different pricing applicable to subscribers would not violate the rule, *id.*, ¶ 106.

<sup>51</sup> Letter from James Bradford Ramsay, NARUC, to Marlene H. Dortch, FCC, GN Docket No. 10-127 (filed July 26, 2010)(attaching National Association of Regulatory Utility Commissioners, *Resolution Opposing Federal Preemption of States' Jurisdiction over Broadband Internet*, adopted by the NARUC Board of Directors, Jul. 21, 2010).

<sup>52</sup> *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

<sup>53</sup> *Wireline Broadband Deregulation Order*, ¶¶ 47, *et seq.*

would normally find convincing.<sup>54</sup> A court would naturally be suspicious of the FCC's continued attempts to reinterpret a statute in order to preserve its own jurisdiction. The FCC might be cognizant of this fact, since it also asked questions regarding whether there are market reasons to distinguish between connectivity services and information services.<sup>55</sup> Notwithstanding, the FCC is going to have a hard time finding that the way broadband services have been provisioned are different from they were offered when deregulation was first adopted.<sup>56</sup>

The need to create a level playing field is well recognized in competition policy.<sup>57</sup> It tends to be one of the more difficult issues a regulator faces when moving a previously monopolistic industry to competition. Now that all broadband services are deregulated, however, there is largely a level playing field right now. If a portion of broadband services is re-regulated, it is critical that the FCC not once again unbalance the playing field by discriminatory regulation. In particular, the move by wireless carriers to be excluded from the Third Way would clearly unbalance the regulatory playing field, a result that would be difficult to justify under competition policy or the Administrative Procedures Act.<sup>58</sup>

### **The Solution: Narrowly Targeted Legislation**

Moreover, although the FCC policy is deceptively termed the "Third Way," it would more accurately should be called the Fourth through the Fifty Fourth Ways, since there will inevitably be different state regulations on top of the FCC ones to clutter the broadband marketplace, a situation that the FCC could not effectively control. This one issue alone poses a serious downside to the reclassification effort.

I should mention that there are behind-closed-doors negotiations going on that could lead to an industry consensus on how to move forward with legal changes that could address FCC jurisdiction over broadband.<sup>59</sup> Such negotiations are good because they can smoke out industry

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<sup>54</sup> The FCC cited the *Fox* decision for the proposition that its reinterpretation of a statutory provision does not need to be better than the original, just a permissible one. However, even the *Fox* decision establishes some serious concern for the broadband reclassification effort: "Sometimes [the agency] must--when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. *FCC v. Fox Television*, 129 S. Ct. at 1811. Therefore, the FCC is likely going to have to explain the market characteristics of wireline broadband services since it was a critical part of the original policy formulation.

<sup>55</sup> *Notice*, ¶¶ 53-61.

<sup>56</sup> I do not give much credence to the argument that the "endless litigation" that would ensue from reclassification should be a justification for not proceeding with the Third Way, since there is inevitably going to be litigation with new rules no matter what the FCC does.

<sup>57</sup> *See, e.g., Wireline Broadband Deregulation Order*, ¶ 94.

<sup>58</sup> *Compare National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1000 (2005)(agency must justify any decision to treat services dissimilarly to avoid arbitrary and capricious decisionmaking). It is likely that there are unique network management issues applicable to wireless. Notwithstanding, if the anti-discrimination regulations are "subject to reasonable network management" as proposed, it would seem that these different network needs can be taken into account in crafting particular regulations or in reaching decisions based on fact-specific cases.

<sup>59</sup> These negotiations apparently have broken down, although they could be renewed at a later point. *FCC Net Neutrality Talks Collapse in Wake of Google-Verizon Deal*, Communications Daily (Aug. 6, 2010).

player bottom line positions, resulting in compromises that could quell disputes and litigation in the future. The problems with negotiations are always that it is impossible to include everyone in the room, and certain interests just will not be taken into account. Thus the issues may remain.

In the end, a more useful solution would be for Congress to adopt new legislation that specifically spells out the nature of the FCC's jurisdiction vis-à-vis broadband regulation. The legislation could specifically address the state preemption arguments and other issues that pose problems with the Third Way approach.