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Out With the Old, In With the New: The FCC and the Paradox of Broadband Access Mandates

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INTRODUCTION

One of the most well-known laws is one of science—for every action, there is an equal and opposite reaction. When considering recent trends in federal communications regulation, one must wonder whether the same principle is at work.

For several years, the Federal Communications Commission (“FCC”) systematically eliminated longstanding regulatory requirements that otherwise would have forced owners of broadband platforms to give competing service providers nondiscriminatory access to their networks to assure them a means of reaching customers.² The general theory was that the proliferation of networks that support broadband-based services placed competitive pressure on network owners, such that they would be pleased voluntarily to provide wholesale access to their non-facilities-based competitors in order to maximize the number of customers on their networks—without any need for a regulator to tell them to do so.

The regulatory pendulum is now swinging the other way. During the last year in particular, the FCC has demonstrated a renewed fondness for using regulation to restrain the conduct of broadband service providers and network owners, this time with a specific focus on

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² See *infra* Section I.

enabling *consumers* to access and use broadband-capable platforms to the greatest extent possible. This trend has manifested itself through the imposition of what can loosely be described as a series of consumer-oriented “access” mandates—rules that, in one way or another, are intended to restrict service providers from binding customers to, or impairing their use of, a particular network.³

Individually, these newer requirements have been the subject of vigorous debate and extensive academic commentary, giving meaning and perhaps legitimacy to a collection of amorphous buzzwords that have captured the popular imagination: “open access,” “open platforms,” “open devices,” “device and applications portability,” “non-exclusivity,” and the mother of them all, “net neutrality.” The discussion below does not seek to replicate those specific arguments. Rather, its objective is more modest, but no less important: to take a step back in order to consider, from a higher level, the broader implications of this trend in the FCC’s recent decisions.

Viewed collectively, this new generation of access mandates reveals a fundamental paradox in the FCC’s approach to regulation in the broadband world. When addressing the applicability of wholesale access requirements in the broadband context, the FCC was content to rely on market forces rather than impose regulations that risk the domino effect of creating high costs that could impede investment and innovation and in turn derail the continued development of a vibrant broadband marketplace. More recently, the FCC increasingly appears willing to change course, going so far as to suggest that *failing* to regulate—notwithstanding the costs to broadband providers—could yield a similar outcome by denying consumers the opportunity to take full advantage of broadband competition. It is an unusual view for a Republican

³ See *infra* Section II.

administration to take, made more perplexing by the fact that the FCC has applied this approach only with respect to certain providers and in certain contexts, sometimes where there is little or no evidence of a market failure that justifies intervention.

The ad hoc nature of this initiative conveys a certain ambivalence about the relative efficacy of market forces and regulation as a means of maintaining order in the broadband marketplace. But the industry can ill afford such indecision on the matter. Indeed, more is at stake than simply preserving intellectual consistency. The new generation of access mandates creates real costs that could impede the continued development of a competitive and innovative market for broadband services, an outcome that serves no one's interests.

I. “THE OLD”: THE ELIMINATION OF LEGACY WHOLESALE ACCESS MANDATES

For decades, a central regulatory challenge was promoting competition in the provision of communications services in a world in which there was only one way to reach customers—the telephone network. The only apparent solution to this “bottleneck” dilemma (apart from requiring all would-be service providers to build their own networks) was to force the telephone monopolist to provide competitors with access to its network.⁴

The FCC first implemented that solution through its so-called “*Computer Inquiry*” framework, which it developed over the course of several decades. A complete recitation of those requirements and their long history would lead this discussion on an unfortunate tangent.⁵

⁴ At the same time, the FCC developed a regime of retail regulation, which included various pricing, service-quality, and other requirements, all to protect consumers. This article, however, focuses only on wholesale access requirements and other regulatory approaches designed to maximize access to networks.

⁵ For a summary of the *Computer Inquiry* framework, see In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via

Suffice it to say that the *Computer Inquiry* rules required telephone companies (among other things) to provide underlying transmission capability on a nondiscriminatory basis to providers of what used to be called “enhanced services” and are now generally referred to as “information services”—in short, services that involve computer processing applications acting on the content or format of the transmitted information.⁶

After the FCC put that framework into place, Congress enacted the Telecommunications Act of 1996 (“the Act”),⁷ which had as its central goal the opening of the telephone network for competitive local exchange carriers.⁸ It is difficult to do justice to the Act’s requirements in a single paragraph. In brief, the Act required incumbent telephone companies to provide requesting competitive carriers with assorted parts of their networks on an “unbundled” basis, for use in providing various services—including broadband-based services.⁹ It was up to the FCC to set the general parameters for when, where, which, how, and for how much such facilities and services would be provided.¹⁰

Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era, 20 F.C.C.R. 14853 ¶¶ 21-29 (2005) [hereinafter Wireline Broadband Order]. For a full list of the decisions that comprise this framework, *see id.* at ¶ 4 n.9 (citing the “*Computer I*” and “*Computer III*” decisions) and *id.* at ¶ 21 n.49 (citing the “*Computer I*” decisions).

⁶ 47 C.F.R. § 64.702(a) (2008). Examples of enhanced services include, among other things, voice mail, electronic mail, electronic store-and-forward, fax store-and-forward, data processing, and gateways to online databases.

⁷ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

⁸ *See, e.g.,* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371 (1999) (“The Telecommunications Act of 1996 . . . fundamentally restructures local telephone markets. States may no longer enforce laws that impede competition, and incumbent LECs are subject to a host of duties intended to facilitate market entry.”).

⁹ For a summary of the Act’s unbundling and other requirements, *see generally* JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 69-113 (2005).

¹⁰ That process proved difficult. *See generally* United States Telecomm. Ass’n v. FCC, 359 F.3d 554 (D.C. Cir. 2004) (describing the FCC’s efforts to implement the statute and the courts’ frequent dissatisfaction with the resulting work).

With the rapid emergence of Internet- and broadband-based services in recent years, the FCC was faced with the challenge of determining whether and to what extent such wholesale access requirements remained relevant. In contrast to the monopoly era, the modern broadband infrastructure consists of many different technologies and platforms—cable facilities, wireless networks, satellites, and even power lines, in addition to the old standby, the telephone network—such that no one network owner necessarily possesses complete bottleneck control over the single means of reaching customers. Network owners upgraded (and in some cases constructed) these broadband-capable platforms at considerable expense, without any guarantee of a return. Accordingly, one could argue—as many network owners did—that there was only limited (if any) need for regulations that mandated access for competitors.

The FCC agreed, and proceeded to lift wholesale access rules for each type of broadband platform. Its foundational decision in this regard was its ruling that high-speed Internet access provided over cable facilities—decreasingly referred to as “cable modem service”—is an unregulated “information service” that is not subject to the *Computer Inquiry* rules.¹¹ This decision confirmed that cable operators would not be required to provide underlying transmission to competing broadband providers (primarily, Internet service providers or “ISPs”) on a standalone, wholesale basis.¹² The U.S. Supreme Court upheld that ruling several years later,¹³ and the FCC took advantage of the momentum to declare that the *Computer Inquiry* rules also did not apply to high-speed Internet access service provided over telephone networks,¹⁴

¹¹ In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, 17 F.C.C.R. 4798 (2002) [hereinafter Cable Modem Order].

¹² *Id.* at ¶¶ 42-45.

¹³ National Cable & Telecomm. Ass’n v. Brand X Internet Servs., 545 U.S. 967 (2005).

¹⁴ Wireline Broadband Order, *supra* note 5.

power lines,¹⁵ and wireless networks.¹⁶ More recently, the FCC has afforded some targeted relief from the *Computer Inquiry* requirements for individual companies that have asked for it in connection with broadband services other than broadband Internet access,¹⁷ although it appears increasingly hesitant to do so.¹⁸

In a separate but related line of cases, the FCC relieved incumbent local exchange carriers of certain “unbundling” requirements under the Act. In particular, it eliminated their obligation under section 251 to offer competitors unbundled access to certain broadband elements, including line sharing (which involves making available the high-frequency portion of the local loop) and fiber-to-the-home and fiber-to-the-curb loops;¹⁹ it also relieved the Bell

¹⁵ In the Matter of United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service, 21 F.C.C.R. 13281 (2006) [hereinafter BPL Order].

¹⁶ In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, 22 F.C.C.R. 5901 (2007) [hereinafter Wireless Broadband Order].

¹⁷ See, e.g., In the Matters of Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements; Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services, 22 F.C.C.R. 19478 ¶¶ 50-55 (2007) [hereinafter Embarq Forbearance Order] (granting relief from the *Computer Inquiry* tariffing requirement, but not the transmission access or nondiscrimination requirements, for some broadband services); In the Matters of Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services; Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services, 22 F.C.C.R. 18705 ¶¶ 53-63 (2007) [hereinafter AT&T Forbearance Order] (same), *petitions for review pending*, Nos. 07-1426, 07-1427, 07-1429, 07-1430, 07-1431, 07-1432 (D.C. Cir. filed Oct. 22, 2007); In the Matter of Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, As Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area, 22 F.C.C.R. 16304 ¶¶ 120-24 (2007) (same). As of this writing, other petitions seeking similar relief remain pending. See Pleading Cycle Established for Comments on Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services, 22 F.C.C.R. 16858 (2007).

¹⁸ The more targeted relief granted in the orders in the footnote above arguably is more narrow than the vague relief afforded to Verizon when its forbearance petition was granted, not through an FCC order, but by operation of law when the FCC failed to act within the statutorily-prescribed time frame. News Release, FCC, Verizon Telephone Companies’ Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law (Mar. 20, 2006); see also *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1133 (D.C. Cir. 2007) (deeming the FCC’s action with respect to Verizon’s petition unreviewable).

¹⁹ In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of

Operating Companies (or the “BOCs,” which are the largest of the incumbents) from their unique obligation to provide these same facilities pursuant to section 271, which set forth specific requirements that allowed the BOCs to re-enter the long-distance market.²⁰

Through these decisions, the FCC demonstrated a consistent deregulatory approach keyed on a central factual premise: that the broadband marketplace is constantly changing and highly competitive, on an intermodal and an intramodal basis, with respect to retail and wholesale services alike—all to the benefit of consumers.²¹ The agency concluded that these conditions permitted it to rely on market forces instead of regulation to ensure that no entity could engage in conduct that harms consumers, such as by unreasonably denying wholesale customers access to its network. As the agency explained when it deregulated wireline broadband Internet access, the existence of “[v]igorous competition between different platform providers” meant that “sufficient marketplace incentives are in place to encourage arrangements with ISPs,” which would then “enable consumers to reap the benefits of advanced wireline broadband Internet access services that incorporate the latest technologically advanced integrated

Wireline Services Offering Advanced Telecommunications Capability, 18 F.C.C.R. 16978 ¶ 255 (2003) [hereinafter Triennial Review Order] (addressing line sharing); *id.* at ¶ 278 (addressing fiber-to-the-home loops); In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of Incumbent Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, 19 F.C.C.R. 20293 ¶ 9 (2004) [hereinafter FTTC Recon Order] (addressing fiber-to-the-curb loops).

²⁰ *See generally* In the Matters of Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); SBC Communications Inc.’s Petition for Forbearance Under 47 U.S.C. § 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc., Petition for Forbearance Under 47 U.S.C. § 160(c), 19 F.C.C.R. 21496 (2004).

²¹ The FCC has reiterated this general conclusion on occasions too numerous to count. *See, e.g.*, Wireline Broadband Order, *supra* note 5, at ¶ 50 (“[T]here is increasing competition at the retail level for broadband Internet access service as well as growing competition at the wholesale level for network access provided by the wireline providers’ intramodal and intermodal competitors.”); *id.* at ¶ 56 (“Continuous change and development are likely to be the hallmark of the marketplace for broadband Internet access at both the retail and wholesale levels over the next several years.”); Embarq Forbearance Order, *supra* note 17, at ¶ 21 (“There are a myriad of providers prepared to make competitive offers to enterprise customers demanding packet-switched data services located both within and outside any given incumbent LEC’s service territory. These competitors include the many competitive LECs, cable companies, systems integrators, equipment vendors, and value-added resellers.”).

equipment, on a more widely available and more timely basis than if we maintained the existing regime.”²² The FCC further concluded that to impose wholesale access requirements where they were not needed would only discourage the continued investment and innovation that produced this competition in the first place.²³

Another defining aspect of this line of decisions was a desire to achieve regulatory parity among comparable services and service providers by regulating downward. Throughout this time, the FCC emphasized its goal to “establish a consistent regulatory framework across broadband platforms by regulating like services in a similar manner.”²⁴ Thus, for example, it eliminated the *Computer Inquiry* rules for wireline broadband Internet access in order to “eliminate disparities between the regulatory treatment of that broadband and cable modem service.”²⁵ Similarly, the agency did not impose on broadband-over-power lines (or “BPL”) regulations “that do not apply to other competing forms of broadband Internet access services,” because doing so “would create a regulatory disparity antithetical to our creation of a level

²² Wireline Broadband Order, *supra* note 5, at ¶¶ 62, 79, 80; *see also, e.g., id.* at ¶ 75 (“[W]e expect that business incentives will compel wireline broadband carriers to offer broadband transmission on a commercially reasonable basis to independent ISPs and will motivate wireline carriers to negotiate mutually acceptable rates, terms, and conditions with unaffiliated ISPs.”); In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 20 F.C.C.R. 2533 ¶ 2 (2005) (“recogniz[ing] the marketplace realities of robust broadband competition and increasing competition from intermodal sources” and thus “eliminat[ing] most unbundling requirements for broadband architectures serving the mass market,” which “ma[k]e it easier for companies to invest in equipment and deploy the high-speed services that consumers desire”) (citation omitted); Embarq Forbearance Order, *supra* note 17, at ¶ 42 (finding that parties seeking relief from the *Computer Inquiry* rules “face[s] sufficient pressure from actual and potential competition to protect consumers, which gives the[m] incentives to offer innovative services”).

²³ *See, e.g.,* Wireline Broadband Order, *supra* note 5, at ¶ 44 (stating that “the additional costs of an access mandate diminish a carrier’s incentive and ability to invest in and deploy broadband infrastructure investment”); FTTC Recon Order, *supra* note 19, at ¶ 9 (concluding that avoiding regulation of these facilities was “necessary to ensure that regulatory disincentives for broadband deployment are removed”).

²⁴ Wireless Broadband Order, *supra* note 16, at ¶ 2; *see also, e.g.,* Wireline Broadband Order, *supra* note 5, at ¶ 17 (seeking to craft “an analytical framework that is consistent, to the extent possible, across multiple platforms that support competing services”).

²⁵ Wireline Broadband Order, *supra* note 5, at ¶ 107 n.335.

playing field for all modes of this service.”²⁶ The FCC was interested in intra-platform parity as well, declining, for example, to single out cable operators that also provided telephony service (back when cable operators did so far less frequently) in order to avoid “creat[ing] an open access regime for cable Internet service applicable only to some operators.”²⁷

These principles—reliance on the market, concern about the costs of regulation, and a desire for regulatory parity—underlie the FCC’s early decisions in the broadband context. The approach was not necessarily new. Indeed, ever since computer-based communications services first emerged in the 1960s, the agency has long espoused a market-driven approach in connection with advanced services.²⁸ That policy—which eventually earned the moniker “nonregulation” or “unregulation”²⁹—ultimately was codified in the Act,³⁰ and drove the FCC’s other efforts to establish “a minimal regulatory environment” for broadband services.³¹

II. “THE NEW”: THE INTRODUCTION OF THE NEW GENERATION OF ACCESS MANDATES

Originally, the FCC stood poised to pursue the same approach with respect to consumer-oriented access issues. In its 2004 notice announcing its intention to establish a comprehensive

²⁶ BPL Order, *supra* note 15, at ¶ 16.

²⁷ Cable Modem Order, *supra* note 11, at ¶ 46.

²⁸ *See e.g.*, In the Matter of Vonage Holdings Corporation, Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, 19 F.C.C.R. 22404 ¶¶ 1-11 (2004) [hereinafter Vonage Order].

²⁹ Jason Oxman, *The FCC and the Unregulation of the Internet*, The Federal Communications Commission, OPP Working Paper Series No. 31 (July 1999), available at http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf.

³⁰ 47 U.S.C. § 157 note (a) (directing the FCC and state public service commissions to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” using methods including “regulatory forbearance . . . or other regulating methods that remove barriers to infrastructure investment”); *id.* § 230(a)(4) (finding that “[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation”); *id.* § 230(b)(2) (stating that it is “the policy of the United States” to “preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation”).

³¹ Cable Modem Order, *supra* note 11, at ¶ 5; *see also, e.g.*, In the Matter of Petition for a Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, 19 F.C.C.R. 3307 ¶ 11 (2004); Vonage Order, *supra* note 28, at ¶ 1.

regulatory framework for “IP-enabled services” (and seeking comment on the various possibilities), the FCC foresaw a world in which consumers “are likely to enjoy greater and greater flexibility in designing or selecting communications packages that suit their individual needs, and can be expected to access those packages over networks of their choosing, on devices of their choosing.”³² The agency expected that such choices would result from a “‘virtuous circle’ in which competition begets innovation, which in turn begets more competition.”³³ In other words, the market would take care of ensuring that consumers can access and use broadband services and networks.

In the midst of its steady line of decisions eliminating (or at least reducing) wholesale access obligations for broadband platform providers in light of robust competition in that market, however, the FCC signaled a change of course that has come to be characterized by pro-active, asymmetrical regulation of those same providers *in spite of* that competition. Ironically, the first step in this direction occurred simultaneously with what was perhaps the high-water mark of the FCC’s deregulatory efforts in connection with wholesale access—its decision that wireline broadband Internet access is an information service not subject to the *Computer Inquiry* requirements. That same day, the FCC issued a “Policy Statement” by which it sought to “offer[] guidance and insight into its approach to the Internet and broadband.”³⁴ In particular, the FCC’s Policy Statement set forth four principles intended to “foster creation, adoption and

³² In the Matter of IP-Enabled Services, 19 F.C.C.R. 4863 ¶ 22 (2004) [hereinafter IP-Enabled Services NPRM].

³³ *Id.*

³⁴ In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, 20 F.C.C.R. 14986 ¶ 3 (2005).

use of Internet broadband content, applications, services and attachments, and to ensure consumers benefit from the innovation that comes from competition.”³⁵ These included the ideas that consumers are entitled to “access the lawful Internet content of their choice,” “run applications and use services of their choice, subject to the needs of law enforcement,” “connect their choice of legal devices that do not harm the network,” and to have “competition among network providers, application and service providers, and content providers.”³⁶

In articulating these consumer-oriented access principles for the modern broadband era, the FCC included a somewhat incongruous citation to a ruling that is synonymous with the monopoly telephone era—the FCC’s now-legendary, 1968 *Carterfone* decision.³⁷ At the time, the old Bell System had a monopoly over both the telephone network and (through an affiliate) the manufacture of telephones, and it used that market power to enforce a prohibition against the use of “foreign attachments”—essentially, telephones made by anyone else—with its network. The FCC prohibited that practice in *Carterfone*, a move that is credited with spurring the development of a competitive telephone equipment market.³⁸

The FCC’s implementation of this re-regulatory approach began with the renewal of its efforts to implement section 629 of the Cable Act, which seeks to assure the commercial availability of equipment (such as set-top boxes) that can be used to receive the signal of “any

³⁵ *Id.* at ¶ 5.

³⁶ *Id.* at ¶ 4.

³⁷ *Id.* (citing Use of the Carterfone Device in Message Toll Telephone Service, 13 F.C.C.2d 420 (1968) [hereinafter *Carterfone*]).

³⁸ *See, e.g.*, In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices, 13 F.C.C.R. 14775 ¶ 11 (1998) [hereinafter *Navigation Devices Order*] (“The *Carterfone* decision allowed consumers to connect [consumer premises equipment] to the telephone network if the connections did not cause harm. As a result of *Carterfone* and other Commission actions, ownership of telephones moved from the network operator to the consumer. As a result, the choice of features and functions incorporated into a telephone has increased substantially, while the cost of equipment has decreased.”).

multichannel video programming distributor.”³⁹ Despite this “jurisdictionally broad” mandate,⁴⁰ and the purported importance of the *Carterfone* “‘right to attach’ principle” that inspired it,⁴¹ the FCC has focused exclusively on the cable industry even as its market share steadily decreases with the sustained growth of video competition from Direct Broadcast Satellite (“DBS”) operators and telephone companies.⁴² This may have made sense in the beginning, when cable was the only game in town. But the FCC has maintained a decade-long exemption from its “integration ban” for the two DBS operators, even though they are the second- and third largest multichannel video programming distributors (“MVPDs”) and have now adopted the same equipment-leasing model that caused the FCC to target the cable industry in the first place.⁴³ Meanwhile, the FCC has waived the requirement for Verizon and Qwest (and some smaller cable operators),⁴⁴ while AT&T has not conceded that it is covered by the statute—meaning that none

³⁹ In re Matter Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment, 22 F.C.C.R. 12024 (2007) [hereinafter Navigation Devices FNPRM]; *see also* 47 U.S.C. § 549(a).

⁴⁰ Navigation Devices Order, *supra* note 38, at ¶ 21.

⁴¹ *Id.* at ¶ 8; *see also id.* at ¶ 11 (“The competitive market for consumer equipment in the telephone context provides the model of a market we have sought to emulate in this proceeding.”).

⁴² According to some estimates, non-cable MVPDs represent one-third of the video marketplace. *See* Comments of the National Cable & Telecommunications Association, MB Docket No. 06-189, at 9 (filed Dec. 29, 2006); *see also* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 21 F.C.C.R. 2503 ¶ 8 (2006) [hereinafter 2005 Video Competition Report] (noting that, as of June 2005, cable had 69.4 percent of the MVPD market).

⁴³ *Compare, e.g.,* Navigation Devices Order, *supra* note 38, at ¶ 64 (noting exemption for DBS providers from integration ban in light of the existence of a competitive retail market for DBS equipment), *with* Linda Moss, *DirecTV’s New Lease on Life*, MULTICHANNEL NEWS, Jan. 23, 2006, <http://www.multichannel.com/article/CA6301253.html> (“Adopting a strategy used by cable operators, DirecTV Inc. in March will begin leasing its set-top boxes and digital-video recorders to its customers instead of selling them.”); *see also* 2005 Video Competition Report, *supra* note 42, at ¶ 6 (noting that DIRECTV and EchoStar are now the second- and third-largest MVPDs). The “integration ban” prohibits cable operators from offering devices with a built-in security component, thus allowing consumers to use devices made by others to obtain their cable signal.

⁴⁴ In the Matter of Consolidated Requests for Waiver of Section 76.1204(a)(1) of the Commission’s Rules; Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices, 22 F.C.C.R. 11780 (2007) (the FCC denied similar requests by Comcast—a decision that Comcast has appealed on the ground that it creates impermissible regulatory disparities—and by the trade association for the cable industry.) *See* In the Matter of Comcast Corporation; Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules; Implementation of Section 304 of the Telecommunications Act of 1996; Commercial

of the BOCs has had to comply with a similar requirement even though, as new competitors in the video market with substantial resources, they presumably could have done so from the outset.

Similar themes are present in the FCC’s ruling prohibiting cable operators from enforcing and executing exclusivity clauses in agreements with owners of multiple dwelling units (“MDUs”)—a term for apartment, condominium, and cooperative buildings—that would give them exclusive access to buildings for purposes of providing broadband, video, and voice services.⁴⁵ In doing so, the agency overruled itself. Four years earlier, the FCC had concluded that there was no “need for government intervention with marketplace forces and privately negotiated contracts.”⁴⁶ That view was based in part on the finding that exclusive contracts had not “thwarted alternative providers’ entrance into the MDU market.”⁴⁷ In fact, the FCC found at the time that such exclusivity clauses had pro-competitive effects—noting, for example, that they may “enable alternative MVPDs to gain a foothold in the MDU market.”⁴⁸ The FCC justified its subsequent reversal by citing new evidence of the harm to consumers from exclusivity clauses.⁴⁹ At the same time that it launched its reconsideration of exclusivity clauses in the video context, the FCC dusted off a then-seven-year-old proceeding that addressed the issue of exclusive

Availability of Navigation Devices; Application for Review, 22 F.C.C.R. 17113 (2007), *pet. for review filed*, Comcast Corp. v. FCC, No. 07-1445 (D.C. Cir.); In the Matter of National Cable & Telecomm. Ass’n; Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules; Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices, 22 F.C.C.R. 11767 (2007).

⁴⁵ See In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, 22 F.C.C.R. 20235 (2007) [hereinafter Cable Exclusivity Order]. The cable industry and two housings groups have appealed the decision to the D.C. Circuit. See *NCTA Appeals FCC’s MDU Order*, TELECOMMUNICATIONS REPORTS, Jan. 23, 2008 [hereinafter NCTA MDU Appeal]; *Groups Challenge MDU Exclusivity Ban for Both New, Existing Contracts*, TELECOMMUNICATIONS REPORTS, Jan. 17, 2008.

⁴⁶ In the Matter of Telecommunications Services Inside Wiring; Customer Premises Equipment; In the Matter of Implementation of the Cable Television Consumer Protection Act of 1992; Cable Home Wiring, 18 F.C.C.R. 1342 ¶ 4 (2003).

⁴⁷ *Id.* at ¶ 69.

⁴⁸ *Id.* at ¶ 64.

⁴⁹ Cable Exclusivity Order, *supra* note 45, at ¶ 26.

contracts in the provision of telecommunications services.⁵⁰ It has since reached the same ruling in that context with a nod toward its prior emphasis on parity,⁵¹ while it continues to consider whether to extend a similar prohibition to DBS and other video providers.⁵²

Last year, the FCC imposed “open device” requirements on a portion of the spectrum—the “C block” of the 700 MHz band—currently being used by television broadcasters but that has been auctioned off and will be made available following the digital television (“DTV”) transition.⁵³ While the agency admitted that it “generally prefer[s] to rely on marketplace forces as the most efficient mechanism for fostering competition,”⁵⁴ it determined that the auction presented “a rare opportunity to implement pro-consumer concepts without disrupting an existing service, given that there will not be any incumbents in the band after the DTV transition

⁵⁰ Parties Asked to Refresh Record Regarding Promotion of Competitive Networks in Local Telecommunications Markets, 22 F.C.C.R. 5632 (2007) (citing *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*; Wireless Communications Association International, Inc. Petition for Rulemaking To Amend Section 1.4000 of the Commission’s Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Review of Sections 68.104, and 68.213 of the Commission’s Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, 15 F.C.C.R. 22983 (2000) [hereinafter *Competitive Networks Order*]).

⁵¹ *Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, WT Docket No. 99-217, at ¶ 5 (rel. Mar. 21, 2008) (“In an environment of increasingly competitive bundled service offerings, the importance of regulatory parity is particularly compelling in our determination to remove this impediment to fair competition.”).

⁵² *Cable Exclusivity Order*, *supra* note 45, at ¶¶ 61-66.

⁵³ *See In the Matter of Service Rules for the 698-746, 747-762 and 777-792 MHz Bands; Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones; Biennial Regulatory Review—Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services; Former Nextel Communications, Inc., Upper 700 MHz Guard Band, Licenses and Revisions to Part 27 of the Commission’s Rules; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010; Declaratory Ruling on Reporting Requirement under Commission’s Part 1 Anti-Collusion Rule*, 22 F.C.C.R. 15289 (2007) [hereinafter *700 MHz Order*]. The trade association for the wireless industry has since appealed the FCC’s order. *See John Dunbar, Airwaves Auction Still Faces Challenge*, FREE PRESS, Oct. 26, 2007, <http://www.freepress.net/news/27454> (noting withdrawal of appeal by Verizon Wireless and immediate appeal by CTIA–The Wireless Association, filed in the D.C. Circuit).

⁵⁴ *700 MHz Order*, *supra* note 53, at ¶ 195.

and that bidders for the spectrum will have notice of these obligations at the outset.”⁵⁵ Thus, licensees that would rely on C block spectrum would be forced to comply with the FCC’s open platform conditions, which essentially would force them to allow any devices or applications to be used on that spectrum so long as they cause no harm. But the FCC reached this conclusion without even making a finding as to whether competition in the wireless broadband market could achieve the same result.⁵⁶ In fact, the FCC suggested that customers may not even be interested in having an “open platform.”⁵⁷

There has been much discussion of extending the “wireless *Carterfone*” concept more broadly.⁵⁸ Congress already has held one hearing on the subject,⁵⁹ and the FCC has been asked to “evaluate wireless carrier practices in light of *Carterfone*” and to “make unmistakably clear that *Carterfone* will be enforced in the wireless industry”⁶⁰—prompting much debate within the industry about open platforms. In addition, the FCC has sought comment regarding whether it

⁵⁵ *Id.* at ¶ 203; *see also id.* at ¶ 195 (noting that the proceeding presented “an important opportunity to apply requirements for open platforms for devices and application for the benefit of consumers, without unduly burdening existing services and markets”).

⁵⁶ *Id.* at ¶ 201 (“We do not decide in this proceeding whether competition in the CMRS market generally is sufficient to ensure that consumers have the ability to use wireless devices and applications of their choice in the emerging wireless broadband market, especially since these questions are being considered more broadly in other proceedings.”).

⁵⁷ *Id.* at ¶ 205 (stating that this “measured step” would allow the FCC and the industry “to observe the real-world effects” of the open devices requirement, including “the extent [to which] the results of [the] C block requirements prove attractive to consumers”).

⁵⁸ *Compare, e.g.,* Tim Wu, *Wireless Carterfone*, 1 INT’L J. COMM. 389, passim (2007) (arguing for the application of *Carterfone*-like principles to the wireless industry), *with* ROBERT W. HAHN ET AL., *THE ECONOMICS OF WIRELESS NET NEUTRALITY* (2007) (criticizing such arguments); *see also, e.g.,* Walter S. Mossberg, *Technology (A Special Report)—Free My Phone: Cellphone Carriers Tell Us What Phones We Can Use, What Services We Can Access, What Something Else We Can Do; Consumers Deserve Better*, WALL ST. J., Oct. 22, 2007, at R1 (part of a collection of articles regarding wireless device portability).

⁵⁹ *Wireless Innovation and Consumer Protection: Hearing before the H. Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet*, 110th Cong. (2007), available at http://energycommerce.house.gov/cmte_mtgs/110-ti-hrg.071107.ConsumerProtection.shtml.

⁶⁰ Skype Communications S.A.R.L. Petition to Confirm a Consumer’s Right to Use Internet Communications Software and Attach Devices to Wireless Networks, RM No. 11361, at ii (filed Feb. 20, 2007).

should impose “wholesale access” or “open device rules” on the Advanced Wireless Services (“AWS”) spectrum.⁶¹

Any endorsement of this concept by the FCC in the wireless context would be somewhat puzzling because the FCC itself has identified evidence indicating that the market is in fact functioning to permit wireless device portability. For example, it has noted that Apple relented in its initial efforts to restrict the types of independent software that could be used on the iPhone following “heavy criticism” from independent programmers, leading it to release a software development kit that would allow programmers to develop third-party applications for the device.⁶² The FCC also has recognized the existence of “growing pressures to move to an open-platform model,” illustrated by Verizon’s well-publicized plans to allow any device to access its wireless network⁶³ (following its initial opposition to the FCC’s open platform rules, which it later rescinded,⁶⁴ and its subsequent lawsuit appealing those rules, which it later dropped⁶⁵), and by the formation of the “Open Handset Alliance” comprised of manufacturers and wireless providers and dedicated to accelerating “openness” in the provision of mobile wireless services.⁶⁶ Such developments already may be causing a shift in the FCC’s approach to this

⁶¹ In the Matter of Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band, 22 F.C.C.R. 17035 ¶ 89 (2007). “Advanced Wireless Services” refers collectively to new (*e.g.*, third generation or “3G”) fixed and mobile terrestrial wireless applications that support various applications. *See id.* at ¶ 1 n.1.

⁶² Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, WT Docket No. 07-71, Twelfth Report, at ¶ 177 (rel. Feb. 4, 2008) [hereinafter Wireless Competition Report] (citation omitted).

⁶³ *Id.* at ¶ 178; *see also* Amol Sharma, *Verizon Wireless Unveils Open-Network Policy*, WALL ST. J., Mar. 20, 2008, at B4 (noting Verizon Wireless’s plan to allow any company to make devices to market to its customers provided that they meet certain minimum technical requirements).

⁶⁴ *Verizon Changes Course, Supports Open-Access Plan*, WASH. POST, July 26, 2007, at D8.

⁶⁵ Dunbar, *supra* note 53.

⁶⁶ Wireless Competition Report, *supra* note 62, at ¶ 179; *see also* Remarks of Commissioner Michael J. Copps, “Free My Phone,” New America Foundation Forum, Jan. 22, 2008, at 2, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-279631A1.pdf (referencing “industry-led efforts to create open platform standards” in the wireless context).

issue: FCC Chairman Kevin Martin recently announced that he has proposed to dismiss the request noted above to apply *Carterfone* requirements to existing wireless networks “[i]n light of the industry’s embrace of a more open wireless platform.”⁶⁷

The FCC’s interest in net neutrality has proven controversial for similar reasons. “Net neutrality” is an umbrella term generally used to refer to the debate over what owners of broadband networks can and cannot do when managing Internet traffic delivered to and from their subscribers. After launching an inquiry into whether platform providers are compromising consumers’ access to content and applications on the Internet and asking for comment on “whether any regulatory intervention is necessary,”⁶⁸ the FCC sought comment on two petitions asking it to impose prohibitions addressing net neutrality.⁶⁹ The FCC also has convened several hearings across the country to explore similar issues.⁷⁰ But again, it has pursued this interest while acknowledging that the market may already be addressing the problem. For example, the agency found previously that some of the largest broadband providers have no incentive to engage in packet discrimination or degradation.⁷¹

At least in the net neutrality context, the efficacy of market forces to restrain anti-competitive behavior appears to be in the eye of the beholder, as proponents and opponents of regulation have managed to draw wildly divergent conclusions from the same observations. One

⁶⁷ Remarks of FCC Chairman Kevin J. Martin, CTIA Wireless 2008, Las Vegas, NV, Apr. 1, 2008, at 3, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281259A1.pdf; *see also* Cecilia Kang, *FCC Chairman to Seek Dismissal of Skype’s Plea for Open Access to Wireless Networks*, WASH. POST, Apr. 2, 2008, at D4.

⁶⁸ In the Matter of Broadband Industry Practices, 22 F.C.C.R. 7894 (2007) [hereinafter Broadband Practices NOI].

⁶⁹ *See* Comment Sought on Petition for Declaratory Ruling Regarding Internet Management Policies, 23 F.C.C.R. 340 (2008); *see also* Comment Sought on Petition for Rulemaking to Establish Rules Governing Network Management Practices by Broadband Network Operators, 23 F.C.C.R. 343 (2008).

⁷⁰ Press Release, FCC, FCC Announces Second Public En Banc Hearing on Broadband Network Management Practices at Stanford University (Mar. 19, 2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280895A1.pdf.

⁷¹ Broadband Practices NOI, *supra* note 68, at ¶ 3 (citations omitted).

example involves Verizon Wireless's September 2007 denial of a request from an abortion-rights group to send text messages to its supporters and its almost immediate reversal of that decision in response to public criticism.⁷² While this cause-and-effect would appear to be evidence that the market is functioning to discipline service providers, net neutrality proponents cited it as all the more reason why regulation was necessary.⁷³

The same point was made more vividly following the recent agreement between Comcast Corporation and BitTorrent, a peer-to-peer network, to commit voluntarily to industry-wide discussions of traffic management issues in an effort to resolve their high-profile dispute concerning Comcast's controversial efforts to block traffic from subscribers trying to share files through the BitTorrent network.⁷⁴ FCC Commissioner Robert McDowell hailed the agreement as "precisely th[e] kind of private sector solution that has been the bedrock of Internet governance since its inception," which is preferable to "[g]overnment mandates" that "cannot possibly contemplate the myriad complexities and nuances of the Internet market place."⁷⁵ Commissioner Deborah Taylor Tate similarly praised this "industry-based solution[]" as a "more effective and efficient means of resolving complex, technical network disputes" than government intervention.⁷⁶ But Commissioner Michael Copps stated that the Comcast-BitTorrent agreement

⁷² Adam Liptak, *Verizon Reverses Itself on Abortion Messages*, N.Y. TIMES, Sept. 27, 2007, <http://www.nytimes.com/2007/09/27/business/27cnd-verizon.html?ex=1348545600&en=be862e23ae5b54e9&ei=5090&partner=rssuserland&emc=rss>.

⁷³ See, e.g., Martin H. Bosworth, *Verizon's Abortion Block Raises Net Neutrality Concerns*, CONSUMERAFFAIRS.COM, Sept. 27, 2007, http://www.consumeraffairs.com/news04/2007/09/verizon_abortion.html.

⁷⁴ Press Release, Comcast, Comcast and BitTorrent Form Collaboration to Address Network Management, Network Architecture and Content Distribution (Mar. 27, 2008), *available at* <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=740>.

⁷⁵ Press Release, FCC, Statement of FCC Commissioner Robert M. McDowell Regarding BitTorrent and Comcast Resolution (Mar. 27, 2008), *available at* <http://www.fcc.gov/commissioners/mcdowell/statements2008.html>.

⁷⁶ Press Release, FCC, Commissioner Deborah Taylor Tate Applauds Comcast/BitTorrent Agreement (Mar. 27, 2008), *available at* http://www.fcc.gov/Daily_Releases/Daily_Digest/2008/dd080327.html.

“confirms . . . that the FCC needs to play a proactive role” in monitoring the Internet, and credited the FCC’s “attention to this issue” for prompting industry-wide dialogue on the subject.⁷⁷ And the agreement provided only limited reassurance to FCC Chairman Kevin Martin, who stated that Comcast should provide the agency with “a commitment of a date certain” by which it would change its traffic management practices and that, in the meantime, the FCC “will remain vigilant” regarding the issue.⁷⁸ The fact that one-half of the FCC cited the Comcast-BiTorrent agreement as proof that the agency need not regulate in connection with net neutrality, while the other half cited it as proof that such regulation is essential, illustrates perfectly the agency’s two-mindedness with respect to when to intervene in the broadband market.

Considered together, the themes underlying the FCC’s consideration of this new generation of access mandates—skepticism regarding the disciplining effect of competition, and asymmetrical application of regulation—deviate from the approach it took with respect to wholesale access mandates. This is not to say that the FCC ever disclaimed any intention to regulate in the broadband context, or that it should. Specifically, the FCC has defined a category of services that it calls “interconnected VoIP services”—broadly understood to include services that provide customers with the capability to make calls to and receive calls from the public switched telephone network⁷⁹—on which it has since imposed requirements to provide enhanced

⁷⁷ Press Release, FCC, Statement of Commissioner Michael J. Copps in Response to Comcast/BitTorrent Announcement (Mar. 27, 2008), *available at* http://www.fcc.gov/Daily_Releases/Daily_Digest/2008/dd080327.html.

⁷⁸ Press Release, FCC, Statement by FCC Chairman Kevin J. Martin on Announcement by Comcast and BitTorrent (Mar. 27, 2008), *available at* <http://www.fcc.gov/commissioners/martin/statements2008.html>.

⁷⁹ *See, e.g.*, In the Matter of Universal Service Contribution Methodology; Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review—Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing and Speech

911 service,⁸⁰ prevent the unauthorized disclosure of customer proprietary network information,⁸¹ comply with disabilities-access provisions,⁸² contribute to the federal universal service fund,⁸³ and allow departing customers to port their phone numbers,⁸⁴ among other things. The FCC also has required interconnected VoIP providers as well as facilities-based broadband Internet access providers to facilitate lawful surveillance using government wiretaps,⁸⁵ and it has considered whether the latter should be required to contribute to universal service.⁸⁶

That the FCC saw fit to impose these regulations, however, does not necessarily explain its current interest in consumer-oriented access mandates or the manner in which it has imposed them. The regulations described above comprise what the FCC calls “non-economic

Disabilities, and the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size; Number Resource Optimization; Telephone Number Portability; Truth-in-Billing and Billing Format; IP-Enabled Services, 21 F.C.C.R. 7518 ¶ 15 (2006) (defining “interconnected VoIP service” as any service that: (1) enables “real-time, two-way voice communications,” (2) requires “a broadband connection from the user’s location,” (3) requires “IP-compatible customer premises equipment,” and (4) permits users to “receive calls from and terminate calls to the PSTN”) [hereinafter VoIP USF Order]; *vacated in part on other grounds*, Vonage Holdings Corp. v. FCC, 489 F.3d 1232 (D.C. Cir. 2007).

⁸⁰ In the Matters of IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers, 20 F.C.C.R. 10245 ¶ 1 (2005).

⁸¹ In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services, 22 F.C.C.R. 6927 ¶ 54 (2006).

⁸² In the Matters of IP-Enabled Services; Implementation of Sections 255 and 251(a)(2) of The Communications Act of 1934, as Enacted by The Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; The Use of N11 Codes and Other Abbreviated Dialing Arrangements, 22 F.C.C.R. 11275 (2007) [hereinafter VoIP Disabilities Access Order].

⁸³ In the Matter of Universal Service Contribution Methodology, FCC 06-94 (2006). *See* Wireline Competition Bureau Streamlines Reporting Requirements for Interconnected VOIP Providers and Announces OMB Approval of New FCC; Forms 499-A and 499-Q, 21 F.C.C.R. 8623 (2006).

⁸⁴ In the Matter of Telephone Number Requirements for IP-Enabled Services Providers; Local Number Portability Porting Interval and Validation Requirements; IP-Enabled Services; Telephone Number Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues; Final Regulatory Flexibility Analysis; Numbering Resource Optimization, 22 F.C.C.R. 19531 (2007).

⁸⁵ In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services, 20 F.C.C.R. 14989 (2005).

⁸⁶ IP-Enabled Services NPRM, *supra* note 32, at ¶ 63.

regulation”—requirements that are “designed to further important public policy goals and protect consumers” and which generally are independent of competitive pressures.⁸⁷ In that sense, they are quite different from access mandates, which are more appropriately classified as “economic regulations” that are “written to apply specifically to cases involving a monopoly service provider using its bottleneck facilities to provide services to a public that is without significant power to negotiate the rates, terms, and conditions of those services”⁸⁸—precisely the type of regulations that the FCC long held should *not* apply to advanced services.⁸⁹ In fact, *Carterfone*, the chief inspiration for the new generation of access mandates, was one of the first economic regulations.

Furthermore, the FCC has applied these “non-economic” rules and the new generation of access mandates in different ways. The agency’s express goal in regulating interconnected VoIP services was to ensure regulatory parity with traditional voice services, for which interconnected VoIP services offer a functional substitute.⁹⁰ As a result, all interconnected VoIP providers are now regulated in a similar manner as traditional telephone companies. In contrast, as discussed,

⁸⁷ AT&T Forbearance Order, *supra* note 17, at ¶ 5.

⁸⁸ IP-Enabled Services NPRM, *supra* note 32, at ¶ 74; Embarq Forbearance Order, *supra* note 17, at ¶ 57 (stating that economic regulation “has been thought to provide important protections against unjust, unreasonable, and unjustly or unreasonably discriminatory treatment of consumers”).

⁸⁹ Vonage Order, *supra* note 28, at ¶ 21 (“In a series of proceedings beginning in the 1960’s, the Commission issued orders finding that economic regulation of information services would disserve the public interest because these services lacked the monopoly characteristics that led to such regulation of common carrier services historically.”); *see also id.* at ¶ 21 nn.78-79.

⁹⁰ *See, e.g.*, In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2007, 22 F.C.C.R. 15712 ¶ 18 (2007) (“[T]he explosive growth of the VoIP industry in recent years has resulted in recent Commission actions addressing the service. The growth of the VoIP industry and the extent to which VoIP service is used as a substitute for analog voice service have necessitated a number of Commission rulemaking proceedings pertaining to interconnected VoIP services.”); VoIP Disabilities Access Order, *supra* note 82, at ¶ 19 (“By limiting the application of our rules to those VoIP communications that use an interconnected VoIP service (and, thus, permit users to receive calls from *and* terminate calls to the PSTN), this approach ensures that, from the consumer’s perspective, services that are perceived and used as a substitute for traditional telephony are subject to the same obligations that apply to traditional telephony.”).

the FCC has applied retail access mandates unevenly, such that some network owners must comply with them while their competitors do not.

The reasons for the FCC's divergent approach with respect to consumer-oriented access mandates are unclear. Perhaps the FCC, which is not immune to political pressure, simply has been swept up in the same wave of interest that has prompted the Democratic Congress and various other entities to pay greater attention to the issue. It also is possible that the agency, despite having said that the broadband marketplace is competitive and that the resulting market forces can restrain anti-competitive conduct, no longer really believes it. In particular, some parties have pointed to a cable-DSL duopoly with respect to wireline broadband given the huge combined market share of cable and telephone companies,⁹¹ a concern that several individual Commissioners have echoed.⁹² More recently, some parties have expressed concern about a Verizon Wireless-AT&T duopoly with respect to wireless broadband on a national level,⁹³ a

⁹¹ See, e.g., Congressional Research Service, Library of Congress, *Access to Broadband Networks*, at CRS-17 (June 29, 2006), available at http://www.ipmall.info/hosted_resources/crs/RL33496_060629.pdf (referencing the “cable and telephone broadband duopoly”).

⁹² See, e.g., In the Matter of Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, 22 F.C.C.R. 21293 (2007); Statement of Commissioner Michael J. Copps, Concurring, *Id.* at 21326 (stating that the Act “envisioned more than just a cable-telephone duopoly as sufficient competition in the marketplace”); Jonathan S. Adelstein, Commissioner, Federal Communications Commission, Testimony Before the Committee on Commerce, Science, and Transportation, United States Senate, at Federal Communications Commission Oversight Hearing, Dec. 13, 2007, at 11, available at http://commerce.senate.gov/public/_files/Com_AdelsteinSenateTestimony121307.pdf (“Only rational competition policies can ensure that the U.S. broadband market does not devolve into a stagnant duopoly, which is a serious concern given that cable and DSL providers now control approximately 96 percent of the residential broadband market.”).

⁹³ Memorandum from Frontline Wireless, LLC to the Antitrust Division, U.S. Department of Justice 1 (Nov. 13, 2007), available at <http://www.usdoj.gov/atr/public/workshops/telecom2007/submissions/227840.pdf> (noting that “[o]nly the two largest [wireless] providers—AT&T and Verizon Wireless—have the spectrum holdings necessary to provide nationwide coverage in an economical manner,” creating the possibility of the wireless industry “return[ing] . . . to the stagnant early days of the cellular duopoly”).

concern that was amplified recently following the success of these two companies in the 700 MHz auction.⁹⁴

To the extent such concerns are animating the FCC's recent inclination toward regulatory solutions, however, the agency has failed to say so explicitly, reducing the transparency of the administrative process. In any event, the FCC need not (and should not) waver in pursuing a market-driven approach. First, the costs of doing otherwise could prove to be too much for the industry.⁹⁵ Any regulatory obligation imposes compliance costs, and the new generation of access mandates is no exception. For example, even the FCC has acknowledged the burdens that open device requirements place on service providers, noting that they may "unduly burden[] existing services and markets"—which is why it has declined thus far to impose such requirements on other wireless services.⁹⁶ More concretely, the cable industry has argued that the commercial availability requirement discussed above effectively results in an estimated \$600 million per year tax on cable subscribers.⁹⁷ Matters are made worse when these costs are imposed only on certain sectors of the industry, since such asymmetrical regulation can, in the FCC's words, "distort competitive outcomes and ill serve end user interests."⁹⁸

The need to incur these direct compliance costs, combined with the prospect of enforcement proceedings and litigation arising from regulation, creates well-established

⁹⁴ *Verizon Wireless, AT&T Big Winners in Record Auction of 700 MHz Frequencies; D-Block Reauction Awaits*, TELECOMMUNICATIONS REPORTS, Apr. 1, 2008, available at 2008 WLNR 5813970.

⁹⁵ In addition to the points that follow, it is worth noting that some parties have questioned whether the FCC has jurisdiction to take some of the actions that it has in connection with the new access mandates. See NCTA MDU Appeal, *supra* note 45 (noting cable industry's argument that the FCC lacks jurisdiction to abrogate existing exclusivity clauses); Dunbar, *supra* note 53 (noting argument by Verizon Wireless, in an appeal that it later withdrew, that the FCC lacked jurisdiction to impose open platform requirements on wireless spectrum).

⁹⁶ 700 MHz Order, *supra* note 53, at ¶ 195; see also *id.* at ¶ 205.

⁹⁷ National Cable & Telecommunications Association, *The \$600 Million Per Year Cable Consumer Set-Top Box Tax* (Feb. 23, 2007), available at <http://www.ncta.com/PublicationType/TalkingPoint/3556.aspx>.

⁹⁸ Competitive Networks Order, *supra* note 50, at ¶ 30.

disincentives to investment and market entry—which, as noted above, is one reason why the FCC eliminated wholesale access requirements.⁹⁹ The stakes are particularly high for broadband providers that have invested an enormous amount of capital constructing and improving their networks, with no assurance of a positive return. This has been a primary argument advanced in opposition to net neutrality mandates. For example, a report prepared by staff of the Federal Trade Commission concluded, “[R]egulation that nominally seeks to protect innovation in content and applications by prohibiting broadband providers from charging for prioritized delivery over their networks actually could erect barriers to new content and applications that require higher-quality data transmission.”¹⁰⁰ Without reasonable means to manage their networks—one of the prices that broadband providers might have to pay if some net neutrality regulations were introduced—such entities would have less incentive to invest in their networks.

The industry’s response to the open device requirements placed on the C block further illustrates the downside of regulation. Analysts have suggested that because this spectrum was so encumbered, few companies were willing to bid on it, ultimately allowing Verizon Wireless—a dominant provider that, as noted, adopted its own version of the open device rules—to obtain that particular spectrum at a steep discount.¹⁰¹ Commissioner McDowell decried that possibility

⁹⁹ See, e.g., Wireline Broadband Order, *supra* note 5, at ¶ 19 (stating that regulation of wireline broadband Internet access “constrain[s] technological advances and deter[s] broadband infrastructure investment by creating disincentives to the deployment of facilities capable of providing innovative broadband Internet access services”).

¹⁰⁰ FEDERAL TRADE COMMISSION INTERNET TASK FORCE, STAFF REPORT: BROADBAND CONNECTIVITY COMPETITION POLICY, at 160 (2007); see also, e.g., STEPHEN B. POCIASK, THE AMERICAN CONSUMER INSTITUTE, NET NEUTRALITY AND THE EFFECT ON CONSUMERS 14 (2007) (“If regulations limit the ability of network investors to differentiate their services, find innovative pricing solutions, prioritize and manage network traffic, network costs will increase and make investment less attractive, which will reduce network investment. Less investment means poorer service quality, and higher network costs means rising broadband service prices. Higher broadband prices can result in depressed demand, which will raise the cost of service for remaining consumers.”).

¹⁰¹ See, e.g., *Questions Remain on C-Block Open Access Mandate’s Significance*, COMMUNICATIONS DAILY, Mar. 6, 2008, at 2 (reporting one analyst’s prediction that the likely sale price of the C block would be only 76 cents per MHz/POP, compared with \$2.68 MHz/POP for the B block and \$1.15 MHz/POP for the A block).

well before the fact, predicting that smaller bidders (including rural companies) would be forced out of the auction entirely.¹⁰² That episode yielded another cost as well, as any reduction in the auction value of the C block would ultimately result in less money going to the U.S. Treasury.

Finally, it is important to consider the practical utility of regulations that depend on the conduct of unregulated parties in order to achieve their goal. For example, in connection with device portability, it would do little good to force service providers to agree upon and publish technical standards that would allow any manufacturer to produce devices that will operate on their networks if no manufacturer wants to make such devices or if no consumer wants to purchase them—a likely circumstance for any industry, like broadband, in which technology and consumer preferences are constantly evolving.

A case in point involves the cable industry’s efforts to comply with the FCC’s rules implementing the commercial availability mandate of section 629, addressed above. The cable and consumer electronics industries have spent a decade—and several hundred million dollars—trying to fulfill that requirement.¹⁰³ Ultimately, the two sides reached an agreement regarding the introduction of unidirectional digital cable-ready products,¹⁰⁴ only to discover that consumers were no longer interested in such one-way devices and were now demanding two-way devices that would support the interactive features that are increasingly available, such as video on demand and electronic programming guides.¹⁰⁵ The industries went back to the drawing board to

¹⁰² 700 MHz Order, *supra* note 53, at 2 (Statement of Commissioner Robert M. McDowell, Dissenting in Part).

¹⁰³ In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices, 20 F.C.C.R. 6794 ¶ 36 (2005) [hereinafter 2005 Deferral Order] (noting “the significant efforts by the cable and consumer electronics industries since 1998”).

¹⁰⁴ In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment, 18 F.C.C.R. 20885 ¶ 2 n.3 (2003).

¹⁰⁵ Navigation Devices FNPRM, *supra* note 39, at ¶ 5 (“It is apparent that consumers have not shown significant interest in one-way devices[.]”).

develop such devices but not without further disagreements, prompting the FCC's renewed attempt to resolve the issue discussed above.¹⁰⁶ Given that experience, it is no wonder that the FCC observed long ago that the commercial availability of devices is “not a development easily mandated by a set of Commission rules.”¹⁰⁷ Of course, if the result were easier to attain—that is, if it were clear that manufacturers and consumers were more eager for “open devices”—then it is less clear why regulation would ever be required in the first place, since service providers would be under pressure to respond to that demand irrespective of regulation.

CONCLUSION

Regulating any dynamic industry—such as broadband—is inherently challenging. Writing about such an industry likewise can be a dicey proposition, as the rapid pace of change means that any article describing communications law today brings to mind Andy Warhol's admonition about the fleeting nature of relevance. Whatever the fate of this particular contribution, the discussion of the new generation of broadband access mandates promises to be an ongoing and important one, as the opportunities to impose such requirements that remain in the pipeline (and those that may be added to it) can only be expected to fuel the intense interest in the issue that exists already. And as the FCC and others forge ahead and consider whether and to what extent there is a place for new-generation access mandates within a coherent regulatory framework for broadband more generally, it is essential that they consider the consequences.

¹⁰⁶ See generally *id.*; see also 2005 Deferral Order, *supra* note 103, at ¶ 3.

¹⁰⁷ In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices, 14 F.C.C.R. 7596 ¶ 12 (1999).