

# Preserving Consumer Protection and Expanding Broadband Access

The Internet is this country's greatest driver of innovation, creativity and economic growth, but its future is at risk as a result of a recent federal court decision. The Federal Communications Commission (FCC) must be able to set rules of the road to preserve the open Internet and ensure that all Americans have affordable access to broadband capability. This is necessary to meet the goals of the National Broadband Plan (NBP), which are to ensure that every American has affordable access to broadband capability and to promote investment, innovation, job growth, and overall entrepreneurial activity on the Internet.

## The FCC's Authority Prior to the *Comcast v. FCC* decision

From the FCC's 2002 Cable Modem Order, when the agency classified broadband access services as "information services," until the D.C. Circuit's recent decision in *Comcast v. FCC*, the FCC's authority to protect broadband consumers and expand broadband access rested upon "ancillary authority" under Title I of the Communications Act. Under this authority, the FCC "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." Broadband Internet access providers (telephone, cable and wireless) supported this regulatory structure and the FCC's regulatory role.

## Uncertainty following *Comcast v. FCC* decision

Weeks following the FCC's submission of its NBP to Congress, the D.C. Circuit issued a decision in *Comcast v. FCC* that has many calling into question whether the FCC can protect consumers of broadband Internet access or implement

significant portions of the NBP. The D.C. Circuit held that the FCC did not have ancillary authority to regulate broadband access providers' network management practices. Importantly, the court rejected several key sections of the Communications Act as a basis for any FCC authority over broadband Internet access. Under this new regime, it is uncertain whether the FCC has the legal authority to:

- Protect consumers from anti-consumer and anticompetitive practices by broadband access providers, including blocking or disfavoring certain applications and content
- Require transparency from broadband access providers to ensure consumers are fully informed
- Adopt rules protecting consumers' privacy
- Retarget federal funding support for broadband for rural and low-income Americans
- Ensure that broadband is accessible by Americans with disabilities

## FCC Chairman Genachowski's Proposed "Third Way"

To resolve the question of legal authority, FCC Chairman Genachowski has responded to the Comcast decision and the insufficiency of Title I with a proposed "third way." Under this alternative, the FCC would define the transmission component of broadband service as a "telecommunication service" and apply only a limited number of provisions under Title II of the Communications Act, while using its power under the Communications Act to forbear from applying any provisions not suitable for the transmission component of broadband. This action places FCC authority on a firmer legal foundation to protect broadband consumers and carry out the NBP without being subject to constant litigation.

The Chairman proposes to apply only 6 of 48 Title II regulations to broadband access providers. Among these are Sections 201 and 202, which, among other things, prohibit providers of

telecommunications services from engaging in “unjust and unreasonable discrimination in charges, practices, classifications, services....or giv[ing] any undue or unreasonable preference or advantage to any particular person, [or] class of persons, ....” This “nondiscrimination” standard is similar to that which the FCC is proposing to adopt in its Open Internet proceeding. Broadband access providers need not fear application of Sections 201 and 202, because the FCC has applied these sections to telephone companies for over 75 years, applied them to DSL services until 2002, and currently applies them to wireless telephony, without much incident in these sectors. The long line of FCC precedent interpreting “unjust and unreasonable discrimination” should provide greater regulatory certainty for broadband access providers, applications providers and consumers.

### **The FCC has the Authority to Place Broadband Under Title II**

The FCC has the authority and sufficient justification to place broadband under Title II. The Supreme Court, in *FCC v. Fox Television Stations, Inc.*, held that an agency only needs to have a “good reason” to justify altering its policy. The FCC has a number of very good reasons for placing its authority over broadband under Title II. When the FCC placed broadband under Title I as an “information service”, under the 2002 Cable Modem Order, it operated in reliance on an environment vastly different from today. At the time, cable broadband service was understood to be an integrated service where consumers received their email, web hosting, and newsgroup access along with their broadband connection.

Today consumers look to broadband access providers primarily for their transmission capability. Other services are now easily separable from this basic communication function. Furthermore, in 2002, dial-up Internet access providers were numerous and faced robust competition. The FCC expected a similar market to develop in broadband but this has not proven true. Today the broadband market is extremely concentrated, with most consumers having the

choice between only two broadband access providers (DSL and cable) and more than 40 million Americans have either no choice or one choice of broadband access providers. Additionally, as wireless has not yet proven to be a substitute for wireline broadband access, this scenario seems unlikely to change in the near future. The FCC acted in a world that has since disappeared when it placed broadband under Title I.

### **Increasing Investment, Economic Development, and Job Growth**

Despite stating otherwise, telephone, cable and wireless companies have openly admitted they will continue to invest under pro-consumer rules and have done so in the past. AT&T’s investment increased nearly \$2 billion in the during the 18 months after strict open Internet conditions were imposed following the company’s merger with BellSouth in late 2006. Verizon paid \$4.7 billion for the C block of the 700MHz spectrum, which came with open access rules. Furthermore, approximately \$15 billion in private funds were openly committed to broadband projects under the American Reinvestment and Recovery Act, which were subject to nondiscrimination and interconnection requirements modeled after FCC open Internet rules.

Preserving the FCC's authority to protect consumers and expand broadband access will create an environment that promotes further investment and economic growth, will aid in the development of both broadband infrastructure and the content that flows through it, and will allow the U.S. to regain its global leadership in broadband.