PART I: INTRODUCTION: NEW WINE AND OLD BOTTLES

In the past decade, the Internet has introduced the world to new models for conducting business, communicating, and obtaining information. This new medium has been a "paradigm-buster" for many traditional business models, from computer manufacturing to communications. The Internet has been cited as a significant factor in the recent period of continuous, strong growth in the U.S. economy and a cause for optimism about the future of the global marketplace. The success and new opportunities provided by the Internet have depended on the free wheeling, unregulated sphere in which it operates. Realizing this, Congress passed the Telecommunications Act of 1996 ("1996 Act") to introduce competition to the local telephone market and to ensure that the Internet remain regulation-free. Congress recognized that the Internet is a wholly unique communications medium, even when services offered over it resemble traditional communications services. Because of its unique nature, Congress excluded the Internet from the regulatory requirements that apply to traditional communications. Rather than relying on government regulation to shape the Internet, Congress mandated reliance upon the market.

The Commission now faces the challenge of faithfully implementing the will of Congress. In the absence of policy direction from Congress, the Commission for nearly thirty years declined to regulate computer processing-rich information services that were the antecedents to World Wide Web ("Web") and call center-based services that are now being developed and offered with startling effect. The Commission determined that most Internet services, such as Internet access, are not to be regulated as telecommunications services. However, despite the requirements of the 1996 Act, the Commission has recently stated that some information and Internet services resembling traditional communications services, particularly phone-to-phone IP telephony, likely...
will face traditional regulation. This “looks like a duck, walks like duck, must be a duck” characterization violates the legal requirements of the 1996 Act and threatens to undermine the most important aspect of Internet technology—its inherent competitive nature. The 1996 Act, particularly Section 230 and the statutory definitions of “information services” and “telecommunications,” requires that information and Internet services be legally distinct from, and remain free of, government regulation. Congress exempted the Internet, and Internet services, from regulation because the basic justifications for regulating traditional communications—scarcity and monopolization—do not apply. The virtually endless number of computers, packets and “passageways” to and within the Internet removes any fear of the scarcity that justified the regulation of communications entities. The large and increasing number of competitors now offering a wide array of services from Internet access to free e-mail to IP telephony confirms this view. If the Internet and the 1996 Act are to fulfill their potential, it is imperative that the Commission follow Congress’ mandate and eschew from regulating Internet technologies and information services, even when they “look” like traditional communications services.

This Article will first describe the effect of the Internet on the economy, particularly the computer and communications industries. The Internet has opened up new doors of opportunity to some businesses and has allowed others to adopt far more efficient means of production operations. In the communications industry, digital technology has allowed service providers to evolve their offerings from single services to multiple services. The profound impact of the Internet on commerce has been possible because it has been left unregulated, and thus been able to evolve rapidly to meet market needs. The authors believe any attempt by the Commission to “regulate” information services or the Internet in the same manner as communications will destroy the very fabric of its success and will violate the 1996 Act.

Second, this Article offers a history of the treatment of enhanced services and information services prior to the enactment of the 1996 Act. Specifically, this Section will discuss the Computer Inquiries and the Commission’s distinction between basic and enhanced services, the policy reasons historically offered by the Commission for not regulating enhanced services, and their applicability in light of the legal effect of the important, if under appreciated, changes wrought by the 1996 Act.

Next, the Article will analyze the policy of a regulation-free zone Congress intended toward Internet and information services and technologies embedded in the 1996 Act. Section 230 of the Act is an explicit endorsement of market regulation of the Internet over government regulation. Indeed, with the adoption of Section 230, Congress removed Commission, state and local regulatory jurisdiction over the Internet. Congress effected a similar removal of regulatory jurisdiction through the adoption of new statutory definitions in the 1996 Act that broadened and codified the Commission’s decisions not to subject information services to communications regulation. By its activity for the management, control or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(20). These provisions have redrawn the borders between regulated common carriers and unregulated information services that existed under the Communications Act of 1934.

The Commission declined to regulate enhanced services in the Second Computer Inquiry. See Computer II, supra note 7, at para. 114. Additionally, Congress defined “information services” in the 1996 Act to include the definition of enhanced services. 47 U.S.C. § 153(43).
tions, Congress denied the Commission, as well as state and local regulatory bodies, the authority to regulate any information services, including Internet technologies.

Finally, the Article will discuss the Commission’s challenge in applying the policies of Congress to new or emerging services, especially those offered by cable television operators or common carriers. When the Commission interprets and applies the 1996 Act to Internet services, it is imperative that it does so consistently with the requirements of the Act, particularly Section 250. The Commission has stated that it is considering regulating phone-to-phone IP telephony because it fears that universal telephone service support collected from carriers may be inadequate without such action. While universal service is a worthy public policy goal, its support does not justify taxation or regulation of new and innovative information services. Moreover, the above-mentioned legal changes in the structure of the Communications Act deny the Commission of jurisdiction over information services entirely. While the problems of funding universal service are significant, they must be resolved within the confines of the 1996 Act. Policy considerations do not justify even limited regulation of information services or the Internet. Consequently, regulating Internet services that “look” like traditional communications services, particularly phone-to-phone IP telephony, is inappropriate and unlawful. While the Commission has been given jurisdiction over advanced telecommunications capabilities under Section 706, it should use its discretion cautiously. Both the Notice of Proposed Rulemaking (“NPRM”) and Notice of Inquiry (“NOI”) released by the Commission under its Section 706 authority suggest that the Commission will best realize Congress’ vision by exercising regulatory restraint within the overall limits established in the 1996 Act.

PART II: THE INTERNET, CREATIVE DESTRUCTION AND THE AMERICAN ECONOMY

A. The Internet Has Transformed Business

In 1984, Victor Alhadeff, frustrated at his attempt to buy computer software, decided to solve his problem by opening a retail software store promising knowledgeable sales associates and the opportunity for customers to try out software before making any purchase commitment. With that decision, Egghead Discount Software was born, a trendsetter in the world of computer retailing. Competition with superstores in the late 1980s and 1990s threatened the success of Egghead because the superstores offered a wider selection of software at a lower price. In 1998, recognizing that it was losing ground in the retail market and that it had an opportunity to chart a new direction, Egghead announced the closing of all of its retail stores, changed its name to Egghead.com, and became an online software seller.

An even more dramatic example of a company responding to the opportunities posed by the Internet is Dell Computer Corporation. Michael Dell began his company 14 years ago with a loan from his parents, banking on his belief that condition and Order and Notice of Proposed Rulemaking, CC Docket No. 98-147 (Aug. 7, 1998) [hereinafter Section 706 NPRM]; In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Notice of Inquiry, CC Docket 98-146 (Aug. 7, 1998) [hereinafter Section 706 NOI].

9 See Report to Congress, supra note 4, at 11548. Universal service, first embodied in the Communications Act of 1934 as a general policy goal, is a set of policies and regulations designed to encourage ubiquitous access and subscription to telephone service. The goals of universal service, as expanded in the 1996 Act, are to ensure that telecommunication services are available at affordable rates across the country, with particular emphasis on schools, libraries, rural areas and low income areas.


12 See In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion

13 Joseph Schumpeter coined the term “creative destruction” to describe “the essential fact about capitalism and refers to the incessant mutation of the economic structure from within, destroying the old and creating a new.” The New Palgrave: A Dictionary of Economics 714 (1987).

sumers would be willing to buy customized computers using either mail order or the telephone.\textsuperscript{16} Today, Dell has $16.8 billion in annual revenues.\textsuperscript{17} Much of Dell’s success can be attributed to the Internet.\textsuperscript{18} Dell’s Internet Business Manager Barry Collins explained, “Using the Internet makes it easier for customers to do business with Dell—and reduces the cost of doing business while creating longer-term relations with our customer base.”\textsuperscript{19} In fact, Dell sells $10 million worth of computer hardware on the Internet each day.\textsuperscript{20} The Internet has inspired Dell to change its marketing practices and, as a result, Dell has recently announced a joint venture with Excite, Inc. to create a portal so that new Dell owners will “be ushered to a Web page co-branded by Dell and Excite” when they first log onto the Internet.\textsuperscript{21}

Perhaps the most significant impact the Internet has had on computer companies, including Dell, is in manufacturing. Computer companies traditionally manufactured or mass-produced their own computers. However, companies that had been successful proponents of “one-size-fits-all” production saw the foundation of their businesses begin to weaken. Consumers often had unique applications for computers and sought customized products to meet their needs. Dell first capitalized on this unmet need with its custom ordering by mail and telephone. The difficulty of ordering a customized product on the telephone or by mail, however, created a significant sales obstacle. The Internet, on the other hand, has allowed manufacturers and service providers to open their production processes and has given consumers the opportunity to specify components and price. While these advances resulted in better service for the customer, they required significant changes on the manufacturing end. First, manufacturers had to require suppliers to “keep the inventory, typically adjacent to or even in the same building as the computer factory, and sell it to the manufacturer at spot prices throughout the day.”\textsuperscript{22} This practice increased the risk for all parties as suppliers were required to keep deprecating inventory on hand and the manufacturers had no inventory on hand to meet unanticipated demand.\textsuperscript{23} However, when Dell instituted the build-to-order system it “just about eliminated the need for inventory and enabled it to undercut the big guys’ prices by 10 percent to 15 percent.”\textsuperscript{24} To better handle the customized manufacturing, a number of computer companies have hired third parties, such as Ingram Micro, Inc., to manufacture their computers.\textsuperscript{25} In addition, many computer makers, such as Compaq and IBM, which have traditionally relied on a strong sales force or retailers to sell their computers, are now beginning to sell directly to the public through their websites.\textsuperscript{26} Thus, the Internet has helped to revolutionize manufacturing and marketing and caused the re-thinking of many standard business practices.

B. The Internet and the Communications Industry

Outside of the computer industry, one of the largest and most established industries to be affected by the emergence of Internet technology is the communications industry. Traditionally, communications services have been separated into distinct categories: the broadcast industry brought radio and television to homes; telephone companies were the means of speaking one-on-one to people over long distances; and cable brought a wider variety of television shows and movies into the living room. Each of these industries emerged serving local markets through uniform customer communication devices, but evolved to bring distant information and communications capabilities to its users.

The Internet, in contrast, had as its initial purpose the connection of distant incompatible communication devices.\textsuperscript{27} The Web, combined with

\begin{itemize}
  \item See Internet and Call Centre Play a Vital Role in PC Sales, \textit{Financial Times}, Oct. 7, 1998, at 13. \[hereinafter Internet and Call Centre].
  \item See Internet and Call Centre, \textit{supra note} 16, at 13.
  \item See id.
  \item See id.
  \item Id.
  \item As of July, 1998, Ingram built computers for Compaq, I.B.M., Hewlett-Packard, Apple Computer and Acer. \textit{Id.}
  \item See id.
  \item The predecessor of the Internet, ARPANET, was built in the 1960s with a grant from the Department of Defense, to link computers of major universities with those of defense contractors to promote more efficient research. See Kevin
\end{itemize}
push technology, offers many the opportunity to receive up-to-the-minute news updates without having to look further than the banner at the bottom of the computer screen. In addition, person-to-person communications services, such as email, offer individuals and companies the opportunity to send and receive messages efficiently without having to pick up the telephone.

The effect of the Internet on the communications industry is as profound as the difference in organizing principles behind each industry. The communications industry always has been controlled by specific legal and regulatory restrictions. However, as digital technology, particularly multi-purpose terminal devices, becomes widely disseminated and networked, the traditional distinctions between formerly discrete communications markets will fade. In fact, they already have begun to blur as cable companies begin to offer telephone services and telephone companies offer video programming. These developments pose difficult legal and regulatory questions for law makers and regulators accustomed to defining markets and regulating within the specified borders.

C. Government Regulation is Inimical to the Internet

The Internet’s efficiency-inducing effect on the


28 With push technology, information is delivered over the Web at the initiation of the information server rather than by the information user.

29 For example, in early June of 1998, Intel announced that it had plans to integrate hub and switching technology into its motherboard chipsets. See Gregory Dutton, Interconnecting Inside: Intel to Integrate Switching—Microsoft Also Adds Network Functions to Windows NT Server, Information Week, June 9, 1998.


31 Although this article only focuses on the impact of the Internet on the computer and communications industries, it has had a similar effect on many types of commerce. Amazon.com offers consumers a virtually endless selection of book-buying options, at a discount to retail stores. See The Road Ahead for Amazon.com, Business Line, Oct. 15, 1998. Online trading firms such as ETrade.com allow investors to buy and sell stocks from the privacy of their computer while avoiding high commission fees. See Bernhard Warner, Taking Stock of the Web, Adweek/Western Advertising News, Sept. 21, 1998. Similar transformations can be seen in the field of travel-related services, among others. “Travel-related Web commerce is projected to grow to $2.2 billion in 2002, according to media-industry research group Simba Information, Inc., and “in 1997, $2.4 billion worth of retail goods would be sold online to 10 million consumers,” according to Forrester Research. Burney Simpson, The Battle for Web Turf, Credit Card Management, Oct. 1998. See also J.M., Amazon.com: A Moving Target, Oct. 1998, at 18 (describing Amazon.com copycats in fields ranging from groceries to business cards).


33 Id. The Global Internet Project’s Web site can be found at <http://www.gip.org>.

34 See id.


36 See Julie Schmit, Cisco Embraces Internet Economy, High-Tech Heavy-Hitter Craves Change, USA TODAY, Sept. 23, 1998, at 3B.
PART III: REGULATORY TREATMENT OF COMPUTER AND DATA PROCESSING SERVICES

A decade after the 1956 AT&T consent decree the Commission began a series of proceedings to determine the regulatory status of data processing and other "enhanced services."37 Throughout the proceedings, the Commission focused on the policy ramifications of subjecting data processing and enhanced services to regulations that were created for monopoly telecommunications providers, and recognized that government regulation of these new services would have a stifling effect.38 The Commission first distinguished between computer use subject to Title II common carrier regulation39 and computer use that was not in its final order in the First Computer Inquiry ("Computer I") and decided not to regulate data processing because it did not involve communication by wire or radio.40 The Commission further chose to treat hybrid services, those which combined elements of data processing with telecommunications, on an ad hoc basis.41 Finally, the Commission required large common carriers42 that offered data processing services to do so through separate corporate subsidiaries.43

The Commission abandoned the case-by-case approach to hybrid services, and refrained from regulating all enhanced services44 in the Second Computer Inquiry ("Computer II") to ensure that data processing services would flourish in a competitive market.45 Although the Commission still claimed jurisdiction over enhanced services,46 it recognized that "Commission regulation must be directed at protecting or promoting a statutory purpose. In some instances, that means not regulating at all, especially if a problem does not exist."47 Because of the competitive market of enhanced services, the Commission expected:

Substantial public benefit by making available to the public, at reasonable charges, a wider range of existing and new data processing services. We believe that these expectations will continue to be realized in the free give-and-take of the market place without the need for and possible burden of rules, regulations and licensing requirements.48

Not only would the public benefit from an unregulated enhanced services market, but the Commission concluded that the current regulatory framework served "as an artificial barrier to entry preventing many companies from offering other enhanced services as offshoots of their highly competitive data processing services.49

38 See Computer II, supra note 7 at para. 129.
39 Title II of the Communications Act gives the Commission jurisdiction over all interstate common carriers. 47 U.S.C. §§ 201. A "common carrier" is defined as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy." 47 U.S.C. § 153 (10).
40 See Computer I, supra note 7. The Commission's claim of authority to regulate the offering of enhanced services through its Section 154 ancillary jurisdiction was upheld by the Second Circuit. See GTE Service Corporation v. FCC, 474 F.2d 724 (2d Cir. 1973). The court stated, "even absent explicit reference in the statute, the expansive power of the Commission in the electronic communications field includes the jurisdictional authority to regulate carrier activities in an area as intimately related to the communications industry as that of computer services, where such activities may substantially affect the efficient provision of reasonably priced communications services." Id. at 731.
41 See Computer I, supra note 7, at para. 34.
42 Specifically, those common carriers providing data processing service either directly or through previously established data processing affiliates were subject to the separate subsidiary requirement. See id. at para. 46.
43 See id. at para. 10. This policy, known as "maximum separation" required the separate subsidiaries to hire separate employees, utilize separate computer equipment and keep separate books. Id. Maximum separation "was designed to protect telephone ratepayers and competitive data processing service providers by preventing the common carriers from engaging in anticompetitive behavior, such as interconnection discrimination and from unfairly burdening their regulated communications services with costs properly attributable to unregulated data processing services." Esbin, supra note 30, at 28.
44 The Commission distinguished between basic telecommunications services and enhanced services. Basic services are defined as "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." Enhanced Services are defined as "any offering over the telecommunications network which is more than a basic transmission service." Computer II, supra note 7, para. 96. Specifically, enhanced services include "services offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscribers' transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a) (1998).
45 Computer II, supra note 7, paras. 100 and 127.
46 The commission claimed jurisdiction over all enhanced services which "constitute the electronic transmission of writing, signs, signals, pictures, etc., over the interstate telecommunications network." Id. at para. 125.
47 Id. at para. 126.
48 Id. at para. 127.
49 Id. at para. 128.
The market for enhanced services and information services remains competitive and the policy reasons favoring regulatory restraint are stronger today than they were fifteen years ago. In fact, the Commission continued to recognize the distinction between basic and enhanced services in the Third Computer Inquiry and began to further relax restrictions on the offering of enhanced services by communications carriers by replacing the separations requirements with non-structural safeguards designed to ensure nondiscriminatory network access to detect and deter cross-subsidization and to control joint marketing.

The Commission’s recognition of the distinction between regulated basic services and unregulated enhanced services continue to reflect the economic reality that competitive enhanced services can only be encumbered by regulation.

We share the Commission’s view that the distinction between basic and enhanced services survived the passage of the 1996 Act. The more profound point, however, is that Congress broadened the definition of services to be classified as information services. By defining information services to arise from acts of computer processing, storing, retrieving, acquiring and transforming, services that depend upon computer processing such as e-mail, voice mail, and Internet access have been placed beyond the reach of regulators. Because we believe IP telephony is a type of information service, it too must remain beyond the reach of regulation.

PART IV: THE 1996 ACT AND THE INTERNET

A. What Is the Internet?

Because of the inherent complexity of the Internet, creating a single, useful definition of the Internet is difficult. At its core, the “Internet is an international network of interconnected computers.” It has been called a network of networks, “which interconnects innumerable smaller groups of linked computer networks.”

Individuals, usually through computers at home or work, connect to the Internet through Internet Service Providers (“ISPs”). ISPs are companies such as America Online (“AOL”), EarthLink or Netcom that serve as conduit to the backbone of the Internet.

The backbone is primarily owned by a small number of large companies, including MCI WorldCom and Sprint. Over thirty-six million host computers are connected to the Internet, and are accessed by over 100 million users around the world. Estimates predict that the number of people using the Internet will grow to 300 million by the year 2000.

The Internet has no central controller and its parts are severable, meaning that if one part of the network became inoperable, the functions of the remainder would not be affected. In addition, the Internet is an interoperable network that “uses open protocols so that many different types of networks and facilities can be transparently linked together.” Data, ranging from text to spoken words to streaming video and audio, are transmitted across the Internet via packets. The information is broken down into small packets of data that are sent via the most efficient available route on the Internet. Individual packets may travel on different physical paths, even though...

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50 Computer III, supra note 7. The Commission’s order, in as far as it preempted state regulation of enhanced services, was vacated and remanded by the Ninth Circuit. See People of the State of California v. FCC, 905 F.2d 1217 (9th Cir. 1990). Non structural safeguards include a requirement that descriptions of procedures to ensure nondiscrimination be included in a Bell Operating Company’s (“BOC’s”) Comparably Efficient Interconnection plans; quarterly reports demonstrating that services are provided to competing enhanced service providers (“ESPs”) on a nondiscriminatory basis; and an obligation to honor requests by customers that their customer proprietary network information not be disclosed to BOC enhanced service personnel. See Computer III, supra note 7, at para. 8.


53 Some ISPs, such as AOL, offer their own proprietary content to subscribers in addition to a link to the Internet itself. Others, such as Netcom, simply serve as a gateway to the Internet.

54 See Esbin, supra note 30, at 19.


57 See Hargis, supra note 55.

58 See Werbach, supra note 27, at 17.

59 Id.
they comprise a single message.\textsuperscript{60} Upon reaching the intended destination, the packets are reassembled into the original data. This means of transmission, unlike traditional telephone service, does not require a dedicated connection between the sender and the recipient, and therefore, allows highly efficient use of network resources.

Congress defined the Internet in the 1996 Act as "the international computer network of both Federal and non-Federal interoperable packet-switched data networks."\textsuperscript{61} Congress also included a definition of "Interactive Computer Service" to describe an "information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."\textsuperscript{62} The breadth of these definitions is stunning. They are found in Section 230 of the 1996 Act, in which Congress explicitly determined that the Internet and Interactive Computer Services are to remain free from regulation.\textsuperscript{63}

B. The Statutory Framework Adopted by Congress Prohibits Regulation of Information Services

Prior to the 1996 Act, Congress never addressed the regulatory status of enhanced services. The Commission could only regulate such services through its exercise of ancillary jurisdiction.\textsuperscript{64} Congress codified the distinctions created by the Commission between basic services and enhanced services in the 1996 Act.\textsuperscript{65} Congress prohibited government regulation of the Internet.\textsuperscript{66} Congress' mandate extends to all Internet services, including all forms of IP telephony.

1. Section 230 Removed the Commission's Ancillary Jurisdiction over Information Services and the Internet

Congress straightforwardly stated its intention that the Internet remain free from regulation in the 1996 Act. Specifically, Section 230 of the 1996 Act provides, "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."\textsuperscript{67} This statement is an express limitation on the jurisdiction of the federal, state and local regulatory authorities over the Internet. The significance of this statement should not be underestimated when applying the 1996 Act to new services.

While the Commission recognized that information services are not within the purview of Title II of the Communications Act in the Non-Accounting Safeguards order, it still asserted ancillary jurisdiction over information services under Title I.\textsuperscript{68} The Commission's ancillary jurisdiction over communications services derives from Title I and is implemented in Section 154(i), which states that "the Commission may perform any and all acts, regulatory regime that Congress has recognized to be outdated to its current operation to new technologies").\textsuperscript{69} The Commission's ancillary jurisdiction over communications services are not within the purview of Title II of the Communications Act in the Non-Accounting Safeguards order, it still asserted ancillary jurisdiction over information services under Title I.\textsuperscript{68} The Commission's ancillary jurisdiction over communications services derives from Title I and is implemented in Section 154(i), which states that "the Commission may perform any and all acts, regulatory regime that Congress has recognized to be outdated to its current operation to new technologies").\textsuperscript{69} See 1996 Act, § 153(20) and (43).

\textsuperscript{65} 47 U.S.C. § 230; Senator McCain Letter, supra note 2. ("It was certainly not Congress' intent in enacting the supposedly pro-competitive, deregulatory 1996 Act to extend the burdens of current Title II regulation to Internet services, which have historically been excluded from regulation.") (emphasis in original).

\textsuperscript{66} 47 U.S.C. § 230(b)(2). "Interactive Computer Services" are defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(e)(2).

make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.” 69 Section 154(i), however, cannot be read out of context from the remainder of the Communications Act. The Commission’s ancillary jurisdiction is restricted “to that reasonably ancillary to the effective performance of the Commission’s various responsibilities.” 70 Specifically, courts have recognized that, “[i]n the case of enhanced services, the specific responsibility to which the Commission’s Title I authority is ancillary to its Title II authority is over common carrier services.” 71 Prior to the passage of the 1996 Act, the Commission’s exercise of ancillary jurisdiction over enhanced services had been upheld. 72

The 1996 Act removes the ancillary jurisdiction of the Commission over information services, the Internet and Interactive Computer Services under Section 230. In the 1996 Act, Congress created a new interpretive rule and by doing so, made regulation of information services and the Internet “inconsistent with this Act.” 73

The Supreme Court recently affirmed that Congress made fundamental jurisdictional changes to the 1934 Communications Act (“Communications Act”) in the 1996 Act. 74 The Supreme Court determined that the inclusion of Sections 251 and 252, among other provisions in the Communications Act gave the Commission jurisdiction over local competition issues, even intrastate interconnection, despite the general limitation on Commission jurisdiction in Section 152(b). 75 The Supreme Court recognized that Congress could alter the allocation of Commission jurisdiction by simply adding new substantive sections without amending the general jurisdiction provisions in Section 152. In contrast to this expansion of Commission jurisdiction, Congress removed Commission and state jurisdiction over the Internet and interactive computer services by including Section 230 in the 1996 Act. 76

Commission recognition of the significance of Section 230, especially in relation to its ancillary jurisdiction, is crucial to a proper understanding of the 1996 Act. The Commission has exercised ancillary jurisdiction over other new or developing services, such as cable and direct broadcast satellite. However, in neither instance had Congress made contrary and binding pronouncements stating that the industry was to be kept “unfettered by Federal or State regulation.” 77 Given the clarity of Congress’ declaration that the policy of the United States is to preserve the competitive free market of the Internet, it is impermissible for the Commission to regulate in this sphere, from which its jurisdiction has been removed. 78

2. Congress’ Definitions Create a Safe-Harbor for Information and Internet Services

Under the 1996 Act, Congress codified the categorical distinctions made by the Commission in the Computer II Inquiry when it created distinct, mutually exclusive categories for “telecommunications” and “information services.” Congress de-

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71 People of the State of California v. FCC, 905 F.2d 1217, 1241 n. 35 (9th Cir. 1990).
72 See CCIA v. FCC, 693 F.2d 198, 213 (D.C. Cir. 1982).
73 Some might argue that Section 601 of the 1996 Act (which was not codified into the United States Code) prevents Section 230 from limiting the Commission’s ancillary jurisdiction without expressly doing so. Section 601 states: “This Act and the amendments made in this Act shall not be construed to modify, impair or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.” Pub. L. No. 104-104, 110 Stat. 143 (1996). Although Congress did not explicitly state that the Commission lacks ancillary jurisdiction over information services, section 154(i) still requires any ancillary jurisdiction of the Commission to be consistent with the Act. Congress did expressly mandate that Internet services should remain unfettered by Federal and State regulation, and to regulate these services would be inconsistent with the Act. It would be irrational to interpret Section 601 as allowing the Commission to assert ancillary jurisdiction that would be inconsistent with the amended Act, as long as it was consistent with the original Act.
75 See 47 U.S.C. § 152(b). This provision reads: “Except as provided in section 223 through 227 . . . , inclusion, and section 332 . . . , and subject to the provisions of Section 301 of this title . . . , nothing in this statute shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service.” See also id. at n. 8.
76 Congress also denied the Commission and states jurisdiction over information services by adding mutually exclusive definitions of “telecommunications” and “information services.” See infra note 83.
77 47 U.S.C. § 152(b).
78 47 U.S.C. § 154(i). The Commission has the authority to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.” Id.
fined “telecommunications” as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in form or content of the information as sent and received.” On the other hand, “information services” are defined as:

[The offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.]

In the orders implementing the 1996 Act, the Commission determined that the term “information services,” as defined in the 1996 Act, encompassed the previous definition of “enhanced services,” as defined in the Computer Inquiries. In fact, the Commission stated that “the term ‘information services’ includes services that are not classified as ‘enhanced services’ under the Commission’s current rules.” Thus, information services is a broader category, because in Computer II, the Commission limited the definition of enhanced services to services “offered over common carrier transmission facilities used in interstate communications,” whereas ‘information services’ may be provided, more broadly, ‘via telecommunications.’ In addition, the Commission specified that protocol processing, as occurs in the Internet Protocol, qualifies as an information service.

PART V: THE COMMISSION MUST ADHERE TO CONGRESS’ INTENT FOR NEW OR EMERGING SERVICES WHEN APPLYING THE 1996 ACT

Congress specifically excluded Commission jurisdiction over information services and the Internet. This exclusion applies regardless of whether the company providing the service is an information service provider that has existed for just over a year or whether it is a common carrier. The regulatory focus must be on the service provided, and if that service falls into the definition of “information services,” the Commission lacks jurisdiction. Similarly, if the service is an Internet service as provided in Section 230, the Commission lacks the authority to regulate it.

The most difficult regulatory challenges will not be whether to regulate ISPs such as AOL or Netcom. The authors expect the Commission to decline any such invitation. Rather, the difficult questions will be whether the Commission asserts jurisdiction over information services that resemble traditional telecommunications services.

This issue may arise in the context of advanced telecommunications services like Digital Subscriber Lines (“DSL”). While the Commission has jurisdiction over advanced telecommunications services under Title II, the Commission should ensure that any regulatory action it takes is consistent with the limitations on its jurisdiction. This might include a careful analysis of the need for regulation. When the Commission does determine that monopolistic bottlenecks require government regulation, it should use its jurisdiction to promote competition and market regulation.

A. The Ends Don’t Justify the Means: Universal Service

The primary stimulus motivating the Commission to classify phone-to-phone IP telephony as...
telecommunications is concern over universal service. The Commission is concerned with the substitutability of phone-to-phone IP telephony and Plain Old Telephone Service (“POTS”).88 Recognizing the Commission’s concern for universal service helps explain why the Commission recently decided to treat ISPs, such as Netcom or AOL, differently when they offer e-mail than when they offer phone-to-phone IP Telephony, although both offerings make the same use of the system.89 Consumers will make fewer calls that are assessed universal service contributions on the Public Switched Telephone Network (“PSTN”) if a lower-cost IP option, which is not subject to the assessment, is available. As a result, long-distance providers seeking to avoid universal service and access charges90 might migrate traffic to IP telephony platforms in search of a competitive advantage. The Commission fears that the bottom will fall out of the universal service fund.91

Universal service is a sensible public policy. The more citizens that have access to telecommunications services, the more those services are worth, given the positive network effects. However, universal service implementation challenges justify neither extending Commission jurisdiction beyond the bounds established by Congress nor altering the limits of that jurisdiction.

Congress recognized that there were limits to supporting universal service despite its laudable goals. Congress stated that “[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation.”92 However, Congress also provided that only telecommunications providers would contribute on an “equitable and nondiscriminatory” basis.93 Congress could have required information service providers to contribute, but did not. Rather, Congress established a simple plan to ensure universal service of telecommunications and Internet services to rural areas and schools.94

The Commission and incumbent local exchange carriers (“ILECs”) have focused on the “harm” caused by not requiring phone-to-phone IP telephony providers to contribute to universal service.95 However, there is also a very real threat of harm if phone-to-phone IP telephony providers are classified as telecommunications providers and subjected to traditional communications regulations. Phone-to-phone IP telephony offers consumers a new choice in telephone service and promises to offer services that combine what looks like traditional telephony with information services, such as receiving data while speaking with someone on the phone. However, this technology is still in its infancy. Categorization as a telecommunications carrier and forced contributions to universal service would only serve to hinder a new, competitive development. Higher costs of doing business, and the inherent costs associated with being regulated, will keep many new entrants out of the market.

Services under § 706 of the 1996 Act. 47 U.S.C. § 157 (note). However, Congress has also directed the Commission to practice regulatory forbearance when regulations are not necessary. See 47 U.S.C. § 160.

88 For example, I-Link, Inc., an enhanced voice and data communications company, announced the expansion of its IP telephony network to cover 60% of U.S. residents by 1999. I-Link to Further Expand its IP Telephony Network, Making it Available to 60% of the U.S. Population, PR NEWSWIRE, Sept. 24, 1998.

89 Report to Congress, supra note 4, at para. 98.

90 An access charge is the “cost to user for access to interexchange, interstate message toll telephony network to originate and receive interstate toll calls, as well as interexchange carrier access to the user’s Local Access and Transport Area.” NORTH AMERICAN TELECOMMUNICATIONS ASSOCIATION, INDUSTRY BASICS: INTRODUCTION TO THE HISTORY, STRUCTURE AND TECHNOLOGY OF THE TELECOMMUNICATIONS INDUSTRY 58 (1991).

91 See id. “If such providers are exempt from universal service contribution requirements, users and carriers will have an incentive to modify networks to shift traffic to Internet protocol and thereby avoid paying into the universal service fund.” 47 U.S.C. § 254(b)(2).

92 47 U.S.C. § 254(b)(4). The Commission accepted this interpretation in the Universal Service Order. See Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd. 8776, para. 777 (1997) [hereinafter, Universal Service Order]. Because information service providers are not subject to universal service requirements, the only way the Commission can force IP telephone service providers to contribute to universal service is to classify them as telecommunications service providers.

93 47 U.S.C. § 254(b)(4). The Commission accepted this interpretation in the Universal Service Order. See Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd. 8776, para. 777 (1997) [hereinafter, Universal Service Order]. Because information service providers are not subject to universal service requirements, the only way the Commission can force IP telephone service providers to contribute to universal service is to classify them as telecommunications service providers.

94 A number of legislators have suggested that the Commission has overstepped its bounds in implementing the E-rate program, with Rep. Nancy Johnson (R-Conn) suggesting that “The charges that the FCC has imposed on telecommunications carriers appear to be taxes . . . [w]e cannot have the bureaucracy making a mockery of tax cuts by imposing fees that are in fact hidden taxes that end up being paid by every one of us.” FCC Accused of Exceeding its Authority on E-rate, COMMUNICATIONS DAILY, Aug. 5, 1998. Additionally, Rep. William J. “Billy” Tauzin opined that the E-rate program became a “virtual titanic of a program, but somewhere out there is an iceberg.” Reauthorization of Federal Communications Commission: Hearing of the Telecommunications, Trade and Consumer Protection Subcommittee of the House Commerce Committee, FEDERAL NEWS SERVICE, Mar. 31, 1998 (statement of Rep. Tauzin).

95 See Report to Congress, supra note 4, at para. 98.
Further, the Commission in the past well understood the publicly beneficial aspects and competitive spur allowed by "bypass" of monopoly facilities by alternative service providers. Specifically, consumer choice and business flexibility increase when alternative routes of communication are available. Similar public benefits can be expected by maintaining a neutral policy toward IP telephony.

In addition, the problem of universal service is much more complex than whether or not phone-to-phone IP telephony providers contribute. For instance, no serious discussion of universal service can take place without recognizing that local telephone rate rebalancing is absolutely necessary. The Commission does its best to ensure that a company offering new technologies does not cross-subsidize the new services with revenues from established services, yet historical policies of subsidizing the cost of local telephone service with long-distance revenues continue. Requiring long-distance telecommunications carriers to subsidize local rates by paying per-minute access charges and/or flat monthly rate charges simply creates incentives to bypass the circuit-switched network. Rather than making business decisions based on smart economics, telephony providers are making choices based upon avoiding regulatory obstacles. Rather than attempting to widen the regulatory umbrella, policy makers should focus efforts on creating a universal service solution that does not create perverse incentives. Consumers should be charged the cost of service, and while this will increase local service charges, it will eliminate economically inefficient cross subsidization that currently plagues the telecommunications industry, and most important, it will stimulate interest in provision of local services by competitive local exchange carriers.

B. The Commission is Not Authorized to Regulate Phone-to-Phone IP Telephony

Even if the Commission's concerns for universal service were well placed, they could not justify the regulation of Internet services because the Commission lacks the jurisdiction to regulate the Internet under the 1996 Act. While the Commission has recognized its limits with regard to some IP services, it has indicated that some Internet services may fall under its control using a functional equivalency analysis.

The Commission has analyzed the regulatory status of Internet services in various proceedings, including its Non-Accounting Safeguards Order, its 1997 Universal Service Order and its 1998 Universal Service Report to Congress. In all three of these proceedings, the Commission indicated that ISPs would remain classified as information service providers and would not be regulated or subject to universal service contributions. However, in its recent Report to Congress, in April 1998, the Commission stated that phone-to-phone IP telephony likely fits under the definition of telecommunications rather than information services. The Commission based its tentative conclusion that phone-to-phone IP telephony is telecommunications on a "functional equivalency" analysis that has no basis in law. The functional equivalency test was not designed to determine which services are subject to Commission jurisdiction. Applying telecommunications regulations and requirements to information services like phone-to-phone IP telephony based on the functional equivalency test violates the 1996 Act because Congress explicitly classified telecommunications in the European Union, COM(98) final at 15.

96 Allocation of Frequencies in the Bands Above 890 Mc, Report and Order, 27 FCC 559, 413 (1959). The Commission granted use of part of the spectrum to private communications developers, recognizing that the creation of a private communications system, which did not need to rely on common carriers, was beneficial to both customers and the competitive environment.

97 Europe has recently faced a difficult issue of rate rebalancing, recognizing that "[t]he changing technology is going to frustrate efforts at preventing bypass." Summary of the Telecommunications Seminar (Abstract), Organization for Economic Co-operation and Development (1997) <http://www.oecd.org>. As a result of the rate rebalancing, average telephone charges in nine Member States of the European Community have fallen five to twenty percent since 1995. First Monitoring Report on Universal Service In Telecommu


100 Universal Service Order, supra note 93.

101 See Report to Congress, supra note 4.

102 See Non-Accounting Safeguards, supra note 68, at para. 102; Universal Service, supra note 93, at para. 788; Report to Congress, supra note 4, at para. 100.

103 See Report to Congress, supra note 4, at para. 107.

104 See id. at para. 99. "The potential future threat to universal service funding posed by use of the Internet derives from services that are functionally substitutable for telecommunications services at the same level of the network hierarchy." Id.
regulated and unregulated services through the definition of information services and telecommunications. The Commission must follow this framework established by Congress.

There is an apparent concern at the Commission that failure to subject phone-to-phone IP telephony to telecommunications regulations will allow certain companies to avoid regulation. The concern is that long-distance companies, such as AT&T or MCI WorldCom, will begin offering long-distance services using IP technology, and will avoid paying access charges to the ILECs.\(^{105}\) Even so, if a company is not providing telecommunications or another service that the Commission has the authority to regulate, then the Commission lacks the authority to regulate that company in the offering of the unregulated services. This approach might result in a lack of pseudo-regulatory parity, but it complies with the will of Congress and increases market predictability.

1. The Commission's Functional Equivalency Analysis is Flawed

In its Report to Congress, the Commission recognized that ISPs are not telecommunications carriers, and are thus exempt from universal service requirements, as well as other Title II regulations.\(^{106}\) However, the Commission concluded that phone-to-phone IP telephony services "lack the characteristics that would render them 'information services' within the meaning of the statute, and instead bear the characteristics of 'telecommunications services.'"\(^{107}\) The Commission came to this conclusion after finding that "from an end-user perspective, these types of phone-to-phone IP telephony service providers seem virtually identical to traditional circuit-switched carriers."\(^{108}\) This analysis looked solely at phone-to-phone IP telephony from a "user" standpoint in determining whether or not to subject this service to regulations.\(^{109}\) This functional equivalency analysis is severely flawed because it ignores the purpose of the 1996 Act.

The Commission argued, in its Report to Congress, that because phone-to-phone IP telephony uses the same customer premises equipment as traditional POTS, that it should be subject to the same level and degree of regulation as POTS.\(^{110}\) Under this reasoning, the Commission could choose to regulate ISPs as telecommunications providers when consumers utilize the same phone jack that traditional telephones use, while ignoring all of the relevant factual and legal characteristics that distinguish ISPs from telecommunications companies.

The Commission has used functional equivalency tests in the past in other circumstances. The functional equivalency test relied on by the Commission to categorize phone-to-phone IP telephony as telecommunications was articulated by the Circuit Court for the District of Columbia in its analysis of "whether telecommunications offerings constitute 'like services' within the meaning of Section 202" of the Communications Act.\(^{111}\) Section 202 prohibits common carriers from discriminating unreasonably when they offer their services.\(^{112}\) The functional equivalency test was created to determine how common carriers must treat certain customers, and it cannot arbitrarily be used by the Commission to establish jurisdiction over this new service.

The Commission attempts to distinguish between ISPs that provide access to the Internet, and phone-to-phone IP telephony that allows users to make telephone calls.\(^{113}\) Yet, both serv-

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\(^{105}\) See id.

\(^{106}\) See id. at para. 100.

\(^{107}\) See id. at para. 101.

\(^{108}\) Id.

\(^{109}\) This conclusion would be tantamount to treating direct broadcast satellite and cable as the same service because the consumer watches both through the same television set.

\(^{108}\) The Commission concluded that phone-to-phone IP telephony is limited to services that meet the following four characteristics:

(1) it holds itself out as providing voice telephony or facsimile transmission service; (2) it does not require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call or facsimile transmission over the public switched telephone network; (3) it allows the customer to call telephone numbers as-

\(^{109}\) See Report to Congress, supra note 4, at para. 88.


\(^{111}\) See 47 U.S.C. § 202. ("It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications . . . for or in connection with like communication service . . . ")

\(^{112}\) See Report to Congress, supra note 4, at para. 88. The Commission also created a distinction between phone-to-phone IP telephony and computer-to-computer IP telephony because of the requirement that users on both ends use software in computer-to-computer IP telephony. Id.
Advances in technology are transforming traditional telephones into smart phones that will increasingly be offered over computers, traditional telephones, and over new "smart phones" that combine the functionality of computers and telephones. These new services involve a local phone call to an Internet access provider that "packetizes" and sends information to a destination through the Internet. It is irrelevant to the Internet access provider whether or not the information transmitted is voice or data. Phone-to-phone IP telephony is legally distinct from POTS. Technically, when a circuit switched connection is made for a POTS line, the entire line is occupied for the duration of the call. Internet signals are broken down into tiny digital packets with unique addresses, each packet is individually sent to its intended destination—taking one of a large number of routes and only occupying a discrete unit of space rather than a whole line. The calls are referred to as packet-switched. In effect, when a telephone call is made using phone-to-phone IP telephony, two local calls are made. A caller uses the PSTN to call a "gateway." Once the gateway answers, the user will enter the telephone number for the receiving party. The first gateway finds a second gateway local to the called party and sends data over the Internet to the other gateway, which will then call the receiving party. There is no incremental charge to either the Internet or local telephone usage, regardless of the call's distance.

The efficiency advantages of the Internet protocol allow small companies to offer services that readily compete with established carriers. In addition, the digital nature of IP telephony will allow companies to create hybrid services that combine both data and voice services. These new services will increasingly be offered over computers, traditional telephones, and over new "smart phones" that combine the functionality of computers and telephones.

The introduction of smart phones illustrates another problem with the Commission's use of the functional equivalency test to categorize phone-to-phone IP telephony as telecommunications. Advances in technology are transforming traditional telephones into smart phones that will resemble computers more than they resemble phones. The Commission has created a distinction between phone-to-phone IP telephony and computer-to-computer IP telephony, relying on the cumbersome equipment and compatible software required to use computer-to-computer IP telephony. Smart phones threaten this superficial distinction because they combine elements of both computers and telephones.

The Commission has recognized that lack of predictability in a regulatory system dependent upon functional equivalency is a problem. In its Report to Congress, the Commission indicated the need to study thoroughly phone-to-phone IP telephony before making any final decisions:

Because of the wide range of services that can be provided using packetized voice and innovative CPE, we will need, before making definitive pronouncements, to consider whether our tentative definition of phone-to-phone IP telephony accurately distinguishes between phone-to-phone and other forms of IP telephony, and is not likely to be quickly overcome by changes in technology.

The effect of creating regulations that are overcome quickly by technology is also a problem that the Commission has long considered in determining how best to address enhanced services. In the Second Computer Inquiry, the Commission recognized the need to limit its authority over new technologies:

Moreover, the extent of our regulatory authority is not automatically expanded with advances in technology and the types of enhanced services that can be offered. Semantic distinctions are avoided as to whether a given service is data processing, information processing, . . . or some other category. As such, the potential for the development of an inconsistent regulatory scheme to accommodate these services is eliminated; all enhanced services are accorded the same regulatory treatment.

The inconsistencies inherent in treating two services as distinct, solely because they use different types of CPE, threaten the predictability that is crucial to any regulatory system. Moreover, the seeming functional equivalencies that the Commission identifies today are not technologically based, yet are subject equivalencies. Furthermore, Congress has spoken decisively against reg-

114 See id. at para. 87. In this process, the analog voice signal is transformed into a digital signal, which is then broken down into packets. The packets of data are sent via the Internet, to the intended destination. Each packet may take a different route, and when they arrive at the destination, they are reassembled and transformed back into an analog signal.


116 See id.

117 See id. This lack of distinct boundaries already can be seen with the ability of computers to send and receive faxes over the PSTN. See id. Additionally, telephones are being sold which give the user the ability to send and receive e-mail. See id.

118 See Report to Congress, supra note 4, at para. 87.

119 See id. at para. 90.

120 Computer II, supra note 7, at para. 116.

121 See id.
ulating Internet and information services. Even when those services "look like a duck" subject to regulation, the Commission has been denied the power to regulate.

2. Phone-to-Phone IP Telephony is an Information Service Under the 1996 Act

The distinction recognized by the Commission between basic and enhanced services was codified by Congress in the 1996 Act when Congress created definitions for "telecommunications" and "information service." The Commission, in its Report to Congress, reiterated Congress' intention that "the categories of 'telecommunications service' and 'information service' in the 1996 Act are mutually exclusive." Thus, if a service is an information service, it cannot be a telecommunications service, and vice versa. The categorization of phone-to-phone IP telephony is difficult, because it does not fit neatly into either of these categories. However, close analysis of the categories, as defined by Congress, makes it plain that phone-to-phone IP telephony is an information service.

In its Report to Congress, however, the Commission suggested that phone-to-phone IP telephony resembles telecommunications services because it "creates a virtual transmission path between points on the public switched telephone network." Additionally, the Commission found that providers of phone-to-phone IP telephony do not "offer a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information." The Commission came to this conclusion despite its earlier inconsistent ruling that protocol conversion qualifies as an information service.

The 1996 Act, however, does not require a net protocol conversion for a service to be classified as an information service. The Commission is adding an additional requirement to those already established by Congress. Under Congress' definition of information services, a service has to perform one of the following: "acquiring, storing, transforming, processing, retrieving, utilizing or making available information." This definition nowhere requires a net change in form. In phone-to-phone IP telephony, the analog voice signal which enters a phone is transformed into an IP packet, which leaves the PSTN and travels through the Internet until it reaches the destination gateway. At that time the signal re-enters the PSTN and is transformed into an analog signal. The transformation of the signal qualifies the IP telephone call as an information service which is therefore free from government regulatory authority. Services qualifying as information services, including phone-to-phone IP telephony, are legally distinct services from telecommunications. Even when traditional telecommunications carriers are offering phone-to-phone IP telephony, the service is distinct and is not subject to regulation.

For more than twenty years, the Commission has refrained from regulating new information services. Phone-to-phone IP telephony is therefore an important test case. The Commission's obligation is to follow the direction of Congress in the 1996 Act. New services, such as phone-to-phone IP telephony, are among the spurs to competition Congress envisioned. Congress recognized this fact and so must the Commission.

C. The Commission Must Respect Congress' Intent Concerning Advanced Telecommunications Services

Phone-to-phone IP telephony is just one of many new challenges before the Commission. The computer industry is constantly expanding and introducing new products and services. The Commission cannot take an ad hoc approach to the regulation of these new services, as it will lead to an unpredictable regulatory environment, with each new service being treated in a different manner. Unfortunately, the Commission has already material transmitted does not use a single protocol through the communication.

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122 See 47 U.S.C. § 153 (20) and (43).
123 Report to Congress, supra note 4, at para. 13.
124 Id. at para. 89.
125 Id.
126 Protocol is a set of instructions that end points in a telecommunications connection use when sending signals back and forth. Protocol conversion takes place when the
127 See Non-Accounting Safeguards, supra note 68, at para. 105.
128 Report to Congress, supra note 4, at para. 52 (emphasis added).
appeared to take such an approach with phone-to-phone IP telephony and seems to be heading in the same direction in its Section 706 proceedings. Rather than follow Congress' mandate to merely study whether advanced telecommunications services are being deployed to all Americans in a reasonable and timely manner, the Commission may be tempted to regulate each new advanced service.

On August 7, 1998, the Commission initiated two proceedings relating to Section 706 of the 1996 Act. The first document released by the Commission was a Notice of Inquiry ("NOI") inquiring about the deployment of advanced telecommunications capabilities. The Commission also released a Notice of Proposed Rulemaking ("NPRM") concerning DSL in response to petitions by four Bell Operating Companies ("BOCs"), the Association for Local Telecommunications Services ("ALTS"), and the Alliance for Public Technology ("APT"). The Commission has an important opportunity to practice regulatory restraint in both of these proceedings.

1. Advanced Telecommunications Capabilities: Communications or Information Services?

The Commission was directed by Congress to begin a study "within thirty months of enactment of the 1996 Act, to find out whether advanced telecommunications capability is being deployed to all Americans in a 'reasonable and timely fashion.'" If the Commission finds that deployment of advanced telecommunications capability is not being made in a "reasonable and timely fashion" it is to take "immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." In the NOI, the Commission invited "commenters to describe the advanced services that they want to provide. We also examine, and we invite others to comment on, the assets, abilities, and incentives of the companies that own the networks."

Congress established a two step process. The first step is to merely study whether or not ad-

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129 47 U.S.C. § 157. It provides:

SEC. 706. ADVANCED TELECOMMUNICATIONS INCENTIVES.

(a) IN GENERAL.—The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulatory methods that remove barriers to infrastructure investment.

(b) INQUIRY.—The Commission shall, within 30 months after the date of enactment of this Act, and regularly thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

(c) DEFINITIONS.—For purposes of this subsection:

1. ADVANCED TELECOMMUNICATIONS CAPABILITY.—The term "advanced telecommunications capability" is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

2. ELEMENTARY AND SECONDARY SCHOOLS.—The term "elementary and secondary schools" means elementary and secondary schools, as defined in paragraphs (14) and (25), respectively, of section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801).

130 See generally Section 706 NOI, supra note 12.
131 See id. at para. 20.
132 ALTS also requested that the Commission declare traffic to ISPs be classified as local traffic for purposes of reciprocal compensation. The Commission is expected to release an order on reciprocal compensation and many important issues, which are beyond the scope of this article, will be raised in such a proceeding.
133 See Section 706 NOI, supra note 12, at para. 7. The Commission notes that it distinguishes "between advanced telecommunications capability and services derived from it ("advanced services"), as in the distinction between infrastructure and applications, or between facilities and services offered to end users." Id. at para. 15, n. 8.
135 Section 706 NOI, supra note 12, at para. 8.
vanced telecommunications capability is being deployed in a timely fashion. The second step, which involves taking regulatory action, applies only if “the Commission’s determination is negative.” However, in its NOI, the Commission does provide insight into its view of its role but merely sets out to define the parameters of “advanced telecommunications capability.” In the 1996 Act, “advanced telecommunications capability” is “defined without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics and video telecommunication using any technology.” The Commission offers potential services that might come under the definition of advanced telecommunications capability, many of which are Internet services. However, the Commission questions whether “push technologies” that “allow consumers to subscribe to data that is regularly refreshed” are encompassed by the definition of advanced telecommunications capability. Many of these “push technologies” are offered over the Internet, and regulating the deployment of this technology would be tantamount to regulating parts of the Internet or Internet service providers. Additionally, the Commission asks “whether advanced telecommunications capability includes content, such as web pages, in addition to the ability to reach content.” While no final determinations are made by the Commission regarding content, the proposal to consider Internet content as subject to its jurisdiction is highly problematic.

While the Commission maintains jurisdiction over some advanced telecommunications services, such as DSL, Section 706 is neither a license to regulate the Internet nor a substitute for the allocations of regulatory authority provided for in the 1996 Act’s broad reach. Congress unequivocally established that the Internet remain unregulated under Section 230. In determining the scope of the meaning of “advanced telecommunications capability,” the Commission must be sure to recognize the limits placed on it by other sections of the 1996 Act. Without recognizing limits to its jurisdiction, the Commission opens the door to regulating services that may use advanced telecommunications capability. Consideration of whether to include content, such as web pages, in the definition exemplifies this potential. According to the Commission:

Section 706(a) requires that, in order to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability, the Commission use price-cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other methods that remove barriers to infrastructure investment.

The Commission asks for comment on what positive regulatory actions it can take to control and accelerate the deployment of advanced telecommunications. The Commission requested “comment about the basic legal and regulatory model that will best foster the deployment of advanced telecommunications capability . . . It may be . . . that as discrete industries and services begin to merge, the application of different regulatory models to competing service will have effects on the marketplace.” More specifically, the Commission considers such actions as social contracts with providers of advanced telecommunications capability, inclusion of the new capability in universal service, and the application of one or more of the existing models of regulation (e.g., as the telecommunications model, the cable TV model or the broadcast model) to advanced telecommunications capability.

While the Commission has yet to adopt any models of regulation or make an official proposal regarding advanced telecommunications capability, the NOI illustrates the pro-regulatory attitude of the Commission. Faced with a new realm of services, the Commission must be sure to adopt an appropriate role. Leaving a regime of extensive control over communications services and the presumption favoring regulation is a daunting institutional challenge. The Commission must shift its policy making under the 1996 Act. Rather,
Congress has directed the Commission to allow the market to regulate new services as much as possible, and to consider government regulation an option only when absolutely necessary. By defining advanced telecommunications capability as broadly as suggested in the NOI and by presuming that regulation is called for in its deployment, the Commission may be opening a Pandora’s box.

The Commission has taken official regulatory action against one advanced telecommunications service, DSL, by denying a request from BOCs to keep DSL unregulated and proposing a separate subsidiary requirement for incumbent LECs which want to offer DSL services. Rather, the Commission instituted a rulemaking proceeding in which it proposed to establish a separate subsidiary requirement for the offering of advanced services, such as DSL. In addition, the Commission focused on requiring telecommunications carriers to make the local loop available to competing advanced telecommunications service providers.

As this proceeding develops, its important for the Commission to implement the pro-competitive intent of Congress, and to respect the distinction between “telecommunications” and “information services” established in the 1996 Act. While the Commission has jurisdiction over telecommunications, which encompasses the loops and digital subscriber lines, it must be sure to create rules which promote competition without subjecting new services to a mountain of regulations. In addition, the Commission must ensure that it does not exceed its bounds of jurisdiction by beginning to regulate information services in the name of advancing new telecommunications services.

The Commission will best implement the intent of Congress by studying new services and the markets in which they reside before regulating. It is important that the Commission develop thoughtful, principled and pro-competitive means of addressing advanced services and that it adhere to the categorical distinctions mandated by Congress.

The consequences of uncontrolled regulation of advanced telecommunications and of the Internet are severe. In the last decade, the United States has witnessed an explosive growth in the amount of communications services rendered. This growth has resulted because of a free market environment where good products succeed and bad products fail. The costs of communications to consumers have plummeted, and options have skyrocketed. Advances in technology, particularly the Internet, have played an important role in improved choices for consumers. However, investing in new technology in a free market is risky. Adding to the inherent risk by imposing extensive and unpredictable government regulations, which can delay the offering of new services and add considerable costs to their production, only hinders the very technology that has led to improved choice for consumers. Limiting the scope of regulation can have the effect of increasing investment in valuable technology.

The Commission’s actions to implement competition in the CPE market serve as an example of the benefits of increased competition. After the Commission opened competition in the CPE market in Computer II, the number of products and services grew exponentially. Prior to the opening of the CPE market to competition, consumers had two choices of telephones—white or black. However, in a competitive market consumers now can buy phones of all sizes and shapes, with or without cords, and with numerous special features. Phone manufacturers, knowing that their investments would not be hindered by government intervention, poured millions of dollars into CPE. Advanced services cannot be subject to the type of regulatory regime under which the boldest innovation offered consumers was a choice of color for their phones.

PART VI: CONCLUSION: WHAT ROLE FOR THE COMMISSION?

The Commission’s role in communications is changing rapidly due to the 1996 Act. In the past, when government regulation was presumed to be the right answer, the Commission was expected to

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146 See Section 706 NPRM, supra note 12, at para. 12.
147 See id.
148 See id. at para. 46.
149 See 47 U.S.C. § 153(20) and (43).
predict the correct regulatory response to services that had not yet been offered to consumers. Under the regulatory changes instituted in the 1996 Act, however, market regulation is now the presumed answer, and the Commission is to respond with regulations only within the guidelines mandated by Congress. In some cases, such as IP services, it means that the Commission cannot act. In other cases, such as some advanced telecommunications, it means the Commission must ensure that a regulatory response is appropriate and that the pro-competitive intent of Congress is realized. Its very likely that, in a market regulated environment, a regulatory solution is unnecessary.

However, the Commission can help increase the predictability of its regulatory response. Commission staff working papers, such as those released by Kevin Werbach and Barbara Esbin, help the industry understand the Commission’s perspective on new services. While they do not propose new regulations, they do offer insight into what factors the Commission finds important in determining when regulation is appropriate. In addition, the Commission could adopt a set of principles that it will rely on when determining that regulation is necessary. The principles should reiterate that primary regulation is to come from the market, and only when the market fails and only when a government response can help without causing subsequent market failures, will the Commission consider a regulatory response.

The Commission will continue to face the challenge of addressing new communications services, and can take one of two roads. It can continue to head in its current direction of exceeding its jurisdictional boundaries and attempt to regulate new competitive services, such as phone-to-phone IP telephony and DSL, on an ad hoc basis, likely delaying their implementation and blunting the incentive to innovate. Or the Commission can follow the direction it has taken for the last twenty years and allow the free market and competition to regulate the offerings of new services. At this juncture the Commission appears to be heading in the direction of applying an outdated regulatory regime, established to address a monopolized industry, to an innovative and competitive industry.

However, the Commission has not yet implemented any firm regulations and can still rethink the consequences of its direction. If the Commission were to take the latter approach, it would not only reflect the intent of Congress, but also ensure that the dynamic and growing Internet economy will flourish, "unfettered by Federal or State regulation."