



National Regulatory  
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**Taking Another Look at  
Federal/State Jurisdictional Relationships  
in the New Broadband World**

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# Table of Contents

<b>Introduction</b> .....	<b>1</b>
<b>I. The Telecom-to-Broadband Transition: A History of How We Got Here and the Issues It Presents</b> .....	<b>2</b>
<b>A. From telecommunications to broadband: a little history</b> .....	<b>2</b>
<b>1. Common-carrier regulation of telecommunications services</b> .....	<b>2</b>
<b>2. Silo regulation of communications services</b> .....	<b>3</b>
<b>3. Convergence breaks down the silos</b> .....	<b>5</b>
<b>B. The regulatory implications of broadband</b> .....	<b>7</b>
<b>1. Potential justifications for regulation</b> .....	<b>7</b>
<b>a. Market power</b> .....	<b>8</b>
<b>b. Essential services</b> .....	<b>9</b>
<b>2. Possible types of regulation</b> .....	<b>10</b>
<b>a. Licensing: entry/exit and transfer</b> .....	<b>10</b>
<b>b. Obligation to serve all comers on a nondiscriminatory basis</b> .....	<b>11</b>
<b>c. Reasonable, nondiscriminatory rates</b> .....	<b>12</b>
<b>d. Universal service</b> .....	<b>12</b>
<b>e. Consumer protection and quality of service</b> .....	<b>14</b>
<b>f. Reporting requirements</b> .....	<b>15</b>
<b>g. Corporate structure/structural separation</b> .....	<b>16</b>
<b>II. Alternatives for Allocating Federal and State Broadband Regulatory Responsibilities</b> .....	<b>18</b>
<b>A. Apply the historical telecommunications interstate/intrastate division to broadband</b> .....	<b>18</b>

<b>B.</b>	Apply the Pole Attachment Act’s “reverse preemption” model to broadband.....	23
<b>C.</b>	The “delegation of enforcement authority” model .....	26
<b>D.</b>	The “joint board” model .....	28
<b>E.</b>	The wireless model .....	29
<b>F.</b>	The “exclusive federal jurisdiction” model .....	31
<b>G.</b>	Mixing and matching models.....	33

**III. An Assessment of Broadband Regulatory Models and Regulatory Requirements .....33**

## Introduction

The advent and rapid growth of the Internet, followed by the advent and growth of broadband capability to deliver more content-rich information, has been a disruptive force in the telecommunications industry and for telecommunications regulation. Federal and state regulators have been wrestling with this problem for some time, and with good reason: The transformation from a telecommunications world to a broadband world has not only defied the historical boundary between federal and state telecommunications regulation; it also has obscured the historical boundaries between telecommunications services on the one hand and other types of electronic communications services (information services, video and radio broadcasting, and cable television services delivered by wire and radio) on the other.

In this paper, “telecommunications” means the federal Communications Act definition—“the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43). In other words, “telecommunications” is pure information transport—whether voice, data, or video—as directed by the user. Although not codified in the federal Act until 1996, this concept long predates that Act, both by Federal Communications Commission (“FCC”) rule and by FCC and state public utilities commission (“PUC”) practice.<sup>1</sup>

“Broadband” in this paper means the transport of information—whether voice, video, or data—over the public Internet and/or other Internet-protocol networks to and from locations of the user’s choosing at speeds in excess of 4 Mbps downstream and 1 Mbps upstream. This data-speed benchmark is somewhat arbitrary and not that critical to the analysis.<sup>2</sup> The main purpose of this “broadband” definition is to distinguish broadband from (1) dial-up, and (2) other proprietary content and application offerings that broadband providers often integrate with broadband’s information-transport function. *See* Part I(A)(3) below.

The purpose of this paper is to provide state and federal regulators and policymakers with alternatives, and an assessment of those alternatives, for arranging the federal–state jurisdictional relationship as we transition from telecommunications to broadband.

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<sup>1</sup> *See* Part I(A)(3) below.

<sup>2</sup> The 4Mbps/1Mbps speed benchmark is used in the FCC’s National Broadband Plan. FCC, *Connecting America: The National Broadband Plan* (Mar. 2010) (“National Broadband Plan” or “NBP”), available at <http://www.broadband.gov>. Several other speed benchmarks have been used. *See, e.g.,* 2006 *OECD Broadband Statistics to December 2006* (defining broadband as 256 kbit/s in one direction), available at [http://www.oecd.org/document/7/0,3746,en\\_2649\\_34225\\_38446855\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/7/0,3746,en_2649_34225_38446855_1_1_1_1,00.html); ITU-T Recommendation I.113 (defining broadband as a transmission capacity that is faster than primary rate ISDN, at 1.5 to 2 Mbit/s), available at <http://eu.sabotage.org/www/ITU/I/0113e.pdf>; FCC, *Guide: Getting Broadband* (noting “Broadband speeds vary significantly depending on the particular type and level of service ordered and may range from as low as 200 kilobits per second (kbps), or 200,000 bits per second, to six megabits per second (Mbps), or 6,000,000 bits per second”), available at <http://www.fcc.gov/guides/getting-broadband>.

**Part I** furnishes an overview of federal and state telecommunications regulation, its relation to the regulation of other communications services, and how the advent of broadband has altered the assumptions on which that historical regulation was built. It then explains the rationales for some form of continuing regulatory oversight of broadband.

**Part II** offers several alternative approaches to the allocation of federal and state regulatory oversight of broadband and assesses the potential benefits and shortcomings of each. The purpose of this exercise is not to recommend one alternative over the others, but to furnish federal and state regulators and policymakers with a means to evaluate in as objective a manner as possible the considerations and options for addressing and fashioning the appropriate regulatory framework for the broadband world.

**Part III** concludes with some additional observations that federal and state regulators and policymakers may find useful in carrying out this task.

## **I. The Telecom-to-Broadband Transition: A History of How We Got Here and the Issues It Presents**

### **A. From telecommunications to broadband: a little history**

The long and convoluted history of telecommunications regulation, both federal and state, is beyond the scope of this paper.<sup>3</sup> To set the stage for analyzing broadband regulatory alternatives, however, an overview of the legal and technological context out of which broadband arises is necessary. The key points are (1) how “telecommunications service,” as defined above, has been regulated; (2) how telecommunications regulation has differed, both substantively and jurisdictionally, from the regulation of other electronic communications services; and (3) how the convergence of communications technology, brought on primarily (but not exclusively) by the Internet and Internet-protocol transmission, has blurred the boundaries between telecommunications regulation and the regulation of other kinds of electronic communications services.

#### **1. Common-carrier regulation of telecommunications services**

The regulation of the provision of telecommunications service—that is, pure transport of the customer’s message, without change in form or content, to the customer’s desired recipient(s)—dates almost from the beginning of the service (first, telegraph service, later followed by telephone service). In the late nineteenth century and with increasing momentum in the early twentieth century, state commissions began to regulate telegraph and telephone

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<sup>3</sup> For a good overview, see William J. Byrnes, *Telecommunications Regulation: Something Old and Something New* (“*Telecommunications Regulation*”), in *The Communications Act: A Legislative History of the Major Amendments, 1934-1996*, at 31-72 (Max D. Paglin et al., eds., 1999).

service.<sup>4</sup> As those services became more interstate, the federal government stepped in, subjecting interstate telegraph and telephone service first to Interstate Commerce Commission (“ICC”) regulation in 1910 and then to the newly created FCC regulation in the Communications Act of 1934.<sup>5</sup>

At both the federal and state levels, telecommunications service was subject to common-carrier regulation. Indeed, the common-carrier obligations of telecommunications service providers were grafted directly from the preexisting common-carrier regulatory obligations of railroads.<sup>6</sup> Those common-carrier obligations were to charge reasonable rates; to serve without discrimination; to exercise care, skill and honesty; and (later) to fulfill “an affirmative duty to render service demanded by any member of the public.”<sup>7</sup> These obligations largely remain as legal duties of telecommunications service providers today, although many of the more formal procedures of fulfilling those obligations—primarily tariffing—have been streamlined or eliminated. *See* Part I(B)(3) and note 43 below.

## 2. Silo regulation of communications services

Also beginning in the late nineteenth century and accelerating in the twentieth century, technology made possible many electronic communications services other than landline telegraph and telephone. Chief among these were wireless radio services—radio telecommunications services, later radio broadcasting, still later television broadcasting, and eventually satellite services.

The burgeoning growth of wireless (along with the increased chaos of unregulated radio transmissions and the resulting radio interference), as well as the ICC’s inability to handle effectively the telegraph/telephone regulation originally assigned to it, led to the Communications Act of 1934 and the creation of the FCC. The Communications Act created regulatory “silos” under which different classes of communications services were subject to fundamentally different types of regulatory obligations and federal/state jurisdictional relationships.

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<sup>4</sup> *See* Barbara A. Cherry, *Utilizing “Essentiality of Access” Analyses to Mitigate Risky, Costly and Untimely Government Interventions in Converging Telecommunications Technologies and Markets*, 11 *CommLaw Conspectus* 251, 257 & n. 36 (2003) (“*Essentiality of Access*”); William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States*, 79 *Colum. L. Rev.* 426 (1979).

<sup>5</sup> *Telecommunications Regulation, supra*, at 31-35; Barbara A. Cherry, *Maintaining Critical Rules to Enable Sustainable Communications Infrastructures*, 24 *Ga. St. U. L. Rev.* 947, 959 (2008).

<sup>6</sup> *See Telecommunications Regulation, supra*, at 31-35; *Essentiality of Access, supra*, at 257 n. 36.

<sup>7</sup> *Id.* at 257.

One regulatory silo is found in Title II of the Communications Act, entitled “Common Carriers.”<sup>8</sup> Title II governs telecommunications services and continues the practice of subjecting telecommunications service providers to common-carrier regulation, with the FCC regulating interstate telecommunications services and state PUCs regulating intrastate telecommunications services.<sup>9</sup>

Radio, or wireless, services are subject to Title III of the Act, entitled “Special Provisions Relating to Radio.”<sup>10</sup> Unlike Title II common-carrier services, Title III wireless services are not subject to a sharp interstate/intrastate divide. The radio frequency emissions involved with wireless service are not susceptible to specific geographic confinement. In addition, radio spectrum was viewed as an asset critical to national security, requiring exclusive federal oversight and control. For these reasons, the Act provides that the federal government shall maintain control of “all the channels of radio transmission,”<sup>11</sup> which Title III accomplishes through an FCC licensing process. As a result, with a few exceptions (*see* Part II(E) below), most wireless services are regulated exclusively by the FCC and are not subject to state PUC regulation (but they are subject to generally applicable state laws).<sup>12</sup>

Other than wireless telecommunications services,<sup>13</sup> Title III radio services are subject to a radically different regulatory regime than Title II services. Most Title III wireless services—primarily broadcasting but also private business radio services, among others—are not subject to any common-carrier obligations at all. In fact, the “broadcasting” regulatory model is the opposite of the common-carrier model: In the broadcasting model, the owner of the transmission facilities also controls the content delivered over its facilities, merging the “content” and “conduit” aspects of communications that the common-carrier model separates.<sup>14</sup> Under the “broadcasting” model, this merger of conduit and content has also given rise to the

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<sup>8</sup> 47 U.S.C. §§ 201 *et seq.*

<sup>9</sup> 47 U.S.C. § 152(b).

<sup>10</sup> 47 U.S.C. §§ 301 *et seq.*

<sup>11</sup> *See* 47 U.S.C. § 301.

<sup>12</sup> *See* Tillman L. Lay, *Some Thoughts on Our System of Federalism in a World of Convergence*, 2000 L. Rev. M.S.U.–D.C.L. 223, 224 (“*Federalism and Convergence*”).

<sup>13</sup> Wireless telecommunications service providers are subject to both Title II and Title III regulation. *See, e.g., Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003).

<sup>14</sup> 47 U.S.C. § 326 (FCC has no authority to censor or interfere with broadcaster’s “free speech by means of radio communication”). *See also Federalism and Convergence, supra*, at 224.



communications facilities owner's becoming a "speaker" with a degree of First Amendment protection.<sup>15</sup>

Congress added a third "silo" in 1984, Title VI of the Act, for cable television service.<sup>16</sup> The "cable service" regulation model is a sort of hybrid between the broadcast model and the common-carrier model, but it tilts heavily toward the broadcasting model. Title VI gives cable operators editorial control over most of their systems' channel capacity, subject to a few channel capacity set-aside obligations for local access, commercial leased access, and local broadcast carriage obligations.<sup>17</sup> But unlike broadcasting and other radio services and more like telecommunications services, the Act preserves discrete federal and state roles for cable regulation. Cable service and cable systems are subject to state or local franchising regulation, with the FCC given oversight and regulation in some areas.<sup>18</sup>

The original Communications Act also has a fourth "silo" of sorts. Because Title I gives the FCC jurisdiction over all "interstate and foreign commerce in communication by wire or radio,"<sup>19</sup> courts have held that the FCC also has Title I, or "ancillary," jurisdiction over all interstate or foreign communications services that do not fall within one of the Act's other service-specific silos.<sup>20</sup> Unlike the Act's service-specific silos, however, Title I only establishes the FCC's general authority and does not set forth any specific regulatory structure or requirements. While the courts have limited the scope of the FCC's Title I "ancillary" jurisdiction,<sup>21</sup> the FCC has increasingly relied on it over the years to cope with communications technology convergence, as we shall now see.

### 3. Convergence breaks down the silos

The seeds of today's debate about how to categorize and regulate broadband began in the late 1970s and 1980s, long before the Internet. Computer and data processing (then largely performed by distributed mainframes) were growing, and many businesses and other large institutions began to develop their own private networks to interconnect their geographically

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<sup>15</sup> See, e.g., *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317 (2d Cir. 2010), *cert. granted*, 79 U.S.W.L. 3629 (U.S. June 27, 2001) (No. 10-1293).

<sup>16</sup> 47 U.S.C. §§ 521 *et seq.*

<sup>17</sup> *Federalism and Convergence*, *supra*, at 226 (citing 47 U.S.C. §§ 531-532 & 534-35, and *City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488 (1986)).

<sup>18</sup> See 47 U.S.C. §§ 541 *et seq.*

<sup>19</sup> 47 U.S.C. § 151.

<sup>20</sup> See, e.g., *United States v. Sw. Cable Co.*, 392 U.S. 157 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

<sup>21</sup> See *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

dispersed data-processing computers. At the same time, computer technology could be applied to telephone network switching. With computer telephone network switches replacing electro-mechanical switches, telephone network switches could perform other functions, such as information storage and content change or generation, beyond merely switching telephone-circuit traffic. This provided a technological entrée for traditional telephone companies to provide integrated communications services beyond pure information transport.

This technological convergence between telecommunications and data processing led to the FCC's *Computer Inquiries*, which drew a line between, on the one hand, what the Telecommunications Act of 1996 subsequently defined as a "telecommunications service" (which was pure information transport), and on the other hand, "information service" (which was transport integrated with information storage, content manipulation, or content generation).<sup>22</sup> "Telecommunications services" remained subject to Title II common-carrier regulation (and state PUC regulation for intrastate services), while "information services" were subject to the FCC's Title I "ancillary" jurisdiction, which the FCC used to determine that information services were "inherently interstate," and thus largely preemptively immune from state PUC regulation.<sup>23</sup>

Since it was established nearly thirty years ago, the telecommunications/information service boundary has increasingly become far more of a policy-based than a technologically based boundary. Confined by a silo-based Communications Act, the FCC used the "information service" categorization as a means of deregulating what it perceived as new or competitively provided services by taking them out of the Title II common-carrier silo. In some cases, the results would seem strange to an outsider. The FCC, for instance, has long characterized e-mail as an "information service," even though, from a non-techie end user's perspective, e-mail resembles nothing so much as a new and much-improved form of telegraph service, the quintessential telecommunications service.

It was against this background that the FCC faced the issue of how to treat the Internet and broadband services. Again desiring to keep these newly emerging services out of what it viewed as an over-regulatory Title II silo, the FCC, after some back-and-forth, ultimately classified broadband services as "Title I information services."<sup>24</sup> Although in 2010 the FCC

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<sup>22</sup> The FCC originally defined these as "basic" and "enhanced" services, respectively. See *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC 2d 384 (1980), *modified*, 84 FCC 2d 50 (1980), *on reconsideration*, 88 FCC 2d 512 (1981) ("*Computer II*"), *pet. for rev. denied*, *CTIA v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983). See generally, Lee L. Selwyn & Helen E. Golding, *Revisiting the Regulatory Status of Broadband Internet Access: A Policy Framework for Net Neutrality and an Open Competitive Internet*, 63 Fed. Com. L.J. 91, 94-95 & n. 8 (2010) ("*Broadband Internet Access*").

<sup>23</sup> See *Computer II*, *supra*.

<sup>24</sup> The FCC first classified cable operator-provided broadband as an information service. *Internet Order Cable Modem Declaratory Ruling*, 17 FCC Rcd 4798 (2002), *petition granted*, *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9<sup>th</sup> Cir. 2003), *rev'd*, *NCTA v. Brand X* (Footnote continued ...)

considered reclassifying broadband transmission as a Title II telecommunications service,<sup>25</sup> it ultimately declined to do so, instead attempting to impose a “light-touch” form of common-carrier regulation on broadband via its Title I ancillary jurisdiction.<sup>26</sup>

The result has been considerable uncertainty about whether, and if so how, broadband may be regulated at the federal and state levels. Because broadband is rapidly displacing telecommunications as the means through which everyone electronically communicates with one another, this uncertainty presents a formidable telecommunications policy problem for state PUCs, the FCC, and our nation.

The technological and service convergence that broadband embodies also means that broadband will displace, to an as-yet-unknown degree, historically non-telecommunications services in which content and transmission are merged, such as broadcasting, cablecasting, and other content-generating services that have traditionally been regulated under the completely different, and more First Amendment-oriented, broadcast- or cable-regulation model. To avoid further complicating an already-complicated topic, I will deal here only with regulation of the “telecommunications substitute” aspect of broadband, leaving for another day the equally important topic of whether, and if so how, the telecommunications and non-telecommunications aspects of broadband can and should be separated.

## **B. The regulatory implications of broadband**

### **1. Potential justifications for regulation**

Broadband is already rapidly displacing—and is ultimately likely to replace completely—telecommunications service as the means by which individuals, businesses, governments, and other organizations electronically communicate with one another and with the public generally. As we have seen,<sup>27</sup> pure electronic information transport of this nature has, almost from the outset of its significant commercial availability, been subject to regulatory oversight—specifically, the provider’s common-carrier, or common-carrier-like, obligation to offer

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(...footnote continued)

*Internet Services*, 545 U.S. 967 (2005). It then reclassified landline telephone company-provided broadband as from a telecommunications service to an information service, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order, 20 FCC Rcd 14853 (2005), and thereafter did likewise with respect to wireless broadband service, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007).

<sup>25</sup> See *Framework for Broadband Internet Services*, Notice of Inquiry, 25 FCC Rcd 7866 (2010).

<sup>26</sup> *Preserving the Open Internet Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905 (2010) (“*Open Internet Order*”).

<sup>27</sup> See Part I(A)(1) above.

information transport service to all comers without unreasonable discrimination and at reasonable rates, terms, and conditions.<sup>28</sup>

Several policy justifications exist for regulating the provision of telecommunications services to the public, most of which could apply to its successor, broadband, as well. The justifications overlap to a degree, but center on two basic rationales:

**a. Market power**

The notion here is that, due to scale, scope, or network economies, or some combination of them, the structure of the broadband industry will not be truly competitive and thus that, absent regulatory intervention, the exercise of market power will result in suboptimal efficiency and consumer welfare.<sup>29</sup> There is reason to think that the broadband-provider industry currently exhibits this trait and will continue to do so. Federal government data indicate that most areas of the U.S., and most businesses and residents, have a choice of no more than two landline broadband providers (the local telephone company and the local cable TV company).<sup>30</sup> The wireless broadband industry is dominated by four nationwide providers,<sup>31</sup> and two of those four (AT&T and Verizon) are also dominant landline broadband service providers.<sup>32</sup> Since most telecommunications service providers and cable operators now also provide broadband, broadband industry structure tends to mirror the combined telecommunications and cable industries' structure in many respects.

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<sup>28</sup> For this reason, it is those who advocate for complete deregulation of broadband (*i.e.*, that broadband should be free of any industry or service-specific regulation and be subject only to generally applicable laws like antitrust), not those who advocate for placing some sort of regulatory obligations on broadband providers, who are urging the greater departure from historical precedent. That does not mean deregulatory advocates are incorrect, but it does mean that their claims that applying common-carrier-like obligations to the pure transport element of broadband represents a departure from the historically deregulated status of “information services” are not accurate.

<sup>29</sup> See, e.g., Jerry A. Hausman, *et al.*, *Cable Modems and DSL: Broadband Internet Access for Residential Customers*, 91 Am. Econ. Rev. 302 (2001).

<sup>30</sup> See, e.g., National Telecommunications and Information Administration (“NTIA”), National Broadband Map, Number of Data Providers (June 30, 2010), *available at* <http://www.broadbandmap.gov/number-of-providers>.

<sup>31</sup> Perhaps soon to be only three if AT&T’s proposed acquisition of T-Mobile is approved.

<sup>32</sup> See IE Market Research, Executive Summary: 1Q.2011 United States Mobile Operator Forecast 6 (Mar. 2011) (Chart 5 depicts subscribers by operator and shows the market is dominated by Verizon Wireless, AT&T Mobile, Sprint Nextel and T-Mobile USA), *available at* <http://www.iemarketresearch.com/documents/1Q11UnitedStatesMobileOperatorForecast-ExecutiveSummary.pdf>.

## **b. Essential services**

The notion is that some types of services are essential, in one or both of two ways. First, the services are fundamental inputs to the production, sale, and consumption of virtually all other goods and services. Second, the efficient delivery and widespread availability of such services are critical to fostering larger societal or public-interest goals, such as promoting widespread public participation in the marketplace of ideas, public education, public health, public safety, and/or economic development and international competitiveness.<sup>33</sup> The “essential service” doctrine is based more on the nature of the service, not whether or not it is competitively provided.

Broadband, like telecommunications before it, exhibits both of these classic traits of an “essential service.” Much like the utility, transportation, and energy sectors, the telecommunications-now-broadband sector provides a fundamental input that is essential for all other economic sectors to function effectively. If critical industry sectors such as those do not perform efficiently and cost-effectively and/or are not widely available and affordable, the efficiency and growth of the entire economy will suffer.

Broadband also serves societal and public-interest goals beyond the mere efficient production, delivery, and consumption of ordinary goods and services. As noted in the FCC’s National Broadband Plan, widespread broadband deployment and adoption is critical to several general societal and national goals: economic development; job creation; more efficient and widespread education; more efficient and effective healthcare delivery; more efficient and environmentally friendly energy generation, delivery, and consumption; more efficient and effective government performance, delivery of services, and connectivity with citizens; improved civic engagement and active participation in democratic processes; more active and widespread citizen participation in the First Amendment marketplace of ideas; and public safety and homeland security.<sup>34</sup>

The indispensable role that broadband, like telecommunications before it, will play in enabling individuals, businesses, and other organizations to communicate among one another, and with their federal, state and local governments, merits special mention. Whether individuals, businesses, and other organizations have the ability to communicate in this manner, free of censorship or content-based discriminatory treatment of their communications by broadband service providers, will have a profound impact on freedom of speech and effective self-governance. In this sense, the effective and open functioning of broadband networks is very different, and far more important to society, than the effective and open functioning of the marketplace for toasters.<sup>35</sup>

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<sup>33</sup> *NBP* at 171,191 *et seq.*, 204 n. 50.

<sup>34</sup> *See id.* at 3.

<sup>35</sup> *See, e.g., Interview with Tim Wu, FTC Policy Advisor, 25 Antitrust* 55, 56 (2011).

## 2. Possible types of regulation

The extent to which broadband is characterized either by a persistent less-than-fully competitive market structure or by “essential service” traits or both is sufficient justification for some degree of government regulatory oversight of broadband providers. The question then becomes: What kinds of regulatory oversight and obligations would be appropriate?

Generally speaking, in markets involving “essential services” where market power is chronic, common-carrier obligations of the kind discussed below have been established. They have historically been applied to telecommunications carriers, although to varying degrees, with the more recent trend in the direction of loosening or eliminating some regulatory obligations as telecommunications markets have been perceived as becoming more competitive. Whether some, none, or all of these types of regulatory requirements should be applied to broadband I leave for the reader’s consideration. Here, I simply set forth suggested categories of regulatory requirements for broadband, which I will then consider in Part II’s assessment of alternative models for allocating federal and state broadband regulatory roles.<sup>36</sup>

### a. Licensing: entry/exit and transfer

Licensing, or certification, of service providers, at both the federal and state levels, is a longstanding practice applied to telecommunications service providers, as well as other utility service providers. The process serves several purposes. First, it manages entry into the market to provide some assurance that providers are capable and willing to provide the service in a manner that will serve the government’s public-policy-interest objectives for the service.<sup>37</sup> Second, it manages exit from the market to ensure that consumers are not left without access to service. Third, through the license-transfer process (which applies to mergers and acquisitions), it addresses market-concentration and market-power issues.

Finally, and more generally, licensing regulation provides an umbrella mechanism for monitoring and enforcing providers’ compliance with other regulatory obligations like those set forth below. Thus, the need for a licensing process depends to a considerable degree on the

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<sup>36</sup> By “regulation” or “regulatory requirements,” I mean governmental obligations or oversight designed to ameliorate market power and/or promote the widespread availability and affordability of an “essential service.” I do *not* mean governmental activities relating to taxation, land use and zoning, or access to rights-of-way or other public property. These governmental functions present a different, and much wider, array of governmental interests beyond broadband regulatory policy.

<sup>37</sup> Historically, license regulation also served the purpose of restricting entry, on the theory that the market was a natural monopoly and thus permitting competitive entry would undermine the economic ability and incentive of the monopoly provider to provide universal service. This rationale, however, has largely been abandoned in the telecommunications arena, both at the federal and state levels. *See, e.g.*, 47 U.S.C. § 253.

number and scope of the other regulatory requirements that are deemed desirable for broadband providers.

**b. Obligation to serve all comers on a nondiscriminatory basis**

The obligation to offer service to all comers on a nondiscriminatory basis is, of course, a core requirement of the common-carrier obligation.<sup>38</sup> Here, I am talking about a broadband provider's obligation to offer service nondiscriminatorily within its network's reach, not the obligation to extend its network to serve unserved areas. I will deal with the latter obligation separately in Part I(B)(2)(d) below under the rubric of "Universal Service."

In the context of telecommunications, and thus in the broadband world that will displace it, the obligation to serve in a nondiscriminatory manner means that unlike, for example, the case with a cable operator or a broadcaster, the provider must offer to carry the messages of all users to each user's requested destination without refusing to carry the messages of some and without blocking, censoring, or slowing down messages based on the identity of the sender or recipient or the content of the message. This principle, with some modification, is embodied in the FCC's *Internet Policy Statement*<sup>39</sup> and its more recently adopted *Open Internet Order*.<sup>40</sup> Although there is some quibbling at the margin, a consensus exists that establishing a no-blocking and no-censoring obligation on broadband providers is appropriate.<sup>41</sup> Imposing a nondiscrimination obligation on broadband providers, however, is a subject of considerable controversy.<sup>42</sup>

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<sup>38</sup> See, e.g., *Essentiality of Access*, *supra*, at 257. The obligation has qualifications, but for present purposes, I will focus on the obligation itself.

<sup>39</sup> *Appropriate Framework for Broadband Access to the Internet over Wireless Facilities*, Policy Statement, 20 FCC Rcd 14986 (2005).

<sup>40</sup> *Open Internet Order*, *supra*.

<sup>41</sup> *Id.*, 25 FCC Rcd at 17941-17944. In the broadband context, "blocking" is blocking out an Internet site or address entirely. "Censoring" is partial blocking—that is, the screening or editing out of some, but not all, of the material from an Internet site or address by the broadband provider.

<sup>42</sup> *Id.*, 25 FCC Rcd at 17944-17951. Compare, e.g., Susan P. Crawford, *Transporting Communications*, 89 B.U. L. Rev. 871, 874-75 (2009) ("*Transporting Telecommunications*"), with *Open Internet Order*, 25 FCC Rcd at 18084-18095 (Commissioner Baker, dissenting). In this context, "discrimination" encompasses charging different rates to different users that are content-based or otherwise unrelated to costs, or providing certain Internet content or applications preferred, or disadvantaged, treatment in terms of bit speed or local cached access.

**c. Reasonable, nondiscriminatory rates**

Historically, telecommunications carriers have been subject to rate regulation to ensure reasonable and nondiscriminatory rates. Originally, this obligation was fulfilled through the tariffing process and through rate-of-return, or cost-of-service, regulation—by the FCC for interstate services and by the state PUCs for intrastate services.

Over the past twenty to thirty years, however, the tariffing and rate-of-return mechanisms for ensuring reasonable and nondiscriminatory telecommunications service rates have largely disappeared, both at the federal and state levels.<sup>43</sup> The consistent justification for telecommunications-carrier-rate deregulation over this period has been the advent and growth of competition in the provision of telecommunication services, thereby eroding traditional carriers' market power. (That is also the stated justification for the easing over the past three decades of virtually all of the regulatory obligations set forth in this Part I(B)(2) with respect to telecommunications carriers.)

Despite the diminution in rate regulation, there persists, at least at the FCC (interstate) level, a telecommunications carrier's Title II statutory obligation to offer service at reasonable and nondiscriminatory rates, even though this obligation is no longer enforced through tariff filing or active rate-regulation requirements.<sup>44</sup> This is an example of a more generalized distinction to be drawn when considering the appropriate regulatory obligations of broadband providers: An obligation to provide service at reasonable and nondiscriminatory rates need not necessarily be implemented through the comprehensive additional trappings of tariff filing and formal, cost-of-service ratemaking proceedings; a more streamlined case-by-case complaint process employing burden-shifting presumptions represents an alternative that might preserve the obligation while reducing its costs.<sup>45</sup>

**d. Universal service**

The goal of making service available to everyone is a longstanding objective of utility regulation generally, including telecommunications regulation. It is typically premised on the "essential service" rationale. Many have likened widespread broadband deployment and its

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<sup>43</sup> The details, of course, vary, and there are a few exceptions. But for the purposes of analysis here, a useful and simplifying generalization is that, with only a few exceptions, telecommunications carriers today are largely exempt from tariff-filing requirements and rate-of-return regulation, and most are not subject to any form of active rate regulation at all.

<sup>44</sup> *See, e.g., Orloff v. FCC*, 352 F.3d at 419, 421 (wireless carriers still subject to statutory reasonable and nondiscriminatory rate obligations, but only on a case-by-case complaint basis and with a presumption of reasonableness).

<sup>45</sup> *See id.*



importance to the nation's future economic well-being and competitiveness to rural electrification and universal telephone service initiatives of nearly a century ago.<sup>46</sup>

The primary obstacle to achieving universal service is potential subscriber density. In particular, the problem is how to promote service deployment to areas and potential subscribers where the cost of deployment, relative to the provider's expected return on investment from additional subscriber revenues, is insufficient to entice the private sector to invest in deployment. Historically, telecommunications regulation has sought to overcome this obstacle in two somewhat different, but related, ways.<sup>47</sup>

The first method, now discarded, was to license a monopoly, coupled with a commitment by the licensed monopolist to build its network out to serve its entire licensed area and a corresponding commitment by the government to permit the provider to charge rates sufficient to compensate it for its prudent buildout costs. This approach was embodied in the Kingsbury Commitment between the original AT&T and the federal government to resolve an antitrust suit, and an analogous model was adopted by state PUCs to promote universal telephone service.<sup>48</sup> This approach definitely enjoyed some success, as the United States led the world in attaining all-but-universal telephone access and service.<sup>49</sup> The "monopoly universal service" model was built on the premise that, by shielding the monopolist from competition in lower-cost areas, the monopolist could subsidize buildout to higher-cost areas through higher but still-regulated rates in lower-cost areas.<sup>50</sup> But the breakup of AT&T in 1983, together with other technological and

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<sup>46</sup> See, e.g., *NBP* at 3.

<sup>47</sup> Another means of overcoming this obstacle, especially in the electric power and water sectors and, to a lesser extent, in the telecommunications field, is to promote municipally or publicly owned and/or cooperative utilities. Diane Moody, *Public Power Costs Less*, *Pub. Power* 70 (Jan. -Feb. 1995); Brian Q. Cannon, *Power Relations: Western Rural Electric Cooperatives and the New Deal*, 31 *W. Hist. Q.* 133 (2000). Reliance on publicly or cooperatively owned providers in higher-cost areas that the private sector has not adequately served has been pursued in the broadband arena as well. Bob Rowe, *Strategies to Promote Advanced Telecommunications Capabilities*, 52 *Fed. Comm. L.J.* 381, 390 (1999-2000). Because this paper focuses on regulation of broadband, however, I will leave the issue of municipal/cooperative provision of service for another day.

<sup>48</sup> See Richard Gable, *The Early Competitive Era in Telephone Communication, 1893-1920*, 34 *Law & Contemp. Probs.* 340, 352 (1969); Jim Chen, *The Legal Process and Political Economy of Telecommunications Reform*, 97 *Colum. L. Rev.* 835, 840-41 (1997).

<sup>49</sup> See, e.g., Michael H. Riordan, *Universal Residential Telephone Service* (Figure 1), in *Handbook of Telecommunications Economics* (Cave et al. eds., 2001).

<sup>50</sup> See Howard A. Shelanski, *Adjusting Regulation to Competition: Toward a New Model for U.S. Telecommunications Policy*, 24 *Yale J. on Reg.* 55, 59-60 (2007). The cross-subsidy ultimately ended up being based primarily on long-distance service subsidizing high-cost

(Footnote continued ...)

regulatory developments in the 1960s through the 1980s, led to competitive entry into the “subsidizing” services and the eventual breakdown of the “monopoly universal service” model.<sup>51</sup>

A second, new universal service model arose in its place, requiring all telecommunications service providers to contribute into a fund (the “Universal Service Fund” or “USF”), which is then distributed by the regulatory agency (the FCC for interstate, the state commission for intrastate) to providers and/or subscribers to defray costs in high-cost areas.<sup>52</sup> The USF approach to universal service has also suffered from its own problems—encouraging arbitrage and other strategic USF-fee-avoidance behavior, as well as inefficient “gold-plating” investment and profiteering by USF fund recipients.<sup>53</sup>

Many of the USF program’s shortcomings, however, could be ameliorated with appropriate revisions to the program. The FCC has proposed to do just that and, at the same time, to convert the USF into a fund designed to promote broadband (rather than telephone) universal service (the “Connect America Fund” or “CAF”).<sup>54</sup> As the telecommunications world transforms into a broadband world, the goal of universal service and the regulatory programs designed to promote it would make the transformation as well.

#### **e. Consumer protection and quality of service**

Due to a combination of market power and “essential service” concerns, telecommunications service providers have typically been subject to their own special consumer-protection requirements. By “consumer-protection requirements,” I am referring collectively to the following types of requirements: consumer billing and other disclosure requirements, consumer complaint response requirements, and quality-of-service (outage reporting, repair responsiveness, and service signal quality) requirements.

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(...footnote continued)

local service, but it also was based in part on local business service subsidizing local residential service.

<sup>51</sup> *Id.* at 59-63.

<sup>52</sup> *See* 47 U.S.C. § 254. There are many variations on the USF model: There are federal and state USF programs, and there are separate types of subprograms in the USF. *See, e.g., NBP* at 140-42. But that detail is unnecessary for our analysis here.

<sup>53</sup> *See, e.g.,* Jeffrey Rosen, *Universal Service Fund Reform: Expanding Broadband Internet Access in the United States* (Brookings Inst., Issues in Technology Innovation No. 8, Apr. 2011).

<sup>54</sup> *NBP* at 144-145; *Connect America Fund*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554 (2011).

Historically, states have taken the lead role in establishing and enforcing consumer-protection obligations for telecommunications service providers.<sup>55</sup> Other than adopting and implementing subscriber privacy and customer proprietary network information requirements required by the Communications Act,<sup>56</sup> the FCC has historically not been very active in the field of telecommunications-service consumer-protection requirements.

The growth of wireless and broadband has flipped this pattern to an extent. Although directed at more than just wireless providers, the FCC's pending *Truth-In-Billing* rulemaking was prompted in no small part by complaints about wireless providers' billing practices.<sup>57</sup> And if the FCC were to adopt such rules, it would be the FCC's first major foray into consumer protection.<sup>58</sup>

Similarly, the FCC's *Open Internet Order* adopted new "transparency" rules for broadband providers. Those rules are a classic form of consumer protection regulation, requiring broadband providers to disclose accurate information to potential and actual subscribers about the prices and capabilities of their services.<sup>59</sup> The need for FCC action on consumer protection in the broadband field arose, at least in part, from questions concerning whether state commissions have sufficient jurisdiction over broadband, under federal or state law, or both, to apply their traditional telecommunications consumer protection requirements to broadband.<sup>60</sup>

#### **f. Reporting requirements**

Traditionally, a significant part of telecommunications carrier regulation has been reporting requirements. Reporting requirements typically have included requirements that licensed carriers file periodic reports with regulating agencies on such matters as their number of

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<sup>55</sup> As with several other telecommunications regulation requirements, the perceived effects of increased competition in the telecommunications sector have resulted in some, but not all, states' relaxing their customer service requirements to varying degrees.

<sup>56</sup> 47 U.S.C §§ 222, 552.

<sup>57</sup> *Consumer Information and Disclosure Truth-in-Billing and Billing Format, IP-Enabled Services*, Notice of Inquiry, 24 FCC Rcd 11380, at 11399, ¶ 57 (2009) ("*Truth in Billing*").

<sup>58</sup> Prodded by an amendment to the Act in 1992, 47 U.S.C. § 552, the FCC did adopt cable-television customer-service rules, but the FCC disclaimed any responsibility for enforcing those rules, and the rules are not mandatory; rather, local or state cable franchising authorities may enforce them if they wish, *see* 47 C.F.R. § 76.309.

<sup>59</sup> *Open Internet Order*, 25 FCC Rcd at 17936-17941.

<sup>60</sup> *See* Part I(A)(3) above.

subscribers, revenues, costs, service outages, and quality of service.<sup>61</sup> Carriers are also typically required to provide additional information at the request of the regulator.

Reporting requirements are intended to enable the regulator to monitor service availability, industry sector growth, performance, and market structure. In essence, the data enable the regulator to monitor the effectiveness of—or alternatively, the continuing need for—regulatory oversight.

In recent years, however, many telecommunications carrier reporting requirements have been reduced or eliminated completely, both at the FCC and the state PUC level. The asserted justification has been that reporting requirements are no longer needed as the telecommunications market becomes more competitive. Indeed, it has been argued that reporting requirements are antithetical to a competitive market, as they place unnecessary costs and burdens on competitive service providers and would counterproductively result in the disclosure of competitively sensitive information.

One difficulty with this trend, however, is that the elimination of many telecommunications carrier reporting requirements has deprived both regulators and policymakers of reliable data on which they can objectively assess the accuracy of industry's claims that the marketplace has become effectively competitive. Instead, regulators and policymakers have been forced to rely exclusively on anecdotal and/or unverified data that are volunteered by industry. This problem has become especially acute in the case of broadband, where the generation of objective, reliable and comparable deployment, price, subscribership and speed data has proven difficult.<sup>62</sup>

#### **g. Corporate structure/structural separation**

Historically, structural separation requirements were imposed on the post-divestiture Regional Bell Operating Companies (“RBOCs”) by FCC rules and the AT&T Consent Decree, as well as on some other incumbent local exchange carriers (“ILECs”) by the FCC.<sup>63</sup> These

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<sup>61</sup> See, e.g., 47 C.F.R. §§ 43.01 *et seq.*

<sup>62</sup> See, e.g., *NBP* at 38, 44.

<sup>63</sup> *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 139 (D.D.C. 1982); *Computer II*, *supra*. See Lee L. Selwyn & Helen E. Golding, *Revisiting the Regulatory Status of Broadband Internet Access: A Policy Framework for Net Neutrality and an Open Competitive Internet*, 63 Fed. Comm. L.J. 91, 103-105 (2010-2011) (“*Broadband Internet Access*”). For similar reasons, electric utilities were once subject to structural separation requirements, Public Utility Holding Company Act of 1935, ch. 687, 49 Stat. 803 (formerly codified at 15 U.S.C. §§ 79–79z-6), but Congress subsequently repealed those requirements, Public Utility Holding Company Act of 2005, Pub. L. No. 109–58, §§ 1261–1277, 119 Stat. 594, 972–7, based on the view that increased competition due to utility industry restructuring was deemed sufficient to protect consumers, see S. Rept. No. 107-15, at 2 (2001).

requirements were considered necessary to deter ILECs from leveraging their local telephone market power into adjacent competitive markets, such as the markets for information services, long-distance services, and cable-television services.<sup>64</sup> The FCC subsequently removed most, if not all, of these structural separation requirements, again based on the argument that increased competition has rendered them unnecessary.<sup>65</sup>

As broadband displaces telecommunications service, however, corporate structure/structural separation issues are likely to arise again. As noted above, the broadband market exhibits several characteristics suggestive of market power.<sup>66</sup> Moreover, the broadband delivery market is very closely related to the markets for Internet-delivered content, applications, and other information services that are delivered over broadband networks. As a result, there is a competitive market concern that broadband network providers might—by favoring their own or affiliated content, applications, or information services, or the preferred content of entities unaffiliated with them, over the content of others—seek to leverage any market power they may have in the broadband market into these adjacent markets. In addition to these competitive market concerns, any such leveraging by broadband providers would pose another risk as well: It could distort the First Amendment marketplace of ideas by hindering the dissemination or reception of communications by broadband subscribers and Internet content sources whose viewpoints or positions the broadband provider disfavors.<sup>67</sup>

In the telecommunications world, these concerns have historically been abated by the common-carrier obligation. That obligation, however, has not been applied—so far at least—to the broadband world.

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The policy questions to be confronted are therefore clear. As broadband replaces telecommunications as the primary means by which we communicate with one another, what, if any, common-carrier-like regulatory requirements should be applied to broadband, and how should jurisdictional responsibility for those requirements be allocated between the federal and state governments?

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<sup>64</sup> *American Tel.*, 552 F. Supp. at 153. *See also Computer II*, *supra*.

<sup>65</sup> *See Transporting Telecommunications*, *supra*, at 896.

<sup>66</sup> *See* Part I(B)(1)(a) above.

<sup>67</sup> Although the FCC did not impose any structural separation requirements in its *Open Internet Order*, these twin concerns did animate several of the rules that the FCC did adopt in that proceeding. *Open Internet Order*, 25 FCC Rcd at 17922-17933, ¶¶ 30, 32.

## **II. Alternatives for Allocating Federal and State Broadband Regulatory Responsibilities**

For the reasons described in Part I, there is a legitimate government regulatory oversight role for broadband. There remains, however, the question of the appropriate allocation of that role between the federal government (the FCC) and the state governments (state PUCs). This paper does not provide a single “best” answer to that question. Rather, it will offer the most plausible alternative models for allocating broadband regulatory responsibilities between the FCC and the state PUCs and then assess the potential strengths and weaknesses of each model. Those six models are as follows: (1) the “interstate/intrastate divide” model; (2) the “reverse preemption” model; (3) the “delegation of enforcement” model; (4) the “joint board” model; (5) the “wireless” model; and (6) the “exclusive federal jurisdiction” model.

### **A. Apply the historical telecommunications interstate/intrastate division to broadband**

As noted in Part I(A)(2) above, the federal Communications Act, subject to only a few exceptions, draws a sharp telecommunications jurisdictional boundary, with regulation of interstate and foreign telecommunications being the province of the FCC and regulation of intrastate telecommunications being the province of the states.<sup>68</sup> As also noted above, however, due to both FCC interpretations of the Act and technological changes, this boundary has become increasingly blurred over the years. Primary contributing factors have been the growth of interstate relative to intrastate traffic, increased bundling of interstate and intrastate telecommunications services, and, of perhaps more relevance here, broadband’s displacement of telecommunications service and the uncertain status of state jurisdiction over broadband under current federal and state law.<sup>69</sup>

These obstacles notwithstanding, the Act’s current interstate/intrastate jurisdictional dividing line could, as a technological matter, be applied to broadband. If broadband providers were required to compile and report the data for verification, IP technology, especially when geolocation data are included, enables the capture of sufficient information to apply an “end-to-end” interstate/intrastate test to broadband traffic.<sup>70</sup> In addition, although data are sketchy due to the lack of current broadband reporting requirements, there is reason to believe

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<sup>68</sup> 47 U.S.C. § 152(b).

<sup>69</sup> See Part I(A)(3) *supra*.

<sup>70</sup> Cf. Initial Comments of Nat’l Ass’n of Regulatory Util. Comm’rs (“NARUC”), *Connect America Fund*, WC Docket 10-90, at 4-7 (filed Apr. 1, 2011) (pointing out flaws in any effort to preempt state PUC jurisdiction over intrastate service with a unitary FCC intercarrier compensation or USF scheme).

that, as has historically been the case with respect to telecommunications, a substantial, albeit diminishing, share of broadband traffic is intrastate.<sup>71</sup>

### *Pros*

The major advantage of applying the interstate/intrastate separation model to broadband is that it recognizes the reality that a substantial amount of communications still occurs locally, or intrastate.<sup>72</sup> People still tend to communicate most heavily with friends and relatives, many of whom live nearby, as well as local businesses with which they transact daily business. This is especially likely to be true with respect to e-mail and texting traffic. On the other hand, it is less likely to be true with respect to more bandwidth-intensive traffic, especially downloads. Those are much more likely to be interstate.<sup>73</sup> Put a little differently, while intrastate broadband communications may account for a significant share of broadband use in terms of the total number of messages, interstate communications are likely to dominate broadband usage in terms of network capacity consumed.

The other major advantages of applying the interstate/intrastate model to broadband are ones that you will find recurring in my discussion of other federal/state broadband jurisdictional models, although with somewhat different implications in each. They are as follows:

- *Permits state experimentation in broadband regulation—with respect to entry/exit, obligation to serve, nondiscrimination, universal service, consumer protection, reporting requirements and corporate structure—providing more diverse evidentiary input to fashion, or adjust, a federal-state broadband regulatory model.*

This is the “states as laboratories” argument in favor of federalism.<sup>74</sup> In the case of broadband, the argument carries some weight, as there is much disagreement about the

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<sup>71</sup> See, e.g., Paul Teske *et al.*, *Federal Preemption in State Regulation of Transportation and Telecommunications*, 23 *Publius: The Journal of Federalism* 71, 84 & Table 1 (1993) (percentage of intrastate telecommunications traffic declined from 98 percent in 1935 to 65 percent in 1992).

<sup>72</sup> See note 71 above.

<sup>73</sup> See, e.g., Sandvine, Executive Summary: *Global Internet Phenomena Report 2* (2011) (stating Netflix accounts for 29.7 percent of peak period downstream traffic), available at [http://www.sandvine.com/news/global\\_broadband\\_trends.asp](http://www.sandvine.com/news/global_broadband_trends.asp).

<sup>74</sup> See, e.g., Ruth Milkman, *Working Together: Suggestions for Federal and State Cooperation in Telecommunications*, 6 *Alb. L.J. Sci. & Tech.* 141, 145 (1996) (“*Working Together*”); Raymond Lawton & B. Burns, *Models of Cooperative Federalism for Telecommunications*, 6 *Alb. L.J. Sci. & Tech.* 71, 80-82 (1996).

appropriate scope of broadband regulation.<sup>75</sup> Experimentation by states at the intrastate service level—finding out what works and what doesn’t—could provide useful input in fashioning appropriate national broadband regulatory policy. Relying exclusively on federal oversight, in contrast, magnifies the adverse impact of error: If the FCC gets it wrong, the entire nation is locked into its error, and it has little or no data from state experimentation to determine how best to correct the error.

- *Provides greater flexibility to tailor regulation to unique local conditions and policy preferences.*

This, too, is a standard justification for permitting state regulation to coexist with federal regulation.<sup>76</sup> In the broadband context, it has some force. At least from the end users’ perspective, broadband service—especially landline broadband service—is largely a local service. To be sure, there are interstate aspects of the service (it enables the subscriber to connect with, obtain information from, and send information to the world over the Internet). But that is equally true of local exchange telephone service, which has traditionally been regulated at the state level. What a broadband service provider offers its subscribers is a local on-ramp to and an off-ramp from the Internet, and the subscriber may only choose among local on-ramp/off-ramp broadband service providers who make service available in the area where he or she lives or works.

In this sense, broadband service is analogous to local phone service: The subscriber is purchasing local information transport to and from the nearest Internet point-of-presence.<sup>77</sup> The rates, terms, and conditions of such end-user local on- and off-ramp transport services have historically been regulated by state PUCs. What end-use subscribers actually purchase is on-ramp and off-ramp transport service to and from the Internet. “Long-haul” broadband transmission is performed by the Internet backbone, an assembly of backbone networks that may be, and often are, owned by different entities than end-use local broadband providers.<sup>78</sup>

Moreover, much like local phone service, the cost of deploying broadband networks varies considerably based on local conditions, such as potential subscriber density, topography,

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<sup>75</sup> Viewpoints range from applying virtually complete common-carrier regulation to complete deregulation of broadband. *See, e.g.,* sources cited in note 42 *supra*.

<sup>76</sup> *See, e.g.,* William Lehr & Thomas Keissling, *Telecommunications Regulation in the United States and Europe: The Case for Centralized Authority* at 5, in *Competition, Regulation and Convergence: Trends in Telecommunications Policy Research* (S.E. Gibert & I. Vogelsang eds. 1999) (“Lehr & Keissling”).

<sup>77</sup> *See Broadband Internet Access, supra*, at 116-118.

<sup>78</sup> *See, e.g.,* Rudolph van der Berg, *How the ‘Net Works: An Introduction to Peering and Transit*, *ars technica* (Sept. 2008), available at <http://arstechnica.com/obl/content/2008/09/peering-and-transit.ars> (last visited Aug. 22, 2011).



local labor conditions, and demographic factors affecting demand for service. What constitute reasonable rates and terms for broadband service, as well as its availability, is therefore likely to vary widely across the nation.

Under the interstate/intrastate model, the Internet backbone, analogous to the “wholesale,” or long-distance, part of the Internet, would be a logical candidate for FCC regulation as an interstate transmission service. But the Internet backbone is completely unregulated, and the relationships among Internet backbone providers, and between them and retail local on-ramp/off-ramp broadband service providers, are set forth in nonpublic, confidential agreements among those parties.<sup>79</sup> This is another result of the FCC’s “information service” classification of broadband, and of its hands-off approach to the Internet.

While these considerations might suggest that extending the Communications Act’s interstate/intrastate divide to broadband makes sense, there are factors pointing the other way.

### *Cons*

Much like the “pros,” many of the “cons” of extending the interstate/intrastate separation to broadband will echo through the other federal/state regulatory allocation models that I discuss below in Parts II(B)-(F). But these “cons” resonate most strongly in the case of the interstate/intrastate separation model. That model, more than any of the other models, would largely wall the FCC off jurisdictionally from any significant role in end-user broadband-service regulation.

- *Strict interstate/intrastate jurisdictional separation of broadband overlooks the “other side” of the broadband ecosystem: the interstate and international markets in broadband applications and content, and the “broadcast”-like delivery of applications and content to subscribers.*

Perhaps the greatest obstacle to applying the Communications Act’s strict interstate/intrastate jurisdictional divide to broadband is the inherent interstate, indeed international, scope of broadband service in terms of what it provides not only to end users but to Internet application and content providers. Moreover, unlike historic voice service, whose local and long-distance services were originally sold as separate services, broadband service offerings and prices are not segregated by their geographic reach: A broadband subscriber pays one price for the ability to reach all Internet addresses worldwide.<sup>80</sup> Thus, a portion of the cost of the wholesale (and inarguably interstate) Internet backbone is built into the retail price of broadband service that end-use subscribers pay. In addition, because the Internet is not circuit-switched, the bits that make up a single broadband-delivered communication—say, an e-mail—may not even traverse the same geographic route to reach the same destination.

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<sup>79</sup> *See id.*

<sup>80</sup> Voice telecommunications services have been moving in the same direction, but broadband has been this way since its inception.

As a result, any effort to erect an impermeable jurisdictional wall between the interstate and intrastate components of broadband would fail to account for the interstate and international Internet applications and content (as opposed to the subscriber) side of the broadband marketplace. It also would likely be frustrated by the constantly changing jurisdictional character of each broadband communication by each subscriber and thus tend to be arbitrary, or at least transitory. Attempting artificially to segregate such an integrated service into distinct intrastate and interstate components would inevitably lead to constant jurisdictional conflicts. And it also could lead to inconsistent, or at least significantly different, types of broadband regulation obligations in each of the fifty states.

- *Strict interstate/intrastate jurisdictional separation of broadband could increase entry costs and/or reduce broadband investment.*

If the regulatory obligations of broadband providers (especially entry/exit, common-carrier-type, rate, or corporate structure regulation) varied significantly from state to state, that could deter entry and/or investment in the broadband market. It would certainly increase broadband and would-be broadband providers' costs, as they would have to meet regulatory licensing requirements in multiple state jurisdictions—something they would not have to do if broadband service were viewed as inherently interstate and only the FCC had regulatory authority over it. Moreover, the extent to which appreciably different, or inconsistent, regulatory obligations were imposed on broadband providers from state to state, that might also deter further investment by incumbent broadband providers, especially in those states with more costly regulatory requirements. And that, in turn, might frustrate achievement of the federal goal of ubiquitous high-speed broadband deployment.

What is far less clear is whether, but for such regulatory entry costs, potential new entrants in the wings would enter the currently less-than-competitive broadband market and/or incumbent providers would invest more in their networks. It may be, for instance, that the current, rather concentrated structure of most local end-user broadband markets is the result of various network economies that lower regulatory costs simply cannot offset or overcome. If that is true, simply reducing regulatory costs would not promote more entry or competition but merely lead to unchecked exercise of market power by broadband service providers. In that case, higher regulatory costs would be a necessary price to pay to ameliorate the adverse effects of what is an inherently non-competitive market.<sup>81</sup>

- *Extension of the strict interstate/intrastate jurisdictional separation to broadband would require more radical change from the status quo.*

As noted above, the FCC has classified broadband as an “inherently interstate information service.”<sup>82</sup> Moreover, some states have already enacted legislation prohibiting state PUC regulation of broadband provider entry, rates, terms, or conditions of service.<sup>83</sup>

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<sup>81</sup> See *Broadband Internet Access*, *supra*, at 116-118.

<sup>82</sup> See text at notes 22-23 above.

This means that resurrecting the Act’s interstate/intrastate divide in the context of broadband would require a substantial change, if not outright reversal, of current law, at both the federal and state levels. That is not to say that such a change would be unwise or unachievable. But it does mean that the legal framework concrete in this area is not fresh; it is already hardening. And that would have to influence any realistic assessment of broadband regulatory options.

**B. Apply the Pole Attachment Act’s “reverse preemption” model to broadband**

The pole-attachment provision of the Communications Act, 28 U.S.C. § 224, represents a unique allocation of regulatory responsibilities between the FCC and the state PUCs. Under Section 224, the FCC is empowered to regulate the rates, terms, and conditions that utility pole owners may impose on cable- and telecommunications-service providers that seek to attach their facilities to utility poles and in utility conduits. 47 U.S.C. § 224(b). Section 224 withdraws the FCC’s regulatory authority over attachments and gives it back to the state, however, where a state certifies that (1) it regulates the rates, terms, and conditions of attachments in its jurisdiction; (2) the state considers the interests of cable and telecommunications service subscribers as well as the interests of electric and telephone utilities in regulating attachments; (3) the state has issued attachment rules and made them effective; and (4) those rules require the state to act on pole-attachment complaints within a specific time period. 47 U.S.C. § 224(c).

This approach is often referred to as “reverse preemption”—that is, the FCC regulates unless or until the state certifies that it regulates in a manner generally consistent with federal objectives. Once the state is certified, however, the FCC loses its jurisdiction over the matter in that state (hence the term “reverse preemption”).

The Act’s pole attachment provision, enacted in 1978 (but since amended), was the product of a legislative compromise between the cable industry and the state PUCs.<sup>84</sup> The allocation of authority between the FCC and the state PUCs in Section 224 reflects a balancing of, on the one hand, (a) the need to establish a federal policy promoting communications system deployment, and on the other hand, (b) the recognition that state PUCs are closer to pole attachment issues, more familiar with pole costs, and, unlike the FCC, already have a regulatory nexus over pole-owning electric and local telephone utilities.<sup>85</sup> Very few states regulated pole

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(...footnote continued)

<sup>83</sup> See, e.g., Ky. Rev. Stat. § 278.5462; Nev. Rev. Stat. § 704.684; Okla. Stat. tit. 17, § 139.110; S.B. 980, 82nd Leg. (Tex. 2011).

<sup>84</sup> Joel Rosenbloom, *Cable Television Amendments, in The Communications Act: A Legislative History of the Major Amendments, 1934-1996* at 239, 213-382 (Max D. Paglin et al. eds., 1999).

<sup>85</sup> *Id.* at 238-39 (citing *California Water & Tele. Co.*, 64 FCC 2d 753 (1977)).

attachments before Section 224 was enacted,<sup>86</sup> and thus one purpose it served was to prod more states to do so. It has had that effect. To date, the FCC has accepted the certifications of twenty states and the District of Columbia.<sup>87</sup>

There are a few parallels between the circumstances motivating Section 224's enactment and the current state of broadband regulation. The scope of the FCC's authority over broadband, as was the case with pole attachments before 1978, is unsettled.<sup>88</sup> States are closer than the FCC to broadband deployment costs and related issues because they are closer to actual physical broadband network deployment in their jurisdictions and thus what areas are served and what areas are not, and are also more familiar with individual local utility and broadband provider local construction costs. State PUCs are also closer than the FCC, both in physical proximity and in terms of complaint response capability, to end-user broadband subscribers.

There are, however, significant differences between pole-attachment regulation and broadband-service regulation. Unlike the case with pole attachments, state authority over broadband is even more legally suspect than that of the FCC, the inverse of the pre-1978 situation with respect to pole attachment regulation. After *Computer II*'s FCC preemption of most state PUC regulation of "information services," state commission jurisdiction over "information services" is questionable at best, and in addition, some states have recently enacted laws denying their state commissions jurisdiction over broadband.<sup>89</sup>

Moreover, in the case of broadband, there is arguably no parallel to state PUCs' preexisting "nexus"—familiarity and expertise—with pole-owning utility companies. But in the case of landline broadband providers, this distinction may be more apparent than real. The predominant landline broadband providers in any local area—the local telephone company and the local cable operator—have historically been regulated primarily at the state or local level. State PUCs have regulated the local telephone company, and local governments (or, in some cases, the states) have regulated the local cable operator.<sup>90</sup> In that sense, a preexisting state regulatory "nexus" does exist with respect to the predominant landline broadband service providers.

To qualify as one of my alternative broadband regulatory models, I would modify the pole-attachment "reverse preemption" model a bit: The FCC would have the ability to seek public comment on, and to assess independently whether, the state's broadband regulation was

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<sup>86</sup> *Id.*

<sup>87</sup> *States That Have Certified That They Regulate Pole Attachments*, Public Notice, 25 FCC Rcd 5541 (2010).

<sup>88</sup> *See, e.g., Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

<sup>89</sup> *See* Part I(A)(3) and note 83 above.

<sup>90</sup> *See* Parts I(A)(1) & (2) above.

consistent with the Communications Act and FCC broadband rules and policies before the FCC would certify the state. In addition, complaints could be filed with the FCC challenging a state's action as inconsistent with the Act or FCC rules. With that modification, I assess the "reverse preemption" model in the broadband context.

### *Pros*

The advantages of the "reverse preemption" model are similar to those of the interstate/intrastate jurisdiction model: It recognizes that, from the end user's perspective, broadband is predominantly a local service. That is, the subscriber's only choices are among locally available broadband service providers. The subscriber is limited to those local options in selecting a provider and must look to the local broadband-service providers to solve any service problems. This is true regardless of whether the broadband provider's overall corporate-service footprint is national, regional, or local. In addition, the "reverse preemption" model permits greater state experimentation to serve as a test bed for different types of broadband regulation. And it also enables—in fact, requires, if state-level requirements are prescriptive—greater tailoring of broadband regulation to respond to local subscriber preferences and needs and to unique local market conditions.

The major difference between the "reverse preemption" model and the interstate/intrastate separation model is that under the "reverse preemption" model, the states' range of regulatory flexibility is narrower, as state regulation must fall within federal parameters defined by the FCC. Under the interstate/intrastate separation model, in contrast, states have exclusive jurisdiction over intrastate service, with no FCC oversight or control.

There is another advantage to the "reverse preemption" model—one that is shared (to varying degrees) by the interstate/intrastate separation model and the "delegation of enforcement" model described in Part II(C) below: It takes advantage of the fact that, at least in theory, the state PUCs collectively have far more resources, and resources closer to the ground, than the FCC to monitor and enforce broadband providers' regulatory obligations.<sup>91</sup> Unlike state PUCs, the FCC has little or no experience in regulating the provision of end-user subscriber services, and it lacks the resources (both in personnel and budget) and geographical distribution to do so effectively for the millions of broadband subscribers nationwide.

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<sup>91</sup> This potential advantage has been noted by several commentators in the case of telecommunications regulation. *See, e.g., Working Together, supra* at 143-44; Lehr & Kiessling, *supra* at 5-6. But this advantage may be more theoretical than actual, at least as matters currently stand. Collectively, state commissions probably do have more personnel than the FCC, and those personnel are certainly "closer to the ground" than the FCC. Whether the state commissions collectively possess more personnel and resources with expertise in telecommunications and broadband, however, is less clear. But state commissions collectively could devote more resources to broadband than the FCC, and perhaps they would if a new regulatory model assigned them more responsibility over broadband.

The “reverse preemption” model, unlike the interstate/intrastate separation model, also recognizes the need for some consistency across the states in broadband regulation. It does so through the FCC certification and oversight process, which I have modified to require FCC review and approval of state certification applications and to permit parties to file complaints with the FCC against state PUCs for acting inconsistently with their FCC certifications. The “reverse preemption” model therefore ameliorates many of the disadvantages of the interstate/intrastate separation model.

### *Cons*

The “reverse preemption” model shares many of the same disadvantages as the interstate/intrastate model (potential increased entry and other costs and consequent potential deterrent to investment), although to a lesser degree due to the increased consistency promoted by the FCC certification process. But because broadband jurisdiction would revert to the states on FCC certification, the “reverse preemption” still carries the inherent risk of significant inconsistency in state-to-state broadband regulations. Some of the inconsistency would arise simply as a result of having multiple decisional authorities (state PUCs) as opposed to a single authority (the FCC). But because the “reverse preemption” model would also give states greater flexibility to fashion their own regulations within the generally defined parameters of their FCC certifications, it also would result in greater diversity in state-to-state regulation.

### **C. The “delegation of enforcement authority” model**

Another model is what I will refer to as the “delegation of enforcement authority” model. Under this model, the FCC makes all of the rules concerning broadband but delegates authority to enforce some or all of those rules to the state PUCs. The Communications Act already contains examples of this model. One is the Act’s mechanism for basic-cable service-rate regulation. The Act requires the FCC to establish rules for the regulation of rates for basic cable television service but requires that local franchising authorities apply and enforce the FCC’s rules by giving them, rather than the FCC, authority to act on basic rate filing by cable operators (subject to appeal to the FCC).<sup>92</sup>

Another example of the “delegation of authority” model in the Act can be found in 47 U.S.C. §§ 251-52 governing carrier interconnection obligations. Section 251(d)(3) permits states to adopt interconnection obligations for local exchange carriers (“LECs”) that are consistent with the FCC’s interconnection rules and do not “substantially prevent” implementation of the FCC’s interconnection rules. Section 252, in turn, requires carrier interconnection agreements, as well as arbitration requests where agreement cannot be reached, to be submitted to the state PUC, which then must resolve the matter in a manner consistent with the FCC’s interconnection requirements.

In some senses, the “delegation of authority” model is a stricter version of the “reverse preemption” model. It is “more strict” in the sense that states have less latitude under the “delegation” model than the “reverse preemption” model. As I have defined the “delegation”

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<sup>92</sup> 47 U.S.C. § 543(a)-(b); 47 C.F.R. §§ 76.901 *et seq.*

model, the FCC is the sole establisher of the rules. State PUCs' responsibility is solely to apply the FCC rules to specific factual situations. To be sure, applying rules to facts would still leave some policymaking room for state PUCs, but considerably less than under the "reverse preemption" model, where once they are certified, jurisdiction lies with the state PUCs, not the FCC; and state PUCs would be free to develop their own local policies as long as they are not inconsistent with more general FCC policies rather than specific FCC rules.

### *Pros*

The primary advantages of the "delegation" model are that it seeks to marry (1) the perceived need for a consistent set of nationwide rules governing broadband (*see* Part II(A)(2) above) with (2) the collective resource advantages of the state PUCs and their greater familiarity with local facts on the ground (*see* Part II(B)(1) above). For this reason this model has also been proposed as the way to handle consumer protection and billing issues relating to wireless and broadband services.<sup>93</sup> The "delegation" model is therefore designed to promote a uniform nationwide regulatory framework for broadband while at the same time recognizing the need to have sufficient resources to enforce that framework and sufficient flexibility to account for local factual variations and conditions.

### *Cons*

The "delegation" model largely, if not completely, eliminates the benefits of having the states serve as "experimental laboratories" for alternative regulatory models. *See* Part II(A)(1) *supra*. The reason is that, under the "delegation" model, the detailed regulatory framework is established exclusively by the FCC; state PUCs merely enforce the FCC's rules. To be sure, states may be able to develop their own policies around the edges of, and gaps in, the FCC's rules, but the space within which they could do so would be far narrower than under the "reverse preemption" model.

The "delegation" model also creates a fundamental tension between the FCC and state PUCs: State PUCs would be required to enforce FCC broadband rules over which they have had little say and with which they may disagree (because the state may feel that the FCC standards are either too weak or too strict). In such circumstances, the state PUC is placed in the awkward position of expending state resources to enforce FCC standards with which it disagrees—an "unfunded mandate" of sorts.

In addition, the "delegation" model suffers from a political accountability problem: It would potentially expose state PUCs to political blame from state subscribers for any perceived inadequacies of the FCC's standards because the state PUC, not the FCC, would be seen by state subscribers as the day-to-day enforcer of those standards. An example of this phenomenon is the basic-cable-service-rate-regulation regime under 47 U.S.C. § 543, which requires the FCC to establish detailed cable-rate rules and formulas, which localities (to whom Section 543 delegates initial rate-review authority) must follow in approving or disapproving cable operators' requests

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<sup>93</sup> *See, e.g.*, Cell Phone Consumer Empowerment Act of 2007, S.2033, 110<sup>th</sup> Cong., § 11 (2007).

to increase basic-service cable rates. The FCC’s cable rate rules have often resulted in a maximum permitted rate that is above even what the regulated cable operator is willing to charge. Yet the locality is put in the awkward position of having either to approve what its residents feel are excessive rates (and suffer the adverse political consequences) or simply decline to regulate (which many localities have done).

On the other hand, some may argue that the “delegation” model suffers from a completely different kind of disadvantage: Because it would give state PUCs the authority to enforce, and thus interpret, the FCC rules in particular cases, it could lead to inconsistent application of the FCC’s standards, thereby frustrating the perceived advantage of having uniform nationwide standards. This criticism would depend heavily on how detailed the FCC’s national broadband standards are, how much leeway state PUCs would be given in applying them, and whether state PUC decisions would be appealable to the FCC (which would promote greater consistency) or the courts (which probably would provide less consistency than a unitary initial review body like the FCC). But regardless of the details, it is likely that the broadband industry would argue that the level of decision-making authority given to the state PUCs under any sort of “delegation” model is antithetical to establishing a uniform, nationwide broadband regulatory policy. This argument may have some merit at a theoretical level, but pursued to its logical end, it is really nothing more than an argument for exclusive federal jurisdiction, which Part II(F) below addresses. Moreover, most proponents of the “uniform nationwide broadband policy” justification for exclusively federal oversight prefer no broadband regulation at all, and removing all state authority is simply seen as an essential step in accomplishing that goal.<sup>94</sup>

#### **D. The “joint board” model**

Yet another alternative is what I will refer to as the “joint board” model. The Communications Act contains a couple of joint board provisions. Section 410 empowers the FCC to establish a joint board composed of FCC and state PUC members and to refer certain matters—in particular, those “regarding jurisdictional separation of common-carrier property and expenses between interstate and intrastate operations”—to the joint board for recommendation. Section 254, added in 1996, specifically requires the FCC to establish a federal-state joint board and refer universal service matters to it, again for recommendations only.

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<sup>94</sup> There is historical precedent for this proposition. One of the goals of the FCC’s original classification of “information services” was to preempt state regulation of those services, while the FCC also deregulated such services at the federal level. *See* text at notes 22-24 above. *Accord* Daniel Griswold & Solveig Singleton, *Multiple Levels of Policy: International, National, State—Or None of the Above?* at 2 (Cato Inst., 1999) (“Because state regulation was preempted but not replaced with the federal restrictions, the federal government became something of a hero of deregulation”), *available at* [http://www.cato.org/pub\\_display.php?pub\\_id=5090+full=1](http://www.cato.org/pub_display.php?pub_id=5090+full=1).



The distinguishing features of the “joint board” model are (1) the creation of a joint board composed of both FCC and state PUC members, and (2) that the board makes recommendations to the FCC, but the FCC makes the ultimate decision.

At first blush, one might think the joint board model is little different than an exclusive FCC jurisdiction model (*see* Part II(E) below), because the FCC makes the ultimate decisions in the joint board model. While true as a technical legal matter, that has not historically been the effect of the joint board model. Although the FCC has not always followed its joint boards’ recommendations, those recommendations, which themselves are the result of the joint board’s own comment process, have typically influenced the FCC far more than the rulemaking comments of any party, and the FCC has only rarely departed significantly from them.

#### *Pros*

The joint board model provides a formal, institutionalized method for states to confer with the FCC and to influence federal broadband policy. At the same time, by giving the FCC the ultimate authority, the model fulfills the objective of those who believe that only a single nationwide broadband regulatory framework is appropriate. By building on the Act’s existing joint board arrangement, the model also has the advantage of being immediately implementable under current law.

#### *Cons*

The joint board model all but eliminates the potential advantages of state experimentation and state flexibility to respond to local conditions. The reason is that, while individual state PUC members of the joint board may suggest proposals based on their state experiences, the result of board deliberations must be a single model applicable to all states.

Moreover, because state PUC representation on the joint board is necessarily limited, it is not likely to reflect the diverse views and concerns of all state PUCs. State PUC members of joint boards generally try to consider the concerns of all states, but the board’s ultimate recommendations inevitably will not, and inherently cannot, reflect the views and preferences of all states.

### **E. The wireless model**

Up to now, this paper has dealt primarily with regulatory alternatives for landline broadband service. The reason is that, as noted in Part I(A)(2) *supra*, state PUCs have historically had no regulatory authority over most radio services, and only slightly more regulatory authority over wireless telecommunications service providers. This omission, however, has important policy implications, because wireless broadband is the fastest-growing

form of broadband service and is ultimately likely to become the most widely used form of broadband by end-use subscribers.<sup>95</sup>

Section 332(c)(3) of the Communications Act,<sup>96</sup> added in 1993, sets forth the allocation of federal and state authority over wireless telecommunications (as opposed to broadband) services, and it is a one-sided allocation. States are prohibited from regulating “entry of” wireless service providers. They are also prohibited from regulating wireless service rates unless the state can successfully petition the FCC with a demonstration that (1) absent rate regulation, wireless market conditions in the state fail to protect subscribers from unjust or unreasonably discriminatory rates, or (2) that wireless market conditions fail to protect subscribers and wireless service is a “replacement” for local telephone service in “a substantial portion” of the local landline service in the state.<sup>97</sup> This standard has, however, proved insurmountable to state PUCs. So far, the FCC has denied virtually every state petition to regulate wireless rates.<sup>98</sup>

Section 332(c)(3) does, however, specifically preserve state authority to regulate “other [*i.e.*, non-entry and non-rate] terms and conditions” of wireless service. Also, where wireless service is a substitute for local telephone service in a substantial portion of the state, Section 332(c)(3) preserves state authority to require wireless providers to contribute to state USF funds.

Because of the unique history of wireless facilities (licensed exclusively at the federal level), the Section 332(c)(3) model is the most that could reasonably be expected of any wireless broadband regulatory model in terms of its jurisdictional allocation between the FCC and the state PUCs.<sup>99</sup> It has been suggested, however, that Section 332(c)(3)’s “wireless model” would also be a good fit for landline broadband service. That is, state PUCs would be prohibited from regulating entry (thus, they would not be able to license broadband providers), nor could they regulate broadband rates. But they could regulate “other terms of service”—typically, consumer protection, disclosure, and billing practices—and could require broadband providers to contribute to state USF programs.

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<sup>95</sup> See, e.g., FCC, High-Speed Services for Internet Access: Status as of December 31, 2008 (Feb. 2010), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-296239A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296239A1.pdf).

<sup>96</sup> 47 U.S.C. § 332(c)(3).

<sup>97</sup> 47 U.S.C. § 332(c)(3)(A)(i) & (ii).

<sup>98</sup> See *Termination of Stale or Moot Proceedings*, Order, 17 FCC Rcd at 1199, 1206 at Appendix, p. 7 (2002).

<sup>99</sup> Keep in mind that, as of right now, even Section 332(c)(3) does not apply to wireless broadband because it is not a “telecommunications service.”

### *Pros*

The “wireless model” would permit states to carry out two key functions—regulation of providers’ relationship with end users (consumer-protection, disclosure, and billing practices) and contributions to state USF programs—for which our analysis of the previous models has consistently indicated that states are better suited than the FCC. *See* Parts II(A)-(D) *supra*. Moreover, in light of the way that the FCC and the courts have construed Section 332(c)(3), states would likely be given considerable leeway in these areas.<sup>100</sup> Thus, the “wireless model” offers the potential of achieving the advantages of state experimentation and of exploiting superior state collective monitoring and enforcement resources.

By placing licensing/entry regulation exclusively at the federal level, the “wireless model” also would lower entry costs and alleviate the risk of inconsistent federal and state decisions regarding broadband provider licensing, rates and discriminatory practices, a recurrent concern with some of the other models. *See* Parts II(A)-(D) above.

### *Cons*

Under the wireless model, state authority would be strictly confined to two areas: broadband providers’ end-use-subscribers practices, and providers’ monetary contributions to the state’s USF program. Other areas—such as deployment and availability of services, rates, and market structure—would be left to the FCC. National uniformity in these areas would be achieved at the expense of the loss of the benefits of state experimentation and reliance of the states’ collective resources in those areas. In addition, without the ultimate enforcement tool of licensing and thus the threat of revocation, the wireless model would weaken the states’ ability to police effectively even the two areas where that model does give them authority.

## **F. The “exclusive federal jurisdiction” model**

The final model—what I will refer to as the “exclusive federal jurisdiction” model—would assign to the federal government exclusive jurisdiction over all broadband regulation. That is the model that has existed for some time with respect to broadcasting and other wireless services: no state regulation other than generally applicable laws, such as taxes, torts, and the like. Absent a change in course, this is also the model toward which the FCC and the states are moving for broadband: The FCC has categorized broadband as an inherently interstate information service, and some states have enacted laws prohibiting state PUC jurisdiction over broadband.<sup>101</sup>

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<sup>100</sup> *See, e.g., CTIA v. FCC*, 168 F.2d 1332 (D.C. Cir. 1999).

<sup>101</sup> *See* notes 22-23 and 83 above.

### *Pros*

The “exclusive federal jurisdiction” model fulfills the goal of regulatory consistency better than any other model. To the extent that absolute nationwide uniformity is viewed as essential to promoting broadband investment, this model best serves that interest.

The “exclusive federal jurisdiction” model is also the model preferred by those (including some at the state level<sup>102</sup>) who believe that any government regulation of broadband (beyond generally applicable laws) will adversely affect broadband investment and growth, and that deregulation of broadband, coupled only with antitrust enforcement, is the best means of achieving the nation’s broadband deployment and adoption goals. The surest means of achieving nationwide deregulation would, of course, be federal preemption.

The “exclusive jurisdiction” model would likewise be attractive to those who believe that, while some broadband regulation is necessary, it should be uniform nationwide. This position has theoretical merit. The question, however, is whether in practice it would differ greatly from a complete deregulation model, because it is doubtful that a single federal agency can effectively monitor and enforce regulatory requirements applicable to retail broadband service nationwide, especially at the end-user, consumer level.<sup>103</sup>

### *Cons*

The disadvantages of the “exclusive federal jurisdiction” model are the mirror image of the advantages of the interstate/intrastate separation model and the “reverse preemption” models set forth in Parts II(A) and (B) above. The “exclusive federal jurisdiction” model overlooks the fact that, from an end-user subscriber’s perspective, broadband service is a local service—a choice among providers of local on-ramp/off-ramp transport to the Internet. It also ignores the fact that broadband is the successor to telecommunications service, where the importance of local flexibility and familiarity with local service and market conditions has always been considered critical. There is no reason to believe that broadband will be different in this respect.

In addition, the “exclusive federal jurisdiction” model would foreclose any benefits of state experimentation with different regulatory models. If federal regulators get it wrong, there will be no empirically supportable alternative models to which federal policymakers could turn. The “exclusive jurisdiction” model also would deprive the FCC of the superior collective resources of the states to apply and enforce any regulatory requirements.

Fundamentally, the “exclusive federal jurisdiction” model rests on the premise that any government regulation of broadband beyond generally applicable laws such as antitrust would adversely affect broadband deployment and adoption. For the reasons stated above,<sup>104</sup> that is a

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<sup>102</sup> See note 83 above.

<sup>103</sup> See text at note 91 above.

<sup>104</sup> See Part(I)(B)(1) above.

questionable premise, given that broadband is displacing telecommunications, and deregulation would leave us for the first time in history with information transport providers having no legal obligation at all to carry everyone’s messages on a nondiscriminatory basis and, perhaps, even having a First Amendment right not to do so. That circumstance, especially when coupled with the rather concentrated market structure of the broadband provider industry,<sup>105</sup> would be a hazardous position to be in, not merely from a market-power-exploitation viewpoint but also from a larger societal free speech and democracy point of view.<sup>106</sup>

### **G. Mixing and matching models**

The models discussed above are not necessarily mutually exclusive. To the contrary, the models may coexist with one other—just as they currently do with respect to telecommunications services under Title II of the Communications Act. Thus, most, if not all, of the models can be “mixed and matched” with respect to different regulatory obligations. To offer but one example, entry and corporate structure requirements, as well as perhaps USF, could be the province of the FCC with joint board input; nondiscrimination and service obligations could be subject to the delegation model; and customer service could be subject to “reverse preemption” or even exclusive state regulation.

## **III. An Assessment of Broadband Regulatory Models and Regulatory Requirements**

I now assess application of the six alternative regulatory models set forth in Part II with respect to potential regulatory requirements set forth in Part I(B)(2) above. Those seven requirements—licensing, obligation to serve, nondiscriminatory rates, universal service, consumer protection, reporting requirements, and corporate structure—are, of course, interrelated. Licensing/entry-exit requirements, for instance, are the typical means for defining what providers are subject to any service-obligation, nondiscrimination, universal-service, reporting, quality-of-service, rate-regulation, and/or corporate-structure requirements that might be applied to broadband.<sup>107</sup> As a result, application of the alternative regulatory models with respect to each will overlap to a significant degree.

The results of my assessment are set forth in Table 1. For the most part, the results in the table flow from the logical consequences of each model’s assignment of responsibilities to the FCC and to the state PUCs, respectively. Thus, under the interstate/intrastate separation model,

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<sup>105</sup> See Part I(B)(1)(a) above.

<sup>106</sup> See generally, Barbara A. Cherry, *How Elevation of Corporate Free Speech Rights Affects Legality of Network Neutrality*, 63 Fed. Com. L.J. 591 (May 2011).

<sup>107</sup> Licensing/entry-exit requirements also can be a means for applying consumer protection requirements, although that link tends to be weaker. Consumer protection requirements can be, and often are, applied to businesses not subject to more formal, utility-type regulation.

the FCC and state PUCs share responsibility over all regulatory requirements, and under the exclusive federal jurisdiction, the FCC has responsibility over all regulatory requirements.

As noted in Part II(G) *supra*, however, the regulatory models are not mutually exclusive. They can be “mixed and matched” with respect to different kinds of regulatory requirements. I have attempted to perform a little of this “mixing and matching” in Table 1.

<b>Table I. Regulatory Models</b>						
<b>Regulation Requirements</b>	<b>Interstate/ Intrastate Divide Model</b>	<b>Reverse Preemption Model</b>	<b>FCC Delegation Model</b>	<b>Joint Board Model</b>	<b>Wireless Model</b>	<b>Exclusive Federal Model</b>
Licensing	FCC enforces interstate; state PUC enforces intrastate	FCC, unless state is certified by FCC	FCC makes rules; states apply & enforce	FCC	FCC	FCC
Obligation to serve	FCC enforces interstate; state PUC enforces intrastate	FCC, unless state is certified by FCC	FCC makes rules; states apply & enforce	FCC	FCC	FCC
Reasonable, Non-discriminatory Rates	FCC enforces interstate; state PUC enforces intrastate	FCC, unless state is certified by FCC	FCC makes rules; states apply & enforce	FCC	FCC	FCC
Universal Service	FCC enforces interstate; state PUC enforces intrastate	FCC, unless state is certified by FCC	FCC, but states can have own state USF programs	FCC, but states can have own state USF programs	FCC, but states can have own state USF programs	FCC
Consumer Protection & Quality of Service	FCC and states	FCC, unless state is certified by FCC	FCC and states	FCC and states	FCC and states	FCC
Reporting Requirements	FCC and states	FCC and states	FCC and states	FCC and states	FCC	FCC
Corporate Structure	FCC enforces interstate; state PUC enforces intrastate	FCC, unless state is certified by FCC	FCC	FCC	FCC	FCC

For some types of regulatory requirements, states should have an active role under any model. With respect to *customer service*, the states have always taken the lead role, and the FCC has never taken an active role at all. Radically altering that approach for broadband would be an ill-advised and dramatic change from this past practice. Given the “essential” nature of broadband service and the less-than-competitive structure of broadband markets, little

justification exists for the inevitable relaxing of consumer protection enforcement that would result from assigning all, or even most, responsibilities to the FCC.

Similarly, states have always played a very active role, shared with the FCC, on *universal service matters*. Leaving states out of universal service matters when it comes to broadband would be peculiar, especially when one considers that the nation's broadband goals of today—promoting universal deployment and adoption—are so similar to the earlier goal of universal telephone service, where states played an active, and essential, role in achieving universal service.

*Reporting requirements* also are a regulatory requirement that the FCC and state commissions should share. In every model other than the exclusive federal jurisdiction model, states would play an active role. They cannot effectively play that role, however, if federal or state law denies state commissions access to objective and reliable data about broadband service on which to base their policies and actions.

On the other hand, *corporate structure regulatory requirements* would be more efficiently and consistently handled at the federal level. The broadband industry is composed of large national and international corporations. Any effort to impose inconsistent corporate structural obligations from state-to-state would run heavily upstream. To the extent that corporate structural safeguards are necessary to protect against improper market-power leveraging from the broadband market into the adjacent content and applications markets, a single nationwide policy on that score would most effectively and efficiently achieve that objective.

Because of the interstate Internet backbone costs that are built into end-user broadband subscriber rates, the FCC must have some role in developing and overseeing any *reasonable and nondiscriminatory rate obligation* applied to broadband service. At the same time, the FCC would lack the resources to police and resolve all broadband rates and practices disputes nationwide. The FCC delegation model, or perhaps the reverse preemption model, would therefore fit this regulatory obligation best.

Because the *obligation to serve*, and the network deployment costs it would entail, cannot logically be separated from any form of rate-related regulation, such as the obligation to assure reasonable, nondiscriminatory rates, the model chosen for the obligation-to-serve requirement should match that chosen for the rate-related requirement—either the FCC delegation or reverse preemption model.

The *licensing requirement* is the umbrella requirement for enforcing most of the other regulatory obligations. FCC licensing would be required; the question is whether separate state licensing should also be required. While, again, the answer would depend on the model chosen for each of the other types of regulatory requirements, perhaps the best model is the one already provided by 47 U.S.C. § 253, Title II's general “no barrier to entry” provision: State PUCs could license on-ramp/off-ramp broadband service providers, but the state license application requirements, much like the state PUCs' current licensing requirements for competitive intrastate telecommunications service providers, must be minimal and easy to satisfy. Moreover, because most local broadband service providers are already certificated by state PUCs (either as



telecommunications service providers, or cable operators, or both), no new state PUC certification may be required. All that would be necessary is expansion of the provider's existing state PUC operating certificate.

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Readers, of course, may come to very different conclusions. My hope is that this paper provides a useful framework to stimulate discussion and analysis of what will undoubtedly be a wide range of opinions on the appropriate future course for broadband policy and regulation.

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