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FCC ANCILLARY JURISDICTION OVER INTERNET AND BROADBAND

*Michael Botein**

I. INTRODUCTION

As new technologies develop, legal means of regulating their behavior become necessary—whether wireless telegraphy or wireless video.[1] Incompatible engineering formats, interconnection problems, and offensive material are common examples of issues for which the public demands regulation. These problems often can be resolved by custom, usage, and private self-regulation—hence the large number of trade associations in the media-telecommunications field. For example, the transition from analog to digital broadcast and cable television was a disaster waiting to happen, and was averted largely by the efforts of broadcast, cable, film, and computer interests though a "Grand Alliance"—guided by a former FCC chairman—in arriving at the current digital video compromise format.[2] Similarly, broadcasting was spared rigorous censorship of "indecent" material through negotiations among groups with different views of propriety.

One of the longest-running examples of this phenomenon during the 20th century was the development of cable television. As discussed below, cable managed to elude regulation by the Federal Communications Commission (FCC) for more than three decades.[3]

Much the same situation now faces regulation of the Internet and broadband—referred to collectively here as cybermedia.[4] Although federal statutes selectively limit or prohibit some types of content—mainly pornographic material[5]—neither the FCC nor any other federal body has national

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[1] For excellent storytelling about and a good history of the first wireless—i.e., telegraphy—*see* Erik Larson, THUNDERSTRUCK (2007).

[2] Joel Brinkley, DEFINING VISION: HOW BROADCASTERS LURED THE GOVERNMENT INTO INCITING A REVOLUTION IN TELEVISION (1997).

[3] Cable first developed in the late 1940s and early 1950s, literally as low-capacity stands of primitive coaxial cable strung from telephone poles, or often from trees. On a good day, most cable systems could carry a maximum of a dozen video signals, and had absolutely no voice, interactive, or data capability. In some respects, it thus resembled the Internet before development of the World Wide Web.

At first, the Federal Communications Commission (FCC) eschewed jurisdiction over cable. Frontier Broadcasting Co. v. Laramie Community TV Co., 24 F.C.C. 251, 253 (1958). The Commission reasoned that cable was neither a common carrier under Title II nor a broadcaster under Title III of the Communications Act, as discussed *infra* note 12. During this interregnum, states and municipalities as their delegates exercised substantial power over many consumer aspects of cable. These areas did not include industry structure or operation, of course, because of geographic limitations. Their powers generally derived from broad police power provisions in state constitutions of statutes, and they naturally did not have national scope.

[4] There is disagreement as to what constitutes "broadband." The FCC recently attempted to clarify this by redefining "broadband" as any sort of "mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from . . . [the] Internet . . . but excluding dial-up Internet access service." *Preserving the Open Internet*, 47 C.F.R. § 8.11(a) (2011).

[5] *E.g.*, the now largely eviscerated Communications Decency Act of 1996, 47 U.S.C. §223 (3d ed. 1998), which was largely struck down in Reno v. ACLU, 521 U.S. 844 (1997).

plenary jurisdiction over cybermedia. The development and economic structure of cybermedia thus hava been largely piecemeal. At present, perhaps the most vexing problem is implementation of "network neutrality," the facially simple requirement that a broadband provider not block, slow down or discriminate against lawful websites, network traffic, applications, services, or applications that compete with services that they provide.[6]

II. THE FCC'S STATUTORY (PLENARY) CABLE JURISDICTION

A traditional legislative approach has been to pass statutes with new regulatory norms. This worked reasonably well in the early days of U.S. electronic communications. Congress largely dodged legal issues as to early telephony by passing very broad statutes and dumping their resolution in the lap of administrative agencies—such as the Interstate Commerce Commission and later the FCC.[7]

A hands-off strategy was less workable with radio frequency (RF) over-the-air spectrum uses, most significantly broadcasting. Electrical interference between stations inevitably results in some parts of the population receiving poor service and others none at all.[8] National federal regulation thus was necessary, and the answer was the Federal Radio Commission in 1927 and then the creation of the FCC as a separate federally mandated regulatory body as part of the Communications Act of 1934 (Communications Act).[9]

Through the Communications Act, Congress had essentially and unknowingly adopted three different types of regulatory regimes: (1) common carriage under Title II; (2) broadcasting under Title III; and 35 years later; (3) ancillary jurisdiction under Title I and some combination of Title II and/or Title III.

As most policy planners increasingly have discovered, very often the Communications Act's statutory icons are of little use in adapting to new technologies and their challenges. Although vesting telecommunications jurisdiction in the Interstate Commerce Commission may have seemed sensible in the early 20th century—after all, telephone and railroads were both carriers—the devil was in the details, particularly since an older agency often had little or no expertise in a new technology, such as telephony.

One result of this was the New Deal's "headless fourth branch,"[10] which gave broad enabling powers to administrative agencies through hopelessly general phrases such as "public interest, convenience, and necessity."[11] That approach created difficulties in designing detailed regulatory responses to new economic and engineering issues, particularly for agencies from the New Deal era that had been conceived to deal with particular industries and economic problems. By the 1950s, agencies often were faced with the need of fabricating new grants of jurisdiction in order to deal with

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[6] Open Internet Report & Order, 25 FCC Rcd. 17905, 17906 (2010); *see also* In re Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, 233 FCC Rcd. 13028 (2008).

[7] Michael Botein, FEDERAL REGULATION OF THE ELECTRONIC MASS MEDIA 22-30 (3d ed. 1998).

[8] *Id.* at 22–24.

[9] 47 U.S.C. § 101 *et seq*. In the process, the FCC also acquired the FCC's moribund common carrier jurisdiction.

[10] Report of the President's Committee on Administrative Management 7, 83 (1937).

[11] *See, e.g.*, 47 U.S.C. §§ 257(c), 309(a), § 311(c)(3)(A).

the details. For example, production of oil and gas had changed from a policy of limitation—because of excess capacity[12]—to one of promotion.

In some cases creative construction of enabling statutes was enough, simply because of broad "public interest" language. In other situations, however, absolutely nothing in an agency's enabling legislation supported a body's power to act. Many statutes were relatively narrow in their scope; unlike many other nations, the United States was loathe to give agencies true plenary jurisdiction over their areas of responsibility. This required a search for other sources of power. Not unsurprisingly, these other sources often turned out to be implied—sometimes from the enabling statute's language, sometimes from the overall purpose of the legislation.

III. THE FCC AND REASONABLY ANCILLARY (NON-PLENARY) JURISDICTION: CABLE TELEVISION

The FCC's history exemplifies an agency's ongoing need to expand its jurisdiction through implied powers. Although the Commission's basic powers were laid out in the Communications Act,[13] in the last 50 years, it has faced at least two major needs to expand its jurisdiction beyond the plain language interpretation of its enabling act: first, with cable television in the 1960s and currently with the internet in the new millennium. This discussion does not include *Chevron* deference to agency interpretation[14] for the purposes of brevity.

As in 1934, the Communications Act still is divided into three parts:

- Title I: Administrative Powers
- Title II: Common Carriers
- Title III: Radio Frequency (RF) Transmission[15]

Until the advent of cable, the coverage of each title was pretty self-evident. When the Commission first had to deal with cable in the mid-1960s, however, it recognized that it was dealing with an entity that was neither a common carrier (such as a telephone provider) nor a broadcaster (such as a radio station).

Early cases treated cable as just an extension of broadcasting, and based the Commission's jurisdiction on its power over broadcasting under Title III.[16] In effect, cable jurisdiction became part of a broadcast station's compliance with Title III, even though a cable operator was functionally and financially totally separate from—and often at odds with—the television stations from which it carried signals.

As was to be the case with the Internet, Congress was unwilling (at least initially) to amend the Communications Act to add a section explicitly designed to regulate cable. In response, the

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[12] Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[13] 47 U.S.C. § 101 *et seq.*

[14] Chevron U.S.A., Inc. v. National Resource Defense Council, Inc., 467 U.S. 837 (1984).

[15] In 1984 and 1992, Congress added statutory coverage of cable in what became Title VI of the Communications Act. Cable Communications Act of 1984, 47 U.S.C. §§ 521–573 (2006); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102–385, 89 Stat. 1503 (codified in scattered sections of 47 U.S.C.). This granted the agency plenary power over a few areas—e.g., concentration of control, programming sales, pole attachments—and left most other areas such as franchises, street usage fees, and access channels, to state and/or local governments.

[16] Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C.Cir), *cert. denied* 375 U.S. 951 (1963).

Commission expanded the "reasonably ancillary" jurisdictional approach into a completely new form of regulatory power.[17] This essentially was a combination of Title I administrative powers with jurisdiction from Title II and/or Title III. The game thus became putting together elements from two or more titles to construct a basis for jurisdiction.

The keystone was Title I, Section 1 of the Communications Act, which provides that the statutory purpose of the Act is "to make available . . . a rapid, efficient, Nation-wide and world-wide wire and radio communication service."[18] This language was supplemented by Title I, Section 2, which states that this act "shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio."[19]

Assuming that a lynchpin existed in sections 1 and/or 2, the first part of the reasonably ancillary equation was in place. Depending upon the source of the second factor, the Title II or Title III substantive source of jurisdiction, the schematic would resemble the following:

Title I	Title II and/or Title III
Section 1 or 2	

The obvious difficulty was establishing the connection between the two foundations of ancillary jurisdiction.[20]

This quandary first arose in *United States v. Southwestern Cable Co.*[21] The Supreme Court in that case reviewed the Commission's requirement that a San Diego cable system demonstrate that its transmission of a "distant" Los Angeles broadcast station would not endanger the financial health of local broadcast stations or advertisers on them.[22] The Commission's concern was that additional signals would reduce local viewing—and hence advertising revenues—for San Diego television stations.

Regulation of distant signal importation—one of the most controversial cable issues in the 1960s and 1970s—thus became a high priority for the FCC. But neither Title II nor Title III conferred any jurisdictional basis over cable, as would be revisited in the 1979 *Midwest Video II* case.[23] Cable was not a telephone-style common carrier, and since it did not use RF transmission, it was not subject to Title III.

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[17] Michael Botein, *CATV Regulation: A Jumble of Jurisdictions*, 45 N.Y.U. L. REV. 816 (1970).

[18] 47 U.S.C. §151.

[19] 47 U.S.C. § 152. Most cable systems did not fall within this, since they transmitted signals by wire, not radio. Where cable operations used microwave transmission to receive broadcast television or other programming, they were deemed to be RF carriers under Title III, and hence there was no need to find ancillary jurisdiction.

[20] E.g., Echostar Satellite, L.L.C. v. F.C.C., 704 F.2d 992, 998 (2013) adopts a similar analysis.

[21] 392 U.S. 157 (1968).

[22] Then 47 C.F.R. § 74.1107 put the burden on a cable system to show that importation of distant signals into any of the nation's 100 largest television markets would be "consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area." Shortly after *Southwestern*, the Supreme Court refused to review a decision upholding the validity of the provision. Bucks County Cable TV, Inc. v. United States, 427 F.2d 438 (3d Cir. 1970), *cert. denied*, 400 U.S. 831 (1970).

[23] See discussion *infra* pp. 278-279.

In effect, the FCC's argument was that if an unregulated industry impacted a regulated one, an agency with jurisdiction over the latter could extend its reach to the former. Taken to its extreme, this rationale would allow federal agencies to assert jurisdiction to an extent coterminous with Congress's legislative power under the Constitution. The Federal Aviation Administration presumably would have jurisdiction over running shoes, since their performance might affect an airline passenger's speed in reaching a departing flight. The Court naturally was interested not in federalizing the national's economy, but merely in resolving a relatively minor dispute of concern to the then-powerful broadcast lobby. After all, at this time the entire U.S. cable industry had about 950,000 subscribers[24]—less than one percent of national households, versus the two-thirds it serves today.

The Court neatly sidestepped these concerns in *Southwestern* in its first application of reasonably ancillary jurisdiction to telecommunications. It simply held that cable impacted on the economic viability of Title III television broadcast stations. As a result, the combination of the general administrative language in Sections 1 and 2 gave the Commission power to protect television broadcasting under Title III's mandate.

The Court was quick to hedge its bets, however, as to the scope of ancillary jurisdiction. It noted that "the authority which we recognize today . . . is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[25]

There naturally were several difficulties with this approach. First, the information regarding cable's impact on broadcast television was limited at best, as indicated by the industry's small size. The cable industry studies purported to show that it increased broadcast revenues by expanding the total audience; conversely, the broadcast white papers claimed that cable importation of distant signals—and eventually of non-broadcast signals, such as CNN or HBO—reduced viewers for broadcast television programs.

Second, the Commission's and the Court's analysis assumed that the goal of protecting broadcast television was sufficient to justify regulating cable. The difficulty with this approach was that it based regulation of non-broadcast media on the preservation of (perhaps even failing) broadcast stations. The Court's rationale analogizing the regulation of cable to the regulation of radio or television broadcast stations to prevent interference and loss of listeners simply did not work. The cable rules were not designed to prevent electrical interference or to provide universal service to the public—major goals of broadcasting. Some observers viewed this as sacrificing cable to pay for broadcasting's sins.

The overall weakness of the *Southwestern* decision may have resulted from the Court's desire to slow cable growth without making new law. Since the Court seemed to go out of its way to restrict the reasonably ancillary doctrine to cable's impact on broadcast television, it very well may have planned to settle the cable-broadcast dispute quickly through a doctrine which never would be heard of again.

For better or worse, this was not the case, since the cable-broadcast wars continued unabated through the enactment of Communications Act cable legislation in Title VI between

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[24] *Will 1971 give CATV a green light?*, BROADCASTING YEARBOOK at 14 (1971), *available at* http://www.americanradiohistory.com/Archive-BC-YB/1971/Section-Intro-Broadcasting-Yearbook-1971-9.pdf.

[25] Southwestern, 392 U.S. at 178.

1984 and 1996.[26] Until Congress finally acted, the industries tried any other available avenue—including litigation. As lobbyists sometimes observe, all that any regulated industry wants is one unfair advantage.

In 1972, the Court revisited the reasonably ancillary issue in *United States v. Midwest Video Corp* (Midwest I).[27] The Commission there had adopted a rule requiring cable systems with more than 3,500 subscribers to engage in "mandatory origination"—producing primarily local programs with news, public affairs, and programming by third parties. Unlike the signal importation rules in *Southwestern*, these regulations did not purport to protect the economic viability of broadcast television stations. In upholding the rules, the Court relied upon Section 1 and held that cable systems effectively owed these services to the public as a quid pro quo for use of broadcast television signals. The Court viewed mandatory origination as a means of achieving public service goals not already served by broadcast television stations.

The Court's emphasis on promoting public service was a radical departure from *Southwestern*'s view of the Commission's jurisdiction over cable as conditional on its statutory powers over broadcasting. Although not viewed as a substantial change in approach, the Court's rationale approached a grant of plenary jurisdiction over cable.

As in *Southwestern*, the Court's emphasis on using cable regulation to reach traditional broadcast goals ignored the fact that cable did not use RF transmissions like broadcasting. The rationale amounted to insuring that cable viewers could be able to receive signals not supplied by broadcast television providers because of economic limitations. This attempt to draw a connection between cable carriage and improvements in broadcast service lacked the logical nexus generally present in ancillary jurisdiction.[28] Although not labeled as plenary jurisdiction, the decision approached that result.

In addition, the Commission had estimated—and the Court agreed—that the cost of mandatory origination to a cable operator would be steep but not economically infeasible. The FCC's projected capital costs were $21,000 for a black-and-white origination system and $56,000 for color. By the standards of 1972, these figures were wildly conservative. Today's estimates would be 10-15 percent as much.[29]

It thus was less than surprising that Chief Justice Burger provided a concurring fifth vote to uphold the rules only with difficulty. Although hardly a technologist, he found the nexus between statutory goals and Commission jurisdiction to be tenuous at best. He saw a serious disconnect in the fact that cable operators were not RF, while broadcasters were. Burger noted that: "candor requires acknowledgment, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts."[30]

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[26] 47 U.S.C. § 601 *et. seq.*

[27] 406 U.S. 649 (1972).

[28] 406 U.S. at 664–65.

[29] Cable quality cameras cost as little as $3,000, including lenses.

[30] 406 U.S. at 676 (Burger, J., dissenting).

This too might have been the end of the ancillary jurisdiction doctrine, were it not for the Commission's continued tinkering with cable operators' obligations to provide local programming. These requirements eventually were invalidated by the Court in *FCC v. Midwest Video Corporation* (Midwest Video II).[31]

In 1976 the Commission embarked upon a departure from what had been a relatively unsatisfying experience with mandatory origination. The agency repealed the existing rule and adopted instead a new "access" requirement. Under this rule, cable operators had to make available four types of channels to unaffiliated third parties: public, educational, governmental (PEG), and leased. Although the Court found a nexus between the Commission's jurisdiction and the rules' requirements, it held that the FCC had pushed the regulatory envelope too far.

One of the goals of the new rules was to enable third parties to use an operator's cable access channels—particularly PEG—without any control by the cable system. Although the Court found some public interest goals in the rules, it invalidated them on the ground that they imposed common carrier obligations on cable carriers: requiring operators to hold out their facilities to unaffiliated entities; barring them from content control; and limiting leased access channel charges. The Court did not pass on the First Amendment status of the rules, however, which effectively allowed Congress and state/local governments to implement access channels later—as they did, beginning with the 1984 Cable Act just a few years later.[32]

In effect, the nexus existed between the agency's overall administrative powers, but the rules' broadcast-style goals violated the Act. Section 153(10) provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."[33] Using its reasoning from prior decisions that a cable system was analogous to a broadcaster and thus could be subject to broadcasting goals, the incorporation of carrier-style obligations invalidated an otherwise valid connection between the Commission's administrative powers and broadcast-like goals. Although Congress ultimately preserved access rules on a local level in the 1984 Cable Act, from *Midwest Video II* until recently, ancillary jurisdiction played little role in telecommunications regulation.

IV. Reasonably Ancillary Jurisdiction over the Internet

After two decades of cable access channel regulation under Title VI of the Communications Act, ancillary jurisdiction was virtually off the regulatory radar screen. Today, however, the history of ancillary jurisdiction may be relevant again with the cable-style "explosive growth"[34] of the Internet and broadband (referred to collectively as cyber media). This development brought with it a perceived need by some for a further expansion of the FCC's jurisdiction.

As had been the case with cable, there is no statutory grant of Commission power over cybermedia, and thus no clear regulatory niche for it under the Communications Act. Like cable, the Internet and broadband are not carriers, since operators are subject only to general antitrust constraints in dealing with third parties and setting rates. Increase use of mobile devices, wifi and the

[31] 440 U.S. 689 (1979).

[32] This now is incorporated into Title VI of the Communications Act, as discussed *supra* note 19.

[33] 47 U.S.C. § 153(11).

[34] Second Report and Order, 2 F.C.C.2d 725, 738 (1966).

like naturally may move cyber media into the RF domain. Although many observers—somewhat ironically, mainly cable operators—argued that the Internet should be treated as a form of cable under Title VI, it clearly was not a one-way distribution system.

In occasional references, courts have suggested that cybermedia might be regulable under ancillary jurisdiction. In a rather convoluted opinion, the Supreme Court in *National Cable & Telecommunications Association v. Brand X Internet Services, Inc.*,[35] held that the Commission could regulate the Internet as an "information" rather than as a "telecommunications" service. After a debate sometimes resembling a food fight between Justices Scalia and Thomas,[36] the plurality hastily noted that "the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction."[37]

In the recent past, the most significant issue arose in *Comcast Corporation v. FCC*.[38] At issue there was the FCC's prior version of its "network neutrality" restrictions, resulting from a complaint against Comcast. At that point, the Commission's policy was mainly to prevent Internet Service Providers ("ISPs") from blocking third parties from using all or part of their bandwidth, imposing unreasonable discrimination, as to price or availability, engaging in paid prioritization of one user over another, and allowing "reasonable network management."

The Commission argued that it had ancillary jurisdiction to impose these policies. The FCC relied on Section 1 as well as Section 230 of the Communications Act, which prohibits blocking of transmissions. The agency was somewhat vague as to the nexus, however, between its administrative power and Titles II, III, or VI. The court ultimately concluded, however, that the Commission had "failed to tie its assertion of ancillary authority over Comcast's Internet service to any 'statutorily mandated responsibility'"[39]—i.e., Title II, III, or VI. Three years later in 2013, the D.C. Circuit used similar reasoning to hold that the FCC could not adopt rules to prohibit satellite broadcasters from using encoding to exclude third parties.[40]

The D.C. Circuit's decision in *Comcast* came just as the new (now former) Chairman of the Commission, Julius Genachowski, was beginning negotiations with ISPs as to network neutrality rules. The dealings eventually broke down, and the Commission adopted rules similar to what had been on the table.[41] The case appeared destined for a lengthy appellate process.[42]

And while the litigation proceeded, Congress moved towards a legislative ban on further Commission action concerning network neutrality.

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[35] 545 U.S. 967 (2005).

[36] *Id.* at 1018.

[37] *Id*. at 980-986.

[38] 600 F.3d 642 (D.C. Cir. 2010).

[39] 600 F.3d at 661.

[40] Echostar, supra note 20, at 998-999.

[41] *In the Matter of Preserving the Open Internet,* Broadband Industry Practices, Notice of Proposed Rulemaking, GN Docket No. 09-191, 07-52 (released October 22, 2009).

[42] Brendan Sasso, FCC Urges Court *to Uphold Net Neutrality Rules*, THE HILL, Oct. 9, 2012, *available at* http://thehill.com/ blogs/ hillicon-valley/technology/248619-fcc-urges-court-to-uphold-net-neutrality.

V. CONCLUSION

The courts and the Congress have been stalled in defining any type of plenary FCC jurisdiction over the Internet and broadband.[43] This naturally left the Commission with little ability to implement a potentially wide variety of public policies—just as it initially was with cable.

Although the discussion of cable jurisdiction in Section II is largely historical now, it shows that a willing Supreme Court can give an agency at least a temporary form of power to deal with perceived public interest issues. Whether particular cable policies made sense at the time or today, the mere fact that a responsible agency felt them to be necessary suggests that similar reasoning may apply to the Internet and broadband.

This is not to suggest that the courts should exercise unbridled discretion in empowering administrative agencies. After all, in purely regulatory situations such as cable or cybermedia, Congress eventually will step in to modify—or perhaps even abolish—any powers implied from sources such as ancillary jurisdiction. While a broader policy debate is pending, however, use of an obvious artifice such as ancillary jurisdiction may be a sound way of plugging a policy lacuna. It thus may be worth considering in the context of the Internet and broadband, just as with cable.

[43] Ironically, the Administration carved out a part of its general stimulus program in the Broadband Stimulus Act of 2009. American Recovery and Reinvestment Act of 2009, Pub, L. 111-5, 123 Stat. 115 (Feb. 17, 2009). This part of the general stimulus act provided substantial grants for broadband projects under the Broadband Technology Opportunities Program, even though federal agencies had no statutory powers to regulate the funded activities. *See* 47 U.S.C. §§ 1304, 1305. The FCC's only role was in producing a National Broadband Plan on March 18, 2010. FEDERAL COMMUNICATIONS COMMISSION, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN (2010), *available at* http://download.broadband.gov/plan/national-broadband-plan.pdf.