Gary L. Phillips
General Attorney &
Associate General Counsel

AT&T Services, Inc.
1120 20th St. NW, Suite 1000
Washington, D.C. 20036
Phone 202 457-3055
Fax 202 457-3074

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Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: A National Broadband Plan for Our Future, GN Docket No. 09-51; Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, GN Docket No. 09-137; High-Cost Universal Service Support, WC Docket No. 05-337; Lifeline and Link-Up, WC Docket No. 03-109

Dear Ms. Dortch:

AT&T has discussed at length how the Commission has statutory authority under both 47 U.S.C. § 254 and Title I of the Communications Act, 47 U.S.C. § 151 *et seq*., to provide universal service funding for broadband deployment and subscribership.[1] In particular, we explained that providing support for broadband was necessary to fulfill Congress's mandate that the Commission use federal universal service programs to ensure that all Americans have access to advanced information and telecommunications technologies and services.[2] I am writing to explain why nothing in the D.C. Circuit's recent decision in *Comcast v. FCC*, No. 08-1291 (Apr. 6, 2010) in any way undermines that authority or suggests that the Commission must reclassify broadband Internet access services as telecommunications services in order to provide universal service funding for broadband. Indeed, if anything, the *Comcast* decision confirms that the Commission properly could exercise its ancillary authority under Title I to the extent necessary to fulfill its statutory obligation under section 254 to promote deployment of broadband, without having to reclassify broadband Internet access service as a telecommunications service or adopt regulations that alter the way in which such services are offered today.

1. The decision in *Comcast* was a straightforward application of the principle that the Commission may exercise its ancillary jurisdiction under section 4(i) of the Act, 47 U.S.C. § 154(i), only if the action in question is "reasonably ancillary to the . . . effective performance of [the Commission's] statutorily mandated responsibilities." Slip Op. at 3 (quoting *Am. Library Ass'n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005)). The D.C. Circuit concluded that regulation of a broadband provider's network management practices was not reasonably ancillary to any of the statutory obligations identified by the Commission in its order, and that the only other statutory

[1] *See* Attachment to Letter from Gary L. Phillips to Marlene Dortch, GN Docket Nos. 09-51, 09-47, 09-137, WC Docket Nos. 05-337, 03-109 (filed Jan. 29, 2010) ("*AT&T White Paper*").
[2] *Id.* at 2.

provisions on which the Commission relied were mere "Congressional statements of policy" that did not, themselves, create the "statutorily mandated responsibilities" necessary to support the exercise of ancillary authority under Title I.[3]

Notably, however, while the court in *Comcast* held that statutory "statements of policy" – such as section 1 of the Act, 47 U.S.C. § 151 – are, *standing alone*, an insufficient basis for the invocation of ancillary jurisdiction, *see* Slip Op. at 17-22, the court also recognized that when statutory policy statements are combined with other "express delegations of authority," the Commission may exercise ancillary jurisdiction over matters reasonably related to those policies and directives. *Id.* at 19; *see also id.* at 22 ("[S]tatements of Congressional policy can help delineate the contours of statutory authority"). That holding clearly encompasses the promotion of universal service, which is entrusted to the Commission by *both* a broad policy statement and a specific statutory directive.

Section 1 of the Act directs the Commission to craft regulations in order "to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges." 47 U.S.C. § 151; *see also National Broadband Plan* at 140 ("Universal service has been a national objective since the Communications Act of 1934"). Likewise, Section 706 of the Telecommunications Act of 1996 says the Commission shall encourage deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans. It also directs the Commission to take immediate action if it finds that advanced telecommunications capability is not being deployed to all Americans. Section 254, in turn, specifically grants the Commission authority to decide which services should be supported by the universal service program, "taking into account advances in telecommunications and information technologies and services." *Id.* § 254(c)(1); *see also id.* § 254(b)(3) (establishing universal service principle that "[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications *and information services* . . . that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas") (emphasis added).

Funding of broadband is clearly "reasonably ancillary" to the express statutory directives in section 254 as informed by sections 706 and section 1.[4] Accordingly, regardless of whether section 706 is merely a policy directive, shifting federal universal service funding to support broadband, as proposed in the National Broadband Plan, would be well within both the Commission's express authority under section 254 *and* its ancillary jurisdiction under Title I, as *Comcast* confirms.

At least one court has *already* upheld very similar actions by the Commission. In the *Universal Service Report and Order*,[5] the Commission held that non-telecommunications carriers were eligible to participate in the universal service discount program for schools and libraries,

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[3] *See* Slip Op. at 3, 22-23.
[4] *See AT&T White Paper* at 4.
[5] *Universal Service Report and Order*, 12 FCC Rcd 8766, ¶¶ 587-597 (1997).

even though the relevant statutory provision only referred to "telecommunications carriers." 47 U.S.C. § 254(h)(1)(B). The Fifth Circuit affirmed, holding that "Congress intended to allow the FCC broad authority to implement" section 254. *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 444 (5th Cir. 1999). Even though the statute did not explicitly allow non-telecommunications carriers to be included in the program, the court concluded that the Commission's actions were justified by a combination of section 254 and "the FCC's 'necessary and proper' authority under section 154(i)." *Id.* at 443-44. By including non-telecommunications carriers in the program, the Commission was "not asserting additional jurisdictional authority, but, rather [wa]s issuing a regulation *necessary to fulfill its primary directives*" of promoting universal service. *Id.* at 444 (emphasis added).

2. Ancillary jurisdiction aside, there are strong arguments, as AT&T explained in its *White Paper*, that the Commission has ample discretion under section 254 to extend universal service support to broadband.[6] Section 254(b) lists six principles that "shall" serve as the basis "for the preservation and advancement of universal service," including the principle that "[a]ccess to advanced telecommunications *and information services* should be provided in all regions of the Nation." 47 U.S.C. § 254(b)(2) (emphasis added); *see also id.* § 254(b)(3); *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001) (recognizing that these principles are not merely precatory: "This language indicates a mandatory duty on the FCC."). Section 254(b) makes clear that Congress's universal service goals are not limited to legacy voice services, but include advanced communications and information services as well. At the very least, section 254 is sufficiently ambiguous to give the Commission discretion to support broadband internet access through the universal service program. *Comcast* – which only addressed certain ancillary jurisdiction arguments under Title I – would be fully consistent with such an exercise of authority.

* * *

For the foregoing reasons, the D.C. Circuit's recent decision in *Comcast v. FCC* in no way diminishes, and, if anything, bolsters, the Commission's statutory authority to support broadband deployment and subscribership through the federal universal service program. The decision in no way suggests that the Commission must reclassify broadband Internet access services as telecommunications services in order to shift federal universal service support to broadband.

Sincerely,

/s/ Gary L. Phillips

[6] *See AT&T White Paper* at 1-5.

Your submission has been accepted

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Proceedings

Name	Subject
09-51	In the matter of a National Broadband Plan for Our Future.
09-137	Inquiry Concerning the Deploment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to section 706 of the Telecommunications Act. .
05-337	In the Matter of Federal -State Joint Board on Universal Service High-Cost Universal Service Support. .. .
03-109	In the Matter of Lifeline and Link-Up

Contact Info

Name of Filer: AT&T
Email Address: sp6591@att.com
Attorney/Author Name: Gary L Phillips

Address

Address For: Filer
Address Line 1: 1120 20th Street, NW
Address Line 2: Suite 1000
City: Washington
State: DISTRICT OF COLUMBIA
Zip: 20036

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