Santa Clara University
School of Law

Santa Clara Law Review

Volume 50 | Number 2 Article 7

1-1-2010

Net Neutrality, Full Throttle: Regulation of Broadband Internet Service Following the Comcast/Bittorrent Dispute

Courtney Erin Smith

NET NEUTRALITY, FULL THROTTLE: REGULATION OF BROADBAND INTERNET SERVICE FOLLOWING THE COMCAST/BITTORRENT DISPUTE

Courtney Erin Smith*

I. INTRODUCTION

Imagine making a telephone call to a friend. In the middle of the conversation, unbeknownst to either of you, a telephone operator joins the call. Mimicking each person's voice, the operator separately informs you both that the call is over and then severs the connection. While this situation may seem too farfetched to generate any pressing concern, it illustrates the actual behavior of a prominent broadband Internet provider—Comcast Corporation.[1]

Comcast has long been a leading Internet Service Provider, serving millions of people.[2] In 2007, Internet users were shocked when news broke that Comcast had intentionally blocked subscribers from engaging in legal, online file sharing.[3] It soon became clear that Comcast had

*Senior Articles Editor, Santa Clara Law Review, Volume 50; J.D. Candidate, Santa Clara University School of Law, May 2010; B.A. Political Science, Interdisciplinary Honors in Education, Stanford University, 2005. I would like to acknowledge the Santa Clara Law Review Board of Editors for their contributions to this comment. I also wish to thank my family and friends for their ongoing support, as well as Professor Allen Hammond for sparking my interest in this topic.

1. *See In re* Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications and Broadband Industry Practices, 23 F.C.C.R. 13028, ¶ 41 (2008) (mem. opinion and order) [hereinafter Against Comcast]. Throughout this comment, I refer to this order as the "Comcast Order."

2. *See* SEC. & EXCH. COMM'N, ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES AND EXCHANGE ACT OF 1934 1–2 (2008), http://www.comcast.com/2008annualreview/pdf/2008comcast10K.pdf.

3. *See infra* notes 36–37 and accompanying text.

not only interfered with certain forms of Internet usage, but also had done so in a way that disguised the cause of the connection failures.[4] Several parties lodged formal complaints to the Federal Communications Commission ("FCC"), and in a written adjudication ("Comcast Order"),[5] the FCC officially found that Comcast had violated federal communications policies.[6]

This August 2008 FCC order documented the first instance in which the Commission formally found a broadband provider to have violated principles of net neutrality.[7] The fact that Congress has neither enacted a statute prohibiting certain broadband network management practices nor enacted any statute empowering the FCC to regulate such practices[8] prompted concern that the FCC's actions lacked a statutory basis.[9] Despite a subsequent proposal regarding net neutrality rules, the FCC has not yet promulgated substantive or procedural rules directly pertaining to these issues.[10]

This comment will address the Comcast Order and argue that the FCC lacks an effective policy for regulating and

---

4. *See infra* notes 38–42 and accompanying text.

5. Against Comcast, *supra* note 1.

6. *See infra* notes 46–58 and accompanying text regarding formal proceedings.

7. *See* Posting of Larry Dignan to ZDNet.com, http://blogs.zdnet.com/BTL/?p=9530 (Aug. 1, 2008, 8:48 EST) (noting that the ruling is "the first official one making network ~~throttling~~ blocking officially illegal"). For a discussion of network neutrality, see discussion *infra* Part II.B.4.

8. *Comcast Files Petition for Review of FCC's Network Management Practices Order*, TECH. L.J., Sept. 4, 2008, http://www.techlawjournal.com/topstories/2008/20080904.asp. But see *infra* notes 204–10 and accompanying text for an explanation of proposed attempts at legislation.

9. *See* Opening Brief for Petitioner Comcast Corporation at 15–16, Comcast Corp. v. FCC, No. 08-1291 (D.C. Cir. July 27, 2009); *see also* Petition for Review and, in the Alternative, Notice of Appeal at 1, Comcast Corp. v. FCC, No. 08-1291 (D.C. Cir. Sept. 4, 2008), *available at* http://static.arstechnica.com/Comcast%20Opening%20Brief%20(as%20filed).pdf [hereinafter Petition for Review] (challenging the FCC's authority to regulate network management practices).

10. *See id.* In October 2009, the FCC proposed draft rules governing network neutrality. *See* Grant Gross, *FCC Moves Toward Net Neutrality Rules*, PCWORLD, Dec. 30, 2009, http://www.pcworld.com/article/185614/fcc_moves_toward_net_neutrality_rules.html. The FCC has also opened the issue for public comment and may soon decide whether to take further action. *See id.* As discussed later in this comment, the FCC's proposal paves the way for further agency rulings or legislative action.

preventing future broadband network management disputes. Part II of this comment examines the Comcast network management dispute and resulting Comcast Order,[11] as well as case law creating the framework for regulating broadband Internet service.[12] Part III addresses the legal issues involved in the adjudication of the Comcast dispute.[13] Then, Part III scrutinizes the rationale set forth in the Comcast Order and challenges its legitimacy in light of the FCC's uncertain statutory authority to regulate the provision of broadband Internet services.[14] Finally, though the FCC may have acted within its authority,[15] Part IV proposes an alternate mandatory disclosure and enforcement model that would more clearly further the goals of the Comcast Order and communications law as a whole.[16]

II. BACKGROUND

Comcast Corporation, which serves over fourteen million high-speed Internet customers, is a leading competitor in the market for broadband cable systems.[17] The term "broadband" is commonly used to describe a high-speed Internet connection to an end user's home.[18] Cable modem service currently dominates the broadband Internet market,[19] allowing users to download information at speeds significantly faster than those of traditional dial-up modems.[20]

The Internet is a packet-switched network—messages are broken into small packets of data, transferred, and then

11. *See* discussion *infra* Part II.A.
12. *See* discussion *infra* Part II.B.
13. *See* discussion *infra* Part III.A.
14. *See* discussion *infra* Part III.B–D.
15. *See* discussion *infra* Part III.B.
16. *See* discussion *infra* Part IV.
17. SEC. & EXCH. COMM'N, *supra* note 2.
18. *See* Mark A. Lemley & Lawrence Lessig, *The End of End-To-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 926–27 (2001). A consumer may receive broadband access by either digital subscriber lines (DSL) or cable lines. Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1124 (9th Cir. 2003).
19. *See* INDUS. ANALYSIS & TECH. DIV., WIRELINE COMPETITION BUREAU, HIGH-SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF JUNE 30, 2007 tbl.2 (2008), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280906A1.pdf.
20. HARRY NEWTON, NEWTON'S TELECOM DICTIONARY 180 (23d ed. 2007) (defining broadband as "any circuit significantly faster than a dial-up phone line").

reassembled.[21] Recent technological developments have enabled Internet Service Providers ("ISPs"),[22] such as Comcast, to examine data packets and learn about the content transmitted over their networks.[23] One such development, called "deep packet inspection," allows an ISP to scan (or "sniff") Internet traffic through instantaneous data examination.[24] With this information, ISPs can customize services to cater more closely to the needs of specific end users and content creators.[25] Some Internet consumers—often the users of peer-to-peer ("P2P") software,[26] Internet telephone calls,[27] and gaming software[28]—may be willing to pay a premium for faster, better, and smarter access to content.[29] Deep packet inspection allows ISPs to prioritize

---

21. Kevin Werbach, *Only Connect*, 22 BERKELEY TECH. L.J. 1233, 1251 (2007). This type of transmission operates on a "best efforts" basis, with no guarantee that a packet will reach its destination. *Id.* Thus, networks seeking to offer enhanced delivery are often willing to provide additional capacity or to pay for overlaps that will facilitate transmission. *Id.* at 1275.

22. ISPs are traditionally divided into three categories: backbone providers, regional ISPs, and last-mile providers. Christopher S. Yoo, *Network Neutrality, Consumers, and Innovation*, U. CHI. LEGAL F. 179, 195 (2008). Yoo further states:

> *Backbone providers* occupy the center of the network and offer high-speed transport between locations spread throughout the country. *Regional ISPs* carry traffic from network access points served by backbone providers to the local distribution facilities maintained by last-mile providers . . . .

Id. (footnote omitted). Last-mile providers (such as Comcast) supply the final connection, carrying traffic to end users. *Id.*

23. *See* Rob Frieden, *Internet Packing Sniffing and Its Impact on the Network Neutrality Debate and the Balance of Power Between Intellectual Property Creators and Consumers*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 633, 636–37 (2008).

24. *See id.* at 641–42.

25. *See id.*

26. Peer-to-peer file sharing networks facilitate the exchange of files among individual users. Yoo, *supra* note 22, at 190. Files in this architecture are not stored in centralized locations, but are instead distributed across the network. *Id.* Unlike the distribution of infringing materials over the web, which is identifiable, P2P distribution of infringing materials is difficult to control since the network architecture is distributed. *See id.* at 190, 193, 205.

27. Software facilitating such communication is often referred to as Voice over Internal Protocol ("VoIP"). This technology offers voice communications capabilities using packet switched Internet. *See* Robert M. Frieden, *Dialing for Dollars: Should the FCC Regulate Internet Telephony?*, 23 RUTGERS COMPUTER & TECH. L.J. 47, 53–55 (1997).

28. *See* Frieden, *supra* note 23, at 641.

29. *Id.* (noting that ISPs do so by engaging in vertical integration of various aspects of the provision of Internet content). These individuals are generally

traffic into different tiers, and to therefore apply different fees and "quality of service" commitments.[30]

Deep packet inspection, however, has also made it possible for ISPs to discriminate against certain types of Internet traffic under the guise of managing network congestion.[31] Cable modem networks are shared networks, meaning that traffic generated by individual customers shares bandwidth with the traffic generated by neighbors.[32] Because the transmission speed available to a single end user over a cable network decreases as the number of total users increases,[33] ISPs use differing techniques to manage network congestion.[34] Some ISPs, however, have used congestion as a proxy for "content-throttling," essentially blocking or slowing the speed at which content is shared over the Internet.[35]

A. Comcast Accused of "Secretly Degrading" Peer-to-Peer Applications

In 2007, several Comcast subscribers noticed problems while using BitTorrent[36] and other file-sharing technologies.[37]

---

candidates for premium service since they often have higher bandwidth requirements, lower tolerance for dropped or delayed data transmission, and more traffic volume than typical users. *See id.* at 642.

30. *See id.* at 637, 639. A "quality of service" commitment explains a provider's standards of customer service.

31. *See id.* at 643–44.

32. Yoo, *supra* note 22, at 201. The ultimate amount of congestion created also depends, however, on the timing of network usage. *See id.* at 206.

33. *See* Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 17 F.C.C.R. 2844 app. B ¶ 21 (2002) [hereinafter Pursuant to Section 706].

34. Yoo, *supra* note 22, at 202–04. For instance, if a router (used to transmit data) detects congestion, it may either de-prioritize packets (thus delaying transmission) or drop them entirely. Frank Pasquale, *Internet Nondiscrimination Principles: Commercial Ethics for Carriers and Search Engines*, U. CHI. LEGAL F. 263, 270 (2008).

35. *See* Dina R. Richman, *The Shot Heard Round the World Wide Web: Comcast Violates Net Neutrality*, 20 INTELL. PROP. & TECH. L.J. 17, 17–18 (2008).

36. The term "BitTorrent" refers to a company as well as a protocol. *See* Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation For Secretly Degrading Peer-to-Peer Applications, at 5 (F.C.C. 2007), *available at* http://www.publicknowledge.org/pdf/fp_pk_comcast_complaint.pdf [hereinafter Complaint of Free Press]. Initially, BitTorrent developed as an open-source protocol for cheaply and quickly distributing large files. *Id.* BitTorrent, Inc. was founded by the original inventor of the

As these complaints began to receive press attention, a spokesperson for Comcast disclaimed any responsibility for the problems, stating "we don't throttle any traffic."[38] After performing a series of nationwide tests, the Associated Press reported that Comcast actively interfered with subscriber attempts to share files online, that this interference affected all types of traffic, and that it had a "drastic effect" on certain traffic.[39] The report further indicated that "the method used by Comcast was difficult to circumvent" because it involved the falsifying of network traffic.[40] When a BitTorrent user attempted to share files via a Transmission Control Protocol ("TCP") connection,[41] Comcast's servers sent each computer a reset packet that appeared to come from the other's computer, effectively terminating the connection.[42] Former FCC Chairman Kevin J. Martin analogized the problem to mail delivery:

> Would it be OK if the post office opened your mail, decided they didn't want to bother delivering it, and hid that fact by sending it back to you stamped "address unknown—return to sender"? Or would it be OK, when someone sends you a first class-stamped letter, if the post office opened it, decided that because the mail truck is full sometimes, letters to you could wait, and then hid both that they read your letters and delayed them?[43]

BitTorrent protocol in order to offer products and services, including licensed movie downloads. *Id.*

37. Against Comcast, *supra* note 1, ¶ 6.

38. *Id.*

39. *Id.* ¶ 7.

40. *Id.* ¶ 8. A separate but related problem was that Comcast's reset packets resembled messages sent by one or both of the users' computers, and many states make it illegal for an individual to impersonate another individual with intent to obtain a benefit or to injure or defraud another. *See* Richman, *supra* note 35, at 18.

41. When an Internet user opens a webpage, sends an e-mail, or shares a document, the user's computer generally establishes a connection with another computer using Transmission Control Protocol (TCP). Against Comcast, *supra* note 1, ¶ 3 (citing INFORMATION SCIENCES INST., RFC 793: TRANSMISSION CONTROL PROTOCOL (1981), http://tools.ietf.org/html/rfc793).

42. *Id.* (noting that when computers connect via TCP, each computer monitors the connection and if either detects a problem, it sends a "reset packet" or "RST packet" to the other, "signaling that the connection should be terminated and a new one should be established").

43. Against Comcast, *supra* note 1, at 13065 (statement of Chairman Kevin J. Martin). Shortly after the Comcast Order was issued, Julius Genachowski took Martin's place as Chairman.

Studies later revealed that Comcast had used deep packet inspection to target and disconnect customers who uploaded files using BitTorrent and other P2P protocols.[44] Comcast initially claimed that it only sent reset packets during periods of network congestion, but later admitted to extensive intrusion after evidence emerged showing that the interference occurred at all times and regardless of the amount of network traffic.[45]

On November 1, 2007, two interest groups, Free Press[46] and Public Knowledge,[47] filed a formal complaint with the FCC, alleging that Comcast secretly degraded subscriber use of P2P applications by interfering with network traffic.[48] Free Press also filed a petition for a declaratory ruling, asking the FCC to clarify that an ISP violates the FCC's Internet Policy Statement when it intentionally degrades a targeted Internet application.[49]

In a three-to-two decision issued August 1, 2008,[50] the FCC found that Comcast had overstepped its network

---

44. *See id.* ¶ 41 (noting a study that identified instances in which Comcast's packet forgery prevented the transfer of data).

45. *See id.* ¶ 9.

46. Free Press is a national nonprofit organization that works to increase informed public participation in media policy debates. Complaint of Free Press, *supra* note 36, at 1–2.

47. Public Knowledge is a group dedicated to fortifying and defending a vibrant information commons. *Id.* This group monitors proposed legislation and policy that relates to intellectual property or technology, and engages in debate on these issues. *Id.*

48. *Id.* at 1–2, 5; *see also* Against Comcast, *supra* note 1, ¶ 10. Free Press sought, among other remedies, a permanent injunction to redress society's "loss of unpredictable innovation," "encourage innovation in Internet applications and content," and "promot[e] the deployment and uptake of high-speed Internet access." Complaint of Free Press, *supra* note 36, at 32–33.

49. Petition for Declaratory Ruling of Free Press et al., No. 07-52, at iii (F.C.C. 2007), *available at* http://www.fcc.gov/broadband_network_management/fp_et_al_nn_declaratory_ruling.pdf. Other parties have also lodged civil suits alleging breach of contract and false advertising. *See, e.g.*, Complaint at ¶¶ 8–9, 14–15, Hart v. Comcast of Alameda, No. C 07-06350 PJH (N.D. Cal. Nov. 13, 2007) (PG 07355993), *available at* http://blogs.pcworld.com/staffblog/archives/HARTvCOMCAST.pdf.

50. The FCC issued its ruling in spite of a March 27, 2008 agreement between Comcast and BitTorrent, in which both parties agreed there was no need for government intervention. *Comcast and BitTorrent Reach Accord on Network Management Practices*, TECH. L.J., Mar. 27, 2008, http://www.techlawjournal.com/topstories/2008/20080327b.asp. The Order also followed Comcast's April 15, 2008 announcement of an industry-wide effort to discuss processes and practices for the management of P2P applications. *Id.*

management authority by blocking BitTorrent traffic.[51] "[T]he company's discriminatory and arbitrary practice unduly squelche[d] the dynamic benefits of an open and accessible Internet and [did] not constitute reasonable network management."[52] The FCC also found that "Comcast's failure to disclose [its] practice . . . compounded the harm."[53] In addition, the FCC adopted a flexible framework for evaluating future network management disputes.[54] This framework considers the legality of the content accessed, whether the management practices have been disclosed, and, if legal content has been arbitrarily blocked or degraded, whether such practice was reasonable.[55]

The FCC also instituted a plan to halt Comcast's "unreasonable" conduct.[56] This plan required Comcast to disclose the details of its network management practices within thirty days,[57] to "submit a compliance plan describing how it intended to stop such . . . practices," and to disclose the details of the practices it intended to deploy following termination of its unreasonable practices.[58] Comcast subsequently filed a complaint against the FCC in the United States Court of Appeals for the District of Columbia Circuit, challenging the basis of the FCC ruling in the absence of pre-existing, legally enforceable standards.[59]

B. Regulation of High-Speed Internet Access

The Communications Act of 1934 ("the Act" or "the

---

51. *See* Against Comcast, *supra* note 1, ¶ 1. Former Chairman Kevin Martin and Democrat Commissioners Michael Copps and Jonathan Adelstein issued statements in support of the ruling, while Republican Commissioners Deborah Taylor Tate and Robert M. McDowell dissented, finding the ruling to constitute undue government intervention. *See generally id.*

52. *Id.* ¶ 1.

53. *Id.*

54. *See id.* at 13065 (statement of Chairman Kevin J. Martin).

55. *Id.* ¶ 1.

56. *See id.* The FCC, however, did not fine Comcast for its behavior. *Id.*

57. Against Comcast, *supra* note 1, ¶ 1.

58. *Id.*

59. Opening Brief for Petitioner Comcast Corporation, *supra* note 9, at 15. Comcast also filed petitions for review of the Comcast Order in the Second, Third, and Ninth Circuits and, pursuant to an order of the Judicial Panel on Multidistrict Litigation, those petitions were consolidated. *Id.* at v. The District of Columbia Circuit terminated the consolidation on April 1, 2009. *Id.* The D.C. Circuit will soon rule on statutory authority in the Comcast matter, and it appears that it may disagree with the foregoing conclusions.

Communications Act")[60] grants the FCC broad authority to regulate interstate and foreign communication by wire or radio, in order to make available an adequate and accessible nationwide communication service.[61] The Telecommunications Act of 1996 ("the 1996 Act"), which amended the Communications Act, provides for promotion of competition and reduction of regulation in the telecommunications industry, in order to secure lower prices and higher quality services and to encourage the rapid deployment of new technology.[62] Because broadband Internet represents a hybrid form of communication, regulatory history has addressed broadband in the context of both communications laws.

1. Broadband Technology as a Form of "Advanced Telecommunications"

Cable modem services are transmitted along the same coaxial cable used to transmit television signals,[63] which may be upgraded to enable high speed broadband service.[64] Neither Congress nor the FCC defines broadband in terms of a specific technology.[65] The FCC refers to broadband as a form of "advanced telecommunications,"[66] using this term to describe services and facilities with a downstream (provider to customer) transmission speed of more than 768 kilobits per second to end users.[67]

60. Communications Act of 1934, 47 U.S.C. §§ 151–614 (2006).

61. *Id.* §§ 151, 154(i).

62. Telecommunications Act of 1996, 47 U.S.C. §§ 151, 216, 607–09 (2006).

63. *See* Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1124 (9th Cir. 2003).

64. *See* Nirali Patel, Comment, *FCC Broadband Policy: More Power for the Bell Monopolies*, 55 ADMIN. L. REV. 393, 400 (2003). Broadband connectivity thus combines pure transmission capabilities of carrier networks with data processing capabilities of the Internet. Werbach, *supra* note 21, at 1268.

65. *See* Patel, *supra* note 64, at 399.

66. *See In re* Development of National Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership, 23 F.C.C.R. 9691, ¶ 1 (2008) (discussing development of broadband policies in response to the Telecommunications Act mandate to deploy "'advanced telecommunications capability'").

67. *Id.* ¶ 20, n.66.

2. Agency Rulings Underlying the Regulation of High-Speed Internet Access

Although both cable modem service and digital subscriber line technology ("DSL") provide high-speed Internet access, differences in network structure cause them to be governed under different schemes based on whether a service is telephone based or cable based.[68] Under the Communications Act, telephone companies are considered "common carriers" regulated under Title II, whereas cable operators are regulated separately under Title VI.[69] In a series of proceedings in the 1960s called "The Computer Inquiries," the FCC sought to determine a regulatory approach to accommodate an era of integrated services and convergence.[70]

In the first proceeding, commonly referred to as "Computer I,"[71] the FCC found data processing (such as calculating numbers in a spreadsheet) to be a highly competitive industry for which government regulation was unnecessary.[72] In contrast, the FCC viewed the market for communications services (such as transmission of information via e-mail) to be a monopoly and therefore decided to regulate communications services as common carrier offerings under Title II of the Communications Act.[73] Services that combined communications and data processing were deemed "hybrid" services to be classified on a case-by-case basis.[74]

---

68. *See* Tramanh Phi, Comment, *Duopolies, Restrictions, and Content Regulation: How Much Access Are We Really Getting from Broadband Internet Access?*, 47 SANTA CLARA L. REV. 347, 352–53 (2007).

69. *See generally* 47 U.S.C. §§ 151–614 (2006).

70. See *infra* notes 71–83 and accompanying text regarding the Computer Inquiries. Convergence is the transition from analog to digital delivery of data and network traffic, resulting in layered networks. *See* Werbach, *supra* note 21, at 1262–64.

71. *In re* Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, 28 F.C.C.2d 267, ¶ 11 (1971) (final decision and order) [hereinafter Computer].

72. *Id.* "Data processing" is the use of the computer for operations that include storing, retrieving, sorting, merging, and calculating data, according to programmed instruction. *See In re* Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, 28 F.C.C.2d 291, ¶ 15 (1970) (tentative decision).

73. Computer, *supra* note 71, ¶ 11. By nature of its technology, the telephone was believed by many to operate most efficiently as a monopoly controlled by a single entity.

74. *Id.* ¶ 27.

In "Computer II,"[75] the FCC established a new regulatory framework that distinguished between "basic services" and "enhanced services."[76] It defined basic services as "the common carrier offering of transmission capacity for the movement of information," such as telephone service.[77] Enhanced services combined a basic service with an enhancement such as computer processing or storage service.[78] Basic services were thereafter regulated under Title II, whereas enhanced services fell outside the scope of Title II and were thus unregulated.[79] Under this framework, incumbent local exchange carriers ("ILECs"), such as common carriers, were subject to substantial federal regulation when providing broadband services.[80] To protect against anticompetitive behavior, the FCC subjected "facilities-based" common carriers to an unbundling requirement, ordering them to provide basic transmission services underlying their enhanced services on a nondiscriminatory basis.[81] Computer II also imposed "structural separation" safeguards that required basic telecommunications carriers offering enhanced services to do so through a separate corporate subsidiary.[82]

---

75. *In re* Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 F.C.C.2d 384, ¶ 5 (1980) [hereinafter Amendment of Section 64.702].

76. *Id.* ¶¶ 86, 96–97 (defining "basic services" as the offering of a "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information," and an enhanced service as "any offering over the telecommunications network which is more than a basic transmission service").

77. *Id.* ¶ 93.

78. *Id.* ¶ 97. Enhanced services were those "offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a) (2008).

79. Amendment of Section 64.702, *supra* note 75, ¶¶ 5–7, 132 (concluding that such regulation is unnecessary because it is not required by statute, is contrary to public interest, and would not lead to regulatory certainty).

80. *Id.* ¶ 132 (noting the FCC's power to control prices, terms, and conditions offered by ILECs).

81. *Id.* ¶¶ 116–18, 149 (also noting elsewhere in the order that "facilities-based" carriers are those that own basic transmission facilities). This unbundling requirement—from which AT&T was specifically exempted—was intended to limit abuse of market power through the controlled access to and use of underlying transmission facilities in a discriminatory and anticompetitive manner. *See id.* ¶¶ 148–50, 154–56.

82. *Id.* ¶¶ 140–41, 159–60.

The subsequent "Computer III" proceeding replaced this structural separation requirement with nonstructural safeguards designed to give all enhanced service providers nondiscriminatory access to network facilities.[83]

When it passed the 1996 Act, in part to accommodate the emergence of new Internet technologies, Congress preserved the Computer II scheme distinguishing regulated basic services from unregulated enhanced services, yet renamed them "telecommunications services" and "information services," respectively.[84] In 2005, the FCC issued an Appropriate Framework for Broadband Access to the Internet over Wireline Facilities ("Wireline Broadband Order"), which categorized the provision of wireline broadband service as an information service.[85] This order also noted that the Computer Inquiry requirements should no longer be imposed on facilities-based carriers in their provision of wireline broadband Internet access service.[86]

3. Case Law Underlying Regulation of High-Speed Internet Access

Given that the FCC did not explicitly classify cable modem service following the development of new technologies,[87] federal courts have also played a role in the regulation of high-speed Internet access. Under the 1996 Act, local governments were able to regulate cable services for the purpose of preserving competition.[88] Yet the Ninth Circuit, in

---

83. *See In re* Amendment of Section 64.702 of the Commission's Rules and Regulations, 104 F.C.C.2d 958, ¶¶ 3–4 (1986). These nonstructural safeguards included modification to network disclosure rules, nondiscrimination in providing network services, and variations in accounting procedures. *Id.* ¶ 36.

84. *See* 47 U.S.C. §§ 153(20), 153(46) (2006).

85. *In re* Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 20 F.C.C.R 14853, ¶ 169 (2005) (report and order and notice of proposed rulemaking) [hereinafter Wireline Facilities].

86. *See id.* ¶ 41. Yet the classification of DSL service as telecommunications (and not a telecommunications service subject to Title II regulation) has been criticized. *See, e.g.*, Patel, *supra* note 64, at 409 (noting flawed distinction between providing and using telecommunications).

87. See discussion *supra* Part II.B.2 regarding agency rulings as to high-speed Internet.

88. *See* 47 U.S.C. § 533(d)(2) (2006) (noting that "[n]othing in this section shall be construed to prevent any State or franchising authority from prohibiting the ownership or control of a cable system in a jurisdiction by any person . . . in circumstances in which the State or franchising authority determines that the acquisition of such a cable system may eliminate or reduce

AT&T Corp. v. City of Portland,[89] found that cable modem service was not a "cable service," but rather a hybrid service—partly an information service and partly a telecommunications service.[90] The FCC later sought to modify this categorization, instead classifying cable modem service as an interstate information service with no separate offering of telecommunications service.[91] In so ruling, the FCC sought to bring cable modem Internet service within its jurisdiction as an information service, which had not previously been subject to regulation.[92] Nonetheless, in *Brand X Internet Services v. FCC*, the Ninth Circuit vacated this finding, reaffirming a hybrid characterization of cable modem service and subjecting cable companies to open-access rules that typically governed the telephone industry.[93]

The FCC and numerous parties, including the National Cable and Telecommunications Association ("NCTA"), challenged the *Brand X* decision.[94] These parties argued that subjecting cable modem service to common carrier regulation would stifle the investment, innovation, and broadband deployment that was necessary to the economy.[95] The Supreme Court of the United States granted certiorari and, in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[96] overturned the Ninth Circuit's ruling.[97] The Court upheld the FCC's categorization of cable

competition in the delivery of cable service in a jurisdiction").

89. AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000).

90. *See id.* at 876–78.

91. *In re* High-Speed Access to the Internet Over Cable and Other Facilities, 17 F.C.C.R. 4798, ¶¶ 56–58 (2002) (declaratory ruling and notice of proposed rulemaking).

92. *Id.* ¶ 59.

93. Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1132 (9th Cir. 2003).

94. *See id.* at 1131–32.

95. Petition for Writ of Certiorari at 18–19, Nat. Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (No. 04-277), 2004 WL 1944011.

96. *Nat. Cable & Telecomms. Ass'n*, 545 U.S. 967. The small Internet company Brand X argued that cable companies, like phone companies, should be required to share their lines with third-party broadband providers. *Id.* at 995–97. The Court, however, sided with the FCC in upholding the cable companies' practice of excluding most third-party broadband providers from their networks. *Id.*

97. *Id.* at 980. The Court held that the Ninth Circuit should have used a *Chevron* framework, whereby statutory ambiguities may be interpreted and resolved by an agency if that statute is within the agency's jurisdiction and the agency's interpretation is reasonable. *Id.* at 981–82 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)).

broadband service as an information service, noting that the mere fact that a cable company offers an information service in the form of Internet access does not mean that it also offers the high-speed data transmission (telecommunications) to provide this service.[98] While the Court exercised authority under its Title I ancillary jurisdiction,[99] it refrained from offering detailed analysis in this regard.[100] Most importantly, the Court stated generally that such jurisdiction allows the FCC to impose additional regulatory obligations on information service providers[101] and special regulatory duties on facilities-based ISPs.[102] Nonetheless, because cable modem Internet access service has been characterized as an information service, it has remained free from government regulation.[103]

4. The Network Neutrality Debate

a. Concepts of Network Neutrality

This regulatory climate for broadband has provided ISPs the flexibility to inspect Internet content in furtherance of innovation and user-specific tailoring.[104] Such developments, however, have also fueled an ongoing debate over network neutrality—the notion that all like Internet content should be treated alike.[105]

---

98. *Id.* at 994.

99. *See* discussion *infra* Part III.A.1 (analyzing the FCC's ancillary jurisdiction under Title I).

100. *Nat. Cable & Telecomms. Ass'n*, 545 U.S. at 996 (noting that it "remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction"); *id.* at 1002 ("Any inconsistency between the order under review and the Commission's treatment of DSL service can be adequately addressed when the Commission fully reconsiders its treatment of DSL service and when it decides whether, pursuant to its ancillary Title I jurisdiction, to require cable companies to allow independent ISPs access to their facilities.").

101. *Id.* at 976.

102. *Id.* at 996.

103. Patel, *supra* note 64, at 408. It is possible, however, that the categories of telecommunications services and information services are becoming "anachronistic in a [converged] world" because the lines between services are increasingly blurred. *See* Werbach, *supra* note 21, at 1266.

104. See *supra* notes 22–30 and accompanying text regarding developments in broadband technology.

105. *See* Yoo, *supra* note 22, at 180; *see also* Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141, 145 (2003). It is important to note, however, that the term "net neutrality" is often conflated with various other meanings. *Compare* Declan McCullagh, *Net Neutrality*

One particularly innovative feature of the Internet is its ability to transmit data from any application and to permit applications to correspond without any changes to the networks transporting data.[106] Those who support net neutrality fear that network providers may use new technology to harm or exclude certain applications and content, thus decreasing innovation and reducing the Internet's value for society.[107] Net neutrality rules would essentially "prevent [broadband] providers from excluding applications or content from their networks or from discriminating against them."[108]

Though the idea of network neutrality has existed for some time, the debate emerged more fully when the FCC categorized many broadband platforms as "information services,"[109] thus removing common carrier protection without implementing new regulation in its place.[110] This issue has also resurfaced recently amid the emerging duopoly among DSL and cable modem providers,[111] the poor performance of the U.S. broadband market,[112] new technologies,[113] and an increasing focus (by providers and by regulators) on the policy issues relating to discriminatory network management

---

Advances on Capitol Hill, CNET NEWS, Apr. 4, 2006, http://news.cnet.com/Republicans-defeat-Net-neutrality-proposal/2100-1028_3-6058223.html?tag=mncol;txt (addressing net neutrality as the idea that government should not forcibly prevent broadband providers from favoring some connection speeds over others), *with* Amit M. Schejter & Moran Yemini, *Justice, and Only Justice, You Shall Pursue: Network Neutrality, the First Amendment, and John Rawls' Theory of Justice*, 14 MICH. TELECOMM. & TECH. L. REV. 137, 172 (2007) (noting that "[n]etwork neutrality is about ensuring that physical scarcity in access to the Internet . . . does not limit the abundance of content").

106. *See generally* Lemley & Lessig, *supra* note 18, at 930–33 (noting that the idea of nondiscrimination among applications has facilitated innovation).

107. *See* Brett M. Frischmann & Barbara van Schewick, *Network Neutrality and the Economics of an Information Superhighway: A Reply to Professor Yoo*, 47 JURIMETRICS J. 383, 387–88 (2007); Yoo, *supra* note 22, at 181.

108. Frischmann & van Schewick, *supra* note 107, at 389. Professor Yoo has posited that allowing some degree of non-neutrality across a network "may actually benefit consumers and promote innovation" through added competition. Yoo, *supra* note 22, at 182.

109. *See* discussion *supra* Part II.B.2.

110. Werbach, *supra* note 21, at 1266.

111. See *infra* notes 215, 219–23 and accompanying text characterizing the broadband market.

112. *See infra* notes 226–28 and accompanying text.

113. *See* Yoo, *supra* note 22, at 187 (referring to online video applications).

practices.[114] Following an October 2009 FCC proposal and renewed public discussion regarding formal net neutrality rules, the debate continues.[115]

b. A Lack of Formal Network Neutrality Policies

Although the principles of net neutrality have not been codified,[116] the Communications Act sets forth two principles of nondiscrimination. First, the Act describes a national Internet policy "to preserve the vibrant and competitive free market that presently exists for the Internet" and "to promote the continued development of the Internet."[117] Further, the Act charges the FCC with encouraging broadband deployment "to all Americans" on a reasonable and timely basis.[118]

In an Internet Policy Statement issued along with its 2005 Wireline Broadband Order,[119] the FCC also "adopted" four principles in an effort to ensure that broadband networks are "widely deployed, affordable, and accessible to all consumers."[120] These principles acknowledge that customers are entitled to: (1) "access the lawful Internet content of their choice," (2) "run applications and use services of their choice," (3) "connect their choice of legal devices that do not harm the network," and (4) "competition among network providers, application and service providers, and content providers."[121] The FCC vowed to incorporate such principles into its ongoing policymaking activities,[122] yet conceded that these

114. *See* Werbach, *supra* note 21, at 1270.

115. *See* Gross, *supra* note 10.

116. *Comcast Files Petition*, *supra* note 8. Congress is reportedly pushing for legislation, yet none of the proposals have garnered enough support to become law. *See also infra* notes 204–206 and accompanying text for an explanation of these proposals.

117. *In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14986, ¶ 2 (2005) [hereinafter Appropriate Framework] (citing 47 U.S.C. § 230(b)(1) (2006)).

118. 47 U.S.C. § 157 (2006); *see also infra* notes 163–66 and accompanying text.

119. See *supra* note 85 and discussion *infra* Part III.A.2.a regarding the Wireline Broadband Order and enforceability of the Internet Policy Statement.

120. Appropriate Framework, *supra* note 117, ¶ 4.

121. *Id.*

122. *Id.* ¶ 5.

> The Commission has a duty to preserve and promote the vibrant and open character of the Internet as the telecommunications marketplace enters the broadband age. To foster creation, adoption and use of

were not "rules" and were subject to reasonable network management.[123] This Internet Policy Statement presumptively applies to wireless broadband.[124] While these measures seem to acknowledge broadband discrimination as a legitimate worry, the FCC has refrained from adopting enforceable mandates.[125]

III. ANALYSIS OF THE COMCAST ORDER AND RESULTING REGULATORY UNCERTAINTY

Though many have lauded the Comcast Order as a landmark step in preserving the open Internet,[126] the FCC's intervention into the Comcast dispute seems inconsistent with its usual abstention from the regulation of information services.[127] By acting in absence of pre-existing standards governing broadband network management, the FCC may have exceeded statutory authority.[128] Moreover, by adopting a highly discretionary approach to network management issues, the FCC has taken a regulatory position that may allow for largely unguided regulatory action. Such an outcome, even if exercised under proper jurisdiction, may

---

> Internet broadband content, applications, services and attachments, and to ensure consumers benefit from the innovation that comes from competition, the Commission will incorporate the above principles into its ongoing policymaking activities.

Id.

123. *Id.* n.15; *see also* Opening Brief for Petitioner Comcast Corporation, *supra* note 9, at 15 (arguing that the Policy Statement was, at the time of the dispute, widely understood not to impose binding legal norms).

124. Marvin Ammori, Policy Statements, Rules, and Wireless Carterfone, Address at the Santa Clara University School of Law Symposium on Carterfone and Open Access in the Digital Era (Oct. 17, 2008). This is apparent in the FCC's deregulation orders for cable modem, DSL, broadband, and wireless, as well as in portions of the Comcast Order that refer to the Internet Policy Statement. *Id.*

125. *See* Werbach, *supra* note 21, at 1272.

126. These parties include the Future of Music Coalition (FMC), Public Knowledge, the Computer and Communications Industry Association, and Free Press.

127. See discussion *supra* Part II.B.2 regarding the historical regulation of broadband Internet access.

128. *See* discussion *infra* Part III.B. Comcast has cast this problem as a violation of the Administrative Procedure Act. Specifically, Comcast has asserted that it was sanctioned for conduct made unlawful on the basis of a "fictional claim, an unknown process for the resolution of that claim, an ever-evolving theory of liability against which to defend, and a 'high' burden of proof that it did not know it was required to meet." Opening Brief for Petitioner Comcast Corporation, *supra* note 9, at 16.

warrant a new model for ensuring reasonable network practices.

A. The Possible Breach of Statutory Authority

To properly adjudicate a proceeding such as the Comcast dispute, the FCC must have jurisdiction pursuant to a substantive provision of the Communications Act.[129] The FCC's characterization of broadband Internet access as an information service, however, precludes the FCC from regulating under Title II.[130] Because Title VI (pertaining to Cable Operators) has not yet been found to directly cover broadband Internet providers, Title I remains the only possible substantive authority for jurisdiction.[131] Thus, in its issuance of the Comcast Order, the FCC relied upon its general authority arising under Title I.[132]

1. Title I Ancillary Jurisdiction

Title I of the Communications Act includes a general grant of rulemaking authority, stating that "[t]he FCC may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."[133] Thus, protecting the effectiveness of existing regulations issued under the Communications Act is an appropriate exercise of Title I ancillary jurisdiction.[134] Despite the differences between broadband Internet and the traditional services covered by substantive titles of the Act, this discretion allows the FCC some leeway to regulate services falling outside of

129. *See* 47 U.S.C. § 151 (2006) (creating a Federal Communications Commission which "shall execute and enforce the provisions of this [Act]").

130. *See* discussion *supra* Part II.B.2.

131. Title III (47 U.S.C. §§ 301–399(b) (2006)) governs radio communications, while Title IV (47 U.S.C. §§ 401–416 (2006)) and Title V (47 U.S.C. §§ 501–510 (2006)) set forth procedural, administrative, and penal provisions.

132. *See* Against Comcast, *supra* note 1, ¶ 14 (citing § 4(i) authority to impose regulatory obligations on ISPs under Title I ancillary jurisdiction).

133. 47 U.S.C. § 154(i) (2006); *see also id.* § 303(r) (authorizing the FCC to, "as public convenience, interest, or necessity requires . . . prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of this [Act]").

134. *See* Dan G. Barry, Comment, *The Effect of Video Franchising Reform on Net Neutrality: Does the Beginning of IP Convergence Mean That It is Time for Net Neutrality Regulation?*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 421, 441 (2008).

those titles.[135]

Nonetheless, the extent of the FCC's Title I authority remains unsettled.[136] For instance, the Title I grant of authority may be no more than a "housekeeping authority" for setting rules of internal procedure.[137] Recent cases have construed this ancillary authority narrowly, recognizing jurisdiction only where its action is "ancillary to" the furtherance of other regulatory authority.[138] In other words, jurisdiction exists where it is "necessary to protect [a] common carrier, broadcast, or cable regulation."[139] This may authorize regulation of ISPs in cases where the Internet service competes with a traditional service,[140] but such a result conflicts with the goals of the 1996 Act, which urged a removal of Title I authority where new competition proves it unnecessary.[141]

2. *Provisions to Which Regulation of the Comcast Dispute May Be Ancillary*

The FCC contended that Title I directly governed the Comcast dispute because P2P connections are a form of "communication by wire" over which the Commission retains broad authority.[142] The FCC also maintained that its exercise

---

135. The Supreme Court has confirmed this flexibility, recognizing the FCC's jurisdiction to impose additional regulatory obligations on information services and to impose special regulatory duties on facilities-based ISPs under Title I. Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1129 (9th Cir. 2003).

136. *See* James B. Speta, *FCC Authority to Regulate the Internet: Creating It and Limiting It*, 35 LOY. U. CHI. L.J. 15, 17, 22 (2003).

137. *See id.* Professor Speta further states:

> The Communications Act's substantive provisions and the FCC's regulatory authority cover only three specific types of communications services: (1) interstate common carriers under Title II, (2) spectrum licenses under Title III, and (3) cable operators under Title VI. Indeed, each of these Titles provides the FCC a grant of legislative rulemaking authority. If the section 4(i) grant of authority included legislative rulemaking, then the specific inclusion of these other substantive grants would be redundant.

Id. at 23–24 (citing Thomas W. Merrill & Kathryn T. Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 517–19 (2002) (footnotes omitted)).

138. *See* FCC v. Midwest Video Corp., 440 U.S. 689, 706–09 (1979).

139. *See* Speta, *supra* note 136, at 25. That is, even if an action is good law, it must be "strictly in furtherance of the goals of substantive titles." *Id.*

140. *See id.* at 25–26.

141. *See id.* at 26.

142. *See* Against Comcast, *supra* note 1, ¶ 15.

of jurisdiction was reasonably ancillary to its Internet Policy Statement and six separate statutory provisions.[143]

a. Internet Policy Statement

The Free Press Petition initiating the Comcast proceeding argued that jurisdiction existed solely because Comcast violated the Internet Policy Statement by throttling Internet traffic,[144] yet the enforceability of the Statement is somewhat uncertain. Prior to the issuance of the Order, Comcast argued that statements of policy were not enforceable because such statements sidestep the substantive provisions of the statute.[145] The fact that the FCC chose to issue the Internet Policy Statement seems to imply a lack of pre-existing and enforceable standards.[146] Assuming the mere existence of the Statement makes it enforceable as FCC precedent, Comcast had notice of its policies.[147] The FCC stated its intent to enforce the Internet Policy Statement when it issued the Wireline Broadband Order.[148] Additionally, because the FCC had mentioned that the blocking or importing of cable modem access may trigger an intervention, Comcast had reason to know that its practices were contrary to communications policy.[149] Moreover,

143. *See id.* ¶ 16; *supra* notes 120–123 regarding principles enumerated in the Internet Policy Statement.

144. *See* Petition for Declaratory Ruling of Free Press et al., *supra* note 49, at 14.

145. *See* Letter from Kathryn A. Zachem, Vice President, Regulatory Affairs, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC 2 (July 21, 2008), *available at* http://domex.nps.edu/corp/files/govdocs1/754/754636.pdf (noting that "[t]he declaration of policy . . . is not part of the substantive portion of the statute," and thus no basis for agency action against Comcast).

146. *See generally* Wireline Facilities, *supra* note 85.

147. *See* Against Comcast, *supra* note 1, ¶ 35. This type of assumption, however, constitutes one of the key concerns for those critical of the FCC's Order.

148. *See id.* ¶ 13 (citing Wireline Facilities, *supra* note 85 for its warning that "[s]hould [the FCC] see evidence that providers of telecommunications for Internet access or IP-enabled services are violating these principles, [it would] not hesitate to take action to address that conduct"). Comcast did not escape the Policy Statement by merely *delaying* applications; the delay was tantamount to blocking. *Id.* ¶¶ 44–45.

149. *See id.* ¶ 40 (citing 17 F.C.C.R. 4842 ¶ 79 (2002)). Comcast has steadily maintained that the Policy Statement did not constitute fair notice as required to ensure due process since it is not enforceable as law. *See* Opening Brief for Petitioner Comcast Corporation, *supra* note 9, at 40–41. The company has equated the Statement to a mere press release, arguing that an agency may

Comcast arguably admitted jurisdiction over its network management practices in prior litigation before the Northern District of California.[150]

The Supreme Court has held that the FCC may base its exercise of authority on the policies the Act states, as well as the regulatory power it confers.[151] Because the Internet Policy Statement reiterates pre-existing policies from the Act, the Statement may well be enforceable.[152] If so, the FCC responded to the Comcast dispute in a manner aligned with such policy.

b. Statutory Provisions

The Free Press Petition initiating the Comcast inquiry did not cite any provisions of the Communications Act or any FCC rules or orders.[153] In fact, prior to issuing the Comcast Order, the FCC sought public comment only as to whether degrading P2P traffic violates the Internet Policy Statement.[154] Nonetheless, the FCC cited authority to regulate Comcast as reasonably ancillary to the furtherance

---

establish binding policy only through rulemaking policies promulgating substantive rules or through adjudications constituting binding precedents. *See id.* at 22 (citing Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974)).

150. *See* Against Comcast, *supra* note 1, ¶ 24.

151. *See, e.g.*, United States v. Midwest Video Corp., 406 U.S. 649 (1972).

152. For example, the Statement points out that the goals of preserving the open and vibrant nature of the Internet and encouraging broadband deployment had been codified in the Act. Appropriate Framework, *supra* note 117, ¶ 2 (citing 47 U.S.C. §§ 230(b)(1), 706(a) (2006)).

153. *See* Petition for Declaratory Ruling of Free Press et al., *supra* note 49, at i, iii, 3, 14; Letter from Kathryn A. Zachem, Vice President, Regulatory Affairs, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC 2 (July 10, 2008), *available at* http://www.wired.com/images_blogs/threatlevel/files/comcast_response_to_fp_authority_letter1.pdf. Free Press later shifted its position to rely on statements set forth in § 230(b) of the Act and § 706(a) of 1996 Act, defending its use of "short-hand" to urge FCC action. Letter to Marlene H. Dortch, Secretary, FCC, from Marvin Ammori, Gen. Counsel, Free Press Attachment 2 2 (June 12, 2008), *available at* http://www.freepress.net/files/FP_et_al_Petition_Ex_Parte_Filing.pdf (claiming that previous references to "enforcing the Policy Statement" were intended to "save words on a more detailed expression: 'making policy based on announced principles set forth in a Policy Statement by using adjudication to enforce rights guaranteed to consumers, and which the FCC must ensure because of obligations imposed on the FCC by the Communications Act'").

154. Comment Sought on Petition for Declaratory Ruling Regarding Internet Management Policies, Public Notice, 23 F.C.C.R. 340, 340 (2008).

of six other statutory provisions: §§ 1, 201, 256, 257, and 601(4) of the Communications Act, and § 706 of the 1996 Act.[155] While the Comcast Order seems more closely tied to the goals of some provisions than others, the aggregate statutory authority and overarching Internet policy are arguably sufficient to support jurisdiction.

Section 1 directs the FCC to "make available" a rapid and efficient communication service.[156] Authority reasonably ancillary to this delegation may exist because prohibiting unreasonable network discrimination encourages more rapid and efficient service across the network.[157] Also, exercising jurisdiction would promote the achievement of "reasonable charges," because allowing consumer access to an alternative media source would spark competition and competitive pricing.[158]

The FCC's jurisdiction seems best asserted as ancillary to § 201, which makes unlawful any common carrier charge, practice, classification, or regulation that is unjust or unreasonable.[159] Though Comcast has not been considered a common carrier,[160] its tendency to shift costs to common carrier competitors with whom it interconnects suggests that regulation may be reasonably ancillary to § 201.[161] If this section is to have any effect in ensuring fair practices among common carriers, it must reach entities that fall beyond that classification yet nonetheless impact the market. Because Comcast's deceptive conduct was contrary to standards of reasonableness,[162] the FCC arguably invoked its authority

155. Against Comcast, *supra* note 1, ¶16. Comcast has nonetheless responded that the FCC cannot exercise authority ancillary to provisions that are arguably mere statements of policy. *See* Opening Brief for Petitioner Comcast Corporation, *supra* note 9, at 42–48.

156. 47 U.S.C. § 151 (2006) (stating the purposes of the Act).

157. *See* Against Comcast, *supra* note 1, ¶ 16.

158. *See id.*

159. 47 U.S.C. § 201(b) (2006).

160. *See* discussion *supra* Part II.B.2.

161. *See* Against Comcast, *supra* note 1, ¶ 17.

162. See *supra* notes 39–43 and accompanying text regarding Comcast's practices. *See also* Against Comcast, *supra* note 1, at 13066 (statement of Chairman Kevin J. Martin) (noting that willingness to disclose practices is a hallmark of reasonableness). While no provision in the Policy Statement imposes a disclosure requirement, such a requirement might be inferred from the mandate that providers engage in "reasonable" network management (which could not have included mimicking another user's computer and covertly sending a reset packet). *See* Appropriate Framework, *supra* note 117, ¶ 5

ancillary to effect the provisions of Title II.

Section 706 of the 1996 Act orders the FCC to encourage the deployment of advanced telecommunications capability to all Americans on a reasonable and timely basis.[163] The FCC claimed ancillary authority based on this section because the degrading of consumer access limits broadband deployment and a prohibition on this behavior would increase the consumer demand for unimpeded access.[164] Even so, by halting Comcast's network management, the FCC seems to have gone beyond mere encouragement. Other methods of encouraging broadband deployment, such as building out networks (particularly in rural areas) or facilitating market entry, may better serve this goal. In light of these alternatives, halting Comcast's practices does not seem closely related enough to § 706 goals to create reasonably ancillary jurisdiction.

Under § 256, the FCC may "promote nondiscriminatory accessibility" of public telecommunications networks to "ensure the ability of users and information providers to seamlessly and transparently transmit and receive information between and across telecommunications networks."[165] This section allows broad oversight of interconnectivity and reliability, regardless of the legal classification of the broadband service.[166] Comcast erected a barrier that effectively shifted traffic; thus, the FCC acted reasonably when it halted this practice and implicitly enabled the public to "seamlessly and transparently transmit and receive information."[167] Logic seems to preclude a finding that the FCC must regulate part of an interconnected network but not the whole. Although the shifting effect of traffic between networks may be an attenuated justification for invoking § 256, this conclusion follows logically in light of the growing importance of interconnectivity.

(noting the principles were subject to reasonable network management). Comcast's behavior also contravened TCP standards promulgated by the Internet Engineering Task Force by violating expectations that accompany network connections and general Internet behavior. *Id.* ¶ 45.

163. 47 U.S.C. § 157 (2006).

164. *See* Against Comcast, *supra* note 1, ¶ 18.

165. 47 U.S.C. § 256(a)(B)(2) (2006).

166. *See* Against Comcast, *supra* note 1, ¶ 19 (citing Wireline Facilities, *supra* note 85).

167. *See id.* (citing 47 U.S.C. § 256(a)(2) (2006)).

Under § 257, the FCC must conduct ongoing reviews to identify and eliminate market barriers for both telecommunications services and information services.[168] This provision reinforces a national policy of promoting the "public interest, convenience, and necessity."[169] The FCC embraced this policy of content neutrality in its Comcast Order, linking the success of the Internet to its open and neutral design.[170] In halting Comcast's discriminatory practices, the FCC furthered the public interest by assuring that third parties are able to enter the broadband market and force competitive pricing.[171]

Title VI is, among other purposes, intended to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public."[172] This directive applies broadly to "cable communications," including P2P transfers.[173] A restriction on discriminatory network management facilitates access to a wider variety of content and a diversity of information sources and services. It was thus not unreasonable for the FCC to have found ancillary jurisdiction under this Title.

Although certain provisions provide more convincing authority than others, there is a strong basis for regulating broadband access based on Title I's historic regulation of new technologies on an "as-needed" basis until such technologies are formally incorporated into the Act.[174] Broadband technology falls under this section because of its rapid technological developments. The text of the Act indicates

168. *See id.* ¶ 20 (citing 47 U.S.C. § 257 (2006)).

169. *Id.* § 257(b) (stating that the FCC "shall promote the policies and purposes of this [Act] favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity").

170. *See* Against Comcast, *supra* note 1, ¶ 20. This is one reason to believe the principles of net neutrality are in fact codified in some form, albeit on a piecemeal basis.

171. *See id.* The FCC is similarly correct to note that contravention of standard practices through discriminatory conduct erects forced barriers to entry and warrants action to allow for technological advancement. *See id.*

172. 47 U.S.C. § 521(4) (2006).

173. Against Comcast, *supra* note 1, ¶ 21. In this instance, the FCC defines "cable communications" to include "those communications, such as peer-to-peer transfers, facilitated by broadband Internet access service provided by cable operators such as Comcast." *Id.*

174. Barry, *supra* note 134, at 443.

congressional intent to empower the FCC in ambiguous cases, noting an interest in "centralizing authority" and "granting additional authority."[175] Though Comcast has criticized the "cobbl[ing] together" of various provisions,[176] a mandate to protect the "public interest, convenience, and necessity" in the context of new technology necessitates an aggregated approach.[177] Given the vagueness of its statutory charge to protect the public interest,[178] the FCC can justify many of its actions on that basis.

Congress may have intended to preserve an Internet generally "unfettered" by regulation,[179] but broadband Internet providers presumably cannot completely escape government oversight, given the Act's stated purpose of "preserv[ing] the vibrant and competitive free market."[180] In light of clear evidence of Comcast's discriminatory practices, a failure to act on the part of the FCC might have suggested disregard for recurring themes in communications policy.[181]

B. An Invitation for Unguided Regulatory Action

While the FCC likely possessed proper ancillary authority to issue the Comcast Order, the Commission erred by adopting too flexible a framework that embraces case-by-case adjudications and allows for unguided regulatory

175. 47 U.S.C. § 151 (2006).

176. Letter from Kathryn A. Zachem, *supra* note 153, at 3.

177. 47 U.S.C. § 257(b) (2006).

178. *See* Frederick W. Ford, *The Meaning of the "Public Interest, Convenience, or Necessity,"* 5 J. BROADCASTING 205, 205 (1961) (pointing out that an outstanding attorney once likened the clause to "simply what the commissioners say it is at the time they render a decision").

179. *See* 47 U.S.C. § 230(b)(2) (2006).

180. *Id.* Yet Comcast would counter—and has countered—that such mere expressions of policy do not create binding legal norms. *See* Opening Brief for Petitioner Comcast Corporation, *supra* note 9, at 28. Comcast has specifically highlighted the FCC's apparent reluctance to rely on §§ 230(b) and 706(a) in support of its Order. *See id.* at 29 (noting that the Order "studiously avoided stating that it enforces Sections 230(b) or 706(a), instead referring repeatedly to enforcement of 'federal policy'").

181. Chairman Kevin Martin noted this potential for setting a poor precedent by failure to act, as well as its implicit suggestion that network neutrality laws are needed. *See* Against Comcast, *supra* note 1, at 13067 (statement of Chairman Kevin J. Martin). Yet the Comcast Order in fact *does* seem to indicate that such laws are necessary, given the FCC's need to cherry-pick from various statutory provisions in order to establish jurisdiction and standards for reasonable network management.

action.[182] The FCC vowed to protect lawful Internet access,[183] yet it has taken no concrete steps to that end. Instead, it has adopted a "wait-and-see" approach in which it intends only to address a violation when it becomes a demonstrated threat.[184]

This method of regulation may cause corporate second-guessing and is subject to lengthy judicial review.[185] Moreover, boundless adjudication could lead the FCC to abuse its discretion because authority is seemingly limitless. Nonetheless, the FCC chose to adjudicate the Comcast dispute despite the novel questions regarding broadband Internet, the complex nature of broadband services that precludes a "one-size-fits-all" approach, and the congressional directives urging restraint.[186] The FCC acknowledged the possibility that it could later prescribe rules following another adjudication.[187]

Despite Comcast's egregious actions,[188] the FCC refrained from adopting a rigid regulatory framework for network management practices. This attempt to maintain a flexible approach, however, may allow further content blocking.[189] The FCC stated that because the Internet Policy Statement empowers customers to "access the lawful Internet content of their choice, [broadband] providers, consistent with federal policy, may block transmissions of illegal content or transmissions that violate copyright law."[190] A statement by former Chairman Martin seemed to further endorse Internet

182. *See* Speta, *supra* note 136, at 26–28. Case-by-case adjudication and the development of facts via an adversarial process create the possibility of delay and lack of uniformity, which in turn inhibit the development of business models. *Id.* at 19. See *supra* note 55 and accompanying text regarding this framework.

183. *See* Wireline Facilities, *supra* note 85, ¶ 96.

184. *See id.*

185. *See* Speta, *supra* note 136, at 22.

186. *See* Against Comcast, *supra* note 1, ¶¶ 30–32.

187. *See id.* ¶¶ 38–40 (citing *In re* Use of the Carterfone Device in Message Toll Telephone Service, 13 F.C.C.2d 420 (1968)).

188. Numerous experts and organizations have condemned Comcast's behavior as not only unreasonable, but as harmful and even a form of censorship. *See* Against Comcast, *supra* note 1, ¶ 46. Evidence suggests that Comcast may have interfered with up to seventy-five percent of P2P TCP connections in certain communities. *Id.* ¶ 42.

189. *See* Posting of David Kravets to Wired.com, http://blog.wired.com/27bstroke6/2008/08/analysis-fcc-co/ (Aug. 20, 2008, 12:53 EST).

190. *See* Against Comcast, *supra* note 1, ¶ 50.

filtering, gauging the reasonableness of network management practices based on whether network activity is illegal or harmful.[191] While such allowances were likely made in good conscience, they seem an invitation for ISPs to block traffic based entirely on content.[192] Thus, the FCC's attempt to resolve network management issues with flexibility may create a more discriminatory result.

Finally, a network management framework lacking clear standards for discrimination is likely to lead to subjective and potentially arbitrary decision making. For instance, the Comcast framework requires the FCC to consider the distinction between legal and illegal content when determining whether a company is blocking or degrading Internet content in a discriminatory (or willful) manner.[193] "Discrimination" has been defined as "allowing network-access providers to treat some traffic or users differently" than others,[194] and actually occurs quite often.[195] A firm may discriminate based on several motivations, and the mere act of preferring one party over another does not necessarily warrant intervention.[196] Comcast's conduct—which involved deceptive trade practices[197]—should clearly be regulated, yet even this situation involved subjectivity because evidence

191. Against Comcast, *supra* note 1, at 13070–71 (statement of Chairman Kevin J. Martin).

192. *See* Posting of David Kravets, *supra* note 189 (noting the FCC's concession that carriers may "act as traffic cops" and block illegal material and transmissions).

193. For a full explanation of the proposed framework, see Against Comcast, *supra* note 1, at 13073–75 (statement of Chairman Kevin J. Martin).

194. *See* Susan P. Crawford, *The Internet and the Project of Communications Law*, 55 UCLA L. REV. 359, 395 (2007).

195. Werbach, *supra* note 21, at 1278–79 (citing cross-subsidization as an example of discrimination in the differential treatment of customers).

196. *Id.* For instance, scarcity and congestion necessarily require some packets to be dropped. In that instance, discrimination may take the form of a mere granting of priority to certain users. *See* Howard A. Shelanski, *Network Neutrality: Regulating with more Questions than Answers*, 6 J. TELECOMM. & HIGH TECH. L. 23, 35 (2007) (analogizing this situation to a traffic lane reserved for only certain vehicles at rush hour, but otherwise open to general use). Other discrimination occurs when a provider hopes to recover operator expenses directly from users who cause the network to incur higher costs, or when it realizes that some are willing to pay higher costs for greater access. *Id.* at 35–36.

197. *See* Werbach, *supra* note 21, at 1278–79 (2007) (noting that such examples are an exception to the rule against regulation).

regarding Comcast's behavior was conflicting.[198] Vague nondiscrimination rules allowing such leeway will fail because they involve difficult determinations as to whether discrimination or content is harmful rather than benign.[199] It is crucial that a regulatory framework include a provision on discrimination because even the possibility of future discrimination may lessen incentives for companies to invest in broadband developments.[200]

C. The Need for Clear Regulatory Framework to Fill a Gap in Policy

The lack of a clear congressional mandate, coupled with the FCC's reluctance to impose additional regulations, has created a policy gap regarding the provision of broadband Internet access services.[201] Though the FCC rightly found the authority to address the Comcast dispute,[202] other network management controversies will undoubtedly arise.[203]

Despite the lack of legislation on net neutrality, recent FCC and congressional proposals suggest broad support for a clear regulatory policy for broadband Internet access services.[204] One proposal, the Internet Freedom Preservation

198. *See, e.g.*, Against Comcast, *supra* note 1, at 13092 (dissenting statement of Commissioner Robert M. McDowell) (acknowledging that "the FCC does not know what Comcast did or did not do" in light of such thin and conflicting evidence).

199. *See* Werbach, *supra* note 21, at 1277.

200. *See* Douglas A. Hass, *The Never-Was-Neutral Net and Why Informed End Users Can End the Net Neutrality Debate*, 22 BERKELEY TECH. L.J. 1565, 1593 (2007) (citing concerns of Professors Lawrence Lessig and Tim Wu).

201. *See* Posting of David Sohn to Center for Democracy & Technology.org, http://blog.cdt.org/2008/07/16/fcc-enforcement-against-comcast (July 16, 2008).

202. It is fortunate that the FCC entered the dispute, because a failure to act might have led the FCC down a slippery slope toward endless types of discrimination by broadband providers. *See* Against Comcast, *supra* note 1, at 13067 (statement of Chairman Kevin J. Martin) (noting that "[i]f we aren't going to stop a company that is looking inside its subscribers' communications . . . blocking that communication when it uses a particular application regardless of whether there is congestion on the network, hiding what it is doing by making consumers think the problem is their own, and lying about it to the public, what would we stop?").

203. In fact, following the Comcast Order, Free Press asked the FCC to require U.S. wireless networks to follow the same policy imposed upon Comcast. *See* Mark Long, *FCC Asked to Apply Open Internet Rule to Skype*, NEWSFACTOR NETWORK, Apr. 3, 2009, http://www.newsfactor.com/news/FCC-Open-Rule-Sought-for-Skype/story.xhtml?story_id=003000AMCIL3&full_skip=1. Free Press cited AT&T's blocking of the Skype application on Apple iPhones. *Id.*

204. *See infra* notes 205–07 and accompanying text.

Act, would have introduced a ban on the blocking and degradation of lawful content, forbidding firms from requiring purchase of further services before providing Internet access, and banning quality of service deals between network providers and specific content providers.[205] In the fall of 2009, the FCC proposed a set of net neutrality rules incorporating several of the principles from its 2005 Policy Statement.[206] A bipartisan effort to advance the adoption of these rules appears to be on the horizon.[207] To date, however, efforts to legislate on net neutrality principles have failed, due in part to opposition from telephone and cable companies who have argued that the FCC possesses ample authority to enforce such principles.[208] The Obama administration has indicated its support for open access and increased broadband deployment,[209] and developments amid economic stimulus efforts have suggested that, in some form, the net neutrality debate will continue to smolder.[210]

Historical precedent indicates an intention to maintain a relatively deregulatory environment,[211] yet most of the

---

205. *See* Richman, *supra* note 35, at 17–19 (noting that it would still have allowed content prioritization so long as it originated from a provider's network). Other proposed legislation has included the Internet Non-Discrimination Act of 2006, the Network Neutrality Act of 2006, the Communications, Consumer's Choice, and Broadband Deployment Act of 2006, and the Internet Freedom and Nondiscrimination Act of 2006. *Id.* at 17.

206. *See* Grant Gross, *FCC Chairman Calls for Formal Net Neutrality Rules*, PCWORLD, Sept. 21, 2009, http://www.pcworld.com/businesscenter/article/172312/fcc_chairman_calls_for_formal_net_neutrality_rules.html.

207. *See* Posting of Cecilia Kang to http://voices.washingtonpost.com/posttech/2009/09/senators_plan_bill_to_advance.html (Sept. 28, 2009, 16:55 EST) (noting Sen. Byron L. Dorgon (D-N.D.) and Sen. Olympia Snowe (R-Maine) are considering legislation aimed at adopting the FCC's proposed rules).

208. Proposals may also have failed due to concern by investors who would be directly impacted by network management restrictions. *See* Grant Gross, *Congress to Push for Net Neutrality Legislation*, PCWORLD, Nov. 13, 2008, http://www.pcworld.com/businesscenter/article/153827/congress_to_push_for_net_neutrality_legislation.html.

209. *See* The White House.gov, Technology, http://www.whitehouse.gov/issues/technology (last visited Jan. 4, 2010).

210. The American Recovery and Reinvestment Act of 2009, which proposes a multi-billion-dollar allotment for broadband buildouts to underserved and rural areas, contains a requirement for open network provisions. Roy Mark, *Broadband Buildout Nets Neutrality Debate*, EWEEK.COM, Mar. 24, 2009, http://www.eweek.com/c/a/IT-Infrastructure/Broadband-Buildout-Nets-Neutrality-Debate-671262.

211. *See, e.g.*, Pursuant to Section 706, *supra* note 33, ¶ 133 ("We believe that

authority indicating a preference for minimal regulation also expresses the utmost support for competition and widespread deployment of broadband Internet.[212] Failure to act in the Comcast matter would have flouted both goals because the behavior blocked third-party content and would have facilitated a Comcast monopoly.[213]

Advocates of the laissez-faire approach to broadband regulation argue that good infrastructure sets up rules for a competitive market, then allows the market to operate without regulation.[214] Yet this theory presumes a prerequisite set of good rules. In reality the market for broadband is very centralized and duopolistic, with high barriers to entry,[215] so the theory relies too heavily on network owners and presumes that these entities will do what is sensible from a social perspective.[216] Another shortcoming of the laissez-faire approach is the ex post enforcement that occurs when the FCC finds a clear basis for intrusion into private business. Scholars criticizing such enforcement have deftly noted that "[t]o say there is no

---

a minimal regulatory framework will promote competition and thus encourage investment in advanced telecommunications capability."); Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 15 F.C.C.R. 20913, ¶ 246 (2000) ("[W]e believe that competition, not regulation, holds the key to stimulating further deployment of advanced telecommunications capability.").

212. *See generally In re* Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 14 F.C.C.R. 2398 (1999).

213. *See, e.g.*, Against Comcast, *supra* note 1, ¶ 9 (discussing the thwarting of Gnutella upload requests).

214. *See* Against Comcast, *supra* note 1, at 13085–87 (dissenting statement of Commissioner Deborah Taylor Tate) (expressing concern over government interference). Such a proposition is rooted in the idea that providers should be given latitude to experiment with a range of models and refrain from intervention until a particular consumer harm is demonstrated. Yoo, *supra* note 22, at 259. Since the "brightest minds" disagree, the U.S. has an interest in hesitating before adopting regulations that make certain business models unlawful. *See id.*

215. *See infra* notes 219–23 and accompanying text regarding the U.S. broadband market.

216. *See* Frischmann & van Schewick, *supra* note 107, at 390, 400 (noting that "network providers calculate . . . private benefits of discrimination against [third party] providers of complementary products without considering the resulting [and detrimental] reduction in . . . innovation").

reason to use a seatbelt because there is always the care of an emergency room is to miss the extraordinary cost of an ex post remedy."[217]

Moreover, leaving broadband unregulated misses the overarching goal of the Act—promoting competition.[218] Though former Chairman Martin has characterized the U.S. broadband market as fiercely competitive,[219] in reality, there is little competition.[220] "More than [ninety-eight] percent of home broadband users obtain access from either a telephone company's DSL service or a cable company's cable modem service."[221] Additionally, "the top ten broadband providers . . . control over eighty-three percent of the market for broadband," and "[o]ver forty percent of the homes in the United States have access to no more than one broadband provider."[222] Thus, U.S. broadband access is controlled by regional cable and telephone companies in a structure that has prevented "price competition for standalone broadband access," and has effectively disincentivized interconnection.[223]

The FCC's three-to-two split in the Comcast ruling echoes the public irresolution over principles of nondiscrimination that, although recognized in various portions of the Communications Act,[224] are not enshrined in a clear set of explicit standards.[225] A general deregulatory approach—based in principles rather than proactive regulations—has caused the United States to fall behind the rest of the world in broadband access.[226] Japan, which embraced broadband regulations, has quickly excelled beyond

217. Lemley & Lessig, *supra* note 18, at 956.

218. *See supra* notes 60–62 and accompanying discussion regarding purposes of communications law.

219. *See* Kevin J. Martin, Op-Ed, *United States of Broadband*, WALL ST. J., July 7, 2005, at A12 (noting that "broadband platforms are engaged in fierce competition . . . . This competition is leading to broadband providers offering customers faster and faster connections at lower and lower prices").

220. *See* Crawford, *supra* note 194, at 398–99.

221. *Id.* at 399.

222. *Id.*

223. *Id.* at 399–400.

224. *See supra* notes 116–18 and accompanying text.

225. *See supra* notes 119–25 and accompanying text.

226. *See* S. DEREK TURNER, BROADBAND REALITY CHECK II: THE TRUTH BEHIND AMERICA'S DIGITAL DECLINE 4 (2006), http://www.freepress.net/docs/bbrc2-final.pdf (attributing the successes of other countries to successful implementation and use of nondiscriminatory, open-access policies).

the United States in the provision of superior (and cheaper) broadband service.[227] Though the United States once pushed for a similar type of competitive access to telephone lines, these efforts eventually fizzled.[228]

Perhaps this is why the FCC found itself in a situation that required the simultaneous adoption and enforcement of a new binding legal mandate. Although the Comcast Order offers guidance, it is insufficient to remove doubt regarding the discriminatory management of Internet traffic. The Comcast dispute and the FCC's indication that other providers have been "cryptic" about their network management practices may be proof that providers have engaged in discriminatory conduct.[229] In that respect, a framework that holds providers accountable for disclosure of network management practices is crucial to averting harm to consumers. The fact that the FCC's authority in the Comcast action was so disputed proves the need for a new regulatory framework for provision of cable modem service.

IV. PROPOSAL

Free Press implored the FCC to regulate broadband provision based on the FCC's goals of preserving the Internet's vibrant and competitive free market and encouraging the widespread deployment of advanced telecommunications capability.[230] To properly advance these

---

227. *See* Pasquale, *supra* note 34, at 273 (noting that broadband "exploded" following Japan's decision to compel large phone companies to open wires to upstart Internet providers). Though the United States once pushed for a similar type of competitive access to telephone lines, these efforts eventually fizzled. *See* Blaine Harden, *Japan's Warp-Speed Ride to Internet Future*, WASH. POST, Aug. 29, 2007, at A1.

228. *See* Harden, *supra* note 227.

229. *See* Against Comcast, *supra* note 1, ¶ 31. Following the Comcast ruling, two journalists alleged that Google Inc. had approached ISPs with a proposal to create a "fast lane" for its own content. Vishesh Kumar & Christopher Rhoads, *Google Wants Its Own Fast Track on the Web*, WALL ST. J., Dec. 15, 2008, at A1 (noting that this service would accelerate Google's service for users). Though Google denied any departure from a pro-net neutrality stance, the allegations increased public concern regarding anticompetitive behavior. Roy Mark, *Net Neutrality Proponents Blast Google Story*, EWEEK.COM, Dec. 15, 2008, http://www.eweek.com/c/a/Enterprise-Networking/Net-Neutrality-Proponents-Blast-Google-Story. In October 2009, the chief executive officers of Google and Verizon Wireless coauthored a statement advocating a common ground in the net neutrality debate. Gross, *supra* note 10.

230. See *supra* notes 144, 153 and accompanying text regarding Free Press's

objectives while adjudicating future disputes, regulators and legislators must elucidate U.S. policy as it relates to broadband Internet access services. Specifically, either the FCC or Congress should implement a mandatory disclosure model for broadband network management practices, accompanied by enforcement provisions granting the FCC narrowly drawn authority to regulate toward this end.

A. A Mandatory Disclosure Model

The Comcast dispute presented a unique instance where a set of established principles could ultimately be codified into rules.[231] Even if the Internet Policy Statement provided Comcast with clear notice of its wrongdoing, the fact that the FCC declined to fine Comcast for its behavior[232] suggests that it was unclear whether Comcast "broke the rules" and whether there existed rules clear enough to be broken.

While the FCC may invoke ancillary jurisdiction to regulate future network management disputes following the Comcast Order, it seems preferable to create a policy that grants the FCC narrowly-drawn authority to regulate broadband network management. Thus, regulators should implement an ex ante mandatory disclosure model applicable to all providers of broadband cable modem service.[233] After all, the FCC found that Comcast exacerbated anticompetitive harm by failing to disclose its practices.[234] Mandatory disclosure is rooted in the idea that end users are willing to avoid complex pricing schemes—even if it means paying a premium for a simpler broadband plan—and that end users create a tremendous effect on the market by impacting pricing choices.[235] Even absent other neutrality regulations, it is important for users to have better information about

---

claims of jurisdiction.

231. *See* Against Comcast, *supra* note 1, ¶ 40 (analogizing to the "widely respected *Carterfone* principles").

232. *See generally id.*

233. This disclosure rule is modeled in part after the disclosure ordered against Comcast. *See id.* ¶ 54. Following issuance of the Comcast Order, the Comcast website now displays a prominent link to its disclosures regarding network management practices. *See* Comcast.net Terms of Service—Subscriber Agreement, http://www.comcast.net/terms/subscriber (last visited Jan. 4, 2010).

234. *See* Against Comcast, *supra* note 1, ¶ 52.

235. *See* Hass, *supra* note 200, at 1620–21 (2007) (noting the vociferous and vocal opposition often expressed amid changing policies).

broadband services.[236]

A mandatory disclosure model would require a public disclosure[237] prior to the provision of broadband service. This disclosure would indicate how services are affected by various service agreements and how the provider manages network congestion. This disclosure must be conspicuous and sufficiently clear to be reasonably understood by a subscriber of ordinary intelligence.[238] It should also detail the equipment used to manage congestion, the allowable levels of bandwidth usage, and the procedures to be pursued if those levels are exceeded. A provider should supplement its disclosures with any changes to its previously disclosed practices, prior to the implementation of the changes. Additionally, following any unilateral interferences with a subscribers' traffic imposed by a provider, the provider must disclose to that subscriber the precise practices employed, the circumstances of their employment, and the protocols that were affected.

B. An Enforcement Mechanism to Prevent Undisclosed Discriminatory Impact

One drawback to this type of disclosure principle is that it does not ensure that consumers or smaller providers are protected from discriminatory market forces. Thus, this ex ante disclosure model should be paired with a specific enforcement provision bringing customer disputes within the FCC's regulatory authority.[239] The provision would prohibit the undisclosed application of network management practices so as to impact a subscriber in a content-based or application-based manner. Where a subscriber alleges that a provider has violated this prohibition and in so doing caused the subscriber actual harm, this provision empowers the subscriber to file a complaint with the FCC.[240] If a provider is

236. *See id.* at 1624.

237. The FCC took this approach with regard to Comcast's behavior, ordering disclosure of future network management practices. *See* Against Comcast, *supra* note 1, ¶ 54.

238. This standard may also be further tailored to fit the typical subscriber of a given type of provider.

239. This should be a narrowly drafted regime, by which the FCC's jurisdiction in such broadband service disputes is confined to the limited issue of disclosure of discriminatory network management.

240. Such harm may be construed broadly to include intangible consequences

proven to have actually harmed a subscriber through such undisclosed discriminatory behavior, the FCC shall order injunctive relief requiring the provider to suspend its discriminatory practices. The FCC shall also immediately issue an order directing the provider to show cause as to why a permanent cease-and-desist order should not issue against it. Failure to show cause will result in issuance of a permanent cease-and-desist order against the provider. A finding of competition in the cable modem service market, however, should be dispositive against the orders as described above.[241]

C. Benefits of a Clear Disclosure Model

There are many benefits to this disclosure model. First, a mandatory disclosure rule enforces a market-driven solution whereby consumers may compare and contrast competing practices before choosing a broadband provider, thus enhancing the competitive free market for broadband.[242] Ex ante enforcement of such a rule avoids the delay and costs of ex post enforcement.[243] Additionally, this scheme sidesteps concerns relating to net neutrality and the First Amendment[244] because it is content neutral and does not alter a provider's network management absent a failure to disclose practices. This scheme preserves the flexibility for providers to reasonably manage networks. In addition, such a framework minimizes the cost and burden of regulating a provider that has made an inadvertent or benign error in its network management because it affords the opportunity to

---

such as severe delay (more than an ordinary inability to access requested Internet content). The harm requirement resembles an antitrust framework in that it evades the adoption of a per se rule, yet provides for case-by-case analysis of the specific practices at issue. *See* Yoo, *supra* note 22, at 246–47 (speaking in context of the antitrust framework).

241. *See generally* Shelanski, *supra* note 196 (noting the importance of ensuring that regulations imposed in the interim before longer-term structural solutions will not remain in force as market conditions no longer justify them).

242. *See* Against Comcast, *supra* note 1, ¶ 52; Hass, *supra* note 200, at 1634 (acknowledging the importance of informed consumer decisions).

243. This approach retains the FCC's ability to examine the reasonableness and harm of practices on a case-by-case basis.

244. The First Amendment provides that Congress shall make no law abridging the freedom of speech. U.S. CONST. amend. I. While net neutrality laws might enhance speech by facilitating transmission of content, such laws might arguably compel speech by requiring ISPs to transmit messages. *See* Richman, *supra* note 35, at 20.

remedy such an error. It also serves the purposes of the Act because it indirectly re-implements a policy of deregulation based on the level of competition in the market. Finally, this proposal does not detract from precedent established by the Comcast Order and is narrowly-tailored to achieve the goals of promoting competition and encouraging broadband deployment.[245]

If Congress were to proceed beyond this proposal and attempt formal legislation on net neutrality, it might encounter the proven difficulty of separating unintended network performance problems from intentional anticompetitive discrimination; thus, enforcement could be costly and imprecise.[246] Instead, this scheme represents a limited step intended to remedy the most egregious network management practices that are undisclosed to customers (and thus usually unreasonable).[247] It is also intended to directly serve the goals addressed in the Comcast Order: preserving the Internet's vibrant and competitive free market and encouraging widespread broadband deployment.[248]

Though it is not without flaws,[249] this proposal embraces an alternate construction of the net neutrality debate, focusing on a level of neutrality necessary to promote the good (sufficiently neutral practices to spark innovation and competition) rather than the perfect (identical treatment of data packets).[250] It remains important that the FCC develop greater expertise in the area of broadband technology. Until that time, this model creates a best-possible environment for innovation that can adapt to ensure fair behavior and network management.

---

245. *See* discussion *supra* notes 116–18 and accompanying text.

246. *See* Barry, *supra* note 134, at 445–46.

247. See *supra* notes 119–23 and accompanying text regarding principles of broadband management, as subject to a standard of reasonableness.

248. See *supra* note 116–18 and accompanying text regarding the policy goals sought to be protected.

249. A mandatory disclosure model adds additional hurdles for broadband providers. This might dampen investment incentives or discourage innovation by limiting a provider's ability to offer new services or formats. If implemented on a broader level, regulatory obligations could restrict broadband deployment. *See* Gross, *supra* note 10 (noting similar arguments by critics of net neutrality rules).

250. *See* Werbach, *supra* note 21, at 1286 (proposing this alternative view of the network neutrality debate).

V. CONCLUSION

The Comcast Order was a landmark decision in the regulation of broadband Internet. The FCC's willingness to reprimand such a dominant provider signifies a shift in Internet policy that may or may not continue as the United States pursues its goal of increased broadband deployment. At the very least, the economic stimulus package approved by Congress in early 2009 requires grant recipients to follow the FCC's challenged net neutrality rules.[251] Though the FCC's October 2009 proposal has not yet been formalized, current Chairman and Obama appointee Julius Genachowski has vowed to enforce violations of net neutrality principles.[252]

Given its commitment to ensuring an open Internet, the FCC rightfully took action to end Comcast's unreasonable practices despite acting on thin statutory authority. Yet before future network management issues arise, a clear regulatory model that preserves the goals acknowledged in the Comcast Order as well as the currently neutral nature of the Internet must be developed. Such a model will not only empower consumers, but will more effectively encourage the innovation that has long allowed the Internet to flourish.

251. *See* Mark, *supra* note 210.

252. *See* Roy Mark, *FCC Chief Vows Net Neutrality Enforcement*, EWEEK.COM, Aug. 25, 2009, http://www.eweek.com/c/a/Government-IT/FCC-Chief-Vows-Net-Neutrality-Enforcement-363871/. Genachowski is in fact considered to be the architect of President Obama's Technology and Innovation Plan, which supports the principles of net neutrality to preserve the benefits of open competition on the Internet. *Id.*

***