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By Any Means Necessary? the Fcc's Implementation of Net Neutrality

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By Any Means Necessary? The FCC's Implementation of Net Neutrality

- Dawn C. Nunziato[1]

> *[W]e say to the public that there is a place, the FCC, where you can come to have allegations of network neutrality violations heard and acted upon.*[2]

Introduction

Since the Federal Communications Commission (FCC) removed common carriage obligations[3] from Internet cable broadband providers in 2002, free speech and open access advocates have been lamenting the FCC's market-oriented, laissez-faire approach and have called for net neutrality regulation to remedy the problems brought about by an unregulated market for Internet communications. Such regulation would reimpose some of the common carriage/non-discrimination obligations historically imposed on telecommunications providers and would prohibit broadband providers from censoring, blocking, or otherwise discriminating against any legal content or applications that users sought to communicate via broadband pipes. In August 2008, however, the FCC reversed its laissez-faire course and censured Comcast—one of the nation's largest broadband providers—for engaging in discriminatory network management practices. In its *Comcast*[4] order, the FCC condemned Comcast's practice of engaging in the clandestine blocking of certain peer-to-peer file-sharing applications and ordered it to discontinue these and other "unreasonable" network management practices and to come clean with the public about the ways in which it manages communications on its network.[5]

Some have argued that the FCC's willingness to act in these circumstances obviates the need for general net neutrality regulation or for broadly-applicable rulemaking by the FCC.[6] In this Article, I contend that, while these recent actions by the FCC are a step in the right direction, the FCC's ad hoc, ex post adjudication actions stand on uneasy jurisdictional footing and, in any case, are insufficient to remedy fully the problems caused by the FCC's removing nondiscrimination obligations from broadband providers in the first place—most significantly, the harm to the free flow of expression on

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[2] Comcast Corp., 23 F.C.C.R. 13028, 13079 (2008) (memorandum opinion and order).

[3] "Common carriage obligations" refer to a regulatory framework imposed on common carriers. *See* 47 U.S.C. §§ 201-31 (2006).

[4] 23 F.C.C.R. 13028 (2008) (memorandum opinion and order).

[5] *Id.* at 13028.

[6] *See, e.g.*, Philip J. Weiser, *The Future of Internet Regulation*, 43 U.C. DAVIS L. REV. (forthcoming 2009).

the Internet. In Part I of this Article, I describe the uneven history of the FCC's regulatory treatment of Internet service providers (ISPs). In Part II, I analyze the Comcast network management practices that were the subject of the FCC's August 2008 order, as well as the order itself. In particular, I scrutinize the FCC's asserted basis for claiming jurisdiction to adjudicate such actions by broadband providers, in light of the fact that the FCC had previously classified such providers as subject to minimal regulatory oversight. In Part III, I contend that—notwithstanding the order and the FCC's apparent willingness of late to impose checks on broadband providers' censorial and discriminatory conduct—broadly applicable, ex ante legislative or agency action is necessary to impose general nondiscrimination obligations on broadband providers. Congress should enact net neutrality legislation to prohibit broadband providers from discriminating against legal content or applications in the form of censoring or degrading such expression, or should require the FCC to adopt binding, generally-applicable rules prohibiting such discrimination.

I. Regulation (and Deregulation) of Internet Service Providers: The FCC's Decisions Exempting Broadband Providers from the Common Carriage Obligations Historically Imposed on Conduits for Communication

From the beginning of the mass communications era, the United States imposed "common carrier" obligations on certain powerful private entities engaged in providing transportation for, and facilitating the communications of, the public to facilitate the free flow of commerce and information free of censorship or discrimination.[7] Through the common carriage doctrine, the government, by way of legislation and the common law, imposed nondiscrimination duties on entities providing transportation and facilitating communication for the public, like telephone companies and the postal service.[8] Rather than granting communications and telecommunications providers the discretion to regulate speech however they see fit, the common carriage doctrine requires that such conduits not discriminate among the communications they are charged with carrying.[9] As the Internet grew to become an increasingly popular medium of communication, the question how to regulate those who facilitated Internet communications arose.[10] In the formative years of the Internet's development, the FCC regulated ISPs—including narrowband and Digital Subscriber Line (DSL) providers—as common carriers subject (inter alia) to nondiscrimination obligations.[11] Yet in 2002, the FCC began a process of removing such obligations from providers of *broadband* Internet access.[12] This course of removing such obligations from broadband providers was approved by the United States Supreme Court in *National Cable & Telecommunications Ass'n v. Brand X Internet*

[7] *See* DAWN C. NUNZIATO, VIRTUAL FREEDOM: NET NEUTRALITY AND FREE SPEECH IN THE INTERNET AGE, 65-69 (2009).
[8] *Id.* at 65-66.
[9] *Id.* at 67-68.
[10] *Id.* at 115-22.
[11] *Id.* at 120-21.
[12] *Id.* at 121-27.

Services.[13] Below, I outline the evolution of the FCC's deregulation of Internet conduits for communication.

In the Communications Act of 1934, Congress granted the FCC the authority to regulate telephone companies as common carriers.[14] The common carriage obligations imposed on telecommunications providers ensured that the public had a right to communicate via telephone free from discrimination by the telephone companies.[15] In the 1970s, as telephone companies began offering other types of services in addition to serving as conduits for telephone conversations, the FCC articulated a framework to distinguish between their conduit function and the value-added services that they offered. In a series of three "Computer Inquiry" decisions in the 1970s and 1980s, the FCC established essentially the following two categories of services: (1) basic services—those that "offer[ed] . . . transmission capacity for the movement of information"—which were regulated as common carriers[16] and (2) "enhanced" or value-added services—those that "combin[ed] basic service with computer processing applications that act on the . . . subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information"—which were not regulated as common carriers.[17]

In its passage of the Telecommunications Act of 1996,[18] Congress revised the categorization of services subject to common carriage regulation. Under the 1996 Act, "telecommunications services" were made subject to common carriage regulation (replacing the category of "basic services"), while "information services" were exempted from mandatory common carriage regulation (replacing the exempt category of "enhanced services").[19] While the Act maintained significant common carrier obligations on providers of telecommunications services, it left information services providers subject to far less stringent regulation.[20] Such services were merely subject to regulation under the FCC's amorphous ancillary jurisdiction—i.e., its jurisdiction to impose additional regulatory obligations ancillary to its jurisdiction to regulate interstate and foreign communications.[21]

A central issue in interpreting the Telecommunications Act was how, if at all, the provision of broadband Internet access by cable providers (and of broadband access more

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[13] 545 U.S. 967 (2005).
[14] *See* Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (current version at 47 U.S.C. §§ 151-615b (2006)).
[15] *Id.* § 202, 48 Stat. at 1070 (current version at 47 U.S.C. § 202).
[16] Amendment of Section 64.702 of the Comm'n's Rules & Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, 387 (1980) [hereinafter Computer II] (final decision).
[17] *Id.*
[18] Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).
[19] *See* 47 U.S.C. § 153 (2006).
[20] *See id.* §§ 153, 201-31.
[21] *See id.* § 154(i).

generally) should be regulated.[22] If regulated as telecommunications services, broadband providers would be subject to common carriage regulation, which would prohibit them from, among other things, discriminating against any legal content or applications (and would also require them to allow interconnection by unaffiliated ISPs).[23] If regulated instead as providers of information services, broadband providers would be exempt from common carriage obligations and would be subject only to the FCC's ancillary jurisdiction. When it enacted the Telecommunications Act of 1996, Congress did not resolve this question and presumably vested the FCC with the discretion to make this determination.

In passing the Telecommunications Act of 1996, Congress also set forth several broad tenets of federal Internet policy. On one hand, the Act provides that the Internet should be allowed to flourish in a "minimal regulatory environment"[24] characterized by a "free market . . . unfettered by Federal or State regulation."[25] On the other hand, the Act articulates the federal Internet policy of "maximiz[ing] *user* control over what information is received by individuals . . .who use the Internet."[26] A conflict arises—as it did in the *Comcast* adjudication[27]—when maximizing Internet users' control over what Internet content or applications they will receive *requires* regulation of ISPs.

In determining how to regulate broadband providers, the FCC was required to decide whether to place them under the same regulatory framework as narrowband providers. Providers of narrowband Internet access offer connection via traditional telephone lines and are regulated as telecommunications services subject to common carrier regulation under the Telecommunications Act of 1996.[28] Over the past ten years, however, as Internet technology has advanced, many Internet users have migrated from the dial-up, narrowband universe to broadband technologies, which provide vastly faster Internet access.[29] The predominant broadband technologies used by residential Internet users are provided via high-speed cable modems and DSL.[30] Because DSL broadband Internet access is provided via telephone lines, the provision of this service was initially regulated as a telecommunications service subject to common carriage

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[22] *See generally* Jim Chen, *The Authority to Regulate Broadband Internet Access Over Cable*, 16 BERKELEY TECH. L.J. 677 (2001) (noting that the regulation of cable-based high-speed Internet is a difficult topic in light of the existing regulatory framework).

[23] The Act provides that common carriers must furnish service upon reasonable request and must establish reasonable charges, practices, classifications, and regulations regarding service. 47 U.S.C. § 201. It also imposes obligations upon common carriers to interconnect with the facilities and services of other carriers and end users, and sets out the terms and conditions under which incumbent carriers must interconnect with newcomer carriers. *Id.* § 251.

[24] Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 F.C.C.R. 4798, 4802 (2002) (declaratory ruling and notice of proposed rulemaking).

[25] 47 U.S.C. § 230(b)(2).

[26] *Id.* § 230(b)(3) (emphasis added).

[27] Comcast Corp., 23 F.C.C.R. 13028, 13079 (2008) (memorandum opinion and order).

[28] *See* 47 U.S.C. § 153.

[29] *See* NUNZIATO, *supra* note 7, at 121.

[30] *Id.*

/nondiscrimination regulations.[31] The regulation of broadband access via *cable*, however, proved to be a more complicated question. Cable broadband providers were not providing traditional telecommunications services and traditionally cable providers were providing their own choice of content to users via one-way connections.[32] Yet, as they upgraded their wires to allow for two-way Internet communications, they began to provide services that looked like traditional telecommunications conduit services.[33] If cable broadband providers essentially served as conduits for the Internet content originated by others—in the same way that narrowband and DSL providers did–regulatory parity would dictate that they be subject to the same types of common carriage/non-discrimination obligations as were dial-up and DSL providers. But the principle of regulatory parity did not carry the day.

The FCC's 2002 Declaratory Ruling Exempting Cable Broadband From Common Carriage Regulation

In 2000, the FCC initiated a rulemaking proceeding to determine how to apply the Telecommunications Act's classifications to cable broadband providers. In its 2002 declaratory ruling, "Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities"[34], the FCC concluded that cable broadband was an "information service" with "no separate offering of telecommunications service."[35] Having concluded that cable companies do not provide telecommunications services when they offer broadband cable Internet services, the FCC ruled that the provision of such services was outside the scope of Title II's mandatory common carriage regulatory framework.[36] The FCC ruled that the provision of cable broadband service does not contain a separate telecommunications service because the transmission of the Internet user's communications is "part and parcel" of that information service, and is integral to its capabilities.[37] As an information service with "no separate offering of telecommunications service,"[38] cable operators' provision of broadband Internet access was exempt from the common carrier regulations of Title II and was subject only to the FCC's "Title I ancillary jurisdiction to regulate interstate and foreign communications."[39] The FCC based its decision, in part, on the policy judgment that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market."[40] Yet, notwithstanding its conclusion that cable broadband was exempt from Title II common carriage regulation, the FCC solicited comments in a companion notice of proposed rulemaking regarding whether it should, under its Title I ancillary jurisdiction, require

[31] *Id.* at 120.
[32] *Id.* at 121.
[33] *Id.*
[34] 17 F.C.C.R. 4798 (2002) (declaratory ruling and notice of proposed rulemaking).
[35] *Id.* at 4802.
[36] *Id.* at 4847-48.
[37] *Id.* at 4823.
[38] *Id.* at 4802
[39] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 976 (2005).
[40] 17 F.C.C.R. at 4802.

cable companies to provide open access and to offer other ISPs access to their facilities on common-carrier terms.[41]

The FCC's decision to exempt cable broadband from common carriage obligations was challenged by non-facilities-based ISPs that sought open access and asserted the right to interconnect with cable providers' pipelines.[42] These ISPs sought a ruling that cable broadband providers should be regulated as providers of telecommunications services subject to common carriage obligations.[43] In its 2005 *Brand X* decision, the Supreme Court held that the FCC enjoyed the discretion to interpret the Telecommunications Act, as it had done in its Declaratory Ruling, to decline to subject cable operators' provision of broadband Internet access—or the provision of any other type of broadband Internet access—to common carriage/nondiscrimination obligations. [44] The Supreme Court also explained that the FCC enjoyed the authority under its ancillary jurisdiction to regulate broadband providers—even while not regulating them as common carriers—if necessary to advance the federal government's and the FCC's general policies in the Internet realm.[45] Such amorphous and unfettered ancillary jurisdiction and discretion, however, have proved problematic, as is evident in the FCC's recent exercise of this authority.

The *Brand X* Decision

In *Brand X*, the Supreme Court set into motion a course of events that led to the FCC's recent adjudicatory actions. The Court reviewed the Ninth Circuit's holding that the FCC's interpretation of the Communications Act, as amended by the Telecommunications Act, did not require it to revisit its earlier holding[46] that cable broadband *was* subject to common carriage regulation under Title II.[47] The Ninth Circuit held that the FCC could not permissibly construe the Communications Act to exempt cable broadband from Title II common carriage regulation.[48] The Supreme Court reversed.[49]

In a rare parting of ways between Justices Thomas, who authored the opinion of the Court, and Scalia, who issued a scathing dissent, Justice Thomas first explained that as a matter of administrative law, the Ninth Circuit erred in failing to apply *Chevron* deference[50] to the FCC's Declaratory Ruling.[51] Under *Chevron*, a federal court is

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[41] *Id.* at 4839-42.
[42] *See, e.g.*, NUNZIATO, *supra* note 7, at 122.
[43] Id. at 125.
[44] *Brand X*, 545 U.S. at 1002.
[45] *Id.* at 976.
[46] AT&T v. Portland, 216 F.3d 871 (9th Cir. 2000).
[47] *Brand X*, 545 U.S. at 979-80.
[48] Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1132 (9th Cir. 2003), *rev'd*, 545 U.S. 967 (2005).
[49] *Brand X*, 545 U.S. at 1003.
[50] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-45 (1984) (holding that if a statute is ambiguous and the implementing agency's construction is reasonable,

permitted to substitute its construction of the statute for the agency's only if it concludes that its construction follows from the unambiguous terms of the statute.[52] Because the Ninth Circuit had concluded merely that its reading was the *best* reading—not the only permissible reading—of the statute, the Ninth Circuit's construction could not trump the FCC's construction of the statute.[53]

The Supreme Court first held that the Telecommunications Act was ambiguous as to whether cable broadband providers were providers of telecommunications services.[54] While cable companies use "telecommunications" to provide consumers with Internet service, they were not necessarily offering telecommunications services, according to the Court.[55] Rather, the Court credited the FCC's reasoning that whether the service included a telecommunications offering "'turn[ed] on the nature of the functions the end user is offered.'"[56] Seen from the end user's perspective, cable broadband is not a telecommunications service because "the consumer uses the high-speed wire always in connection with the information-processing capabilities provided by Internet access, and because the transmission is a necessary component of Internet access."[57] According to the FCC's analysis (credited by the Court), end users make use of the wire provided by cable companies in order to "access the World Wide Web, newsgroups, and so forth, rather than 'transparently' to transmit and receive . . . messages without computer processing or storage of the message."[58] Because such communications were always integrated with computer processing and storage, the FCC permissibly concluded that "cable modem service was not a 'stand-alone,' transparent offering of telecommunications."[59] The Court rejected the argument that cable companies providing Internet service necessarily also provide telecommunications service because they provide the underlying telecommunications used to transmit Internet services:

> Cable companies in the broadband Internet service business "offe[r]" consumers an information service in the form of Internet access and they do so "via telecommunications," but it does not inexorably follow as a matter of ordinary language that they also "offe[r]" consumers . . . (telecommunications) that is an input used to provide this service. . . .
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a federal court must accept the agency's construction even if it differs from what the court believes is the best statutory interpretation).

[51] *Brand X*, 545 U.S. at 980-82.

[52] *Chevron*, 467 U.S. at 842-45.

[53] *Brand X*, 545 U.S. at 984-85.

[54] *Id.* at 986.

[55] *Id.* at 989.

[56] *Id.* at 988 (emphasis omitted) (quoting Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 F.C.C.R. 4798, 4822 (2002) (declaratory ruling and notice of proposed rulemaking)).

[57] *Id.*

[58] *Id.*

[59] *Id.*

> The question . . . is whether the transmission component of cable modem service is sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering. We think that they are sufficiently integrated . . . . Such functionally integrated components need not be described as distinct "offerings."[60]

Justice Thomas concluded that, because of ambiguities in the statutory language, it was permissible for the FCC to determine that the transmission component of cable modem service was sufficiently integrated with the complete service it offered such that it was reasonable to describe the combination as a single, integrated offering that constituted an information service with no separate offering of a telecommunications service.[61]

Applying *Chevron's* second step, the Court concluded that the FCC's construction was reasonable.[62] It rejected the argument that the FCC's construction was unreasonable because it would allow Internet communications providers to evade common carriage obligations historically imposed on other conduits for communication.[63] It also rejected the argument that the FCC's interpretation was arbitrary and capricious because it left providers of broadband Internet access via DSL subject to common carriage requirements while removing such requirements from cable broadband providers.[64] The Court held that the FCC enjoyed the discretion gradually to alter telecommunications policy so as to eventually exempt the provision of all broadband Internet access from common carriage requirements.[65] As a consolation to open access and net neutrality advocates, however, the Court concluded that the FCC "remains free to impose special regulatory duties on [broadband providers] under its Title I ancillary jurisdiction."[66]

Justice Scalia, dissenting, offered a harsh critique of the FCC's interpretation and newly-proclaimed (and seemingly unconstrained) freedom to regulate broadband providers under its ancillary jurisdiction.[67] Scalia's critique anticipates the problems inherent in the FCC's recent exercise of its ancillary jurisdiction in the *Comcast* order.[68] According to Justice Scalia, cable broadband providers clearly offer telecommunications services and to hold otherwise and permit them to evade common carriage obligations was nonsensical.[69] He rejected the interpretation advanced by the FCC: that cable broadband providers' bundling of telecommunications services with value-added services meant that they should not be classified as providers of telecommunications services:

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[60] *Id.* at 989-91 (citations omitted).
[61] *Id.* at 990-91.
[62] *Id.* at 997.
[63] *Id.*
[64] *Id.* at 1000-02.
[65] *Id.* at 1002.
[66] *Id.* at 996.
[67] *Id.* at 1013-14 (Scalia, J., dissenting).
[68] *Id. See* Comcast Corp., 23 F.C.C.R. 13028, 13028 (2008) (memorandum opinion and order) (holding that Comcast's "discriminatory and arbitrary practice . . . does not constitute reasonable network management," and ordering Comcast to cease such practice).
[69] *Brand X*, 545 U.S. at 1006-08 (Scalia, J., dissenting).

> The relevant question is whether the individual components in a package being offered still possess sufficient identity to be described as separate objects of the offer, or whether they have been so changed by their combination with the other components that it is no longer reasonable to describe them in that way.
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> . . . There are instances in which it is ridiculous to deny that one part of a joint offering is being offered merely because it is not offered on a "'stand-alone'" basis.
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> If, for example, I call up a pizzeria and ask whether they offer delivery, both common sense and common "usage" would prevent them from answering: "No, we do not offer delivery—but if you order a pizza from us, we'll bake it for you and then bring it to your house." The logical response to this would be something on the order of, "so, you *do* offer delivery." But our pizza-man may continue to deny the obvious and explain, paraphrasing the FCC and the Court: "No, even though we bring the pizza to your house, we are not actually 'offering' you delivery, because the delivery that we provide to our end users is 'part and parcel' of our pizzeria-pizza-at-home service and is 'integral to its other capabilities.'" Any reasonable customer would conclude at that point that his interlocutor was either crazy or following some too-clever-by-half legal advice.
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> . . . .
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> Despite the Court's mighty labors to prove otherwise, *the telecommunications component of cable-modem service retains such ample independent identity that it must be regarded as being on [sic] offer* –especially when seen from the perspective of the consumer or the end user. [70]

In other words, even though cable broadband providers provide some information services in addition to the telecommunications services they offer, it was irrational to conclude that there is no separately identifiable offering of telecommunications service that is subject to common carriage regulation.

The discretion that the FCC purported to reserve to regulate the provision of broadband Internet services under its Title I ancillary jurisdiction was also subjected to Justice Scalia's trenchant criticism:

[70] *Id.* at 1006-08 (emphasis added) (citations omitted).

> This [unfettered ancillary jurisdiction] is a wonderful illustration of how an experienced agency can (with some assistance from credulous courts) turn statutory constraints into bureaucratic discretions. The main source of the Commission's regulatory authority over common carriers is Title II, but the Commission has rendered that inapplicable in this instance by concluding that the definition of "telecommunications service" is ambiguous and does not (in its current view) apply to cable-modem service. It contemplates, however, altering that (unnecessary) outcome, not by changing the law (*i.e.*, its construction of the Title II definitions), but by reserving the right to change the facts. Under its undefined and sparingly used "ancillary" powers, the Commission might conclude that it can order cable companies to "unbundle" the telecommunications component of cable-modem service. And presto, Title II will then apply to them, because they will finally be "offering" telecommunications service! . . . Such Möbius-strip reasoning mocks the principle that the statute constrains the agency in any meaningful way.[71]

Within three years of the *Brand X* decision, the FCC determined that it indeed enjoyed ancillary jurisdiction to regulate a cable broadband provider.[72] Below, I explore the actions of the FCC and of broadband providers that led to this result, as well as the problems arising from the FCC's exercise of this unconstrained ancillary jurisdiction.

After the *Brand X* decision, the FCC removed common carriage regulations from every other type of broadband provider,[73] as the Court's opinion authorized it to do.[74] One month after *Brand X* was handed down, the FCC ruled that the provision of broadband Internet access via DSL, like cable broadband, was also an "information service," and therefore that telephone companies' provision of broadband Internet access via DSL would be exempt from common carriage requirements.[75] The FCC subsequently ruled that all other types of broadband are likewise exempt from common carriage/nondiscrimination regulations.[76] Thus, under the Telecommunications Act,

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[71] *Id.* at 1013-14.

[72] *See Comcast*, 23 F.C.C.R. at 13034-36.

[73] *See* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14853, 14858 (2005) [hereinafter Wireline Broadband Order] (report and order and notice of proposed rulemaking). *See also* NUNZIATO, *supra* note 7, at 126 (discussing the Wireline Broadband Order).

[74] *See Brand X*, 545 U.S. at 1002-03.

[75] *See* Wireline Broadband Order, *supra* note 73, at 14858. For transition purposes, the Wireline Broadband Order required DSL providers to "continue to provide existing wireline broadband Internet access transmission offerings, on a grandfathered basis, to unaffiliated ISPs" for one year after the date of the order's publication of September 23, 2005. *Id.*

[76] Wireline Broadband Order, *supra* note 73, at 14858. *See, e.g.*, Rob Frieden, *Neither Fish nor Fowl: New Strategies for Selective Regulation of Information Services*, 6 J. TELECOMM. & HIGH TECH. L. 373 (2008).

decisions about what expression to censor and what expression to facilitate were left to solely to the discretion of the companies providing broadband Internet access—for most residential Internet users, the cable/telephone duopoly.[77]

The FCC's 2005 Broadband Policy Statement

When the FCC exempted DSL providers from common carriage/non-discrimination obligations, at least one of the FCC Commissioners was troubled by the implications of this course of action. Commissioner Michael Copps, a long-time advocate of net neutrality principles, managed to prevail upon his colleagues to adopt a statement of broadband policy setting forth Internet users' basic rights.[78] Accordingly, shortly after the *Brand X* decision, on the same day that it exempted DSL providers from common carriage requirements, the FCC Commissioners issued a Broadband Policy Statement (Policy Statement) setting forth four principles regarding consumers' access to the Internet:

- consumers are entitled to access the lawful Internet content of their choice[;]
- . . . consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement[;]
- . . . consumers are entitled to connect their choice of legal devices that do not harm the network[;]
- . . . consumers are entitled to competition among network providers, application and service providers, and content providers.[79]

The legal force of these principles is unclear, and the uncertain status of the principles further contributes to the uncertainty surrounding the FCC's recent actions regulating broadband providers to ensure their compliance with these principles. On one hand, in the Policy Statement, the FCC recognized that it has "a duty to preserve and

[77] According to the FCC's 2006 data, about ninety-five percent of all residential broadband is provided by the cable/telephone duopoly. *See* INDUSTRY ANALYSIS AND TECHNOLOGY DIVISION, WIRELINE COMPETITION BUREAU, FED. COMMC'NS COMM'N, HIGH-SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF DECEMBER 31, 2006 9 tbl.3, chart 6 (2007), *available at* http://www.masstech.org/broadband/FCC07data.pdf.

[78] *See* Comcast Corp., 23 F.C.C.R. 13028, 13078 (2008) (Copps, Comm'r, concurring) (memorandum opinion and order) ("[After the *Brand X* decision gave the Supreme Court's stamp of approval on the 2002 Declaratory Ruling], the Commission was more interested in re-categorizing telecommunications services as information services and eliminating many of the social and economic responsibilities of broadband service providers. I urged my colleagues to at least adopt an Internet Policy Statement that contained the basic rights of Internet end-users . . . .").

[79] Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14986, 14988 (2005) [hereinafter Policy Statement] (policy statement).

promote the vibrant and open character of the Internet as the telecommunications marketplace enters the broadband age," and, in order to do so, promised to "incorporate the above principles into its ongoing policymaking activities."[80] In so doing, the FCC arguably provided notice to broadband providers of its intent to adjudicate or enact rules in accord with these policies. The FCC made clear that if it encountered "evidence that providers of telecommunications for Internet access . . . are violating these principles, [it would] not hesitate to take action to address that conduct."[81] Indeed, the FCC and others opposed to net neutrality legislation have referred to the FCC's power to enforce these principles to support the argument that net neutrality legislation is unnecessary.[82]

On the other hand, the FCC expressly stated that in adopting the Policy Statement, it was not adopting formal rules.[83] The principles set forth in the Broadband Policy Statement were rendered even fuzzier by the FCC's caveat that the rights of Internet users articulated therein were "subject to reasonable network management"[84] by broadband providers (without any articulation of what types of deviations from the principles would be excused as "reasonable network management"). As such, the Policy Statement appears to embody a compromise among different factions of the FCC regarding the legal force and effect of the rights and principles it embodies. After the release of the Policy Statement, it was unclear exactly how (if at all) the FCC would enforce the rights articulated in the Policy Statement.

The FCC's First (and Incomplete) Steps Toward Broadband Rulemaking

Two years after it adopted the Broadband Policy Statement, the FCC took preliminary steps toward a formal rulemaking that would set forth a regulatory framework applicable to providers of broadband Internet access. In 2007, the FCC adopted a Broadband Industry Practices Notice of Inquiry—typically the first step in a rulemaking proceeding—designed to determine whether to articulate broadly-applicable and enforceable net neutrality rules governing network management practices, to elucidate the scope of its authority to regulate broadband providers, and to develop a factual record on which to determine whether such rules were necessary.[85] In particular, the FCC sought inquiry on the following matters:

> [W]e seek to enhance our understanding of the nature of the market for broadband and related services, whether network platform providers and others favor or disfavor particular content, how consumers are affected by

[80] *Id.* Further, the FCC subsequently asked merging companies to agree to be bound by the principles articulated in the Policy Statement. *See, e.g.*, Verizon Commc'ns Inc., 20 F.C.C.R. 18433, 18509 (2005) (memorandum opinion and order) (noting in review of an application for merger between Verizon Communications, Inc., and MCI, Inc., that both companies would abide by the principles set forth in the Policy Statement).

[81] Wireline Broadband Order, *supra* note 72, at 14904.

[82]

[83] Policy Statement, *supra* note 78, at 14988 n.15.

[84] *Id.*

[85] *See* Broadband Industry Practices, 22 F.C.C.R. 7894, 7896-98 (2007) (notice of inquiry).

> these policies, and whether consumer choice of broadband providers is sufficient to ensure that all such policies ultimately benefit consumers. We ask for specific examples of beneficial or harmful behavior, and we ask whether any regulatory intervention is necessary.
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> . . . .
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> We seek a fuller understanding of the behavior of broadband market participants today . . . [D]o providers treat different packets in different ways? How and why? Are these providers operating consistent with the [FCC's 2005 Broadband] Policy Statement? . . . Do providers deprioritize or block packets containing material that is harmful to their commercial interests, or prioritize packets relating to applications or services in which they have a commercial interest?
>
> . . . .
>
> We next ask whether the Policy Statement should be amended. . . . [A]re there specific changes to the Policy Statement that commenters would recommend? We also ask whether we should incorporate a new principle of nondiscrimination. If so, how would "nondiscrimination" be defined, and how would such a principle read? Would it permit any exclusive or preferential arrangements among network platform or access providers and content providers?
>
> Finally, does the Commission have the legal authority to enforce the Policy Statement in the face of particular market failures or other specific problems? . . . Assuming it is not necessary to adopt rules at this time, what market characteristics would justify the adoption of rules?[86]

In asking for comments on this list of network neutrality related questions, the FCC presumably indicated that it intended to consider the broad range of responses in engaging in rulemaking on net neutrality issues. Although the FCC received a substantial number of comments in response to these questions, it never progressed toward a rulemaking and never issued a notice of proposed rulemaking. Instead, as discussed below, the FCC chose to proceed via informal adjudication under its seemingly unfettered ancillary jurisdiction in its August 2008 order regarding Comcast's discriminatory network practices.[87]

Proposed Net Neutrality Legislation

Meanwhile, beginning in 2006, troubled by the potential implications of the FCC's removal of common carriage obligations form broadband providers, open access and net neutrality advocates "prevailed upon members of Congress to

[86] *Id.* at 7894-98.
[87] *See* Comcast Corp., 23 F.C.C.R. 13028, 13034-36 (2008) (memorandum opinion and order).

introduce network neutrality legislation."[88] Such legislation would prohibit broadband providers from discriminating against legal content or applications in the form of blocking, prioritizing, or degrading such content or applications.[89] The most speech-protective of the proposed legislation would prohibit providers from blocking, impairing, degrading, or discriminating against the ability of any person to use a broadband connection to access the content or services available on broadband networks.[90]

Other proposed net neutrality legislation, such as the Communications Opportunity, Promotion and Enhancement (COPE) Act of 2006,[91] would not directly prohibit broadband providers from discriminating against content or applications, but would grant the FCC explicit authority to adjudicate consumer complaints regarding discrimination and to enforce the principles articulated in the 2005 Broadband Policy Statement.[92] Presumably, the supporters of the COPE Act believed that the FCC does not *currently* enjoy such authority and therefore must be granted such authority in order to adjudicate net neutrality-related complaints.

None of the federal network neutrality bills was passed as of September 2009. For the time being, it appears that net neutrality advocates will enjoy greater success advancing their cause with the FCC than with Congress, as I consider in Part II.

II. The Comcast Adjudication and the FCC's Regulatory About-Face

In the fall of 2007, Internet users began to suspect that Comcast, the nation's second largest broadband provider, was blocking and otherwise discriminating against legal file-sharing applications.[93] With the help of the public interest organizations Free

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[88] NUNZIATO, *supra* note 7, at 131.

[89] *See* Network Neutrality Act of 2006, H.R. 5273, 109th Cong. § 4 (2006), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-109hr5273ih/pdf/BILLS-109hr5273ih.pdf.

[90] *See id.*; *see also* Internet Freedom and Nondiscrimination Act of 2006, H.R. 5417, 109th Cong. (2006), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-109hr5417RH/pdf/BILLS-109hr5417RH.pdf (prohibiting broadband Internet providers from interfering with users' ability to choose the lawful content, services, and applications they wish to access).

[91] H.R. 5252, 109th Cong., *available at* http://www.gpo.gov/fdsys/pkg/BILLS-109hr5252IH/pdf/BILLS-109hr5252IH.pdf (as introduced in House, May 1, 2006).

[92] *See id.* In early 2008, Representatives Edward Markey and Charles Pickering introduced The Internet Freedom Preservation Act of 2008, which would, among other things: (1) establish that it is the United States's national broadband policy "to maintain the freedom to use . . . broadband . . . networks . . . without unreasonable interference from or discrimination by network operators" and to safeguard against unreasonable discrimination and degradation of content based on source, ownership, or destination; and (2) require the FCC to assess broadband services and consumer rights via a series of public broadband summits and report back to Congress on its findings. Internet Freedom Preservation Act of 2008, H.R. 5353, 110th Cong. (2008), *available at http://www.gpo.gov/fdsys/pkg/BILLS-110hr5353ih/pdf/BILLS-110hr5353ih.pdf*.

[93] *See* Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation For Secretly Degrading Peer-to-Peer Applications at 5, Comcast Corp., 23 F.C.C.R. 13028 (2008) (No. FCC 08-183) (memorandum opinion and order), *available at* http://www.freepress.net/files/fp_pk_comcast_complaint.pdf.

Press and Public Knowledge, users were able to confirm their suspicions and establish that Comcast was blocking and degrading the protocols employed by BitTorrent, an open source program used for quickly distributing large files.[94] The question then became: was Comcast doing anything illegal? If so, what law was it violating? As the provider of an "information service," Comcast was subject neither to common carriage/nondiscrimination obligations, nor to the FCC's regulatory oversight under Title II of the Communications Act.[95] Although Comcast's actions arguably violated the Broadband Policy Statement, FCC Chairman Martin had made clear that the principles articulated in the Statement were not "rules" or otherwise "enforceable documents."[96] Furthermore, it was not clear how one could frame a complaint alleging a violation of the Broadband Policy Statement, even assuming its principles were enforceable. While violations of Title II common carriage obligations could be alleged via "Formal Complaints,"[97] the FCC had not established mechanisms for bringing to its attention violations of the Broadband Policy Statement.

Undaunted by these procedural uncertainties, in November 2007, Free Press and Public Knowledge asked the FCC to undertake an investigation into Comcast's discriminatory network management practices. They framed their allegations in the form of a Formal Complaint and Petition for a Declaratory Ruling (notwithstanding the fact that Formal Complaints were intended for allegations of Title II violations), and alleged that Comcast was degrading and blocking peer-to-peer file-sharing applications and withholding information about these actions from Internet subscribers.[98] They alleged that, beginning in August 2007, certain Comcast Internet subscribers who sought to use peer-to-peer file-sharing applications such as BitTorrent noticed that their file transfers were being cut off and/or severely degraded by Comcast.[99] When these users complained, Comcast flatly denied that it was blocking, degrading, or otherwise "shaping" any traffic on its network and blamed the problems that users were experiencing on the users themselves and on the BitTorrent protocol.[100] In October 2007, however, the Associated Press (AP), together with the Electronic Frontier Foundation (EFF), produced clear evidence that Comcast had indeed degraded and blocked a variety

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[94] *See id.* at 6-7.

[95] *See* text accompanying note 19.

[96] *See* Press Release, Fed. Commc'ns Comm'n, Chairman Kevin J. Martin Comments on Comm'n Policy Statement (Aug. 5, 2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260435A2.pdf.

[97] *See* 47 U.S.C. § 208 (2006).

[98] *See* Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation For Secretly Degrading Peer-to-Peer Applications, *supra* note 93, at 5-11; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management" at 7-14, Comcast Corp., 23 F.C.C.R. 13028 (2008) (No. FCC 08-183) (memorandum opinion and order), *available at* http://www.fcc.gov/broadband_network_management/fp_et_al_nn_declaratory_ruling.pdf.

[99] Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation For Secretly Degrading Peer-to-Peer Applications, *supra* note 93, at 5.

[100] Posting of Seth Schoen to Deeplinks Blog, http://www.eff.org/deeplinks/2007/09/comcast-and-bittorrent (Sept. 13, 2007).

of peer-to-peer applications, including those using BitTorrent, Gnutella, FTP, and even Lotus Notes's software suite (which is routinely used by businesses to share email, calendars, and other files).[101] In particular, AP reported problems in using BitTorrent to download copies of the King James Bible from a computer with a Comcast cable modem.[102] EFF, upon further investigation, found that Comcast was employing network management tools to cause peer-to-peer connections to shut down,[103] and intentionally configuring its network to jam such traffic and to make it extremely difficult, if not impossible, for its subscribers to use such applications.[104]

Furthermore, Comcast's method of jamming such applications was designed to hide from users the fact that it was Comcast itself that was taking actions to discriminate against such applications.[105] When a Comcast user attempted to send packets to others using certain file-sharing applications, Comcast shut down the connection between that user and other non-Comcast users by "hacking into its own network and using a clandestine 'man in the middle' tactic whereby each party is sent a communication 'RST' (reset) message which falsely tells the other party to shut down the connection."[106] As a result of such interference, each affected user's computer received a message invisible to the user that looked like it came from another, peer computer instructing it to stop communicating. "But neither message originated from the other computer—it comes from Comcast."[107] As one commentator characterized Comcast's interference, "[i]f it were a telephone conversation, it would be like the operator breaking into the conversation, telling each talker in the voice of the other: 'Sorry, I have to hang up. Good bye.'"[108]

Free Press and Public Knowledge claimed that Comcast's action violated the principles articulated in the Broadband Policy Statement, especially Internet users' freedom "to access the lawful Internet content of their choice" and to "run applications and use services of their choice."[109] Comcast eventually acknowledged that it purposely slowed down some traffic on its network, including some music and movie downloads, but claimed that it should be permitted to do so in order to direct traffic to prevent

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[101] Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation For Secretly Degrading Peer-to-Peer Applications, *supra* note 93, at 6-7.

[102] *See id.* at 9.

[103] PETER ECKERSLEY ET AL., ELECTRONIC FRONTIER FOUNDATION, PACKET FORGERY BY ISPS: A REPORT ON THE COMCAST AFFAIR 1-2 (2007), http://www.eff.org/files/eff_comcast_report.pdf.

[104] Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation For Secretly Degrading Peer-to-Peer Applications, *supra* note 93, at 9.

[105] *Id.*

[106] Vuze, Inc., Petition to Establish Rules Governing Network Management Practices by Broadband Network Operators at 10, WC Docket No. 07-52 (Nov. 14, 2007) (petition for rulemaking), *available at* http://www.publicknowledge.org/pdf/vuze-petition-20071114.pdf.

[107] Peter Svensson, *Comcast Blocks Some Internet Traffic*, MSNBC, Oct. 19, 2007, http://www.msnbc.msn.com/id/21376597/.

[108] *Id.*

[109] Policy Statement, *supra* note 79, at 14988.

network clogs.[110] It argued that its actions fell within the "reasonable network management" exception to the freedoms guaranteed to users under the Policy Statement,[111] which, Comcast argued, the Commission recognized was necessary "'for the good of all customers.'"[112]

The FCC's Order

In its August 1, 2008 informal adjudication on this matter, the FCC sided with the Internet users.[113] The FCC first concluded that it indeed enjoyed jurisdiction to rule on this matter.[114] After establishing its authority to adjudicate, the FCC found that Comcast's actions violated the Broadband Policy Statement and did not fall within the Statement's exception for "reasonable network management."[115] It concluded that Comcast's network management practices were discriminatory and not reasonably tailored to address Comcast's concerns about network congestion.[116] It found further that Comcast had an anti-competitive motive to engage in such discrimination, as the file-sharing applications against which it discriminated posed a competitive threat to Comcast's own video-on-demand service.[117] The FCC also found that Comcast's disclosures to its subscribers regarding its discriminatory actions were wholly inadequate and that subscribers could not possibly have learned from Comcast's disclosures that such discrimination was occurring.[118] I analyze each of these conclusions below.

As a threshold matter, the FCC declared that it enjoyed the broad, general authority to enforce "federal Internet policy," which encompassed the power to adjudicate the present dispute between Free Press and Comcast.[119] It grounded its authority to adjudicate in the broad outlines of federal Internet policy articulated by Congress in the Telecommunications Act of 1996, in particular, the general policy of "encourag[ing] the development of technologies [that] maximize *user control* over what information is received by individuals . . . who use the Internet."[120] Second, the FCC explained that when it promulgated its Broadband Policy Statement in 2005, it clearly asserted its responsibility for enforcing this federal Internet policy.[121] In elaborating upon this policy, the Broadband Policy Statement made clear that the FCC intended to

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[110] *See* Grant Gross, *EFF:Comcast Continues to Block P-to-P*, WASH. POST, Nov. 30, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/11/30/AR2007113001543.html.
[111] *See* Policy Statement, *supra* note 79, at 14988 n.15.
[112] Ryan Paul, *FCC to Investigate Comcast BitTorrent Blocking*, ARS TECHNICA, Jan. 8, 2008, http://arstechnica.com/news.ars/post/20080108-fcc-to-investigate-comcast-bittorrent-blocking.html.
[113] Comcast Corp., 23 F.C.C.R. 13028, 13028 (2008) (memorandum opinion and order).
[114] *Id.* at 13034-44.
[115] *Id.* at 13058.
[116] *Id.* at 13054-56.
[117] *Id.* at 13030.
[118] *Id.* at 13059.
[119] *Id.* at 13045.
[120] 47 U.S.C. § 230(b)(3) (2006) (emphasis added).
[121] *Comcast*, 23 F.C.C.R at 13034.

"*preserve and promote the open and interconnected nature of the public Internet*,"[122] and to "preserve and promote the vibrant and open character of the Internet as the telecommunications marketplace enters the broadband age."[123] In furtherance of those goals, the FCC expressly instructed broadband providers that they would be required to ensure that their users enjoyed the freedom to "run applications and use services of their choice" and to "access the lawful Internet content of their choice."[124] Furthermore, when it adopted the Broadband Policy Statement, the FCC warned that if it was presented with "evidence that providers of telecommunications for Internet access . . . [were] violating these principles, [it would] not hesitate to take action to address that conduct."[125]

The FCC further defended its jurisdiction to adjudicate this dispute by referring back to the *Brand X* decision itself, in which the Supreme Court dismissed criticisms of the FCC's decision to exempt broadband providers from common carriage regulations by explaining that the FCC would retain the power to impose regulatory obligations on broadband providers "under its Title I ancillary jurisdiction to regulate interstate and foreign communications."[126] Under such Title I authority, the FCC explained, it enjoyed broad authority and jurisdiction over "communication by wire," including over Comcast's provision of broadband Internet access.[127] In response to the argument that the FCC's ancillary jurisdiction must be reasonably ancillary to the effective performance of *something* in particular, the FCC explained that that "something" is the federal Internet policy set forth in the Telecommunications Act.[128] The FCC then articulated a host of other provisions of the Communications Act to which its jurisdiction was also ancillary.[129]

Turning to the means it selected to define the contours of national Internet policy in general and net neutrality norms in particular—via informal adjudication instead of via rulemaking—the FCC acknowledged the Supreme Court's mandate[130] that it "fill[] in the interstices of the [Telecommunications Act,] . . . as much as possible, through th[e] quasi-legislative promulgation of *rules*" rather than by case-by-case adjudication.[131] It defended its decision to proceed via adjudication in this case by adverting to the novel, complex, and variegated nature of Internet traffic management issues, which rendered case-by-case adjudication preferable to one-size-fits-all rules.[132] Moreover, in furtherance of the national Internet policy set forth in the Telecommunications Act that

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[122] Policy Statement, *supra* note 79, at 14988 (emphasis in original).
[123] *Id.*
[124] *Id.*
[125] Wireline Broadband Order, *supra* note 73, at 14904.
[126] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 976 (2005).
[127] Comcast Corp., 23 F.C.C.R. 13028, 13035 (2008) (memorandum opinion and order).
[128] *Id.*
[129] *Id.* at 13036-40.
[130] *Id.* at 13045.
[131] SEC v. Chenery Corp., 332 U.S. 194, 202 (1947) (emphasis added).
[132] *Comcast*, 23 F.C.C.R. at 13046.

"'broadband services should exist in a minimal regulatory environment,'"[133] the FCC claimed that proceeding via case-by-case adjudication established a comparatively less burdensome regulatory environment for broadband providers.[134]

In addressing the merits of Free Press's complaint, the FCC found that Comcast's network management practices unlawfully discriminated among applications and protocols by using deep packet inspection technology to peer into Internet users' communications and terminate communications based on their content.[135] The FCC found that Comcast terminated certain connections when it determined that there were too many peer-to-peer uploads by sending RST (reset) packets to interrupt and terminate these communications.[136] It held that Comcast's use of deep packet inspection technology and Reset Injection was unreasonable, constituted discriminatory censorship in violation of the principles articulated in the Broadband Policy Statement, and was not "carefully tailored to [Comcast's] interest in easing network congestion."[137] In particular, Comcast's network practices were overinclusive—not targeting all Internet users who used substantial bandwidth, but only those who used disfavored applications, regardless of the level of overall network congestion at the time or whether the user's particular geographic area had congested nodes.[138] Comcast's network practices were also *under*inclusive, in that even an Internet user using an extraordinary amount of bandwidth would be left alone by Comcast as long as he or she was not using a disfavored application like BitTorrent.[139] Applying a form of strict scrutiny to Comcast's network management practices, the FCC went on to find that Comcast had alternative avenues to advance its legitimate network management goals that were less restrictive of expression, including capping individual users' bandwidth consumption and/or charging overage fees to high capacity users, instead of punishing *anyone* who uses disfavored peer-to-peer technology.[140]

Finally, the FCC sharply rebuked Comcast for failing to disclose its network management practices to affected Internet users to the FCC itself.[141] To remedy this lack of meaningful disclosure, the FCC ordered Comcast to:

> (1) disclose to the Commission the precise contours of the network management practices [it was employing] . . . ; (2) submit a compliance plan . . . that describes how it intends to transition from discriminatory to nondiscriminatory network management practices by the end of [2008]; and (3) disclose to the Commission and the

[133] *Id.* at 13046 (quoting Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 F.C.C.R. 4798, 4802 (2002) (declaratory ruling and notice of proposed rulemaking)).
[134] *Id.*
[135] *Id.* at 13050-51.
[136] *Id.* at 13051.
[137] *Id.* at 13056.
[138] *Id.*
[139] *Id.* at 13056-57.
[140] *Id.* at 13057.
[141] *Id.* at 13058-59.

> public the details of the network management practices that it intends to deploy following the termination of its current practices, including the thresholds that will trigger any limits on customers' access to bandwidth.[142]

The FCC, however, declined to adopt generally applicable disclosure requirements—or any other requirements—regarding network management practices for broadband providers generally,[143] limiting itself to imposing these mandates on Comcast in particular. The FCC concluded by retaining continuing jurisdiction over this matter and by urging Free Press and members of the public generally to "keep a watchful eye on Comcast as it carries out this relief." [144]

Chairman Kevin J. Martin's Concurring Statement

While concurring generally with the FCC's order, FCC Chairman Martin was more willing to articulate broadly-applicable rules for broadband providers and set forth these rules in a way similar to that applicable under First Amendment scrutiny. He explained that the FCC was "ready, willing, and able" to enforce the net neutrality principles articulated in its Broadband Policy Statement, [145] and would conduct its analysis of whether a broadband provider violated these principles as follows: first, the FCC would consider "whether the network management practice [was] intended to distinguish between legal and illegal activity," such as child pornography or copyright-infringing content.[146] Next, it would consider whether the broadband service provider had "adequately disclosed its network management practices," both because Internet users should be able to rely upon such disclosure so they can make informed decisions about their choice of broadband provider and because lack of full disclosure is strong evidence that the practice is unreasonable. [147] Finally, if the FCC were to determine that the broadband provider arbitrarily degraded or blocked legal content under the guise of "network management," it would apply a version of intermediate scrutiny to determine whether the network management practice "further[ed] an important interest and [was] carefully tailored to serve that interest."[148]

Applying this analysis, Commissioner Martin had no difficulty concluding that Comcast's discriminatory blocking of BitTorrent and similar applications was unreasonable and unlawful. As he explained,

> If we aren't going to stop a company that is looking inside its subscribers' communications (reading the "packets" they send), blocking that communication when it uses a particular application regardless of whether

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[142] *Id.* at 13060.
[143] *Id*. at 13046, 13058.
[144] *Id.* at 13061.
[145] *Id.* at 13065 (Martin, Chairman, concurring).
[146] *Id.* at 13066.
[147] *Id.*
[148] *Id.*

> 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? Failure to act here would have reasonably led to the conclusion that new legislation and rules are necessary.[149]

Because the Commission was "ready, willing and able" to regulate such bad practices by broadband providers on an informal, ad hoc basis, neither formal rulemaking nor broadly applicable net neutrality legislation was necessary, according to Martin.[150]

Commissioner Robert M. McDowell's Dissent

Commissioner McDowell disagreed with the majority of FCC Commissioners regarding the FCC's jurisdiction to adjudicate in these circumstances. He explained that, "[s]ince the Supreme Court's decision in *Brand X*, we have been busy taking broadband services out of the common carriage realm of Title II and classifying them as largely *unregulated* Title I information services."[151] Accordingly, with respect to Comcast, he concluded, "we do not have any rules governing Internet network management to enforce."[152] He emphasized that the Broadband Policy Statement principles were not intended to serve as enforceable rules, and that the FCC had clearly contemplated a *rulemaking* proceeding regarding network management practices, as was evidenced by its adoption of the *Broadband Industry Practices Notice of Inquiry* in 2007, the first step in a rulemaking proceeding.[153] As McDowell complained, "no notice of proposed rulemaking, with a chance for public comment, was ever issued. Nothing regulating Internet network governance has been codified in the Code of Federal Regulations. In short, we have no rules to enforce."[154]

McDowell also sharply criticized the majority's broad conception of the FCC's ancillary jurisdiction, under which "the Commission apparently can do *anything* so long as it frames its actions in terms of promoting the Internet or broadband deployment."[155] He also observed that members of Congress apparently believed that the FCC did not enjoy the jurisdiction to regulate broadband providers' network management practices and accordingly sought (unsuccessfully, so far) to enact net neutrality legislation that would grant the FCC such jurisdiction.[156]

In summary, the FCC Commissioners were sharply divided in their understanding of whether the FCC had the power to adjudicate in the Comcast

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[149] *Id.* at 13067.
[150] *See id.*
[151] *Id.* at 13089 (McDowell, Comm'r, dissenting).
[152] *Id.*
[153] *Id.* at 13089-90.
[154] *Id.*at 13090.
[155] *Id.*
[156] *Id.*

incident, whether the FCC had rules to enforce against Comcast, how the FCC (and Congress) should proceed in the future in protecting Internet users' freedom to communicate, and what level of scrutiny it should apply to allegations of discrimination by broadband providers.

Process-Based Criticisms of the FCC's Approach

The FCC's approach to regulation of broadband providers in its *Comcast* order is insufficient to protect Internet users' free speech rights and is vulnerable to attack on several fronts. First, as a procedural matter, there are strong arguments that an agency cannot enforce a policy statement (especially one that it itself declared unenforceable)[157] that did not emerge from a notice-and-comment rulemaking.[158] As discussed above, FCC Chairman Martin made clear when adopting the Broadband Policy Statement that "policy statements do not establish rules nor are they enforceable documents."[159] Courts have held that agencies "cannot apply or rely upon [such nonbinding policy statements] as law because a general statement of policy only announces what the agency *seeks to establish as policy.*"[160] Although agencies enjoy the discretion to act via adjudication instead of via rulemaking, such adjudications must enforce previously articulated rules or binding principles. In its *Comcast* adjudication, the FCC did neither.

Second, the FCC's adjudication is subject to criticism on the grounds that it relied entirely on a paper record composed of predominantly self-serving statements by the parties themselves or other interested parties that were not subject to penalties of perjury or cross-examination. As Commissioner McDowell complained in his dissent,

> [a]ll we have to rely on are the apparently unsigned declarations of three individuals representing the complainant's view, some press reports, and the conflicting declaration of a Comcast employee. The rest of the record consists purely of differing opinions and conjecture . . . [The Commission should instead have] conduct[ed] its own factual investigation under its enforcement powers."[161]

The agency's informal adjudication in *Comcast* differs markedly from the formal adjudication mode that is available to the FCC, in which adjudications are held before one of the FCC's two full-time administrative law judges, employ a trial and investigative

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[157] *See supra* text accompanying note 96.

[158] *See, e.g.*, Weiser, *supra* note 6 (manuscript at 32) ("[A]n agency cannot enforce a policy statement that did not emerge from notice-and-comment rulemaking or explicitly warn parties that it would be enforced.").

[159] Press Release, Chairman Kevin J. Martin, *surpa* note 96.

[160] Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) (emphasis added). *See also* Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 407 (2007) (arguing that agencies "cannot base an enforcement action solely on a regulated entity's noncompliance with a guidance document.").

[161] *Comcast*, 23 F.C.C.R. at 13092 (McDowell, Comm'r, dissenting) (footnote omitted).

staff that is separate from the FCC, and have a variety of procedural requirements.[162] The processes attendant to formal adjudications alleviate many of the concerns inherent in informal adjudications. As Stuart Benjamin and Arti Rai explain,

> the trial-type context of formal adjudications, with the parties presenting evidence and rebutting their opponents' evidence and with the hearing officer's decision based solely on the material presented at the hearing, alleviates the fear of powerful interests presenting arguments privately to the decisionmaker and more generally reduces concerns about bias affecting the agency's decision.[163]

Because the FCC failed to employ formal adjudication and instead employed a mode of informal adjudication in which it purported to enforce principles and policies it had previously labeled "non-enforceable," its process is flawed in many respects.

Although the decision reached by the FCC reprimanding Comcast appears to be an important step in the right direction, across-the-board regulation of broadband providers in the form of either legislation or agency rulemaking—both of which were opposed by a majority of the FCC Commissioners[164]—is necessary to ensure that discrimination against content does not occur in the first place. While post hoc reprimands specifically directed toward one particular company are an important indication of the FCC's current approach toward net discrimination, they do not obviate the need for broadly applicable, ex ante regulation.

III. Too Little, Too Late: The FCC's Adjudication Actions are Insufficient to Protect Internet Users' Freedom of Expression

The Case For Net Neutrality Regulation

Instead of engaging in ad hoc, informal adjudication as an exercise of its ancillary jurisdiction, the FCC should have concluded back in 2002 that broadband providers were common carriers that were subject at least to nondiscrimination obligations under Title II of the Communications Act. Congress has the power, in effect, to undo the FCC's decision to exempt broadband providers from common carriage obligations and to subject broadband providers to the nondiscrimination requirements imposed upon common carriers under Title II.[165] As I argue in greater detail in *Virtual Freedom: Net Neutrality*

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[162] *See* Weiser, *supra* note 6 (manuscript at 51-52 & nn.177-79).

[163] Stuart Minor Benjamin & Arti K. Rai, *Who's Afraid of the APA? What the Patent System Can Learn from Administrative Law*, 95 GEO. L.J. 269, 313 (2007).

[164] FCC Chairman Martin, for example, made clear in his concurrence with the Comcast Order that he has "consistently opposed calls for legislation or rules to impose network neutrality." *Comcast*, 23 F.C.C.R. at 13067 (Martin, Chairman, concurring).

[165] Such obligations could be imposed by net neutrality legislation. *See supra* text accompanying notes 88–92.

and Free Speech in the Internet Age,[166] in the absence of common carriage obligations imposed on broadband providers, carefully crafted net neutrality legislation is necessary to protect our free speech interests in the Internet age. Congress enjoys the power to regulate—or to require the FCC to regulate—broadband providers so as to subject them to the obligation not to discriminate against the content members of the public seek to communicate.[167] Such regulation would advance the free speech interests of members of the public and would not infringe the First Amendment rights of broadband providers.

Even assuming that broadband providers enjoy a protectable First Amendment interest in the functions they perform, net neutrality regulations prohibiting broadband providers from engaging in discrimination against legal content or applications would be deemed content-neutral regulations of speech that survive the applicable intermediate scrutiny. Courts' analyses of the constitutionality of such regulation would be similar to the analysis the FCC itself imposed in its *Comcast* adjudication.[168] Such regulation would advance the substantial government interest of protecting the public's access to information and, if the regulation were carefully crafted and appropriately tailored to advance this interest, it would withstand First Amendment scrutiny.[169] Consistent with the Supreme Court's analysis in *Turner Broadcasting System v. FCC*,[170] in which the Court recognized the limited First Amendment editorial rights of the cable companies while upholding regulations requiring them to serve as conduits for content that was not of their choosing,[171] carefully crafted regulation of broadband providers prohibiting them from unreasonably discriminating against legal content or applications comports with the First Amendment's protections. Thus, even if broadband providers were able to convince a court that their First Amendment interests were implicated by net neutrality regulation, *Turner* would counsel in favor of holding that such interests were outweighed by the countervailing public interest in "'the widest possible dissemination of information from diverse and antagonistic sources'"[172] and in "public discussion and informed deliberation [that] . . . democratic government presupposes and the First Amendment seeks to achieve."[173]

Any regulation prohibiting broadband providers from blocking legal content or applications should also mandate *transparency* in any such blocking—much like the FCC mandated in its *Comcast* adjudication[174]—requiring broadband providers to inform their

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[166] NUNZIATO, *supra* note 7.

[167] Such requirements could be imposed by net neutrality legislation. *See supra* text accompanying notes 88–92.

[168] *See supra* text accompanying notes 135-40.

[169] *See* Letter from Tim Wu, Assoc. Professor, Univ. of Va. Sch. of Law, and Lawrence Lessig, Professor of Law, Stanford Law Sch., to Fed. Commc'ns Comm'n (Aug. 22, 2003), *available at* http://www.freepress.net/files/wu_lessig_fcc.pdf.

[170] 520 U.S. 180 (1997). *See* NUNZIATO, *supra* note 7, at ch. 7 (discussing *Turner* and its implications for the judicial scrutiny of net neutrality legislation).

[171] *Turner*, 520 U.S. at 224.

[172] *Id.* at 192 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994)).

[173] *Id.* at 227 (Breyer, J., concurring) (citing *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring)).

[174] *See supra* text accompanying notes 140-41.

subscribers when content and/or applications are blocked and the reasons for such blocking (e.g., the provider claims that the content that was blocked constituted illegal child pornography or copyright infringing works). Mandating transparency in blocking will enable users to impose meaningful checks on the blocking decisions of broadband providers and ensure that such blocking does not mask the provider's unlawful discrimination. It is currently quite difficult, if not impossible, for users to discern whether content or applications have been blocked (as was evident in the case of Comcast's discriminatory actions). Indeed, lack of transparency will only compound the discrimination because users—or, as in Comcast's case, the broadband provider[175]—may attribute the difficulties in access to the blocked content or applications themselves, instead of placing the blame where it belongs—with their broadband provider. Internet users enjoy the right to be informed that content or applications have been blocked by their providers and the reasons for such blocking so they can impose meaningful checks on broadband providers' discriminatory actions.

Network operators should be permitted to prioritize types of traffic that inherently require high bandwidth without discriminating within and among those types of applications. Operators should be permitted to engage in uniform application-based prioritizing, in which all applications of a certain type are accorded the same priority of delivery.[176] Under such regulation, broadband providers should not be prohibited from according higher priority to *all* Voice over Internet Protocol (VoIP) packets, for example, because such packets are latency-sensitive.[177] However, broadband providers should be prohibited from prioritizing *within* such types of applications so as to favor their affiliated VoIP applications over those of a rival, as providers have been accused of doing in discriminating against VoIP provider Vonage while prioritizing and favoring their own VoIP applications, for example.[178] To protect the free flow of information and the public's access to information from a wide variety of sources, such discriminatory prioritization should be prohibited.

In summary, Congress should pass legislation prohibiting (or requiring the FCC to prohibit) broadband providers from blocking legal content or applications *across the board* and from engaging in discriminatory prioritization or degradation of such content or applications. Such legislation should also mandate transparency in blocking or degrading, requiring broadband providers to inform Internet users of any content or applications that were blocked or degraded and the reasons therefor, so that users will be

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[175] *See supra* text accompanying note 100.

[176] *See* FED. TRADE COMM'N, STAFF REPORT: BROADBAND CONNECTIVITY COMPETITION POLICY 88-89 (2007), *available at* http://www.ftc.gov/reports/broadband/v070000report.pdf.

[177] By employing packet marking, "'preferential treatment can be given to latency-sensitive applications during periods of increased network congestion,' and '[p]acket marking based on application classification . . . enables routers upstream or downstream . . . to prioritize traffic based on individual application requirements and address congestion at relevant network points.'" *Id.* at 89 (quoting CISCO SYSS., CISCO SERVICE CONTROL: A GUIDE TO SUSTAINED BROADBAND PROFITABILITY 4-5 (2005), *available at* http://www.democraticmedia.org/files/CiscoBroadbandProfit.pdf).

[178] *See* NUNZIATO, *supra* note 7, at 9 (discussing the Madison River Communications incident, in which a DSL provider blocked access to Vonage).

able to impose meaningful checks on these decisions of broadband providers and ensure that such actions do not mask unlawful discrimination.

Conclusion

Since the FCC embarked upon the path of removing common carriage/nondiscrimination obligations from broadband providers in 2002, the rights of Internet users to communicate on the Internet have been imperiled. The stop-gap attempts undertaken by the FCC to remedy the problems caused by its decision to undertake this deregulatory course of action have been insufficient to protect Internet users' free speech interests. The Broadband Policy Statement promulgated by the FCC in 2005 does not impose meaningful obligations on broadband providers. Although the Supreme Court sought to assure Internet users that the FCC would protect their right to communicate in the broadband realm by exercising its ancillary jurisdiction, the exercise of such jurisdiction is fraught with procedural and other difficulties, as evidenced by the FCC's recent informal adjudication in the *Comcast* case. Because the FCC has declined to articulate generally applicable nondiscrimination rules for broadband providers, the rights of Internet users to communicate in the broadband realm are insufficiently protected. Broadly applicable regulation or legislation is necessary to guarantee our right to communicate in the Internet age.