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Adam Holofcener

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Recommended Citation

Adam Holofcener, *Net Neutrality Besieged by Comcast Corp. v. FCC: The Past, Present and Future Plight of an Open Internet*, 7 J. Bus. & Tech. L. 403 (2012)

Available at: <https://digitalcommons.law.umaryland.edu/jbtl/vol7/iss2/7>

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Net Neutrality Besieged by *Comcast Corp. v. FCC*: The Past, Present and Future Plight of an Open Internet

I. INTRODUCTION

WHO CONTROLS THE INTERNET? THE QUESTION ITSELF IS STARTLING and there is no concrete answer.¹ However, there are multiple avenues through which access to the internet and its content can be affected. Traditionally, there has been a balance of control over the internet by both market and regulatory forces that engendered high levels of innovation and profit. A recent case heard in the United States Court of Appeals for the District of Columbia Circuit, *Comcast Corp. v. FCC*,² shook that balance and called into question the federal government's regulatory authority over the internet. The government must regain its authority either by enhanced advocacy in front of the judiciary or legislative action if the internet is to remain an innovative and economically viable space for generations to come.

This paper focuses on the now uncertain relationship between Internet Service Providers ("ISPs"), for-profit corporations that provide access to the internet, and the Federal Communications Commission ("FCC"), the governmental agency that purportedly regulates access and use of the internet by utilizing the principles of Network Neutrality ("Net Neutrality"). There will be a brief background section on the concept of Net Neutrality, a platform that has encouraged open, uniform access to the internet from its inception, and Net Neutrality's importance in our age of unceasing technological advancement.³ Next, a legal background section will present information on administrative law, which governs the FCC, and relevant case law.⁴ A large section will then cover the events leading up to *Comcast Corp. v.*

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* J.D. Candidate, University of Maryland Francis King Carey School of Law, May 2012. Thanks to all my family, friends, and Baltimore. This document has no copyright and can be freely used by anyone. Adam.Holofcener.Law@gmail.com; <http://www.kunstemporary.com>.

1. See JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET AND HOW TO STOP IT* 30 (2008) ("The . . . Internet was a network that no one in particular owned and that anyone could join.").

2. 600 F.3d 642 (D.C. Cir. 2010).

3. See *infra* Part II.

4. See *infra* Part III.

FCC, the case itself, and its progeny.⁵ This section illustrates when the United States Court of Appeals for the District of Columbia Circuit challenged the FCC's power to regulate certain parts of the internet, and enforce Net Neutrality principles against ISPs. A brief discussion of the FCC's response to the D.C. Circuit's opinion will be followed by a summary of impending lawsuits against the FCC, filed by groups both for and against Net Neutrality.⁶ Finally, this article will analyze the two ways that the government can maintain Net Neutrality: 1) the FCC can convince the court that it has proper authority to regulate the internet or 2) Congress can pass legislation.⁷ Clarification of this issue is vital because without Net Neutrality the proliferation of online innovation and novel business development will cease.

II. BACKGROUND AND IMPORTANCE OF NET NEUTRALITY

A. What Is Net Neutrality?

Network Neutrality ("Net Neutrality") is the idea that the internet works best when all content, sites, and platforms are treated equally.⁸ The equal treatment of the internet's content is directly controlled by Internet Service Providers ("ISPs"), the corporations to whom the public pays a fee in order to access the internet, such as Comcast Corporation ("Comcast"), Verizon Wireless, and AT&T, Inc. Net Neutrality posits that individuals who pay similar rates to an ISP for access to the internet should have similar access to all legal content that the global internet offers, and that content should travel over the network at the same rate.⁹ The ISP is supposed to neutrally apply access to the internet without, for example, blocking certain content or slowing down certain applications.¹⁰

Tim Wu, a professor at Columbia Law School, proposed a useful analogy comparing the internet with another network, the electric grid, whose providers offer a neutral experience to its customers.¹¹ As Wu stated, "[t]he electric grid does not care if you plug in a toaster, an iron, or a computer."¹² A customer is not precluded from using the electric grid for any legal purpose after that customer has paid to use the grid.¹³ The internet does differ in some key aspects from the electric

5. See *infra* Part IV.

6. See *infra* Part IV.

7. See *infra* Part V.

8. Tim Wu, *Network Neutrality FAQ*, http://www.timwu.org/network_neutrality.html (last visited Apr. 19, 2012). Tim Wu coined the term "Net Neutrality" and advises the Obama Administration on issues of online competition. See Patrick Kingsley, *The Wu Master*, THE GUARDIAN, Mar. 17, 2011, at G2, available at <http://www.guardian.co.uk/technology/2011/mar/17/the-master-switch-tim-wu-internet>; see generally TIM WU, THE MASTER SWITCH (2011).

9. Lawrence Lessig & Robert W. McChesney, *No Tolls on the Internet*, WASH. POST, June 8, 2006, at Opinions, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/07/AR2006060702108.html>.

10. *Id.*

11. Wu, *supra* note 8.

12. *Id.*

13. *Id.*

grid, such as its inception and development, but these facts reinforce the internet's heritage as a network neutrally applied to its users and content. A brief look at the internet's heritage serves to highlight why Net Neutrality is important to keeping the internet vibrant and viable in the future.

B. Why Is Net Neutrality Important?

The internet was founded and developed on the principles of Net Neutrality.¹⁴ Originally, the internet was used almost exclusively by universities and the government.¹⁵ The goals of these entities focused on research, communication, and security.¹⁶ The institutions that used the internet wanted, and needed, to be able to transfer information over the network with as much ease and freedom as possible.¹⁷ The smooth and unencumbered transfer of information was important because the internet promoted and necessitated collaboration between its users.¹⁸ The internet was built from the ground up by its users speaking directly to one another and building off each other's creations. During the internet's nascent period, Net Neutrality was crucial in that it engendered an environment prone to offer unfettered online access to all users. If this had not been the case then the internet would not have developed into such an innovative tool, a tool with the propensity for infinite innovation. However, Net Neutrality blossomed naturally because the original internet was couched in academic and governmental affairs.¹⁹ The need for Net Neutrality only became apparent when the internet service became proprietary and ISPs offered internet access to public users, the majority of whom solely consume the internet without participating in its further creation.²⁰ As the internet entered the market, ISPs moved toward models that diversely and completely

14. See *Q&A: The network neutrality debate*, BBC NEWS (Dec. 2010), <http://www.bbc.co.uk/news/technology-10924691> ("Any attempt to restrict [open access to the internet], say advocates, would be an attack on the very principle the internet was founded upon.").

15. William M. Bulkeley, *Bolt Beranek to Acquire From Stanford Provider of Internet for Silicon Valley*, WALL ST. J., June 22, 1994, at B8 ("The Internet . . . was originally used mainly for nonprofit communications among academics, researchers and others.").

16. *Id.*

17. See John Perry Barlow, *A Declaration of Independence of Cyberspace*, http://w2.eff.org/Censorship/Internet_censorship_bills/barlow_0296.declaration (last visited Apr. 19, 2012) ("Cyberspace consists of transactions, relationships, and thought itself, arrayed like a standing wave in the web of our communications.").

18. See JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET AND HOW TO STOP IT* 28 (2008) ("[The Creators of the Internet] had little concern for controlling the network or its users' behavior."); see also LAWRENCE LESSIG, *CODE 2.0* 243–44 (2006) ("There is an unprecedented collaboration of people from around the world working to converge upon truth across a wide range of topics."); see generally WIKIPEDIA, <http://www.wikipedia.org> (last visited Apr. 19, 2012). Wikipedia is an example of online activity that was not only born out of but dependent on collaborative efforts.

19. See ZITTRAIN, *supra* note 1, at 27 ("The early Internet was implemented at university computer science departments, U.S. government research units.").

20. See *id.* at 33–34 ("The future need not resemble the [internet's] past, however, and a robust debate exists today about the extent to which ISPs ought to be able to prioritize certain data streams over others by favoring some destinations or particular service providers over others.").

monetized their product while excluding competition.²¹ However, this framework ran in stark contrast to the originating principles of the internet. To keep the internet growing and flourishing in the fashion that it always has, ISPs must remain neutral in their allotment of internet access because the internet's current and future creators, many of whom are amateur, as opposed to academic, will need that access to keep the internet growing.

To use an anecdote from a different realm of science, Cory Doctorow related a tale about the creators of the first micro-chip at a talk he gave on Net Neutrality at the New America Foundation in July 2010.²² Doctorow explained that the first micro-chip was developed by a large team of scientists who all worked for the government.²³ Each scientist contributed to the making of the micro-chip; however, each individual scientist's knowledge of micro-chip creation was limited to a particular part in the process.²⁴ Therefore, in order to create a micro-chip, scientists needed to speak to each other.²⁵ At first, the scientists had no problem speaking with one another because they all worked for the government.²⁶ The government encouraged communication between workers to obtain the best product, and it is clear that without this communication no micro-chip would have been created, or at least not with such blinding speed.²⁷ After micro-chips were released into the field of public commerce, each scientist was employed by a separate private company.²⁸ The companies made each scientist sign non-disclosure and non-compete agreements, so as to protect their investments.²⁹ However, the companies fallaciously believed that each scientist could individually create a complete micro-chip.³⁰ The scientists responded to the demands of their private employers coupled with non-disclosure agreements by holding secret meetings every year where they could all gather to share ideas and information.³¹ Neither this paper, nor Net Neutrality, is against innovative technologies transferring into the stream of commerce. The use of pro-cooperative, as opposed to exclusively pro-competitive, regulatory schemes need to be enacted if the internet is to remain both innovative and commercially viable in the future.

21. See BARBARA VAN SCHWEICK, *INTERNET ARCHITECTURE AND INNOVATION* 242–43 (2010) (stating that network providers, in the absence of regulation, can either price internet use differently depending on the application being used, or block applications that compete with services they offer, such as Voice-over-Internet-Protocol, which competes with ISPs standard telephone services. Van Schweick elaborates that the exclusion of competition by ISPs reflects the tendency that ISPs usually retain some sort of monopoly over their services, at the very least, in their specific local region).

22. Cory Doctorow, *How Copyright Threatens Democracy: A Conversation at the New America Foundation*, NEW AMERICA FOUNDATION, http://newamerica.net/events/2010/cory_doctorow (last visited Apr. 19, 2012).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

III. LEGAL BACKGROUND

The regulation of the internet primarily concerns the Federal Communications Commission (“FCC”), which is an administrative agency. Administrative agencies have a procedure and practice that is somewhat different from traditional state or federal court based adjudications. It will be helpful to begin with a short section on the law governing administrative agencies; this will clarify the subsequent sections which discuss actions taken by the FCC.³² Next, there will be a section on the case law pertaining to how the FCC previously regulated telecommunications services, including the internet. That case law forms the basis for the FCC’s ability to regulate telecommunications services today.

A. Administrative Law Pertaining to the FCC’s Dealings with Comcast

Administrative agencies are governed by enabling statutes, passed by Congress, which outline the areas of authority delegated to a particular administrative agency. In this case, the FCC gains its relevant authority from the Communications Act of 1934, amended by the Telecommunications Act of 1996 (“the Act”).³³ Utilizing the authority given to it from the Act, the FCC has two ways of effectuating its power: rulemakings and adjudications. Rulemakings and adjudications made by administrative agencies are governed, generally, by the Administrative Procedure Act (“APA”).³⁴ The APA affords that rulemakings and adjudications can be both formal and informal.³⁵ The FCC’s adjudication of Comcast was informal, meaning that standard trial like procedures such as witness testimony and maintaining a proper record were unnecessary.³⁶ The APA also lays out procedures for judicial review to take place in United States federal courts of both administrative rulemakings and adjudications.³⁷ In *Comcast Corp.*, the Court of Appeals for the D.C. Circuit reviewed the findings and conclusions of the FCC’s informal adjudication. Therefore, the Court’s standard of review was deference to the administrative agency unless the agency’s findings and conclusions were arbitrary and capricious.³⁸

After the D.C. Circuit’s ruling in *Comcast Corp. v. FCC*, the FCC conducted an informal rulemaking in an effort to cure some of the effects of the opinion.³⁹ The APA stipulates that an agency must publish a Notice of Proposed Rulemaking (“NPRM”) in the Federal Register in an informal rulemaking.⁴⁰ The NPRM must

32. See *infra* Part IV.

33. 47 U.S.C. § 151 et seq.

34. 5 U.S.C. § 500 et seq.

35. *Id.*

36. *Id.*

37. *Id.*

38. 5 U.S.C. § 706(2)(A). See *Motor Vehicle Mfr. Ass’n v. State Farm*, 463 U.S. 29, 43 (1983) (stating that the proper standard of review for an administrative agency’s findings and conclusions is arbitrary and capricious).

39. In the Matter of Framework for Broadband Internet Service, 25 FCC Rcd. 7866 (2010).

40. 5 U.S.C. § 553.

contain the text of the actual rule to be promulgated and a time and place that the public can comment on the proposed rule.⁴¹ The FCC must provide an explanation of the comments that it received relating to the proposed rule when the final rule is published; the final rule must also contain a statement of basis and purpose.⁴²

B. The FCC's Authority Under the Telecommunications Act

Originally enacted by Congress in 1934, the Communications Act⁴³ (“the Act”) provides the FCC with broad authority to regulate common carrier services.⁴⁴ In 1996, the Act was amended by the Telecommunications Act. The FCC’s ability to regulate common carriers extends to landline telephones,⁴⁵ radio transmissions, broadcast television and cell phones,⁴⁶ and cable services.⁴⁷ In 2002, in the Cable Modem Order, the FCC ruled that the internet is neither a telecommunications service under Title II of the Act nor a cable service under Title VI.⁴⁸ However, the Act stipulates 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.”⁴⁹ This has been labeled the FCC’s “ancillary authority” following three United States Supreme Court decisions which defined how the FCC could utilize such authority. Because the internet does not fall directly within the purview of the Act, the FCC has to show that regulation of the internet falls within its ancillary authority in order to regulate Internet Service Providers (“ISPs”).

In the first of the ancillary authority cases, *United States v. Southwestern Cable Co.*, the Act had not yet statutorily extended the FCC’s authority to cover regulating cable television; however, the Supreme Court held that regulating cable television was “reasonably ancillary” to the FCC’s regulation of regular broadcast television.⁵⁰ The second ancillary authority case also dealt with cable television operators. In *United States v. Midwest Video Corp.*, the Supreme Court upheld the FCC’s regulation which required cable operators to create and broadcast new television programs as well as its regular programming.⁵¹ Finally, in *FCC v. Midwest Video Corp.*, the Supreme Court struck down a regulation by the FCC which mandated that cable television providers set aside some channels for public use.⁵² In 2005, the

41. *Id.*

42. *Id.*

43. 47 U.S.C. § 151 et seq.

44. See 47 U.S.C. § 153(11) (“Common carrier . . . means any person engaged as a common carrier for hire, in interstate or foreign communication by wire . . .”).

45. 47 U.S.C. § 201 et seq.

46. 47 U.S.C. § 301 et seq.

47. 47 U.S.C. § 601 et seq.

48. *In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd. 4798, 4802 (2002).

49. 47 U.S.C. § 154(i).

50. 392 U.S. 157, 178 (1968).

51. 406 U.S. 649, 670 (1972) (*Midwest Video I*).

52. 440 U.S. 689, 708–09 (1979) (*Midwest Video II*).

United States Court of Appeals for the District of Columbia Circuit created a two part test for determining whether the FCC may exercise its ancillary authority. The test came from *American Library Ass'n v. FCC* and stated that “[t]he [FCC] . . . may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission’s general jurisdictional grant under Title I [of the Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”⁵³ The determination of ancillary authority is determined on a case by case basis.⁵⁴ The Supreme Court has decided one case dealing with the FCC’s ancillary authority over the internet and ISPs. In *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Serv.*, the Supreme Court explained that “the [FCC] remains free to impose special regulatory duties on [cable internet providers] under its Title I ancillary jurisdiction.”⁵⁵

IV. *COMCAST CORP. v. FCC*: BEFORE AND AFTER

The Net Neutrality saga actually started with an informal adjudication by the FCC against Comcast. That adjudication led to Comcast’s appeal against the FCC in the United States Court of Appeals for the District of Columbia Circuit, followed by the FCC’s rulemaking in response to the D.C. Circuit’s ruling. Finally, a section will examine the impending lawsuits against the FCC’s recent Open Internet rules, which, at best, can be called Net Neutrality-lite.

A. *Free Press and Public Knowledge Attack Comcast’s Network Management Practices.*

On November 1, 2007, Free Press (“FP”) and Public Knowledge (“PK”)⁵⁶ submitted a Formal Complaint (“Complaint”) to the FCC against Comcast “For Secretly Degrading Peer-to-Peer Applications.”⁵⁷ The Complaint alleged that Comcast had been blocking peer-to-peer (“P2P”)⁵⁸ applications for its 12.9 million customers.⁵⁹ FP and PK alleged that blocking these P2P applications made it difficult, if not

53. 406 F.3d 689, 691–92 (D.C. Cir. 2005).

54. *Nat’l Ass’n of Regulatory Util. Comm’rs. v. FCC*, 533 F.2d 601, 612 (D.C. Cir. 1976).

55. 545 U.S. 967, 996 (2005).

56. See generally FREE PRESS, <http://www.freepress.net> (last visited Apr. 19, 2012); PUBLIC KNOWLEDGE, <http://www.publicknowledge.org> (last visited Apr. 19, 2012). Free Press and Public Knowledge are non-profit advocacy groups that fight for citizens’ rights in many areas of contemporary salience, such as media reform, access to information, and the internet.

57. Formal Complaint, In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation For Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd. 13028 (2008) (No. 07-52), available at http://www.publicknowledge.org/pdf/fp_pk_comcast_complaint.pdf.

58. Peer-to-Peer applications allow individuals to share files across the internet without relying on a central server. This is how services like Napster worked, although P2P services are content neutral in that they can convey both legal and illegal content. Each person that is part of the network can upload and download files of their choosing between each other quickly and efficiently.

59. Formal Complaint at 5, In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation For Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd. 13028 (2008) (No. 07-52), available at http://www.publicknowledge.org/pdf/fp_pk_comcast_complaint.pdf.

impossible, for its users to quickly and easily share materials with other internet users.⁶⁰ Even non-Comcast customers were harmed by Comcast's actions because if a non-Comcast user attempted to share files across a P2P network with a Comcast user she would have been inhibited by the Comcast user being blocked.⁶¹ FP and PK pointed out that Comcast adamantly denied these allegations before the Complaint was filed.⁶² However, in the Complaint a wealth of research compiled by the Electronic Frontier Foundation ("EFF")⁶³ showed that Comcast had in fact been blocking the P2P applications of their customers.⁶⁴ FP and PK alleged that Comcast's conduct violated the FCC's Internet Policy Statement, which was drafted specifically to combat Net Neutrality violations.⁶⁵ The Complaint asked that the FCC "immediately . . . enjoin Comcast's secret discrimination[,] . . . issue a temporary injunction requiring Comcast to stop degrading any applications[,] . . . issue a permanent injunction ending Comcast's discrimination[,] . . . [and] impose the maximum forfeitures"⁶⁶

On January 14, 2008, the FCC's Wireline Competition Bureau asked for public comment⁶⁷ on FP and PK's Complaint and received more than 6,500 comments in response.⁶⁸ Using the public comments it received, the FCC issued a Memorandum Opinion and Order on Comcast's network management practices.⁶⁹ The FCC grounded its authority to regulate Comcast in this matter pursuant to its ancillary authority⁷⁰ granted under Title I of the Act.⁷¹ The FCC cited section 230(b)⁷² of the Act, as well as many other sections, which spoke both generally and specifically about keeping the internet an efficient, vibrant, and innovative place.⁷³ The

60. *Id.* at 7.

61. *Id.*

62. *Id.* at 5–6.

63. See generally ELEC. FRONTIER FOUND., available at <http://eff.org> (last visited Apr. 19, 2012). Electronic Frontier Foundation is a non-profit group which advocates and litigates on behalf of citizens' digital rights.

64. Formal Complaint at 8, In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation For Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd. 13028 (2008) (No. 07-52), available at http://www.publicknowledge.org/pdf/fp_pk_comcast_complaint.pdf.

65. *Id.* at 12. The FCC's Internet Policy statement stated that "consumers are entitled to run applications and use services of their choice"; see also Policy Statement, 20 FCC Rcd. 14986 (2005) (internet policy statement).

66. Formal Complaint at ii, In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation For Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd. 13028 (2008) (No. 07-52), available at http://www.publicknowledge.org/pdf/fp_pk_comcast_complaint.pdf.

67. Comment Sought on Petition for Declaratory Ruling Regarding Internet Management Policies, 23 FCC Rcd. 340 (2008) (public notice).

68. In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd. 13028, 13033 (2008) (memorandum and order).

69. *Id.*

70. See *supra* notes 48, 52 and accompanying text.

71. Comment Sought on Petition for Declaratory Ruling Regarding Internet Management Policies, 23 FCC Rcd. 340, n.2 (2008) (public notice).

72. See 47 U.S.C. § 230(b) ("It is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services").

73. 47 U.S.C. §§ 151, 157, 201, 256, 257, 601(4).

Memorandum and Order largely considered whether the FCC had jurisdiction to regulate Comcast in the area of network management,⁷⁴ and Comcast argued vigorously that jurisdiction was improper.⁷⁵ However, despite rebutting Comcast's arguments concerning ancillary authority, the FCC rejected Comcast's claims on separate issues as well.⁷⁶ The FCC's own past rulings and statements further buttressed their authority to regulate Comcast in the arena of network management.⁷⁷

The FCC found that "Comcast's network management practices discriminated among applications and protocols rather than treating all equally."⁷⁸ The FCC acknowledged a host of examples found in the record of Comcast interfering with its customers' use of P2P applications as well as Comcast's own admission of interference with at least 10% of uploading P2P Transmission Control Protocol connections.⁷⁹ From these findings, the FCC concluded that FP and PK made a prima facie case that Comcast's practices violated parts of the Act as well as the Internet Policy Statement, and Comcast would have to show that its network management practices were reasonable.⁸⁰ The FCC found that Comcast's practice of "selectively target[ing] and terminat[ing] the upload connections of its customers' peer-to-peer applications . . ." to be neither reasonable network management nor "carefully tailored to [Comcast's] interest in easing network congestion . . ."⁸¹ The term Net Neutrality is not in the regulations and was therefore not specifically used by the FCC in its adjudication, but its findings fall squarely within the schema of Net Neutrality laid out above. In response to Comcast's failure to disclose its network management practices to its customers, the FCC stated that, in the future,

74. Network management is when the ISP manipulates its network, the flow data, or any other part of its general dissemination of access to the internet in order to ensure that its services stay operational, in terms of technological integrity. For example, if internet traffic suddenly surges to dangerous levels the ISP may delay transmission to some of its users so as not to overload the entire system. All ISPs are allowed to conduct reasonable network management in order to avoid any real damage to their system.

75. In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd. 13028, 13035 (2008) (memorandum and order).

76. See *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (Comcast argued that the Supreme Court had rejected section I of that Act as a basis for ancillary jurisdiction. However, *Midwest Video Corp.* stated that the FCC could not claim ancillary power over its broadcasting responsibilities in Title III of the Act); see also *Hart v. Comcast of Alameda*, No. C-07-06350-PJH (N.D. Cal. May 28, 2008) (Comcast argued in *Hart* that "the reasonableness of a broadband provider's network management practices . . . has, however, been firmly placed within the jurisdiction of the Federal Communications Commission . . . , an administrative agency whose authority to regulate internet broadband access companies' services is well-established."); 47 C.F.R. § 1.110 (stating that if Comcast is found to be willfully blocking or degrading internet content then parties affected by Comcast's actions can file a complaint).

77. See Policy Statement, 20 FCC Rcd. 14986 (2005) (internet policy statement); *In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd. 4798, 4802 (2002).

78. In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd. 13028, 13050 (2008) (memorandum and order).

79. *Id.* at 13051. Transmission Control Protocol ("TCP") is an application which transmits bytes of data on the world wide web and other networked programs. TCP is necessary for sharing files over a P2P network.

80. *Id.* at 13052–53.

81. *Id.* at 13054–56.

Comcast must disclose its practices in clear terms if it intends to limit the speed and bit-rate of its customers' internet connections.⁸² The FCC's Order mandated that Comcast "(1) disclose to the commission the precise contours of the network management practices at issue here . . . (2) submit a compliance plan to the commission with interim benchmarks . . . and (3) disclose to the commission and the public the details of the network management practices that it intends to deploy following the termination of its current practices"⁸³

B. Comcast Corp. v. FCC

Comcast appealed the FCC's Order in the United States Court of Appeals for the District of Columbia Circuit, specifically the issue of the FCC's ability to regulate its network management practices and bar it from interfering with customers' use of P2P applications.⁸⁴ The court vacated the FCC's Order solely on the basis of a lack of jurisdiction.⁸⁵ Before reaching the issue of jurisdiction, the court examined the FCC's two claims: (1) Comcast should be estopped from raising a lack of jurisdiction argument, and (2) the court should not examine the FCC's use of ancillary authority in this context because of the Supreme Court's decision in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Serv.*⁸⁶

First, the court determined that Comcast's statements in *Hart v. Comcast of Alameda, Inc.*, did not estop Comcast from a jurisdictional argument because in *Hart*, as in this case, Comcast only concedes that its internet service constitutes a "communication by wire" as described in the first prong of the test for ancillary authority set out in *American Library Ass'n v. FCC*.⁸⁷ Comcast's concession, stated by the Court, does not amount to an acceptance by Comcast that the FCC's regulations were "reasonably ancillary" to the Title I service of "communication by wire" necessitated by the second prong of the *American Library* test.⁸⁸ Second, the court explained that the use of ancillary authority must be examined on a case-by-case basis; therefore, the decision in *Brand X* does not preclude the court from examining the FCC's ancillary authority of Comcast.⁸⁹ Because *Brand X* did not alleviate the court's need to conduct an analysis on whether the FCC used its

82. *Id.* at 13060.

83. *Id.* The FCC declined to fine Comcast because this was the first adjudication the FCC conducted on this matter.

84. *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (2010).

85. *Id.* at 661. Comcast also argued that the FCC circumvented the rulemaking requirements of the Administrative Procedure Act and violated the requirements of the Due Process Clause, but the Court failed to reach those issues. *Id.*

86. *Id.* at 647; *see also* *Telecomms. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967 (2005).

87. *Comcast Corp.*, 600 F.3d at 648; *see also* *Hart v. Comcast of Alameda*, No. 07-6350, 2008 U.S. Dist. LEXIS 112959 (N.D. Cal. 2008).

88. *Comcast Corp.*, 600 F.3d at 648. Both prongs of the *American Library* test need to be fulfilled in order for ancillary authority to take effect.

89. *Id.* at 650.

ancillary authority properly, the court set about determining whether the FCC had properly fulfilled the second prong of the *American Library* test.⁹⁰

The court determined that the provisions of the Telecommunications Act that were used by the FCC to justify ancillary authority fell into two categories: “those that the parties agree set forth only congressional policy and those that at least arguably delegate regulatory authority to the Commission.”⁹¹ Section 230(b) and section 1 of the Act, which the FCC substantially relied on in its justification of ancillary authority, were acknowledged by all parties to be statements of congressional policy.⁹² The court stated that “policy statements alone cannot provide the basis for the Commission’s exercise of ancillary authority”⁹³ The court went on to say that while policy statements can help to clarify areas of ancillary authority, the authority itself must be grounded in Title II, III or VI; the FCC did not use section 230(b) or section 1 to point to relevant language in any of those Titles.⁹⁴ The court also rejected the FCC’s argument that ancillary authority based upon policy statements alone had sufficed for any past cases in the D.C. Circuit.⁹⁵ The court rejected sections proffered by the FCC that “arguably delegate[d] regulatory authority to the Commission”⁹⁶ The court found that sections 706 and 256 both grant no actual regulatory authority;⁹⁷ section 257 attempts to create authority based fallaciously upon reporting duties;⁹⁸ section 201

90. *Id.* at 651.

91. *Id.*

92. *Id.* at 652; *see also* 47 U.S.C. § 230(b) (“It is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services”); 47 U.S.C. § 151 (“[The FCC is created] for the purpose of regulating interstate and foreign commerce in communication by wire so as to make available . . . a rapid, efficient, . . . world-wide wire and radio communication service . . .”).

93. *Comcast Corp.*, 600 F.3d at 654.

94. *Id.* at 655.

95. *Id.* at 657. *See* *Computer and Commc’ns Indus. Ass’n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982); *Rural Tel. Coal. v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988); *New York State Comm’n on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984); *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 880 F.2d 422 (D.C. Cir. 1989) (NARUC III).

96. *Comcast Corp.*, 600 F.3d at 658.

97. Section 706, actually housed in § 1302 of the Telecommunications Act, states that:

[The FCC] . . . with regulatory jurisdiction over telecommunications services shall encourage the deployment . . . on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

47 U.S.C. § 1302(a). In pertinent part, the FCC:

[. . .] shall establish procedures for [FCC] oversight of coordinated network planning by telecommunications carriers and other providers of telecommunications service for the effective and efficient interconnection of public telecommunications networks used to provide telecommunication service. . . . Nothing in this section shall be construed as expanding or limiting any authority that [the FCC] may have under law in effect before the date of enactment of the Telecommunications Act of 1996.

47 U.S.C. § 256(b)(1) & (c).

98. Section 257 required the FCC to:

and Title III are based upon arguments not located in the FCC's Order and therefore cannot be proffered; and, section 623's narrowly tailored authority attempts to regulate outside of its purview.⁹⁹ The court concluded that the FCC failed to complete its obligations under the *American Library* test and, thus, the Order must be vacated.¹⁰⁰

C. Three Proposals by the FCC for Regulating the Internet

Shortly after *Comcast Corp.* was decided, Austin Schlick, General Counsel of the FCC, issued a statement reiterating the FCC's "light-touch role with respect to broadband communications[,]” which responded both to the decision in *Comcast Corp.* and offered suggestions as to how the ruling could be overcome using congressional laws, Supreme Court decisions and a reclassification of broadband internet access.¹⁰¹ Schlick explained that the FCC had three options to choose from in reacting to the *Comcast Corp.* decision.¹⁰² First, the FCC could “stay the course,” taking steps that would abide by the D.C. Circuit's ruling in *Comcast Corp.*¹⁰³ This option was supported by various cable and telephone companies; however, the FCC determined that this approach would be untenable because of regulatory uncertainty, delays in implementing regulation, and no hope of regaining the FCC's position pre-*Comcast Corp.*¹⁰⁴

Second, the FCC could reclassify broadband internet access as a telecommunications service, which was the case before the FCC exclusively classified it as an information service in their 2002 Cable Modem Declaratory Ruling.¹⁰⁵ The FCC, stated Schlick, was skeptical to take this approach because it would thrust broadband services under the entire regime of Title II of the Act, which was primarily crafted for telephone networks and does not allow for a level of regulatory restraint which the FCC finds appropriate for the internet.¹⁰⁶

[. . .] complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under [the Telecommunications Act] (other than this section), market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications and information services.

47 U.S.C. § 257(a). Section 257 also requires the FCC to report to Congress on the regulations that the FCC enacted pursuant to the proceeding in 257(a), every 3 years. *Id.* at 257(c).

99. *Comcast Corp.*, 600 F.3d at 658–61.

100. *Id.* at 661.

101. A *Third-Way Legal Framework for Addressing the Comcast Dilemma*, BROADBAND.GOV, <http://www.broadband.gov/third-way-legal-framework-for-addressing-the-comcast-dilemma.html> (last visited Apr. 19, 2012) [hereinafter BROADBAND.GOV].

102. *Id.*

103. *Id.*

104. *Id.*

105. See *In re High Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798, 4819 (2002). It is important to note that if the FCC re-classified the internet as a telecommunications service than under Title II of the Telecommunications Act there would be no question of FCC authority to regulate.

106. BROADBAND.GOV, *supra* note 101.

Lastly, the FCC proposed a “Third Way” approach of bifurcating the classification of the internet into its separate telecommunications and information based services.¹⁰⁷ This approach closely mimics Justice Scalia’s dissent in *Brand X*.¹⁰⁸ Even in the majority opinion of *Brand X*, the Court held that deference will be given to the FCC’s classification of broadband internet services.¹⁰⁹ The FCC was inclined towards this approach because it allows, through the act of forbearance,¹¹⁰ Title II to be specifically tailored toward the needs of broadband, which fit the heading of telecommunications services.¹¹¹ The FCC had proposed as few as six sections of the Act that could be used to regulate broadband services until Title II, forbearing the rest.¹¹² The “Third Way” approach benefitted from compatibility with wireless communications as well as strengthening the foundation for FCC regulatory authority in internet services.¹¹³ Finally, the “Third Way” assured the FCC’s ability to preempt state regulation of broadband access and administer the framework without much difficulty.¹¹⁴ On June 17, 2010, the FCC released In the Matter of Framework for Broadband Internet Service as a notice of inquiry.¹¹⁵ In this document, the FCC reiterated the main points from its “Third Way” statement and asked for public comments on the proposal.¹¹⁶ Thus far, the FCC has given considerable deference to the comments it has received concerning this issue; therefore, it will be worth examining this next batch of comments as the FCC further refines its regulation of the web.

D. The Public Responds to a New Effort by the FCC to Remain in Control of Net Neutrality

The key players in this saga, Comcast Corporation (“Comcast”), Public Knowledge (“PK”), and Free Press (“FP”) crafted Comments and Reply Comments, respectively, that together laid out the entire rhetorical framework, both for and against, the FCC’s interest in further promulgating Net Neutrality regulations.

107. *Id.*

108. See Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 1008 (2005) (Scalia, J., dissenting) (stating internet providers offer two disparate things to consumers, only the first of which is telecommunications in nature: 1) access to the internet and 2) other applications).

109. See *id.* at 1002 (majority opinion) (stating that the FCC may use its expertise to determine how it classifies the entities that it regulates).

110. The FCC may choose to forbear, or limit, aspects of Title II regulation for instances that it deems improper. Such as forbearing Title II regulation to only parts of the internet that are telecommunications in nature. 47 U.S.C. § 160.

111. BROADBAND.GOV, *supra* note 101.

112. See 47 U.S.C. §§ 201, 202, 208 (stating that the FCC can forbid service providers from unjust and unreasonable practices); 47 U.S.C. § 254 (stating that the FCC shall work to provide telecommunications service to everyone in the country); 47 U.S.C. § 222 (stating that telecommunications providers shall protect the confidential information that they receive from their customers); 47 U.S.C. § 255 (stating that telecommunications providers will make their wares accessible to individuals with disabilities).

113. BROADBAND.GOV, *supra* note 101.

114. *Id.*

115. In the Matter of Framework for Broadband Internet Service, 25 FCC Rcd. 7866 (2010).

116. *Id.* at 7878.

Comcast's Comment contained two propositions: (1) the FCC should continue to regulate broadband internet services under its Title I ancillary authority and (2) broadband internet services should remain classified as information services because Title II classification would create risks for internet investment and innovation without helping the FCC reach their goals.¹¹⁷ The Reply Comments of both PK and FP respond to sections of Comcast's Comments.

Comcast urged that the decision in *Comcast Corp.* did not foreclose the FCC's ability to regulate the internet.¹¹⁸ Comcast focused on areas of internet regulation such as broadband dissemination,¹¹⁹ pole attachment rates,¹²⁰ "consumer privacy, broadband services for individuals with disabilities, and public safety and homeland security."¹²¹ PK pointed out in its Reply Comments that Comcast failed to address possible statutory support for any of the issues raised in *Comcast Corp.*, such as regulating ISPs who block legal user content and do so without disclosure to consumers.¹²² The FCC encountered a level of uncertainty when it regulated under its Title I ancillary authority; PK explained that "[t]he Commission cannot prepare for this wholesale shift from 'conventional communications technologies' to [Internet Protocol]-based services with a patchwork of legal theories."¹²³

Comcast asserted that broadband services are properly classified as information services.¹²⁴ The classification of the internet has progressed through past rulings of the FCC, starting with the Second Computer Inquiry, which took place in 1980,¹²⁵ and culminating in the Cable Modem Order of 2002.¹²⁶ Comcast argued that broadband internet service has not changed within the last decade; therefore, the current classification should stand.¹²⁷ FP explained in its Reply Comments that the resistance to classifying some aspects of broadband as telecommunications services

117. Comments of Comcast Corporation at 30, In the Matter of Framework for Broadband Internet Service, 25 FCC Rcd. 7866 (2010), available at <https://prodnet.www.neca.org/publicationsdocs/wwpdf/71610comcastbb.pdf>.

118. *Id.* at 6.

119. 47 U.S.C. § 254.

120. 47 U.S.C. § 224.

121. Comments of Comcast Corporation at 12, In the Matter of Framework for Broadband Internet Service, 25 FCC Rcd. 7866 (2010), available at <https://prodnet.www.neca.org/publicationsdocs/wwpdf/71610comcastbb.pdf>.

122. Reply Comments of Public Knowledge at 1, In the Matter of Framework for Broadband Internet Service, 25 FCC Rcd. 7866 (2010), available at http://www.publicknowledge.org/files/docs/PK_Reply_Comments_Third_Way.pdf.

123. *Id.* at 5.

124. Comments of Comcast Corporation at 17–18, In the Matter of Framework for Broadband Internet Service, 25 FCC Rcd. 7866 (2010), available at <https://prodnet.www.neca.org/publicationsdocs/wwpdf/71610comcastbb.pdf>.

125. In re Amendment of Section 64.702 of the Comm'n's Rules & Regs, Second Computer Inquiry, 77 FCC 2d 384 §§ 93–97, 102 (1980).

126. In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, 17 FCC Rcd. 4798 § 7 (2002).

127. Comments of Comcast Corporation at 21, In the Matter of Framework for Broadband Internet Service, 25 FCC Rcd. 7866 (2010), available at <https://prodnet.www.neca.org/publicationsdocs/wwpdf/71610comcastbb.pdf>. The Cable Modem Order took place in 2002, which was before the existence of Facebook. Do you think the internet has changed since 2002?

“stem from a fundamental misunderstanding of the definitions of telecommunication service and information service.”¹²⁸ FP quotes directly from the statutory language to highlight the differences between telecommunication¹²⁹ and information¹³⁰ services.¹³¹ FP debunked misconceptions held by Comcast and others¹³² as to what the FCC would consider as broadband services falling under the telecommunications heading.¹³³ PK provided a chart in their Reply Comments which outlines similar explanations about what broadband services will be telecommunications¹³⁴ and which will not.¹³⁵

Comcast fears that broadband internet services are incompatible with Title II classification because of the differences between the internet and services traditionally regulated by Title II-telephones.¹³⁶ Comcast’s main argument is that the internet changes so quickly, as it did when it transitioned from dial-up to wireline to wireless, that regulation will unnecessarily inhibit investment and innovation.¹³⁷ FP stated that the studies¹³⁸ commissioned by the

128. Reply Comments of Free Press at 4, In the Matter of Framework for Broadband Internet Service, 25 FCC Rcd. 7866 (2010), *available at* http://www.freepress.net/files/FP_10_127_replies_final.pdf.

129. *See* 47 U.S.C. § 153(50) (“A telecommunications service offers to the public the ability to ‘transmit, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.’”).

130. *See* 47 U.S.C. § 153(24) (An information service offers “a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing,” except insofar that capability is used “for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”).

131. Reply Comments of Free Press at 4, In the Matter of Framework for Broadband Internet Service, 25 FCC Rcd. 7866 (2010), *available at* http://www.freepress.net/files/FP_10_127_replies_final.pdf. The fallacy of Comcast’s argument is that they couch their statutory understanding in the telecommunications landscape of 2002. By looking at the internet of 2010 through the lens of the internet in 2002, Comcast’s position, as well as their confusion, is reasonable. However, the real problem is that the internet of 2010 is fundamentally different from the internet of 2002. When this paper is published the internet will look even different from the time that Comcast Corp. was decided. It is untenable for Comcast to erroneously assert that the internet remains what it was in 2002 or to even imply that the internet does not exponentially change on a continual basis.

132. *See, e.g.*, Comment of Verizon Wireless, In the Matter of Framework for Broadband Internet Service, 25 FCC Rcd. 7866 (2010); Comment of AT&T Wireless In the Matter of Framework for Broadband Internet Service, 25 FCC Rcd. 7866 (2010).

133. *See* Reply Comments of Free Press at 4–7, In the Matter of Framework for Broadband Internet Service, 25 FCC Rcd. 7866 (2010), *available at* http://www.freepress.net/files/FP_10_127_replies_final.pdf (stating that P2P, Voice over IP, e-readers with wifi capability and google search are clearly information services, as opposed to telecommunication services).

134. *See* Reply Comments of Public Knowledge at 10–11, In the Matter of Framework for Broadband Internet Service, 25 FCC Rcd. 7866 (2010), *available at* http://www.publicknowledge.org/files/docs/PK_Reply_Comments_Third_Way.pdf (stating broadband internet access, unbundled broadband internet, local telephone service, long distance telephone service, interconnected VoIP, Integrated DNS will be considered telecommunications services under a bifurcated FCC approach to classifying the internet).

135. *See id.* (stating dial-up internet, non-interconnected VoIP, standalone DNS, Edge caching, Facebook, email, instant messaging and e-books will be considered information services).

136. Comments of Comcast Corporation at 32, In the Matter of Framework for Broadband Internet Service, 25 FCC Rcd. 7866 (2010), *available at* <https://prodnet.www.neca.org/publicationsdocs/wwpdf/71610comcastbb.pdf>.

137. *Id.* at 32–33. Query if this does not contradict Comcast’s earlier position; but see *supra* note 126 and accompanying text.

138. CSMG, FCC Reclassification NOI: Economic Impact Assessment (2010).

Telecommunications Industry Association (“TIA”), which promulgated the anti-investment nature of Title II classification, were faulty.¹³⁹ FP emphasized that the FCC’s goal in implementing its “Third Way” framework is keeping the status-quo.¹⁴⁰ The next section will outline a final comment period, the FCC’s regulation that came out of In the Matter of Framework for Broadband Internet Service, and its consequences.

E. The FCC Promulgates Net Neutrality Lite and Suits Are Filed on Both Sides

In light of *Comcast Corp.*, the FCC crafted a partial Net Neutrality regulation in order to reassert its purported regulatory authority over ISPs. As is clear from the discussion above, the consequences of *Comcast Corp.* relating to the FCC’s ability to generally regulate broadband internet quickly surfaced. With *Comcast Corp.* making a dent in the FCC’s internet regulatory armor, ISPs began to propose Net Neutrality legislation which they had been hesitant to craft pre-*Comcast Corp.*¹⁴¹ Perhaps the strangest development in the post-*Comcast Corp.* world was the conservative Net Neutrality proposal submitted jointly to the FCC by Google and Verizon.¹⁴²

After the Google/Verizon proposal was submitted, the FCC released a Public Notice soliciting “Further Inquiry into Two Under-Developed Issues in the Open Internet Proceeding.”¹⁴³ The Public Notice offered comment on two areas: Specialized Services and Open Internet Principles for Mobile Wireless Platforms.¹⁴⁴ The comment on Specialized Services implicated Net Neutrality in the six categories specified by the FCC: Definitional Clarity, Truth in Advertising, Disclosure, Non-exclusivity, Limit Specialized Service Offerings and Guaranteed Capacity for Broadband Internet Access Service.¹⁴⁵ PK joined other Washington, D.C. based non-profit groups, like Media Access Project (“MAP”), in submitting a Comment under the heading “Comments of Public Interest Commenters.”¹⁴⁶ The public

139. Reply Comments of Free Press at 11–12, In the Matter of Framework for Broadband Internet Service, 25 FCC Rcd. 7866 (2010), available at http://www.freepress.net/files/FP_10_127_replies_final.pdf

140. *Id.* at 13. If any environment will encourage investment deterring behavior it is an environment of legal uncertainty like the kind present after *Comcast Corp.* This is a flaw of rhetoric surrounding broadband regulation. The FCC is attempting to create a system of de-regulation for telecommunications based broadband services; however, to keep those systems “neutral,” or open, regulations must be put in place. Comcast and others misconstrue the use of regulations, no matter in what capacity they are used, as a talisman for stifling the traditional streams of broadband commerce. However, as PK and FP have pointed out, such Reaganian fears of regulation are inappropriate, and, furthermore, just the opposite is true. *Id.*

141. See *AT&T on Comcast*, AT&T INC., <http://attpublicpolicy.com/uncategorized/att-statement-on-comcast-v-fcc-decision/> (last visited Apr. 19, 2012); see also *Verizon at New Democrat Network Keynote*, VERIZON COMMUNICATIONS INC., <http://policyblog.verizon.com/BlogPost/714RemarksVerizonEVPTomTaukeatNewDemocratNetwork.aspx> (last visited Apr. 19, 2012).

142. *A Joint Proposal for an Open Internet*, GOOGLE, <http://googlepublicpolicy.blogspot.com/2010/08/joint-policy-proposal-for-open-internet.html> (last visited Apr. 19, 2012).

143. Further Inquiry into Two Under-Developed Issues in the Open Internet Proceeding, 75 Fed. Reg. 55297 (Sept. 10, 2010) (to be codified at 47 C.F.R. pt. 1).

144. *Id.*

145. *Id.* at 3–4.

146. Comments of Public Interest Commenters, Further Inquiry into Two Under-Developed Issues in the Open Internet Proceeding, 75 Fed. Reg. 55297 (Sept. 10, 2010), available at <http://newamerica.net/sites/>

interest community joined together for this Comment out of sheer fatigue from reiteration of its points.¹⁴⁷ PK, MAP and others continued to support the framework laid out by their previous briefs, Reply Comments, and even the original Complaint against Comcast.¹⁴⁸ The group stressed that the FCC should “not make any determinations with regard to specialized services in this proceeding”¹⁴⁹

After reviewing all of the comments, the FCC released its Report and Order (“the Order”) of In the Matter of Preserving the Open Internet Broadband Industry Practices.¹⁵⁰ Generally, the FCC’s Order attempts to keep Net Neutrality intact; however, there are key exceptions and omissions that make the Order seem more like Net Neutrality-lite.¹⁵¹ The key provisions to the Order respond directly to Comcast’s actions in Comcast Corp. v. FCC.¹⁵² The Order provides that fixed and mobile broadband providers will be transparent with their network management services, fixed broadband providers will not block lawful internet content or services, and fixed broadband providers cannot unreasonably discriminate the transmission of lawful network traffic.¹⁵³ The Order’s not so Net Neutrality friendly provisions and omissions are the following: while the transparency provision applies to both fixed and mobile broadband, mobile broadband has less restrictive rules on blocking services and devices, and no restrictions on unreasonable discrimination of network traffic.¹⁵⁴ Further, managed services¹⁵⁵ are still allowed.¹⁵⁶ The overall structure and content of the Order matches, very closely, and some commentators say “quote,” the Google/Verizon proposed Net Neutrality legislation

newamerica.net/files/profiles/attachments/Public_Interest_Network_Neutrality_Comments.pdf. PK and MAP were joined by the Benton Foundation, Center for Media Justice, Consumers Union, and New America Foundation.

147.

The Public Interest Commenters have answered the questions set out for comment in the Public Notice, not only in their respective filings in the initial and reply comment rounds in these dockets, but also in the Commission’s “Third Way” Broadband Framework proceeding with their respective initial and reply comments filed in that separate docket.

Id. at 2.

148. *Id.*

149. *Id.* at 21.

150. Preserving the Open Internet, 25 FCC Rcd. 17,905 (2010) (report and order).

151. See Matthew Lasar, *It’s Here: FCC Adopts Net Neutrality (lite)*, ARS TECHNICA, http://arstechnica.com/tech-policy/news/2010/12/its-here-fcc-adopts-net-neutrality-lite.ars?utm_source=rss&utm_medium=rss&utm_campaign=rss (last visited Apr. 4, 2012) (“[The Media Access Project] . . . cannot support the watered-down, loop-hole ridden option that the FCC appears to have chosen . . .”).

152. Notice of Appeal at 1, Verizon v. Federal Communications Commission, No. 11-11-1014 (D.C. Cir. Jan. 20, 2011).

153. Preserving the Open Internet, 25 FCC Rcd. 17,905, §§ 53–80 (2010) (report and order).

154. *Id.* at §§ 93–107.

155. Prioritized Internet Protocol services sold by the ISP over the last-mile broadband pipe.

156. See Nate Anderson, *Why Everyone Hates New Net Neutrality Rules-Even Net Neutrality Supporters*, ARS TECHNICA, <http://arstechnica.com/tech-policy/news/2010/12/why-everyone-hates-new-net-neutrality-rules-even-Net-Neutrality-supporters.ars> (last visited Apr. 4, 2012) (reporting that “The new but not-yet-properly-defined ‘managed service’ exemption may amount to the first step down a slippery slope of non-neutral Internet services”).

mentioned above.¹⁵⁷ Therefore, it is somewhat surprising that Verizon is now suing the FCC for putting its Order into effect.¹⁵⁸

There have been multiple legal challenges to the FCC's newly released Order, on both sides of the ideological spectrum.¹⁵⁹ These challenges come from both ISPs, Verizon and MetroPCS, as well as public interest groups in favor of Net Neutrality, such as Free Press. Verizon's challenge specifically spoke to the FCC's authority to craft such an order at all.¹⁶⁰ Verizon's original joint Net Neutrality proposal with Google called on Congress to pass legislation to assure that the Net Neutrality proposal would be judicially enforceable.¹⁶¹ Free Press argued that the Order was arbitrary and capricious based upon the distinction made between fixed and mobile broadband; therefore, the Order should be struck down or the distinction should be removed.¹⁶² All of the suits were filed in different jurisdictions; however, in an effort to consolidate the lawsuits, a random lottery performed by the courts chose the D.C. Circuit as the venue where all the petitions for review of the Order would be heard.¹⁶³ With these petitions looming, we can now explore where the FCC might be able to turn the Net Neutrality tables back in its favor; first, in terms of better grounding its claim of ancillary authority, and second, looking at what Congress has done and can do.

V. ANALYSIS

Net Neutrality will break free of the uncertainty described above if the FCC adequately describes its authority over the internet to the courts or Congress crafts specific legislation. There is a recurring pattern here: an ISP interacts with the internet in a way that the FCC deems inappropriate; the FCC attempts to change the behavior of the ISP by either rulemaking or adjudication; the ISP appeals to the

157. Nate Anderson, *Why is Verizon Suing Over Net Neutrality Rules it Once Supported?*, ARS TECHNICA, http://arstechnica.com/tech-policy/news/2011/01/verizon-sues-over-net-neutrality-rules-it-once-supported.arsutm_source=rss&utm_medium=rss&utm_campaign=rss (last visited Apr. 4, 2012).

158. *Id.*

159. *See, e.g.*, *Verizon v. FCC*, No. 11-1356 (D.C. Cir. filed Sept. 30, 2011); *Free Press v. FCC & USA*, No. 11-2123 (1st Cir. filed Sept. 28, 2011); *People's Production House v. FCC & USA*, No. 11-3905 ag (2nd Cir. filed Sept. 26, 2011); *Media Mobilizing Project v. FCC & USA*, No. 11-3627 (3rd Cir. filed Sept. 26, 2011); *Mountain Area Info. Network v. FCC & USA*, No. 11-2036 (4th Cir. filed Sept. 26, 2011); *Access Humboldt v. FCC & USA*, No. 11-72849 (9th Cir. filed Sept. 26, 2011).

160. *See* Anderson, *supra* note 157 (reporting Verizon was "deeply concerned by the FCC's assertion of broad authority for sweeping new regulation of broadband networks and the Internet itself. We believe this assertion of authority goes well beyond any authority provided by Congress, and creates uncertainty for the communications industry, innovators, investors and consumers.").

161. *Id.*

162. Petition For Review at 2, *Free Press v. Federal Communications Commission & United States of America*, No. 11-2123 (1st Cir. Sept. 28, 2011); *see also* Nate Anderson, *Net Neutrality Supporters File Lawsuit Against Net Neutrality Rules*, ARS TECHNICA, <http://arstechnica.com/tech-policy/news/2011/09/net-neutrality-backers-file-lawsuit-against-net-neutrality-rules.ars> (last visited Apr. 4, 2012).

163. *See* Amy Schatz, *Net Neutrality Case Heads to D.C. Circuit Court*, DIGITS WSJ BLOGS (Oct. 6, 2011, 5:45 PM), <http://blogs.wsj.com/digits/2011/10/06/net-neutrality-case-heads-to-d-c-circuit-court/> (stating that the public interest community was interested in having their petitions heard in a venue other than the D.C. Circuit because of the unfriendly ruling that came down in *Comcast Corp. v. FCC*).

D.C. District Court. This analysis will explore ways to stop this series of events from infinite repetition. The first section will examine parts of the opinion from *Comcast Corp. v. FCC* where the court offers hints to the FCC of where it should look to more adequately ground its authority over the internet. This will help predict whether the FCC can find success in the D.C. Circuit's review of their Open Internet Order. Second, it is worth exploring Congressional action in this area, no matter what transpires with the FCC's ancillary authority. Is Congress our only hope for Net Neutrality? Has Congress been trying to pass a Net Neutrality bill, and, if so, is there any hope it will pass? The plausibility of Net Neutrality in a codified form will depend what action can be taken by either the FCC or Congress.

A. The DC Circuit Court, in Comcast Corp. v. FCC, Hinted at Areas in the Telecommunications Act Where the FCC Can Properly Ground its Authority over the Internet.

In *Comcast Corp.*, the court did not completely shut the door on the FCC's ability to regulate ISPs through use of ancillary authority.¹⁶⁴ The court offered the FCC suggestions as to how it can better formulate arguments for ancillary authority. First, the court instructed, “[p]erhaps the Commission could use section 230(b) or section 1 to demonstrate such a connection, [with Title II, III or VI of the Telecommunications Act,] but that is not how it employs them here.”¹⁶⁵ It is unlikely that the court would have suggested that the FCC look further into how these policy statements reflect actual grants of authority to other Titles of the Act if such a search would be entirely fruitless. In the FCC's “Third Way” proposal, a bifurcated classification of the internet would explicitly implicate Title II in this area.¹⁶⁶ Therefore, the sections referenced by the court must be presented in a way that ties them to Title II, even if a formal reclassification of the internet does not take place.

The cases on which the FCC relied, albeit falsely, to support their use of ancillary authority were inapplicable because the court determined that the FCC's regulatory authority in those cases was actually grounded in substantive Titles of the Act, not Title I ancillary authority.¹⁶⁷ However, the policies laid out in section 230(b) and section 1 of the Act would be toothless if they could not apply in a situation such as this one, which is so perfectly formed for their implication.¹⁶⁸ The court erroneously imposed a strict burden on the FCC because it feared that the broad language contained in section 230(b) and section 1 could support almost any regulation of Title II, III or VI services.¹⁶⁹ The slippery slope of an FCC which has “untrammelled

164. 600 F.3d 642 (D.C. Cir. 2010).

165. *Id.* at 654–55.

166. *See supra* notes 106–13 and accompanying text.

167. *See supra* notes 49–51 and accompanying text. The court stated that “Southwestern Cable, Midwest Video I, Midwest Video II . . . bar this expansive theory of ancillary authority.” *Comcast Corp.*, 600 F.3d at 661.

168. *See supra* note 91 and accompanying text.

169. *Comcast Corp.*, 600 F.3d at 655.

freedom to regulate activities over which the statute fails to confer . . . Commission authority,”¹⁷⁰ is not the cause for judicial vexation. However, what should be troubling is an industry of ISP on the vanguard of telecommunications which effectively lack oversight from a regulatory agency whose stated purpose implies their regulation of such entities.

The court explained that the FCC’s arguments concerning section 201 cannot be reached on the merits because those arguments do not reflect the original analysis by the FCC in their Order.¹⁷¹ The FCC’s argument of ancillary authority through section 201 focuses on whether blocking certain traffic on Comcast’s internet service transferred the burden of that service to other ISPs who were subject to Title II on a common carrier basis; however, the court stated the relevant language of section 201: “[a]ll charges, practices, classifications, and regulations for and in connection with [common carrier] service shall be just and reasonable.”¹⁷² This speaks directly to the arguments made in the paragraph above: the FCC must couch its arguments in Title II whether or not a formal reclassification, or bifurcation, of the internet has taken place. While the court rejected the idea that Brand X decided definitively where ancillary authority could be used regarding the internet, the FCC should return to Brand X to argue that incrementally revisiting its classification of information-service providers is proper and would extend Title II authority to the telecommunications-based aspects of the internet.¹⁷³

What is clear is that at the very least, the FCC needs to address the court’s suggestions by buttressing its claim of authority, whether ancillary or not, in either Title II, III, or VI of the Telecommunications Act. Title II, where the internet used to be housed, is the most reasonable option with the greatest opportunity for success. If it is too late to save the FCC’s Open Internet Order from the D.C. Circuit chopping block this approach may be viable for future regulatory attempts.

B. A Congressional Attempt at Net Neutrality

The *Comcast Corp.* saga got the attention of some members of Congress and led to the Internet Freedom, Broadband Promotion, and Consumer Protection Act of 2011 (“the Bill”), proposed by Senators Maria Cantwell (D-WA) and Al Franken (D-MN).¹⁷⁴ The Bill would directly amend the Communications Act of 1934.¹⁷⁵ Franken took issue with the FCC’s Open Internet Order and the Bill has provisions focused on combating ISP conduct that contravenes Net Neutrality.¹⁷⁶ First, the Bill

170. *Id.* at 661 (quoting Nat’l Ass’n of Regulatory Util. Comm’rs v. Fed. Comm’n Comm’n & United States of America, 533 F.2d 601, 618 (D.C. Cir. 1976)).

171. *Id.* at 660.

172. *Id.* (quoting 47 U.S.C. § 201(b)).

173. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Serv., 545 U.S. 967, 1002 (2005).

174. S. 74, 112th Cong. (1st Sess. 2011).

175. *Id.* at § 3.

176. Cirien, *Franken: First Time FCC Has Allowed Discrimination on the Internet*, THE UPTAKE (Jan. 15, 2011), <http://www.theuptake.org/2011/01/15/franken-first-time-fcc-has-allowed-discrimination-on-the-internet/>.

does not differentiate between fixed and mobile broadband.¹⁷⁷ Second, the bill is comprehensive in forbidding ISPs from unjustly blocking: access, devices, competition, and content; and engaging in discrimination, preference, prioritized content, interfering network features; or refusing to interconnect.¹⁷⁸ There is still room for reasonable network management; however, the Bill makes sure that ISPs actions are transparent.¹⁷⁹ The Bill codifies principles that the FCC originally proposed in its 2009 NPRM for In the Matter of Preserving the Open Internet Broadband Industry Practices.¹⁸⁰ In effect, this Bill would map out the rules of the road for ISPs use of the internet.

Senator Cantwell sees the Bill as working in tandem with the FCC's Order.¹⁸¹ In Title II of the Telecommunications Act, the Bill inserts a new section that puts the internet firmly in the regulatory grasp of the FCC.¹⁸² Operating under Title II, the FCC would no longer have to try and justify ancillary authority. While Cantwell believes in the FCC's authority to create its most recent Order, as a stringent Net Neutrality supporter she can only see this Bill as solidifying the FCC as the internet's arbiter.¹⁸³ With Free Press and Public Knowledge in firm agreement with the Bill, this particular legislation seems like the answer to saving Net Neutrality.¹⁸⁴

Currently, the success of the Bill is troublingly unlikely. Nothing has happened with the Bill since the day it was introduced to Congress.¹⁸⁵ This was the same fate as an earlier Net Neutrality bill, The Internet Freedom Preservation Act of 2009.¹⁸⁶ The problem is similar to the reality facing nearly all other pieces of 21st century Federal legislation: partisanship and misconception. Republicans in Congress, like Representative Marsha Blackburn (R-TN), ostensibly cannot fathom Net Neutrality because it is industry stifling regulation.¹⁸⁷ In the House, Blackburn has gone so far as to present her own bill, the Internet Freedom Act, which would reverse the FCC's

177. See S. 74 at § 280(m)(2)(A) (defining Broadband Internet Access as “the ability for an end user to transmit and receive data to the internet using Internet Protocol at peak download data transfer rates in excess of 200 kilobits per second, through an always-on connection . . .”).

178. *Id.* at § 280(c).

179. *Id.* at § 280(d) & (f).

180. Notice of Proposed Rulemaking, 24 FCC Rcd. 13064 ¶ 103–42 (2009) (open internet NPRM).

181. See *Cantwell: Net Neutrality Essential to Promoting Innovation and Protecting Consumers*, MARIA CANTWELL (Jan. 25, 2011), available at <http://cantwell.senate.gov/news/record.cfm?id=330533> (last visited Apr. 19, 2012) (“The actions that the FCC and Congress take now will set the ground rules for competition on the broadband Internet, impacting innovation, investment, and jobs for years to come.”).

182. S. 74 at § 3.

183. *Cantwell Introduces Bill to Strengthen Net-Neutrality Rules*, THE HILL (Jan. 25, 2011), <http://thehill.com/blogs/hillicon-valley/technology/140085-cantwell-introduces-bill-to-strengthen-net-neutrality-rules>.

184. *Id.*

185. BILL SUMMARY & STATUS, 112TH CONGRESS (2011–2012), S. 74 ALL CONGRESSIONAL ACTIONS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN00074:@@X> (last visited Apr. 5, 2012).

186. H.R. 3458, 111th Cong. (1st Sess. 2009). On the day the bill was introduced it was referred to committee. That was the last action taken on this bill, just like Senators Franken and Cantwell's Bill.

187. See *Blackburn Files Internet Freedom Act*, MARSHA BLACKBURN (Jan. 5, 2011), <http://blackburn.house.gov/News/DocumentSingle.aspx?DocumentID=218966> (last visited Apr. 19, 2012) (“In these times, for an unelected bureaucracy with dubious jurisdiction [sic] and misplaced [sic] motives to unilaterally regulate [sic] that [economic] growth is intolerable.”).

recent Order and affirmatively abrogate all FCC authority over the internet.¹⁸⁸ The partisanship is blatant when just looking at the titles of the two House Net Neutrality bills with opposite effects: Internet Freedom Act (Marsha Blackburn, R-TN) and The Internet Freedom Preservation Act (Edward Markey, D-MA). They must be speaking about different types of Freedom? Luckily, Blackburn's bill made it no further than any other Net Neutrality legislation, either Democrat or Republican.¹⁸⁹ Even in the passing of the FCC's Order, three democrat commissioners pushed the Order through on top of two republican commissioners' nays.¹⁹⁰ I only touch on the partisanship issue because the correct answers and rhetoric, both for and against Net Neutrality, have been written; however, the political climate will probably make it impossible to ever get a vote. Therefore, as discussed above, the FCC must firmly retake its authority over the internet; it clearly has the tools to do so.

VI. CONCLUSION

Network Neutrality is vital to the future of the internet.¹⁹¹ Since the filing of FP and PK's Complaint against Comcast, the FCC has struggled to retain authority over the internet.¹⁹² Internet service providers are chomping at the bit to take advantage of the court's ruling in *Comcast Corp. v. FCC* for their own financial gain. However, both the FCC and Congress have the power to keep the internet open, vibrant, and viable.¹⁹³ The FCC and Congress must use their respective tools to institute a proper Net Neutrality framework. This country touts its commitment to the principles of freedom as one its defining qualities; that commitment must extend to the internet.

188. H.R. 96, 112th Cong. (2011). With fear that her bill would not pass, Blackburn and other Republicans in both the House and Senate, decided to utilize the esoteric Congressional Review Act ("CRA"). The CRA allows for Congress to quickly overturn administrative regulations with resolutions that are passed with simple majorities in both the House and the Senate and signed by the President. However, the CRA did not pass the Senate. *See* H.J. Res. 37, 112th Cong. (1st Sess. 2011); S.J. Res. 6, 112th Cong. (1st Sess. 2011) ("Disapproving the rule submitted by the Federal Communications Commission with respect to regulating the internet and broadband industry practices.").

189. BILL SUMMARY & STATUS, 112TH CONGRESS (2011–2012), H.R. 96 ALL CONGRESSIONAL ACTIONS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR00096:@@X> (last visited Apr. 19, 2012).

190. Brian Stelter, *F.C.C. Faces Challenges to Net Rules*, N.Y. TIMES, Dec. 22, 2010, at B2.

191. *See supra* Part II.

192. *See supra* Part IV.

193. *See supra* Part V.