

# WHY WE NEED NET NEUTRALITY LEGISLATION NOW OR: HOW I LEARNED TO STOP WORRYING AND TRUST THE FCC

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*Would it be OK if the post office opened your mail, decided they didn’t want to bother delivering it, and hid that fact by sending it back to you stamped “address unknown—return to sender”? Or would it be OK, when someone sends you a first class-stamped letter, if the post office opened it, decided that because the mail truck is full sometimes, letters to you could wait, and then hid both that they read your letters and delayed them?<sup>1</sup>*

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1. Comcast Corp., 23 F.C.C.R. 13,028, 13,065 (2008), *vacated*, Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010) (statement of Chairman Kevin J. Martin).

## I. INTRODUCTION

The Internet has conquered modern society. Since its conceptual birth in the early 1960s, the Internet has blossomed into a complex entity unto itself.<sup>2</sup> It has revolutionized the way people have traditionally viewed communication. Older methods of communication, such as writing and mailing a letter, sending a fax, or even making a telephone call over landlines, have been rendered obsolete. Instead of mailing a postcard, one can simply leave a message on a Facebook wall. More convenient than sending a fax, one can scan and e-mail a document with just a cursory knowledge of computers. Long distance telephone calls that were once costly can be made for pennies on the dollar through the use of Internet telephony services such as the popular Vonage Voice over Internet Protocol (VoIP) service, requiring nothing more than a computer, a microphone, and an Internet connection.

The Internet's influence is not limited to creating new and more efficient methods of communication. It has also redefined the very manner in which people and businesses function on a day-to-day basis. With a few clicks of a mouse, an Internet user can join hundreds of thousands of people in donating their computers' unused processing power to assist researchers in studying and developing cures for illnesses such as Alzheimer's and cancer.<sup>3</sup> In that same sitting, this individual can work from home, accessing the same information and materials that formerly would have been available only at work, then order a pizza and know exactly when it will be delivered.

Statistics indicate approximately 74% of all Americans, a staggering

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2. Barry M. Leiner et. al., Internet Society, A Brief History of the Internet, <http://www.isoc.org/internet/history/brief.shtml> (last visited Aug. 4, 2010) (stating the concept of the Internet was first conceived by J.C.R. Licklider in a series of memos in which "[h]e envisioned a globally interconnected set of computers through which everyone could quickly access data and programs from any site"). Notable coauthors include Internet pioneers Vinton G. Cerf and Stephen Wolff. *Id.*

3. Using a powerful form of information processing known as "distributed computing," computer scientists are able to utilize volunteers' idle computers via the Internet to assist in research in complicated areas such as cancer. Folding@Home Distributed Computing, <http://folding.stanford.edu> (last visited Aug. 4, 2010). By harnessing these computers, scientists gain the ability to process more information than they would have if they had exclusive access to every supercomputer that exists today. Folding@Home Distributed Computing, <http://www.stanford.edu/group/pandegroup/folding/FoldingFAQ.pdf> (last visited Aug. 4, 2010).

228 million, use the Internet.<sup>4</sup> However, it is certain that a large majority of users possess only a superficial knowledge of the Internet, including those users who are in positions of great authority in the government and dictate national policy. For example, in a hearing on the Consumers' Choice and Broadband Development Act of 2006, then-ranking member Senator Ted Stevens (R-Alaska) offered his understanding of the Internet and how it functions:

The Internet is not something that you just dump something on. It's not a big truck. It's a series of tubes. And if you don't understand, those tubes can be filled, and if they are filled, when you put your message in, it gets in line. It's go[ing to] be delayed by anyone who puts [a message] into that tube and [there are already] enormous amounts of material [in that tube].<sup>5</sup>

Senator Stevens's understanding, while not technically incorrect, is just one demonstration of an imprecise understanding of the Internet itself, an understanding common to many. Without a more precise understanding of the basic function and setup of the Internet, one cannot appreciate the important policy issues that surround the Internet and thus cannot intelligently participate in debates regarding such policy issues, resulting in a select few deciding and dictating such policy, not necessarily in the public's best interests.

This Note will address one of the most hotly contested issues of which most Internet users have never heard: net neutrality, also known as network neutrality, Internet neutrality, and NN.<sup>6</sup> While generally defined differently by proponents and critics, the basic concept of net neutrality is that Internet users ought to be able to access information online whenever they want, without interference by Internet Service Providers (ISPs)—companies such as Comcast or EarthLink that provide Internet access to subscribers.<sup>7</sup> Part II of this Note will discuss the basic framework of the Internet so the reader may gain an appreciation of the net neutrality debate. Part III will define and discuss the concept of net neutrality, including its history and its potential impact on Internet users. Part IV will consider the current problem of net neutrality and discuss the recent

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4. United States of America Internet Usage, <http://www.internetworldstats.com/am/us.htm> (last visited Aug. 5, 2010).

5. Posting of Alex Curtis to Public Knowledge, <http://www.publicknowledge.org/node/497> (follow the "directly download the mp3 here" hyperlink) (June 28, 2006).

6. This Note will use each of these terms interchangeably.

7. Access is subject, of course, to a locality's laws.

developments in the net neutrality debate. Part V will discuss and explain the recent 2008 *Comcast* decision and examine the future of net neutrality in a post-*Comcast* world. Part VI will recommend an approach and predict which approach will succeed.

## II. THE INTERNET EXPLAINED

Without an understanding of the basic principles of the Internet, one cannot gain a clear appreciation for the debate surrounding net neutrality. “The Internet is not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks.”<sup>8</sup> Indeed, the Internet is “[a] distributed network [that] has no one central repository of information or control, but is comprised of an interconnected web of ‘host’ computers, each of which can be accessed from virtually any point on the network. . . . [T]here is [a] hierarchy through which the information must flow or be monitored.”<sup>9</sup> Information sent may flow through any number of paths across the Internet—it is not dependent on a linear series of connections, but relies solely on a series of numerous and redundant connections until it reaches its destination.<sup>10</sup> Thus, if one of these connections fails because of war, malfunction, or any other reason, the information will still be successfully sent through alternative channels via this decentralized system.<sup>11</sup>

Information is sent across this network of networks in small and divided units called packets.<sup>12</sup> These packets are nothing more than small

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8. *ACLU v. Reno*, 929 F. Supp. 824, 830 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844 (1997).

9. Kevin Werbach, *Digital Tornado: The Internet and Telecommunications Policy* 17 (FCC Office of Plans & Policy, Working Paper No. 29, 1997), available at [http://www.fcc.gov/Bureaus/OPP/working\\_papers/oppwp29.pdf](http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp29.pdf).

10. *See ACLU*, 929 F. Supp. at 831 (“From its inception, the [Internet] was designed to be a decentralized, self-maintaining series of redundant links between computers and computer networks, capable of rapidly transmitting communications without direct human involvement or control. . . . A communication sent over this redundant series of linked computers could travel any of a number of routes to its destination.”).

11. *See, e.g., Werbach, supra* note 9, at 17 (“The distributed nature of the Internet gives it robust survivability characteristics, because there is no one point of failure for the network . . . .”); *see also ACLU*, 929 F. Supp. at 831 (“[The Internet has] the automatic ability to re-route communications if one or more individual links were damaged or otherwise unavailable. . . . [T]his redundant system of linked computers was designed to allow vital research and communications to continue even if portions of the network were damaged, say, in a war.”).

12. *See, e.g., ACLU*, 929 F. Supp. at 832.

bits of information.<sup>13</sup> For example, when an e-mail is sent, it does not travel to its destination in one piece.<sup>14</sup> Instead, once the user is ready to send the message, the user's computer divides that message into numerous packets and it is sent via a process called dynamic routing.<sup>15</sup> Dynamic routing simply means there is no preordained path for these packets to take.<sup>16</sup> In attempting to send the data to its intended destination, "each router calculates the best routing for a packet at a particular moment of time, given current traffic patterns, and sends the packet to the next router. . . . [T]wo packets from the same message may not travel the same physical path through the network."<sup>17</sup> Thus, the various packets of the same e-mail might take different paths, but all of the packets will strive to reach the same destination. However, if the "router encounters congestion or other problems [in attempting to forward each individual packet], it simply drops any packets it can't deliver in a timely fashion, making it the responsibility of the sender to notice that a packet hasn't been acknowledged and re-send it."<sup>18</sup>

The Internet was also founded as a "dumb," end-to-end network.<sup>19</sup> "[C]omputer networks should be decentralized, with most of the 'intelligence' of the network residing on computers at the network's endpoints, rather than with routers at the core of the network."<sup>20</sup> This means that, generally, for information sent online from one user to another, only two users—the sender and the recipient—know what was actually sent. The information, divided into packets, will ideally get blindly passed along the networks across the Internet until they reach their final destination, at which point they are reassembled into a piece of

13. See, e.g., *id.* ("The Internet uses 'packet switching' communication protocols that allow individual messages to be subdivided into smaller 'packets' that are then sent independently to the destination, and are then automatically reassembled by the receiving computer.").

14. *Id.*

15. Werbach, *supra* note 9, at 17.

16. See *id.* (explaining dynamic routing); see also *ACLU*, 929 F. Supp. at 832 ("Messages between computers on the Internet do not necessarily travel entirely along the same path. . . . While all packets of a given message often travel along the same path to the destination, if computers along the route become overloaded, then packets can be re-routed to less loaded computers.").

17. Werbach, *supra* note 9, at 17.

18. Timothy B. Lee, *The Durable Internet: Preserving Network Neutrality Without Regulation*, 626 POL'Y ANALYSIS 5 (2008), available at <http://www.cato.org/pubs/pas/pa-626.pdf>.

19. *Id.* at 12.

20. *Id.* at 4.

information coherent to the recipient computer.

### III. NETWORK NEUTRALITY

#### A. *What is Network Neutrality?*

The concept of network neutrality is not new. In fact, it is over a century old. For example, in the mid-1860s, a federal law was passed that was designed to regulate telegraph messages, ensuring “messages received from any individual, company, or corporation, or from any telegraph lines connecting with this line at either of its termini, shall be *impartially* transmitted in the order of their reception.”<sup>21</sup> This Act required the many companies that operated telegraph lines across the continental United States to impartially process and transmit messages received, the priority of which was dictated by the order in which the messages were received. Thus, implicit within Congress’s mandate of impartial process was a requirement of neutrality—the telegraph companies could not adjust their treatment of messages based on the content of those messages or by whom or to whom they were sent.<sup>22</sup>

A clear and concise definition of network neutrality is difficult to exact. Some parties argue “[n]etwork neutrality is the principle that Internet users should be in control of what content they view and what applications they use on the Internet.”<sup>23</sup> Others argue it has become nothing more than “[a] catchy phrase . . . com[ing] to mean as many things as Baskin-Robbins has ice cream flavors.”<sup>24</sup> A literal definition exists in section 202 of the Communications Act of 1934 (amended by the Telecommunications Act of 1996):

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device,

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21. Pacific Telegraph Act of 1860, ch. 137, § 3, 12 Stat. 41, 42 (1860) (emphasis added).

22. An exception was granted in favor of the federal government, which states “the dispatches of the government shall have priority.” *Id.*

23. A Guide to Net Neutrality for Google Users, <http://www.docstoc.com/docs/1064274/A-Guide-to-Net-Neutrality-for-Google-Users> (last visited Aug. 5, 2010).

24. Rachele B. Chong, *The 31 Flavors of the Net Neutrality Debate: Beware the Trojan Horse*, 2007 ADVANCED COMM. L. & POL’Y INST. 1, available at [http://www.nyls.edu/user\\_files/1/3/4/30/83/Rachele%20Chong%20-%20Net%20Neutrality%20Essay%20-%20December%202007.pdf](http://www.nyls.edu/user_files/1/3/4/30/83/Rachele%20Chong%20-%20Net%20Neutrality%20Essay%20-%20December%202007.pdf).

or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.<sup>25</sup>

Despite the numerous and diverse definitions provided by scholars, law professors, corporations, and policymakers, one common theme boils out. Much like the purpose of the Pacific Telegraph Act—to prevent telegraph carriers from processing and relaying private telegraphs on any other basis than in the order in which received—modern-day network neutrality seeks to maintain the Internet’s original “dumb,” end-to-end architectural principle by prohibiting common carriers—ISPs—from interfering with the transmission of packets over their networks, whether by artificially slowing down or blocking those packets, or by any other means that selectively inhibits the natural flow of packets over their network.

Currently, the principle of network neutrality as it applies to the Internet is not the result of a legislative enactment. In fact, network neutrality has never been successfully legislated. Instead, the principle finds its foundation in a policy statement released by the FCC in 2005. In this statement, the FCC observed that “it is the policy of the United States ‘to preserve the vibrant and competitive free market that presently exists for the Internet’ and ‘to promote the continued development of the Internet,’” and noted Congress, through section 706(a) of the Communications Act of 1934, “charge[d] the Commission with ‘encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability’—broadband—‘to all Americans.’”<sup>26</sup> In fulfillment of this charge, the FCC established four guiding principles concerning network neutrality for use in policymaking:

[1] [c]onsumers are entitled to access the lawful Internet content of their choice[;] . . . [2] consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement[;] . . . [3] consumers are entitled to connect their choice of legal devices that do not harm the network[;] . . . [and 4] consumers are entitled to competition among network providers, application and service providers, and content providers.<sup>27</sup>

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25. Communications Act of 1934, 47 U.S.C. § 202(a) (2006).

26. Appropriate Framework for Broadband Access, 20 F.C.C.R. 14,986, 14,987 (2005) (footnotes omitted).

27. *Id.* at 14,988 (footnotes omitted).

There are limits to the FCC's approach. Because this is merely a policy statement, it is "only a non-binding explanation of the FCC's position on [the] subject."<sup>28</sup> However, it "does put companies on notice regarding how . . . the FCC interprets the law, and [the] agency intends to act on it."<sup>29</sup>

### B. *Why Should You Care?*

The policy of network neutrality has the potential to influence anyone who uses the Internet—whether via a computer or a device that can connect to the Internet such as a Blackberry or an iPhone—or relies on the Internet for goods or services. There are numerous potential consequences for users if network neutrality is tossed by the wayside. Although some argue that, absent network neutrality regulations, network operators would still not discriminate among information flowing over their networks because there would be no economic or business advantage in doing so,<sup>30</sup> one cannot assume such network operators' motives are so rational and predictable.

The consequences of not enforcing network neutrality are numerous. Without these principles overlooking the shoulders of network operators, one can expect these operators might discriminate against websites that are resource intensive, such as Hulu,<sup>31</sup> which offer services that might compete against an ISP's own services,<sup>32</sup> or even discourage traffic to networks of

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28. Neal Hannan et al., Comment, *Net Neutrality and the FCC: What's Being Done to Preserve It*, COLUM. SCI. & TECH. L. REV. (2007), <http://www.stlr.org/html/engadget/?entry-005>.

29. *Id.*

30. Lee, *supra* note 18, at 9.

31. Hulu, <http://www.hulu.com>. Hulu is an Internet-based service that offers television shows, movies, and clips for free, anytime in the United States. *See id.* Websites like Hulu, which are by their nature very demanding of bandwidth—and thus network resources—could expect to be held at gunpoint by ISPs: either pay certain fees or lose potential access to that ISP's customers. With many ISPs potentially having millions of customers, these ISPs could lock companies like Hulu out of entire markets. Further, with the sheer number of ISPs located in the United States alone, it would be economically and practically infeasible for Hulu and similar sites to strike agreements with every single ISP. Instead, it is likely these websites, if they were to survive at all, would be limited to serving only densely populated areas, leaving rural communities behind.

32. It is not uncommon for network operators to sell other services aside from Internet access. Many also offer cable and telephone service alongside Internet access. If, for example, a network operator decided it wanted to enter the telephone business, it could potentially block or substantially interfere with a VoIP provider, such as



which it disapproves by limiting the available bandwidth.<sup>33</sup>

Such consequences are not merely conjecture. In 2005, Vonage discovered nearly two hundred of its rural customers had their Vonage Internet telephone service, VoIP, blocked by a subsidiary of Madison River Communications (MRC), which offered traditional telephone service in addition to Internet access.<sup>34</sup> Vonage petitioned the FCC to investigate, and after an initial inquiry, the FCC and MRC entered into a consent decree in which MRC was to render a voluntary payment of \$15,000 to the FCC and stipulate it would cease and desist blocking Internet-based telephone service for thirty months.<sup>35</sup> Although the offense might seem slight, MRC's actions are much more contemptible when one realizes that “[f]or those customers who had disconnected their traditional phone lines and were relying solely on Vonage, the blocking meant they had no ability to make calls, even to emergency 911 services.”<sup>36</sup>

In 2006, America Online (AOL) proposed charging extra fees against organizations that send large amounts of e-mail.<sup>37</sup> In response, approximately five hundred small businesses formed a coalition and launched the website DearAOL.com in protest.<sup>38</sup> The coalition members tried to activate their constituent bases and encourage people to visit the website and sign a petition to fight AOL's proposed e-mail policy, but not

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Vonage, which provides telephone services over the Internet at a fraction of the cost of traditional telephone companies.

33. Peer-to-peer networking has become a viable and thriving alternative to hosting files centrally on a website. Rather than requiring a centralized location online to host a file, peer-to-peer networking software—such as BitTorrent—permits users to tap into networks of other people using peer-to-peer networking software where the user will get many small pieces of the file from many different users. The main advantages of this method of transfer include faster transfer rates and redundancy, so if one peer fails to provide the needed piece of the file, another peer can step in and provide that missing link without any extra effort. While some decry the use of peer-to-peer networking as a haven for criminals exchanging copyrighted files such as software or music, it has proven valuable for legitimate purposes such as academic research and military use.

34. Jonathan Krim, *Phone Company Settles in Blocking of Internet Calls*, WASH. POST, Mar. 4, 2005, at E02.

35. Madison River Commc'ns, 20 F.C.C.R. 4295, 4297–99 (2005) (detailing an investigation made by the FCC under § 201(b) of the Communications Act of 1934).

36. Krim, *supra* note 34.

37. Hiawatha Bray, *AOL Blocks E-mail Tied to Critic of Firm*, BOSTON GLOBE, Apr. 15, 2006, available at [http://www.boston.com/business/technology/articles/2006/04/15/aol\\_blocks\\_e\\_mail\\_tied\\_to\\_critic\\_of\\_firm/](http://www.boston.com/business/technology/articles/2006/04/15/aol_blocks_e_mail_tied_to_critic_of_firm/).

38. *Id.*

long after the movement, “AOL’s e-mail system began rejecting all incoming e-mails containing any mention of DearAOL.com. Hundreds of coalition members reported receiving ‘bounceback’ messages informing them that their e-mails to AOL customers were not getting through.”<sup>39</sup>

Perhaps one of the most egregious examples of a network neutrality violation occurred in 2007 when subscribers of Comcast, the nation’s second-largest ISP, accused the company of “traffic shaping,” a technique that “involves slowing down some forms of traffic, like file-sharing, while giving others priority.”<sup>40</sup> Thus, Comcast was accused of manipulating the available bandwidth of its users so that users of popular peer-to-peer programs, such as BitTorrent and eDonkey, would become frustrated and terminate any pending transfers.<sup>41</sup>

The destruction of the network neutrality principle would have dire effects for the average Internet user. Today, large and small corporations all across the world rely heavily on the Internet and services provided over the Internet to conduct business. They rely on it to communicate efficiently and, depending on the industry, may even deliver their product over the Internet. If network neutrality were not enforced, it is conceivable the cost of transacting business would increase, directly or indirectly. Transaction costs could directly increase if, for example, a corporation operated a website that offered a service which directly competes with an ISP’s service, such as Internet-based telephony. If permitted to operate unhindered, a United States-based corporation could utilize Internet-based telephony as its main phone line. If an ISP that also operated a traditional landline telephone service desired to do so, it could shift traffic or slow down the Internet-based telephony connection in such a way that would severely downgrade the quality of the phone call, rendering the Internet-based telephony virtually unusable and thus worthless. A corporation that relies on services or products primarily found online could, as a result of the actions of an ISP, lose access to those services or products.

Individuals could also be victims of an overzealous ISP. As the network neutrality principle stands, an Internet user has unfettered access to virtually any website in the world. If one wishes to search Yahoo!, for example, all one has to do is log onto the Internet, go directly to that web address, and search. However, an ISP could jeopardize this unfettered

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39. *Id.*

40. Peter Svensson, *Comcast Blocks Some Internet Traffic*, MSNBC, Oct. 19, 2007, <http://www.msnbc.msn.com/id/21376597/>.

41. *Id.*

access. Many websites, such as CNN.com, do not earn a profit from users themselves in the sense the users pay to use a service. Rather, these websites earn their profits through the advertisements on their website. ISPs view sites such as these as a potential source of income.<sup>42</sup> By charging a website for access to an ISP's subscribers—which could range in number from the hundreds to the millions—an ISP could effectively hold a website at ransom. These websites would be forced to choose between complying and exploring new sources of revenue by either eliciting higher fees for advertising on their websites or charging users fees for use, or simply dissolving. Thus, the impact on individuals is clear—they will either be forced to pay for access to certain websites or will completely lose access.

#### IV. THE CURRENT DEBATE

The current debate regarding network neutrality involves primarily two groups: (1) those who believe the principle of network neutrality should be legislated; and (2) those who wish to continue to allow the FCC, which has traditionally enforced the basic principles of the Internet, to enforce net neutrality. Proponents of network neutrality legislation include Vint Cerf,<sup>43</sup> Google, eBay, Amazon, and Microsoft.<sup>44</sup> Opponents of network neutrality legislation include virtually every telecommunications company in the United States.<sup>45</sup> Not surprisingly, the division runs between Internet Content Providers (ICPs)—those who provide services over the Internet, such as Google—and ISPs—those who provide the delivery methods for such services.

More specifically, proponents of legislating network neutrality argue the 2005 Supreme Court decision *National Cable & Telecommunications Ass'n v. Brand X Internet Services*<sup>46</sup> was particularly devastating for the

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42. For example, Edward Whitacre, the former CEO of AT&T, famously declared in an interview, "Now what [websites such as Google or Yahoo!] would like to do is use my pipes free, but I ain't going to let them do that because we have spent this capital and we have to have a return on it. . . . Why should they be allowed to use my pipes?" *At SBC, It's All About "Scale and Scope"*, BUSINESSWEEK, Nov. 7, 2005, available at [http://www.businessweek.com/magazine/content/05\\_45/b3958092.htm](http://www.businessweek.com/magazine/content/05_45/b3958092.htm).

43. Cecilia Kang, *My Chat with Google's Vint Cerf*, WASH. POST, Oct. 21, 2009, [http://voices.washingtonpost.com/posttech/2009/10/vint\\_cerf\\_googles\\_chief\\_intern.html](http://voices.washingtonpost.com/posttech/2009/10/vint_cerf_googles_chief_intern.html). Cerf was one of original architects of the Internet. *Id.*

44. *Who Will Pay for the Internet Superhighway?*, USA TODAY, July 12, 2006, [http://www.usatoday.com/money/industries/technology/2006-07-11-netneutrality\\_x.htm](http://www.usatoday.com/money/industries/technology/2006-07-11-netneutrality_x.htm).

45. *Id.*

46. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

principles of network neutrality.<sup>47</sup> In June 2005, the Supreme Court decided an appeal stemming from an FCC decision that held broadband access constituted information services.<sup>48</sup> The Court affirmed the FCC's ruling, holding the FCC had the discretion to reclassify cable broadband as an information service.<sup>49</sup> Five weeks after its authority to reclassify cable broadband was affirmed by the courts, the FCC voted—after meeting behind closed doors and without releasing a report—to reclassify digital subscriber lines (DSLs), a second popular form of Internet access, as an information service as well.<sup>50</sup> This vote to reclassify DSL as an information service added a second forum that, along with cable broadband, is ripe for net neutrality violations.

According to the ACLU, without the principle of network neutrality, “network providers are free to discriminate.”<sup>51</sup> Companies that offer the portals to connect to the Internet “are not considered ‘state actors’ that trigger free speech protections under the First Amendment. . . . [T]hey can effectively shut down the 21st century marketplace of ideas by screening Internet e-mail traffic, blocking what they deem to be undesirable content, or pricing users out of the marketplace.”<sup>52</sup> Without the Communications Act of 1934 protecting net neutrality, “nothing prevents network providers from discriminating against Internet users and application and service

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47. *Internet Freedom and Innovation at Risk: Why Congress Must Restore Strong Net Neutrality Protection*, ACLU, Sept. 22, 2006, <http://www.aclu.org/freespeech/internet/26829res20060922.html>.

48. *Brand X*, 545 U.S. 967. *Brand X* is an important decision in the field of telecommunications because of one of the issues presented—whether high-speed, broadband access is considered a telecommunications service or an information service. *Id.* at 975. The importance of the decision is realized when one understands Title II of the Communications Act of 1934 “subjects all providers of ‘telecommunications servic[e]’ to mandatory common-carrier regulation,” whereas information services are not subject to such mandatory regulation under Title II. *Id.* at 973, 976–77. Ultimately, the Court held a *Chevron* deference to the FCC’s interpretation was required, and thus the FCC’s interpretation—broadband access constituted information services—was due *Chevron* deference. *See id.* at 980–82 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

49. *See id.* at 1002–03.

50. Marguerite Reardon, *FCC Changes DSL Classification*, CNET NEWS, Aug. 5, 2005, [http://news.cnet.com/FCC-changes-DSL-classification/2100-1034\\_3-5820713.html?tag=mncol](http://news.cnet.com/FCC-changes-DSL-classification/2100-1034_3-5820713.html?tag=mncol); Marguerite Reardon, *FCC to Hammer Out New DSL Rules*, CNET NEWS, Aug. 4, 2005, [http://news.cnet.com/FCC-to-hammer-out-new-DSL-rules/2100-1034\\_3-5819111.html?tag=mncol](http://news.cnet.com/FCC-to-hammer-out-new-DSL-rules/2100-1034_3-5819111.html?tag=mncol).

51. ACLU, *supra* note 47.

52. *Id.*

providers in terms of content, quality of access, and choice of equipment.”<sup>53</sup>

Opponents of network neutrality legislation argue from different, more practical angles. Rachelle Chong, a communications policymaker and Commissioner of the California Public Utilities Commission, argues “[net neutrality] may be a Trojan horse for increased government regulation of the Internet, seeking to layer monopoly common-carrier concepts onto a lightly-regulated Internet environment.”<sup>54</sup> In other words, to Chong, net neutrality is nothing more than an excuse to inject unnecessary increased regulation into an otherwise lightly regulated medium. It is exactly this light regulation Chong argues permitted the Internet to flourish in the first place.<sup>55</sup>

Other arguments of opponents to legislation are not dissimilar from Chong’s. An editorial of the Washington Post, which Chong herself cites,<sup>56</sup> argues:

The proponents of net neutrality exaggerate the purity of cyberspace. Big names on the Web already have a huge advantage over no-brand competitors: Surfers go to places that they trust, particularly to make credit-card purchases. Moreover, once you have an advantage on the Web, it becomes self-reinforcing: If your site is popular and many others link to it, search engines such as Google will direct more traffic your way. Corporations already strive mightily to make your Internet experience non-neutral. From the early days of the World Wide Web, America Online Inc. tried to keep customers within its own virtual “walled garden” of services. More recently, Google has elbowed out competitors by offering toolbars and other freebies that keep its friendly search box perpetually on computer screens. Meanwhile, big e-tailers have accelerated their service by paying to “cache” their Web pages on computers close to customers. So if cable and phone companies start delivering some Web content at premium speeds, they will be adding to an existing trend, not sullyng Eden.<sup>57</sup>

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53. *Id.*

54. Chong, *supra* note 24, at 1.

55. *Id.* at 10 (“The history of the Internet shows that government has always used forbearance from regulating the Internet. . . . As a result, investment, innovation and consumer choice have flowed due to the certainty of government ‘non-intervention.’ Regulation has not proved necessary and the broadband sector has thrived.” (footnote omitted)).

56. *Id.* at 9.

57. Editorial, *The Eden Illusion*, WASH. POST, Mar. 13, 2006, at A14.

Thus, opponents characterize the Internet as a harsh environment for those who are not in the “in.” Big companies have developed big names and use their size and alliances to their advantage, reinforcing their positions on the Internet by using techniques such as providing free browser toolbars to Internet users and linking services together.<sup>58</sup> The inherent design of the Internet lends itself to these fortifications. By its very nature, the Internet consists of volumes of websites that are invisible to the human eye. Without previous knowledge of a website, a user is forced to rely upon indexing sites such as Google and links provided by other websites. Because bigger names have the power to force lesser known competitors out of the visible network, it is a functional necessity that ISPs have the flexibility to adapt to continually changing market conditions. Without such flexibility, ISPs would be at a serious competitive disadvantage and would chance survival.

## V. THE COMCAST CRISIS

### A. Comcast Gets Caught Violating Net Neutrality

In early 2007, Comcast subscribers noticed “they had problems using BitTorrent and similar technologies over their Comcast broadband connections.”<sup>59</sup> Later that year, frequent reports began surfacing in the news media that Comcast was throttling the bandwidth of its users who were using peer-to-peer programs such as BitTorrent.<sup>60</sup>

After catching wind of these accusations, the Associated Press (AP) decided to investigate.<sup>61</sup> Using BitTorrent, an AP reporter attempted to download the King James Bible—not protected by copyright and thus a completely legal download—in two locations: from one computer on the West Coast and one computer on the East Coast, locations both served by

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58. *Id.* A very demonstrative example can be found at Google’s homepage. Google, <http://www.google.com/> (last visited Aug. 5, 2010). By simply visiting the homepage, visitors can experience a modern day “walled garden” of services such as access to video services, e-mail, and retrieval of driving directions, among numerous other services, all provided by Google. *See id.*

59. *See* Comcast Corp., 23 F.C.C.R. 13,028, 13,030 (2008), *vacated*, Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

60. Marguerite Reardon, *Comcast Denies Monkeying with BitTorrent Traffic*, CNET NEWS, Aug. 21, 2007, [http://news.cnet.com/8301-10784\\_3-9763901-7.html?](http://news.cnet.com/8301-10784_3-9763901-7.html?) (“[Comcast] flat-out denied that the company was filtering or ‘shaping’ any traffic on its network.”); *see also* Svensson, *supra* note 40.

61. *See* Svensson, *supra* note 40.

Comcast.<sup>62</sup> Further, the AP also attempted to download this version of the Bible from three other connections provided by Comcast's competitors—one served by Time Warner Cable, one by Cablevision Systems Corporation, and the third from service provided by AT&T and Cogent Communications Group.<sup>63</sup> Substantiating the accusations of Comcast users countrywide, the AP discovered unusual difficulties transferring the King James Bible through connections provided by Comcast, but had little trouble transferring through connections provided by its competitors.<sup>64</sup>

According to MSNBC, Comcast throttled peer-to-peer traffic over its network by the following process:

[When a peer-to-peer user attempts to download a file,] [e]ach PC gets a message invisible to the user that looks like it comes from the other computer, telling it to stop communicating. But neither message originated from the other computer—it comes from Comcast. If 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."<sup>65</sup>

Thus, in a twist to earlier examples of network neutrality violations, Comcast did not block information packets being transferred between two users; instead, using "reset packets" that instructed each user's computer to disconnect, Comcast managed to covertly disengage the transfer by posing to each user as the other user's computer. In response to the AP investigation, Comcast denied it was blocking some traffic but admitted it was "delaying" peer-to-peer traffic utilized by its users.<sup>66</sup> Recognizing a problem, the FCC declared it would investigate the complaints against Comcast.<sup>67</sup>

### B. *The FCC Throws the Book at Comcast*

On November 1, 2007, Free Press filed a complaint against Comcast

62. Peter Svensson, *AP Tests Comcast's File-Sharing Filter*, FOX NEWS, Oct. 19, 2007, [http://www.foxnews.com/printer\\_friendly\\_wires/2007Oct19/0,4675,ComcastDataDiscriminationTests,00.html](http://www.foxnews.com/printer_friendly_wires/2007Oct19/0,4675,ComcastDataDiscriminationTests,00.html).

63. *Id.*

64. *Id.*

65. Svensson, *supra* note 40.

66. *F.C.C. to Look at Complaints Comcast Interferes with Net*, N.Y. TIMES, Jan. 9, 2008, available at, [http://www.nytimes.com/2008/01/09/business/media/09fcc.html?\\_r=1&partner=permalink&expprod=permalink](http://www.nytimes.com/2008/01/09/business/media/09fcc.html?_r=1&partner=permalink&expprod=permalink).

67. *Id.*

with the FCC, requesting the Commission “declare ‘that an Internet service provider violates the [Commission’s] Internet Policy Statement when it intentionally degrades a targeted Internet application.’”<sup>68</sup> Free Press also filed a request that the FCC render a declaratory ruling “to ‘clarify that an Internet service provider violates the FCC’s Internet Policy Statement when it intentionally degrades a targeted Internet application.’”<sup>69</sup> Vuze, Inc., filed a separate petition for rulemaking with the FCC, requesting the Commission “‘adopt reasonable rules that would prevent the network operators from engaging in practices that discriminate against particular Internet applications, content or technologies.’”<sup>70</sup> With these three petitions in mind, the FCC invited public input, and the response was overwhelming.<sup>71</sup> Over twenty thousand Americans confirmed what the AP had suspected: Comcast was degrading the Internet connections of its users, and these Americans demanded the FCC “‘take immediate action to put an abrupt end to this harmful practice.’”<sup>72</sup>

### 1. *The Jurisdictional Battle*

Comcast countered the complaints, arguing the FCC did not have jurisdiction over the matter.<sup>73</sup> More specifically, Comcast claimed lack of jurisdiction because the “authority must be ‘‘ancillary’’ to something, but here it is not clear what that something might be.”<sup>74</sup> However, the FCC was certain of its ancillary jurisdiction. Citing *Brand X*, it stated, “‘[T]he Commission has jurisdiction to impose additional regulatory obligations [on information service providers] under its Title I ancillary jurisdiction to regulate interstate and foreign communications’ and that ‘the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction.’”<sup>75</sup>

The Commission declared that undoubtedly, peer-to-peer Transmission Control Protocol (TCP) connections, such as the ones provided by Comcast to its customers, qualify as “a form of

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68. Comcast Corp., 23 F.C.C.R. 13,028, 13,032 (2008), *vacated*, Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010) (citation omitted).

69. *Id.* at 13,033 (citation omitted).

70. *Id.* (citation omitted).

71. *See id.*

72. *Id.* at 13,032 (citation omitted).

73. *Id.* at 13,035.

74. *Id.* (citations omitted).

75. *Id.* (citations omitted).



‘communication by wire.’”<sup>76</sup> Because the connections qualify as a form of “communication by wire,” the subject matter fell squarely within the general jurisdictional grant of Title I.<sup>77</sup> Likewise, the “something” Comcast sought was the Congressional Internet policy inscribed into section 230(b) of the Communications Act, the very same act that, the FCC noted, establishes the FCC as the primary federal agency responsible for enforcing regulation of interstate and foreign communications by wire.<sup>78</sup> “As Congress was no doubt aware, section 1 of the Act requires the Commission to ‘execute and enforce the provisions of [the] Act.’ To carry out this responsibility, section 4(i) empowers the Commission to ‘issue such orders . . . as may be necessary in the execution of its functions.’”<sup>79</sup>

Further, the Commission noted, in a separate action in the United States District Court for the Northern District of California, “Comcast *itself* admitted Commission jurisdiction over its network management practices in litigation.”<sup>80</sup> There, Comcast petitioned the court to suspend the proceedings “because ‘[a]ny inquiry into whether Comcast’s P2P management is unlawful falls squarely within the FCC’s subject matter jurisdiction.’”<sup>81</sup> Agreeing with Comcast’s argument, the court subsequently approved of the abeyance of proceedings.<sup>82</sup> However, the Commission remarked upon Comcast’s sudden change of mind, stating “[c]ourts of equity have long frowned on a party making representations to one tribunal, benefiting from those representations, and then turning around to assert precisely the opposite claims to a second tribunal.”<sup>83</sup>

In its final challenge of jurisdiction, Comcast argued the FCC lacked the authority to enforce a third federal policy found in section 230(b)—“to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive services, unfettered by Federal or State regulation.”<sup>84</sup> The Commission efficiently and effectively struck back,

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76. *Id.* (citing 47 U.S.C. § 152(a)).

77. *Id.*

78. *Id.* (citations omitted).

79. *Id.* at 13,035–36 (citations omitted). Hedging its bets, the Commission also cited six other sources of jurisdiction over the matter, including sections 1, 201, 256, 257, and 604(1) of the Communications Act of 1934, as well as section 706 of the Telecommunications Act of 1996. *Id.* at 13,036.

80. *Id.* at 13,042.

81. *Id.* (citations omitted).

82. *Id.*

83. *Id.* (citing *Zedner v. United States*, 547 U.S. 489, 504 (2006)).

84. *Id.* (quoting 47 U.S.C. § 230(b)(2)).

declaring no reasonable reading of the provision could lead one to believe Congress intended there would be scant oversight of providers of broadband services.<sup>85</sup> Historically, the Commission has always provided oversight of such services and to permit no oversight would directly conflict with other policies in the Communications Act.<sup>86</sup> Further, the Commission observed precedent has already rejected such an interpretation.<sup>87</sup> Finally, the Commission noted Comcast had previously waived its argument.<sup>88</sup> Two years prior, in a merger between Comcast, Adelphia, and Time Warner Cable, the Commission investigated concerns submitted by Free Press that the merger would result in anticompetitive conduct and interference with access to Internet content and applications.<sup>89</sup> After investigating the claims and finding insufficient evidence to warrant action, the FCC “provided that ‘[i]f in the future evidence arises that any company is willfully blocking or degrading Internet content, affected parties may file a complaint with the Commission.’”<sup>90</sup> Comcast failed to petition the Commission to reconsider the stipulation and it did not seek judicial review.<sup>91</sup>

## 2. *The FCC Strikes Back—The FCC’s Approach to the Controversy*

Noting Congress has granted federal agencies wide latitude in determining how best to achieve their charged purposes,<sup>92</sup> and specifically, that Congress delegated to the Commission the authority to determine how to achieve its ends,<sup>93</sup> the Commission decided to adjudicate such disputes on a case-by-case basis, rather than by general rulemaking.<sup>94</sup> Fortifying this decision were three main concerns. First, the FCC noted the novelty of the

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85. *Id.*

86. *Id.*

87. *Id.* at 13,043 (citing Tel. No. Requirements for IP-Enabled Serv. Providers, 22 F.C.C.R. 19,531 (2007)).

88. *Id.*

89. *Id.* at 13,043–44.

90. *Id.* at 13,044 (quoting Adelphia/Time Warner/Comcast Order, 22 F.C.C.R. 8203, 8298 (2006)).

91. *Id.*

92. *Id.* at 13,044 (citing numerous federal court decisions, including decisions of the United States Supreme Court).

93. *Id.* (citing 47 U.S.C. § 154(j)) (“Congress has specifically given the Commission the authority to ‘conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.’”).

94. *Id.* at 13,045 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 202–03 (1947)) (stating an agency may adjudicate on a case-by-case basis, rather than making a hard-and-fast rule, in situations where an agency may not have sufficient experience to make a rule or when the problem cannot be captured within a general rule).

question at hand demanded a case-by-case examination “because the Internet is a new medium, and traffic management questions like the one presented here are relatively novel.”<sup>95</sup> Second, any rule that could be promulgated regarding the regulation of Internet access networks would, by its very nature, be inadequate due to the various kinds of information systems the FCC would attempt to cover.<sup>96</sup> Last, and perhaps most substantially, the case-by-case adjudication approach would fall in accordance with both Congressional directives and Commission precedent.<sup>97</sup>

With jurisdictional issues settled and the legitimacy of the espoused case-by-case approach established, the Commission turned to the issue of whether Comcast’s actions in covertly throttling bandwidth connections violated federal policy and whether the FCC should exercise its congressionally assigned adjudicative authority to stop Comcast’s interference with Internet traffic.<sup>98</sup> Quite pointedly, the Commission declared there was no doubt Comcast discriminated against Internet traffic in violation of federal policy:

Comcast has deployed equipment across its networks that monitors its customers’ TCP connections using deep packet inspection to determine how many connections are peer-to-peer uploads. When Comcast judges that there are too many peer-to-peer uploads in a given area, Comcast’s equipment terminates some of those connections by sending RST packets.<sup>99</sup>

Analogizing, the FCC described Comcast as “open[ing] its customers’ mail because it wants to deliver mail not based on the address or type of stamp on the envelope but on the type of letter contained therein.”<sup>100</sup> These actions, deemed both invasive and discriminatory,<sup>101</sup> contravened federal public policy objectives.<sup>102</sup> By establishing numerous violations,

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95. *Id.* (noting the rapid rise of the Internet and its related technologies).

96. *Id.* at 13,046 (“[W]e are not certain that a one-size-fits-all approach is good policy.”).

97. *Id.* at 13,046 (citing 47 U.S.C. § 230(b)(2); Cable Modem Declaratory Ruling, 17 F.C.C.R. 4798, 4802 (2002)).

98. *Id.* at 13,050.

99. *Id.* at 13,050–51 (footnotes omitted).

100. *Id.* at 13,051 (citations omitted).

101. *Id.* (citation omitted) (“This practice is not ‘minimally intrusive’ but invasive and outright discriminatory.”).

102. *Id.* at 13,052–53.

including several violations of the Internet Policy Statement,<sup>103</sup> the FCC held Free Press had successfully established a prima facie case that Comcast did in fact impede Internet content and applications.<sup>104</sup>

Finding a prima facie case was established, the Commission then turned to a permutation of the United States Supreme Court's due process test—whether, in light of the established violations, Comcast's practices were reasonable and carefully tailored to Comcast's interest in easing network congestion.<sup>105</sup> The FCC held Comcast's policies were unreasonable.<sup>106</sup> Crediting the Internet Engineering Task Force with establishing “the equivalent of perfect competition . . . among applications and content . . . with a minimum interference by the network or platform owner,”<sup>107</sup> the Commission found the established Comcast policy “contravenes the established expectations of users and software developers . . . across the Internet.”<sup>108</sup> Affirming the FCC's conclusion that Comcast's network management was unreasonable were well-respected academics and professionals across the United States, including Professors Tim Wu of Columbia Law School and Barbara van Schewick of Stanford Law School.<sup>109</sup>

Further, the Commission determined Comcast failed to carefully tailor its policy to its interest for three separate reasons. First, the policy could affect customers who used little bandwidth merely because they used a “disfavored application.”<sup>110</sup> Second, Comcast's management techniques were not applied only at peak usage hours, but at any time, “regardless of the level of overall network congestion at that time, and regardless of the time of day.”<sup>111</sup> Finally, Comcast's policies did not appear to target only congested connection points, but encompassed many connection points

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103. See *Appropriate Framework for Broadband Access*, 20 F.C.C.R. 14,986, 14,988 (2005) (providing a bulleted list of principles adopted by the Commission regarding broadband networks and their openness, affordability, and accessibility by consumers). The FCC specifically held Comcast violated the first two principles of the policy statement. *Comcast Corp.*, 23 F.C.C.R. at 13,053–54.

104. *Comcast Corp.*, 23 F.C.C.R. at 13,052–53.

105. *Id.* at 13,054, 13,056.

106. *Id.* at 13,058.

107. *Id.* at 13,054 (citation omitted).

108. *Id.*

109. *Id.* at 13,055.

110. *Id.* at 13,056 (citations omitted).

111. *Id.* (citations omitted).

that were not congested.<sup>112</sup> Rather than managing its network traffic with this type of discrimination, Comcast could have instituted other policies that would have attacked the problem more efficiently.<sup>113</sup> For example, rather than blocking applications it disliked, Comcast could have capped total Internet-usage amounts and subsequently charged those users who used an inordinate amount of bandwidth.<sup>114</sup> The FCC noted “the practices employed by Comcast [were] ill-tailored to the company’s professed goal of combating network congestion.”<sup>115</sup> Because the policies of Comcast were found unreasonable and not carefully tailored, the Commission held Comcast was in violation of the Commission’s Internet Policy Statement.<sup>116</sup>

### C. Remedies

Noting the goal of the Commission’s adjudication was to end the discriminating network management practices of Comcast, the Commission required Comcast to provide information to the FCC regarding its techniques of traffic management, including what equipment was deployed, where it was deployed, how it was used, and what it affected.<sup>117</sup> The Commission also required Comcast to submit a compliance plan with the Commission, detailing how Comcast intended to transition to a nondiscriminatory regulatory system and what sort of policy it would adopt following the termination of its current one, and to disclose the plan to the public.<sup>118</sup> Similarly, the Commission stipulated an enforcement mechanism: if Comcast failed to submit a compliance plan to the FCC, or if Comcast submitted a compliance plan but later failed to fulfill its obligations, an interim injunction would automatically take effect ordering Comcast to desist from its current regulatory practices, cause would have to be shown why Comcast should not have a permanent cease-and-desist order issued against it, and a hearing would be automatically set.<sup>119</sup>

### D. Comcast Cries “Foul!”

Dissatisfied with the outcome of the decision, Comcast complied with

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112. *Id.*

113. *Id.* at 13,057.

114. *Id.*

115. *Id.* at 13,058.

116. *Id.*

117. *Id.* at 13,059–60.

118. *Id.* at 13,060.

119. *Id.*

the FCC's order while simultaneously appealing.<sup>120</sup> In its appeal, Comcast raised three objections to the order. First, it argued the FCC failed to justify the basis on which it was exercising jurisdiction over Comcast's network management practices.<sup>121</sup> Comcast then argued the actions taken by the FCC were "procedurally flawed" because the FCC did not provide proper notice to Comcast under the Due Process Clause, nor did it follow the rulemaking requirements of the Administrative Procedure Act.<sup>122</sup> Lastly, it asserted that parts of the FCC's order were "so poorly reasoned as to be arbitrary and capricious."<sup>123</sup> In its opinion, the court focused on the first objection—whether the FCC had properly established jurisdiction over the matter.<sup>124</sup>

Before addressing the first objection, the court addressed two threshold arguments proffered by the FCC: (1) Comcast should be judicially estopped from challenging the FCC's jurisdiction over the matter in the present action given Comcast took a contrary position in an earlier California proceeding; and (2) even if Comcast could not be judicially estopped from challenging the FCC's authority, *National Cable & Telecommunications Ass'n v. Brand X Internet Services*<sup>125</sup> clearly established the FCC had the authority to issue its order, rendering an ancillary jurisdiction analysis moot.<sup>126</sup> The court, however, disagreed with both arguments, stating the use of judicial estoppel was inappropriate "[b]ecause Comcast never clearly argued in the California litigation that the [FCC's] assertion of authority over the company's network management practices would be 'reasonably ancillary to the [FCC's] effective performance of its statutorily mandated responsibilities,'"<sup>127</sup> and concluding even after *Brand X*, an exercise of the FCC's ancillary jurisdiction necessarily requires justification on a case-by-case basis,<sup>128</sup>

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120. Comcast Corp. v. FCC, 600 F.3d 642, 645 (D.C. Cir. 2010).

121. *Id.*

122. *Id.*

123. *Id.*

124. *See id.*

125. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

126. *Comcast Corp.*, 600 F.3d at 647.

127. *Id.* at 649 (quoting *Am. Library Ass'n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005)).

128. *Id.* at 651 ("Accordingly, the [FCC] cannot justify regulating the network management practices of cable Internet providers simply by citing *Brand X*'s recognition that it may have ancillary authority to require such providers to unbundle the components of their services. . . . The [FCC's] exercise of ancillary authority over

subsequently requiring an analysis under *American Library Ass'n v. FCC* to determine the validity of an exercise of ancillary jurisdiction.<sup>129</sup>

Looking to Comcast's primary objection—the FCC failed to properly justify the basis on which it was exercising jurisdiction when it regulated Comcast's network management practices—the court considered the FCC's argument that the basis existed in several provisions of the Communications Act, namely section 230(b) and section 151, provisions the parties agreed “set forth only congressional policy.”<sup>130</sup> In its relevant part, section 230(b) states “[i]t is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services’ and ‘to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet.’”<sup>131</sup> Section 151, on the other hand, calls for the establishment of “‘a rapid, efficient, Nation-wide, and world-wide wire and radio communication service.’”<sup>132</sup> In its hearing, the FCC held Comcast's network management practices frustrated both policy objectives in section 230(b) and Comcast's discriminatory regulation practices failed to comply with the FCC's goal of ensuring a “rapid” and “efficient” broadband network under section 151.<sup>133</sup> Stating the FCC “acknowledge[d] that section 230(b) and section [151] are statements of policy that themselves delegate no regulatory authority,” the court failed to agree with the FCC—that section 230(b) and section 151 were sufficient to establish ancillary jurisdiction on their own—because

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Comcast's network management practices must, to repeat, ‘be independently justified.’” (quoting *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 612 (D.C. Cir. 1976)).

129. *See id.* at 646, 651. *American Library Ass'n* established the FCC may utilize its ancillary jurisdiction only when “‘(1) the [FCC's] general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the [FCC's] effective performance of its statutorily mandated responsibilities.’” *Id.* at 646 (quoting *Am. Library Ass'n*, 406 F.3d at 691–92).

130. *Id.* at 651–52; *see also id.* at 658 (rejecting the FCC's argument “that it could exercise ancillary authority on the basis of policy alone (citing *Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 806–07 (D.C. Cir. 2002))). This examination is the second part of the two-part analysis established by *American Library Ass'n*. Comcast and the FCC agreed the first element—the regulated subject is covered under the general jurisdictional grant of the Communications Act—was met. *Id.* at 646–47.

131. *See id.* at 651 (citing 47 U.S.C. § 230(b)).

132. *See id.* at 652 (citing 47 U.S.C. § 151).

133. *See id.*

“[p]olicy statements are just that—statements of policy.”<sup>134</sup> The court noted policy statements “are not delegations of regulatory authority.”<sup>135</sup> In order to sufficiently establish ancillary jurisdiction, the FCC needed to establish jurisdiction that is ancillary to “Title[s] II, III, VI, or, for that matter, anywhere else.”<sup>136</sup> In other words, without using an express delegation of authority, the FCC could not rely on policy statements to establish ancillary jurisdiction.<sup>137</sup> After halting the FCC’s reliance on policy statements in section 230(b) and section 151, the court then examined a second series of statutory provisions on which the FCC relied—express delegations of authority found in sections 706, 256, 257, 201, and 623 of the Telecommunications Act of 1996.<sup>138</sup>

Section 706 charges the FCC with the duty to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”<sup>139</sup> However, the court noted, in a still-valid 1998 FCC ruling, the FCC held section 706 did “not constitute an independent grant of authority,” rather it was a directive that required the FCC to rely on authority contained in other provisions in achieving its goal of deploying advanced services.<sup>140</sup> “[B]ecause agencies ‘may not . . . depart from a prior policy *sub silentio*,’”<sup>141</sup> the court forced the FCC to “remain[] bound by its earlier conclusion that section 706 grants no regulatory authority.”<sup>142</sup> The court thus eliminated section 706 as a jurisdictional cornerstone for the FCC’s argument.

The court also examined the alleged grant of authority in section 256 but summarily dismissed it, stating that although the section orders the FCC “to ‘establish procedures for . . . oversight of coordinated network planning . . . for the effective and efficient interconnection of public

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134. *Id.* at 652, 654.

135. *Id.* at 654.

136. *Id.*

137. *See id.*

138. *Id.* at 658–61 (citing 47 U.S.C. §§ 201, 256, 257, 543, 1302).

139. *Id.* at 658 (quoting 47 U.S.C. § 1302(a)).

140. *Id.* (quoting Deployment of Wireline Servs. Offering Advanced Telecomms. Capability, 13 F.C.C.R. 24,012, 24,046, ¶ 77, 24,045, ¶ 69 (1998)).

141. *Id.* at 659 (quoting FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1811 (2009)).

142. *Id.*



telecommunications networks,”<sup>143</sup> the section also states “[n]othing in this section shall be construed as expanding . . . any authority that the [FCC] otherwise has under [t]he law, . . . precisely what the [FCC] seeks to do here.”<sup>144</sup>

The court also foreclosed the exercise of ancillary jurisdiction based on section 257 of the Telecommunications Act of 1996.<sup>145</sup> Section 257 was a requirement—whose fifteen-month timeline had already lapsed at the time of the hearing—that the FCC initiate proceedings in which it was to identify and eliminate, by instituting regulations in accordance with its authority as granted in the chapter, “market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services.”<sup>146</sup> Further, the section subsequently required the FCC to produce triennial reports to Congress outlining any remaining barriers to entry.<sup>147</sup> The FCC, the court recognized, could impose disclosure requirements in order to satisfy the reporting requirement while relying on ancillary jurisdiction.<sup>148</sup> However, the court acknowledged relying on such a reporting requirement as a basis to initiate ancillary jurisdiction in regulating network management practices simply “defies any plausible notion of ‘ancillarity.’”<sup>149</sup>

The FCC’s use of section 201 suffered a similar fatal setback. Noting the FCC’s section 201 argument in the appeal was not the same as the one originally proffered in the FCC’s order, the court dismissed both.<sup>150</sup> As initially argued in its order, the FCC claimed Comcast, in limiting the Internet traffic flowing through its network, displaced Internet traffic that would otherwise flow through its network to other ISPs, some of which were operating under Title II.<sup>151</sup> Because “section 201 provides that ‘[a]ll charges, practices, classifications, and regulations for and in connection with [common carrier] service shall be just and reasonable,’” the FCC would purportedly be able to establish ancillary jurisdiction.<sup>152</sup> However,

143. *Id.* (quoting 47 U.S.C. § 256(b)(1)).

144. *Id.* (quoting 47 U.S.C. § 256(c)).

145. *Id.* at 59–60.

146. *Id.* at 659 (quoting 47 U.S.C. § 257(a)).

147. *Id.* (citations omitted).

148. *Id.*

149. *Id.* at 659–60 (citing Motion Picture Ass’n of Am., Inc. v. FCC, 309 F.3d 796, 801–02 (D.C. Cir. 2002)).

150. *Id.* at 660.

151. *Id.* (citing Comcast Corp., 23 F.C.C.R. 13,028, 13,037–38, ¶ 17 (2008)).

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

because this argument was not advanced in the appeal, the court did not read it into the appeal and the argument was thus waived.<sup>153</sup> The argument actually presented by the FCC revolved around VoIP services—VoIP technology has affected the traditional pricing and practices of traditional telephony providers such as AT&T—which are subject to regulation under section 201, and because Comcast’s throttling of Internet traffic disrupted VoIP providers, the FCC has the authorization to regulate based on ancillary jurisdiction.<sup>154</sup> However, just as the argument the FCC did not proffer in the appeal necessarily failed because it was not argued in the appeal, the FCC’s new argument necessarily failed because it was not argued in the original order.<sup>155</sup>

The final jurisdictional blow came with the dismissal of section 623, which grants the FCC the authority to regulate “basic tier” service on certain cable systems, as a basis for utilizing ancillary jurisdiction.<sup>156</sup> According to the FCC, customers who have broadband Internet access could quickly gain the ability to view video-on-demand without having to resort to cable television subscriptions.<sup>157</sup> As a result, an increase in economic pressures on cable television would likely occur, pushing cable television prices—which have been historically on the rise—down.<sup>158</sup> Permitting Comcast to engage in discriminatory network management practices threatened, in the FCC’s eyes, increased competition and reduced prices, and thereby activated ancillary jurisdiction over the matter.<sup>159</sup> However, the court disagreed.<sup>160</sup> Characterizing section 623 as a narrow grant of regulatory power—limited to rate setting for some basic cable systems—the court concluded that, as before, ancillary jurisdiction must be established on a case-by-case basis and be based upon an express grant of authority.<sup>161</sup> As such, an adequate basis for exercising ancillary jurisdiction

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153. *Id.* (“Whatever the merits of this position, the [FCC] has forfeited it by failing to advance it here.” (citing *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 497 (D.C. Cir. 2004))).

154. *Id.*

155. *Id.* (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87–88 (1943)).

156. *Id.* at 661 (citing 47 U.S.C. § 543(b)).

157. *Id.* at 660–61 (quoting *Comcast Corp.*, 23 F.C.C.R. 13,028, 13,037, ¶ 16 (2008)).

158. *Id.* (quoting *Comcast Corp.*, 23 F.C.C.R. at 13,037, ¶ 16).

159. *See id.* (citations omitted).

160. *Id.* at 661.

161. *See id.* (“In the *Order*, the [FCC] does not assert ancillary authority based on this narrow grant of regulatory power. Instead, the *Order* rests on the premise that section [151] gives the [FCC] ancillary authority to ensure reasonable rates for *all*

under section 623 was lacking.<sup>162</sup>

Ultimately the court, ruling in favor of Comcast, decisively stated its holding: “Because the [FCC] has failed to tie its assertion of ancillary authority over Comcast’s Internet service to any ‘statutorily mandated responsibility,’ we grant the petition for review and vacate the *Order*.”<sup>163</sup> With the court having eliminated sections 706, 256, 257, 201, and 623 of the Telecommunications Act of 1996 as pillars on which to rest the FCC’s exercise of ancillary jurisdiction over Comcast’s network management techniques, the court single-handedly forced the FCC to reconsider its entire approach to the regulation of net neutrality.

#### E. *The Comcast Decision’s Aftermath and the Third Way*

For the FCC, the aftermath was significant. Not only was the ruling an embarrassingly decisive victory in favor of Comcast, but the ruling itself cast doubt upon whether the FCC even *had* the authority to regulate ISPs under the current legal landscape.<sup>164</sup> However, such pessimism was short-lived. In a memorandum released by FCC Chairman Julius Genachowski on May 6, 2010, Genachowski acknowledged the opinion “cast[s] serious doubt on the particular legal theory the [FCC] used for the past few years” and subsequently introduced three possible options being considered to provide “the soundest and most appropriate legal grounding to let the FCC carry out what almost everyone agrees to be necessary functions regarding broadband communications.”<sup>165</sup> The first option presented is for the FCC

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communication services, including those . . . over which it has no express regulatory authority. . . . [Precedent] . . . bar[s] this expansive theory of ancillary authority.” (citing *Comcast Corp.*, 23 F.C.C.R. at 13,037–38, ¶ 17)).

162. *See id.*

163. *Id.* (quoting *Am. Library Ass’n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005)).

164. *See* Editorial, *The F.C.C. and the Internet*, N.Y. TIMES, Apr. 19, 2010, at A22, available at <http://www.nytimes.com/2010/04/19/opinion/19mon1.html/> (“The decision, in the words of the F.C.C.’s general counsel, Austin Schlick, undermines the agency’s ability to serve as ‘the cop on the beat for 21st-century communications networks.’”); *see also* Editorial, *You Can’t Afford to Be Neutral on Net Neutrality*, MILWAUKEE J. SENTINEL, Apr. 24, 2010, available at <http://www.jsonline.com/news/opinion/91954444.html> (“The court ruled, essentially, that the FCC had no authority to enforce net neutrality . . . .”); Joelle Tessler, *FCC Loses Key Ruling on Internet ‘Neutrality,’* YAHOO! FINANCE, Apr. 6, 2010, <http://finance.yahoo.com/news/FCC-loses-key-ruling-on-apf-78990100.html?x=0> (“Tuesday’s unanimous ruling by the three-judge panel was a setback for the FCC because it questioned the agency’s authority to regulate broadband.”).

165. Statement of Julius Genachowski, FCC Chairman, *The Third Way*: A

to “stay the course,”<sup>166</sup> continuing to rely on Title I’s ancillary jurisdiction grant and attempt to indirectly draw upon the Title II provisions that give the FCC express authority over those entities providing telecommunications services.<sup>167</sup> The second would require the FCC to reclassify Internet communications as a telecommunications service, which would reestablish the FCC’s authority over broadband communication networks but would also impose many new regulatory requirements on ISPs.<sup>168</sup> According to Genachowski, neither of these two options is ideal.<sup>169</sup> If the first option were executed, the resulting path would risk “lead[ing] the [FCC] straight back to its current uncertain situation” while wasting time critical to the effective improvement of broadband.<sup>170</sup> Ultimately, such an ancillary jurisdiction-based approach would be uncertain and would have “a serious risk of failure in court.”<sup>171</sup> On the other hand, if the FCC were to reclassify broadband services, there would be a clarification of the legal basis on which the FCC regulates broadband policy, and an extensive series of ill-suited regulations would be applied to broadband, likely resulting in overregulation that could threaten future development of the Internet.<sup>172</sup>

However, Genachowski proposed a third alternative—the “Third

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Narrowly Tailored Broadband Framework (May 6, 2010), <http://www.broadband.gov/the-third-way-narrowly-tailored-broadband-framework-chairman-julius-genachowski.html>; *see also* Statement of Austin Schlick, FCC General Counsel, A Third-Way Legal Framework for Addressing the Comcast Dilemma (May 6, 2010), <http://www.broadband.gov/third-way-legal-framework-for-addressing-the-comcast-dilemma.html> (expounding on Chairman Genachowski’s statement).

166. Schlick, *supra* note 165.

167. Genachowski, *supra* note 165.

168. *Id.*

169. *See id.*

170. *Id.*; *see also* Schlick, *supra* note 165 (“Any action the [FCC] might take in the broadband area . . . would be subject to challenge on jurisdictional grounds . . . [and] [e]ven if the [FCC] won every case, there would be implementation delays of months or years while legal challenges worked their way through the courts—eons in what the Ninth Circuit has called the ‘quicksilver technological environment’ of broadband.” (quoting *AT&T Corp. v. City of Portland*, 216 F.3d 871, 876 (9th Cir. 2000))).

171. Genachowski, *supra* note 165.

172. *Id.*; *see also* Schlick, *supra* note 165 (“[This] approach would put the Commission on a strong jurisdictional footing in future broadband rulemakings and adjudications, . . . [b]ut this full Title II approach would trigger a detailed regulatory regime (comprising 48 sections of the United States Code) that the Commission has successfully refrained from applying to broadband Internet services. . . . [T]hose rules would be inconsistent with the current consensus approach of regulatory restraint.”).

Way”—a narrow approach in which the FCC would “[r]ecognize the transmission component of broadband access service . . . as a telecommunications service,” utilize a limited range of Title II provisions that had been previously considered within the FCC’s purview in regulating broadband pre-*Comcast*, renounce applying Communications Act sections “that are unnecessary and inappropriate for broadband access service,” and establish meaningful regulatory boundaries in order to protect against overzealous regulation.<sup>173</sup> The Third Way would strike an appropriate balance for the FCC. It would establish a firm legal ground on which the FCC could rely in regulation.<sup>174</sup> The narrow approach would permit the FCC to regulate the transmission of information over ISPs’ networks but not allow the FCC to regulate the Internet itself.<sup>175</sup> Even more, by providing decipherable boundaries in which the FCC must operate, it would provide assurances that current and future broadband initiatives—with which the FCC is charged—are compatible with this approach and are legally valid.<sup>176</sup>

#### VI. POST-COMCAST AND THE COMCAST APPEAL

It can generally be agreed upon that the *Comcast* decision and its appeal were critical decisions for the issue of net neutrality; however, one’s opinion of the magnitude of the impact will likely rest on which side of the debate one sits.

For those who champion net neutrality legislation, these decisions were a mixed victory. On the one hand, the FCC demonstrated it was willing to enforce net neutrality through its Internet Policy Statement. On the other hand, the D.C. Circuit’s vacation of the FCC’s original order severely hampered the ability of the FCC to rely on ancillary jurisdiction to enforce its Internet Policy Statement. While the FCC’s order applied very narrowly—on its face, it applied only to Comcast—the D.C. Circuit’s ruling effectively, swiftly, and broadly destroyed a cornerstone of the FCC’s legal strategy. The reversal functioned not only as a narrow reversal of the FCC’s earlier decision concerning Comcast specifically, but amplified that reversal into a broad condemnation of the FCC’s overall tactics in broadband regulation.

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173. Genachowski, *supra* note 165; *see also* Schlick, *supra* note 165 (explaining the “Third Way” in greater depth).

174. Genachowski, *supra* note 165.

175. *See* Schlick, *supra* note 165.

176. *See* Genachowski, *supra* note 165.

For those who are less-than-zealous advocates of formal and legislated net neutrality—ISPs and other companies who might be “negatively” affected by such legislation—the reversal is most welcomed. Traditionally, ISPs have had wide latitude in regulating Internet traffic to control for irregularities, not unlike other industries that are given self-regulation. The FCC’s decision, although later vacated, sent notice to these potential offenders that if jurisdiction exists, they too could be held responsible if they unreasonably discriminate against traffic over their network and do not carefully tailor the discrimination to the substantial interest of regulating their networks. Noncompliance would likely have grave consequences for ISPs—if Comcast would have violated the FCC’s orders prior to the orders being vacated, an interim injunction automatically would have taken effect, forcing Comcast to suspend its offending operations.<sup>177</sup> In turn, the FCC’s Enforcement Bureau immediately would have ordered Comcast to show cause why a permanent cease-and-desist letter should not have been issued against it and a hearing would have been scheduled.<sup>178</sup> Further, because very little precedent exists aside from the *Comcast* decision, it would be difficult for ISPs to determine whether actions they might take in regulating their networks might qualify as unreasonable, potentially causing the FCC to invoke its jurisdiction and haul that ISP into a hearing for the purpose of defending itself.

The reversal of *Comcast* alters the balance of power between the FCC and the ISPs. Because the very basis of the FCC’s regulation—ancillary jurisdiction—was held inapplicable by the D.C. Circuit, authority was effectively stripped from the FCC to regulate the ISPs’ network management practices, permitting the ISPs to engage in self-regulation in the true sense of the word. The ISPs, and not the FCC, suddenly found themselves with the ability to dictate what their network management practices would be without having to answer to the FCC.

The D.C. Circuit’s reversal, though, was nothing short of a Pyrrhic victory for Comcast. Although the decision appears to be a win for Comcast, it is likely to become “the worst-case outcome from the perspective of the phone and cable companies.”<sup>179</sup> As the policy director for the public interest group Free Press— which filed the original complaint against Comcast— Ben Scott stated in an interview regarding the

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177. Comcast Corp., 23 F.C.C.R. 13,028, 13,060 (2008), *vacated*, Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

178. *Id.*

179. Tessler, *supra* note 164.

appellate decision, “Comcast [essentially] swung an ax at the FCC to protest the BitTorrent order, . . . [a]nd they sliced right through the FCC’s arm and plunged the ax into their own back.”<sup>180</sup> By challenging the FCC’s jurisdiction in regulating Comcast’s network management practices, Comcast forced the FCC’s hand. In proposing the Third Way, FCC Chairman Julius Genachowski and General Counsel Austin Schlick will attempt to reshape the legal landscape to its pre-*Comcast* condition. In order to do so, the FCC would reclassify high-speed Internet access as a Title II service, subjecting such access to greater regulatory authority of the FCC.<sup>181</sup> Further, the FCC would stick to six main sections to maintain its authority—201, 202, 208, 254, 222, and 255.<sup>182</sup> When sections 201, 202, and 208 are combined they “collectively forbid unreasonable denials of service and other unjust practices, and allow the [FCC] to enforce their prohibition” and are considered the heart of the net neutrality movement.<sup>183</sup> Sections 254, 222, and 255, on the other hand, are other devices the FCC intends on using to implement the FCC’s wider charge of national broadband deployment, including permitting the reformation of the Universal Service Fund to help pay for broadband development, requiring ISPs to protect the confidentiality of their consumers, and requiring ISPs to make their services and equipment accessible to consumers with disabilities, to the extent this is reasonably achievable.<sup>184</sup> Clearly, a shifting reliance to these sections was an avenue that was unforeseeable to Comcast when it originally challenged the Order, and could place Comcast back into its starting position, subject to the jurisdiction and rules of the same federal agency it originally sought to avoid.

Regardless, the *Comcast* decision and its appeal do inform the legal community of several things. First, they show the FCC is capable and willing to act in defense of net neutrality. Many proponents of net neutrality have feared that, in absence of legislation protecting net neutrality, ISPs and related companies would trample their way over the Internet, serving their interests ahead of their subscribers. The FCC

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180. *Id.*

181. Schlick, *supra* note 165.

182. *See id.*

183. Stacey Higginbotham, *How the FCC Plans to Regulate Broadband*, GIGAOM, May 6, 2010, <http://gigaom.com/2010/05/06/fcc-reclassify-broadband/> (stating sections 201, 202, and 208 are “pretty much what the net neutrality docket is trying to codify”).

184. *Id.*

decision and the appeal are decisive signals that despite the fact the FCC's original approach for regulation was held invalid, the FCC is still willing to fight for the principle of net neutrality by resorting to alternate legal grounds. Further, it shows the FCC believes it has the legal authority to enforce net neutrality as a guiding principle and is willing to act upon it.

Second, the original *Comcast* decision also indicates that in the event the FCC successfully establishes jurisdiction based on sections 201, 202, and 255, it will not utilize general rulemaking as a regulatory means. Instead, it will likely approach alleged violations on a case-by-case basis.<sup>185</sup> By utilizing a case-by-case approach in enforcing net neutrality, the FCC guarantees any adjudicative measures it initiates will be expensive and arduous. The proceedings of the original *Comcast* decision, for example, took place in two separate places in the United States.

[T]he [FCC] held public hearings on the complaint [of Free Press] . . . at Harvard Law School in Cambridge, Massachusetts, on February 25, 2008, and at Stanford Law School in Palo Alto, California, on April 17, 2008, with testimony from a diverse panel of experts—both technical and legal, industry and academic—along with numerous members of the public.<sup>186</sup>

Arguably, the magnitude of the effort exerted by the FCC<sup>187</sup> could have been warranted in the original decision because of its lack of precedent and novelty of the issue, but the FCC has created the expectation that every time an alleged violation arises, it will proceed as it did in the *Comcast* action or risk being viewed as not providing a full and fair trial to the defendant.

The *Comcast* decision and its appeal also reveal inherent flaws in the process of allowing the FCC to regulate net neutrality. Government agencies are often susceptible to agency capture and iron triangles. Agency capture takes place when “agencies are captive to the clientele

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185. See *Comcast Corp.*, 23 F.C.C.R. 13,028, 13,045–46 (2008), *vacated*, *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (“[W]e . . . choose to adjudicate disputes regarding federal Internet policy on a case-by-case basis.”).

186. *Id.* at 13,033.

187. *Id.* at 13,081 (statement of Commissioner Jonathan A. Adelstein) (“[R]arely has this Commission conducted such intensive fact-finding. We have witnessed nine months of filings and two hearings to glean testimony from providers, legal experts, engineers, entrepreneurs, scholars, consumer advocates, and many others. We have heard from thousands of individual consumers who have filed comments with us.”).



they serve—the railroad industry, truckers, or farmers.”<sup>188</sup> In an agency capture, the agency would become so closely tied with the industry it regulates it becomes virtually an extension of the industry itself, no longer regulating in the interests of the federal government but instead in the interests of the “regulated” industry, perhaps in the form of relaxed rules and lighter regulation. Iron triangles, on the other hand, “assume more-complex relations whereby congressional committees, agency clientele, and agency personnel all enjoy low-visibility cordial relations and produce policy that favors all parties involved. These triangles are characterized by consensus, a limited number of participants, and policy expansion.”<sup>189</sup> An agency which falls into an iron triangle operates as a piece of a larger system in which interest groups give Congress electoral support, which in turn provides funding and political support to the agency, which in turn provides low regulation and special favors to the interest group. The FCC, being a federal agency, runs the risk of falling victim to both and making itself more of an arbitrator and less like a regulator.<sup>190</sup> When such an agency’s power is virtually plenary, the stakes become higher. In the *Comcast* decision, the Commission’s order may be reflective of these theories because of the arguably light remedy ordered against Comcast. However, the FCC’s actions in light of the *Comcast* appeal seem to suggest the opposite—neither of these concepts is fully applicable, at least not yet. The FCC, reacting to its legal defeat, responded not by surrendering in its fight for net neutrality, but rather by proffering an alternative regulatory scheme that would enable the FCC to protect net neutrality. This proposal, combined with the public outcry of ISPs and related companies against such a proposal, indicates the FCC has not merely become a powerless or emasculated puppet of the industry but instead stands upright

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188. Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 249 (1998) (citation omitted).

189. *Id.*

190. Interestingly, at least one of the Commission members favored such an approach of arbitration.

Rather than assuming the role of ‘world wide web enforcer,’ perhaps the best way for the FCC to fulfill our duties under *Internet Policy Statement* would be to assume the role of mediator or arbitrator, helping to facilitate agreements among the various sectors of the broadband internet industry to create an experience that benefits all users, rather than issuing broad mandates to protect the few.

Comcast Corp., 23 F.C.C.R. at 13,085 (statement of Commissioner Deborah Taylor Tate).

on its own two feet, actively seeking an approach to salvage its regulation of net neutrality.

Lastly, the *Comcast* decision and its appeal demonstrate the divisive nature of the net neutrality debate, especially among the branches of the federal government. Should net neutrality's fate rest in the hands of the FCC or should Congress take control and legislate net neutrality? A significant portion of congressional Republicans and Democrats favor the latter approach. On May 24, 2010, over seventy Democrats penned a letter to FCC Chairman Julius Genachowski articulating their frustration with the FCC's attempts to regulate net neutrality and expressing their preference.<sup>191</sup> Not to be outdone, on May 28, 2010, 171 congressional Republicans also sent a letter to Chairman Genachowski expressing their preference for congressional legislation over the FCC's new legal approach.<sup>192</sup> Both letters suggest remarkable congressional support for removing the primary responsibility of protecting net neutrality from the purview of the FCC and vesting that responsibility with Congress.

As idyllic as such a preference sounds, however, the realities of Congressional action doom an outcome that would sufficiently protect net neutrality. Congress rarely acts unitarily. It is plagued by the collective-action and prisoner's dilemmas. Each of its 535 members has powerful constituents, all clamoring for something different. It is extremely difficult, in light of this, for Congress to become a cohesive group, with each member seeking the same ends. More often than not, members tend to focus on their constituents and their needs, and not the collective good.

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191. Letter to Julius Genachowski, FCC Chairman (May 24, 2010), *available at* [http://www.policybytes.org/Blog/PolicyBytes.nsf/dx/TitleII\\_FCC\\_24May2010.pdf/\\$file/TitleII\\_FCC\\_24May2010.pdf](http://www.policybytes.org/Blog/PolicyBytes.nsf/dx/TitleII_FCC_24May2010.pdf/$file/TitleII_FCC_24May2010.pdf) (“[W]e have serious concerns about the proposed new regulatory framework for broadband and the Internet. The expanded FCC jurisdiction over broadband that has been proposed and the manner in which it would be implemented are unprecedented and create regulatory uncertainty. . . . The significant regulatory impact of reclassifying broadband service is not something that should be taken lightly and should not be done without additional direction from Congress.”).

192. Letter to Julius Genachowski, FCC Chairman (May 28, 2010), *available at* <http://www.reclaimthemedial.org/files/GOPBroadbandletter-28May10.pdf> (“We write to encourage you not to proceed down your announced path to reclassify broadband service as a phone service under Title II of the Communications Act. Such a significant interpretive change to the Communications Act should be made by Congress. . . . In the [*Comcast* appeal], the D.C. Circuit explained that ‘statements of congressional policy can help delineate the contours of statutory authority.’ Congress issued just such a policy statement in 1996 when it added section 230 to the Communications Act. . . . Whether the country should stray from that legislated posture . . . is a matter best left to Congress.”).

The inherent diversity of views, opinions, and problems of congressional group action thus poses a serious threat to net neutrality. By sending these letters and asking the FCC to defer to Congress, these representatives have essentially asked the FCC to risk that such legislation will not materialize.<sup>193</sup> Because of the gravity of the consequences of not properly regulating net neutrality—including, but not limited to, stifling innovation and development of a more robust framework on which our commerce, industry, and military increasingly rely—the FCC cannot simply allow complete deference to Congress in this arena. To protect the integrity of the Internet and ensure its proper maturation, the FCC must be permitted to utilize its technical expertise and promote net neutrality through its use of the Third Way. Only such a cautious approach would preserve the Internet’s vitality and respect the delicate balance that must be struck when regulating the Internet.

## VII. CONCLUSION

The topic of net neutrality has arisen as a hot-button issue and the center of much divisiveness; however, those familiar with it know it is not an issue about freedom on the Internet as much as it is an issue about control. Although many clamor for legislation to protect net neutrality, the FCC, through *Comcast* and its appeal, has demonstrated it is willing to defend the public’s beloved cause. Further, because of the novelty, the meteoric rise in popularity of the Internet, and historically light regulation, it would behoove the common supporter of net neutrality legislation to—ever so watchfully—permit the FCC to exercise its expertise and regulate net neutrality through utilization of the Third Way and, if the

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193. There are certain situations where congressional inaction could be detrimental. The failure of Congress to reinstate the federal estate tax for 2010 is one such example. See, e.g., David Kocieniewski, *Legacy for One Billionaire: Death, but No Taxes*, N.Y. TIMES, June 9, 2010, at A1. In March 2010, a Texas billionaire died from a brain hemorrhage. *Id.* Ranked by *Forbes* as the seventy-fourth richest man in the world, he accumulated a personal wealth of \$9 billion from his network of natural gas processing plants and pipelines. *Id.* If he had died in 2009, his estate would have been subject to a federal estate tax of at least 45%. *Id.* If he had died in 2011, his estate would have been subject to a minimum estate tax of 55%. *Id.* However, “because Congress allowed the tax to elapse for [2010] and gave all estates a free pass,” his estate was not subject to the tax. *Id.* This is a key example of the implications of congressional inaction. Imported into the net neutrality debate, if the FCC were to cease pursuing the Third Way, and Congress failed to act appropriately in protecting net neutrality, the results could have serious repercussions, potentially slowing or even reversing the decades of progress the Internet has enjoyed and compromising further development.

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circumstances warrant such action, demand formal congressional legislation to grant the FCC the adequate tools it needs to ensure net neutrality via congressional statute.

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