

The FCC's Authority to Regulate Net Neutrality After *Comcast v. FCC*

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Summary

A major debate over the government's role with respect to the Internet is currently occurring. Legally, one of the major questions appears to be whether the Federal Communications Commission (FCC or Commission) currently has the authority to regulate the ways in which Internet service providers (ISPs) manage Internet traffic over their networks. The FCC adopted an Internet Policy Statement in 2005 that expressed the agency's support for a policy of non-discrimination toward Internet traffic, subject to reasonable network management.

In 2007, through various experiments by the media, most notably the Associated Press, it became clear that Comcast was intermittently blocking the use of an application called BitTorrent™ and, possibly, other peer-to-peer (P2P) file sharing programs on its network. Comcast eventually admitted to the practice and agreed to cease blocking the use of the P2P applications on its network. However, Comcast maintains that its actions were reasonable network management and not in violation of the FCC policy. In response to a petition from Free Press for a declaratory ruling that Comcast's blocking of P2P applications was not "reasonable network management," the FCC conducted an investigation into Comcast's network management practices. The FCC determined that Comcast had violated the agency's Internet Policy Statement when it blocked certain applications on its network and that the practice at issue in this case was not "reasonable network management." The FCC declined to fine Comcast because its Internet Policy Statement had never previously been the basis for enforcement forfeitures. Comcast appealed this decision to the U.S. Court of Appeals for the D.C. Circuit, as did other public interest groups.

The D.C. Circuit ruled on April 6, 2010, that the FCC could not base ancillary authority to regulate cable Internet services solely upon broad policy goals contained elsewhere in the Communications Act. Whatever the merits of other jurisdictional arguments the FCC may advance, the court found that the FCC did not have jurisdiction to enforce its network management principles on the basis it had advanced in that case. The court did not address the other questions posed by the case, including whether the FCC could proceed via adjudication.

The court's ruling has thrown into doubt the FCC's authority to regulate Internet network management. On December 21, 2010, the Commission adopted new open Internet rules in its Open Internet Order. The Commission cited Section 706 of the Telecommunications Act of 1996 as well as authority ancillary to its statutory mandates in Titles II, III, and VI of the Communications Act of 1934. Two commissioners dissented. Commissioner McDowell published a lengthy rebuttal to the Commission's jurisdictional argument in his dissenting statement. This report will analyze both the Commission's jurisdictional arguments and Commissioner McDowell's counter-arguments. The most recent rules were published in the *Federal Register* on September 23, 2011. The rules have been challenged in court. The appeals by various parties have been consolidated in the D.C. Circuit. As of April 23, 2013, oral arguments in the case had yet to be scheduled. However, the parties have submitted their briefs to the court, and the case is expected to proceed.

For further information on the policy aspects of this debate, see CRS Report RS22444, *Net Neutrality: Background and Issues*, by Angele A. Gilroy.

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Introduction

Some degree of Internet traffic management is necessary for networks to function effectively. For example, in order for voice conversations to occur over the Internet, the data packets encoding the communications must arrive in rapid sequence. Long delays between the arrival of voice data packets would make voice conversations over the Internet impossible to conduct. Prioritization of voice data packets over other packets traveling simultaneously over the same network ensures clear voice transmissions, while minimally delaying other network traffic. Logically, if network managers have the power to prioritize data packets, they also have the power to subordinate them. This means network managers have the power to render the applications that depend on packet-prioritization (like voice or video applications) useless. Accordingly, there must be a line between network management that is necessary for the Internet to provide quality service to users, and network management that is anti-competitive or otherwise harmful to the free exchange of information. Questions have arisen regarding where that line is and who has the ability to draw it. For more information see CRS Report RS22444, *Net Neutrality: Background and Issues*, by Angele A. Gilroy.

In an attempt to separate the unnecessary network management practices from the necessary, the Federal Communications Commission (FCC) issued an Internet Policy Statement in 2005. The Internet Policy Statement endeavored to ensure that broadband consumers would have access to all lawful content on the Internet and that all lawful applications could be used on networks. These rights may be limited by the needs of broadband providers to reasonably manage their networks. The Policy Statement was not a regulation carrying the force of law; therefore, violation of the Policy Statement presumably would not result in liability. However, as the Internet became more prominent, and traffic management became more critical to communication, whether companies were abiding by the Policy Statement became a matter of increasing concern for the FCC.

In 2007, through various experiments by the media, most notably the Associated Press, it was discovered that Comcast Corporation (Comcast) was intermittently interfering with the use of an application called BitTorrent™ and, possibly, other peer-to-peer (P2P) file sharing programs on its network, as a method of traffic management. While initially denying the accusations, Comcast eventually admitted to the practice and agreed to cease blocking the use of the P2P applications on its network. However, Comcast maintains that its actions in relation to P2P programs were reasonable network management and not in violation of the FCC's policy.

In response to a petition from Free Press for a declaratory ruling that Comcast's blocking of P2P applications was not "reasonable network management," the FCC conducted an investigation into Comcast's network management practices. The FCC determined that Comcast had violated the agency's Internet Policy Statement when it blocked certain applications on its network and that the practice at issue in this case was not "reasonable network management." Comcast disputes the FCC's authority to issue such a ruling and appealed the decision to the U.S. Court of Appeals for the D.C. Circuit. The court held that the FCC did not make a proper argument for asserting ancillary jurisdiction over network management practices.

The court's ruling has thrown into doubt the FCC's authority to regulate Internet network management. On December 21, 2010, the Commission adopted new open Internet rules in its Open Internet Order. The FCC has attempted again to use its existing authority to justify regulations of Internet network management. The Commission cited Section 706 of the

Telecommunications Act of 1996 as well as authority ancillary to its statutory mandates in Titles II, III, and VI of the Communications Act of 1934 as the provisions granted the agency the jurisdiction to issue and enforce the rules.. Two commissioners dissented. Commissioner McDowell published a lengthy rebuttal to the Commission's jurisdictional argument in his dissenting statement. This report will analyze both the Commission's jurisdictional arguments and Commissioner McDowell's counter-arguments.

FCC's Network Management Principles

Federal policy towards the Internet, as embodied in Section 230(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, is "to preserve the vibrant and competitive free market that presently exists for the Internet" and "to promote the continued development of the Internet."[1] In Section 706 of the Communications Act, Congress instructs the FCC to encourage "the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[2]

Basing its authority on these two provisions, in 2005, the FCC issued a policy statement intended to offer guidance to network owners regarding the rights of consumers accessing the Internet through their networks.[3] The FCC acknowledged that information service providers (those who provide access to the Internet) are not governed by stringent Title II common carrier regulations, but asserted that it had jurisdiction to issue the Policy Statement pursuant to its Title I ancillary jurisdiction.[4] Title I ancillary jurisdiction permits the Commission to issue additional regulatory obligations in order to regulate interstate and foreign communications in furtherance of the Communications Act. In the FCC's assessment, Title I ancillary jurisdiction granted the FCC ample authority to take steps to ensure that broadband networks are widely deployed, open, affordable and accessible to all and to ensure that Internet services are operated in a neutral manner. Accordingly, the FCC adopted the following principles to encourage broadband deployment and to preserve and promote the open and interconnected nature of the public Internet:

- consumers are entitled to access the lawful Internet content of their choice;
- consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement;
- consumers are entitled to connect their choice of legal devices that do not harm the network; and

[1] 47 U.S.C. §230(b)(2).

[2] 47 U.S.C. §157 (incorporating §706 of the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (1996)).

[3] In the Matters of the Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, 20 FCC Rcd 14986 (2005) [hereinafter FCC's Network Management Principles].

[4] *Id*. at 14988.

- consumers are entitled to competition among network providers, application and service providers, and content providers.[5]

It is also important to note that, upon adopting these precepts, the FCC expressly stated that it was "not adopting rules in this policy statement" and that the principles adopted were "subject to reasonable network management."[6] The Commission termed the Policy Statement to be guidance and insight into its approach to the Internet that was intended to be consistent with Congressional directives. The Commission did not put the network management principles out for public comment, nor did it publish the principles in the Code of Federal Regulations.

The Ruling Against Comcast

In 2007, the Associated Press reported the results of various tests it had conducted to investigate whether Comcast was blocking P2P applications on its network.[7] The AP concluded that Comcast "actively interfere[d] with attempts by some of its high-speed Internet subscribers to share files online."[8] The AP alleged that Comcast was specifically targeting P2P applications, such as Gnutella and BitTorrent™, preventing anyone who wished to use these applications from being able to do so in an effective way. The Electronic Frontier Foundation conducted similar tests with similar results. Comcast admitted to interfering with P2P applications on occasions of high volume traffic, but maintained that its interferences were a reasonable network management practice.[9]

As a result, Free Press, a non-profit organization that advocates for media reform, filed a complaint against Comcast with the FCC. The complaint asked the FCC to declare "that an Internet service provider violates the [Commission's] Internet Policy Statement when it intentionally degrades a targeted Internet application."[10] Free Press also filed a petition with the Commission requesting that the agency issue a declaratory ruling that would clarify that any Internet service provider that intentionally degrades or blocks particular applications would be in violation of the FCC's Internet Policy Statement. The Commission put the petition out for public comment.[11]

After hearing comments from the public and from industry participants, the Commission determined that Comcast had violated its Internet Policy Statement, because its practice of degrading usage of P2P applications prevents consumers from using the lawful application of their choice and does not fall under the exception for reasonable network management.[12] The

[5] *Id*.

[6] *Id*. at n. 15.

[7] Peter Svensson, Comcast Blocks Some Internet Traffic, AP Testing Shows, Associated Press, October 19, 2007.

[8] *Id.*

[9] Letter from Mary McManus, Senior Director of FCC and Regulatory Policy, Comcast Corporation to Kris A. Monteith, Chief, Enforcement Bureaus, File No. EB-08-OJ-1518, at 5 (January 25, 2008) (Comcast Response Letter).

[10] Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, File No. EB-08-IH-1518 (November 1, 2007).

[11] Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management, WC Docket No. 07-52, Public Notice, 23 FCC Rcd 343 (WCB 2008).

[12] In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications and Broadband Industry Practices Petition of Free Press et al. for Declaratory (continued...)

Commission was particularly troubled by what it determined to be Comcast's lack of transparency regarding the company's network management practices.[13] The Commission found that Comcast was less than forthcoming about its network management practices and that only after independent evidence emerged that Comcast was not being truthful did the corporation admit to its true methods of traffic management related to P2P programs.[14] The Commission noted that "[a] hallmark of whether something is reasonable is whether a provider is willing to disclose to its customers what it is doing."[15] Since Comcast, evidently, was not disclosing its practices, the Commission viewed its actions as suspect. Furthermore, the Commission found there were other effective methods for managing the heavy traffic generated by P2P programs that fell short of interfering with the applications' ability to function.[16]

Despite determining in its adjudication that Comcast had violated its Internet Policy Statement, the Commission did not issue a forfeiture order against the company.[17] The Commission also declined to issue an injunction or a cease-and-desist order against the company. The company had already agreed to cease its objectionable practices and the Commission determined that a reasonable transition period was necessary.[18] To monitor Comcast's compliance, the Commission required Comcast submit to the Commission, within 30 days of the order: (1) the precise contours of its previous network management practices; (2) a compliance plan "with interim benchmarks that describe[d] how it intend[ed] to transition from discriminatory to nondiscriminatory network management practices [by the end of 2008]; and (3) publicly disclose its newly implemented and protocol-agnostic network management practices.[19]

Comcast filed the requested documents with the FCC on September 19, 2008.[20] Comcast also filed a certification with the FCC on January 5, 2009, affirming that the company had fulfilled its promise to move to protocol-agnostic network management practices.[21] The Commission sent a

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Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management," 23 FCC Rcd 13028 (2008) [hereinafter Comcast Decision].

[13] *Id*. at para. 52.

[14] *Id*. at para. 53.

[15] *Id*.

[16] *Id*. at para. 49.

[17] *Id*. at para. 54. Because the Commission was enforcing a policy statement that had never previously been enforced, the agency did not issue a forfeiture order in this particular case. The Commission reserved the right to proceed by adjudication in the future, and believed it could issue forfeiture orders for future violations of the network management principles.

[18] *Id*.

[19] *Id*. Failure to submit the required documents and / or failure to complete its transition to protocol-agnostic network management would have resulted in further enforcement action by the Commission. *Id*. at para. 55.

[20] Letter from Kathryn A. Zachem, Vice President, Regulatory and State Legislative Affairs, Comcast to Marlene H. Dortch, Secretary, FCC, Re: In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices: Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management," File No. EB-08-IH-1518, WC Docket No. 07-52 (September 19, 2008).

[21] Letter from Kathryn A. Zachem, Vice President, Regulatory and State Legislative Affairs, Comcast to Marelene Dortch, Secretary, FCC, Re: In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices: Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management," File No. EB-08-IH-1518, WC Docket No. 07-52 (continued...)

letter to Comcast on January 18, 2009 asking the company to clarify its treatment of VoIP services.[22] The Commission expressed concern that Comcast made no distinction between VoIP services in its filing, but, apparently, treats its own VoIP service offering differently than it treats other VoIP services. Furthermore, the Commission noted that if Comcast's VoIP service is a separate offering of a telephone service (distinct from the broadband offering), then it is possible that it should be classified as a "telecommunications service." Telecommunications services are subject to more stringent regulations under Title II of the Communications. The Commission, therefore, asked Comcast to explain why it omitted the effects its new network management practices would have on Comcast's VoIP service from its required filings and why Comcast's VoIP service should not be treated as a telecommunications service under Title II.

Comcast filed its answer with the Commission on January 30, 2009.[23] The company argued that Comcast's voice service is a separate service from its broadband offering. In the company's opinion, it, therefore, was not part of the ongoing discussions about Comcast's broadband network management practices and is not affected by the newly implemented management regime. Comcast also argued that the question of whether Comcast's voice service should be treated as a telecommunications service is irrelevant to the current proceedings, but, nonetheless, asserted that Comcast's voice offering is not a telecommunications service. The Commission has yet to take any action in response to Comcast's letter, though the issues raised by the Commission related to Comcast's VoIP services are more generally addressed in the Commission's Open Internet Order, discussed below.

Though Comcast voluntarily ceased the network management practices that the Commission found objectionable, Comcast appealed the decision of the Commission to the D.C. Circuit.[24]

Court Opinion in Comcast v. FCC

On April 6, 2010, the D.C. Circuit vacated the FCC's order against Comcast because the FCC had failed to tie its assertion of ancillary authority to any "statutorily mandated responsibility."[25] After dispensing with the FCC's preliminary arguments against the court's jurisdiction, the panel

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(January 5, 2009).

[22] Letter from Dana R. Shaffer, Chief, Wireline Competition Bureau, and Matthew Berry, General Counsel, FCC, to Katherine A. Zachem, Vice President, Regulatory Affairs, Comcast Corporation, Re: In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices: Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management," File No. EB-08-IH-1518, WC Docket No. 07-52 (January 19, 2009).

[23] Letter from Kathryn A. Zachem, Vice President, Regulatory and State Legislative Affairs, Comcast to Dana R. Shaffer, Chief, Wireline Competition Bureau, and Matthew Berry, General Counsel, FCC Re: In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices: Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management," File No. EB-08-IH-1518, WC Docket No. 07-52 (January 30, 2009).

[24] Petition for Review and, in the Alternative, Notice of Appeal, Comcast Corporation v. Federal Communications Commission, (No. 08-____) (D.C. Cir. 2008).

[25] Comcast v. Federal Communications Commission, No. 08-1291, 2010 U.S. App. LEXIS 7039 (D.C. Cir. April 6, 2010). The court did not address the question of whether the FCC acted appropriately in attempting to enforce the policy statement through an adjudication because the FCC did not clear its jurisdictional hurdle.

applied the test for ancillary jurisdiction it had announced in *American Library Assn. v. FCC*,[26] and found the FCC's argument insufficient to satisfy the standards.

The Supreme Court recognizes that the FCC has so-called "ancillary authority" to regulate services that it has not been granted express authority to regulate.[27] The FCC did not claim that it had express authority to regulate cable Internet service. Rather, the agency argued that regulation of Internet services was "reasonably ancillary to the ... effective performance of its statutorily mandated responsibilities."[28] The FCC relied primarily upon Section 230(b) of the Communications Act, which states that "it 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."[29] The FCC argued that this statement of policy, along with the general rulemaking authority in Title I, was sufficient to assert ancillary jurisdiction over cable Internet network management.

In *American Library Assn. v. FCC,* the D.C. Circuit recently held that the FCC may assert its ancillary authority when two conditions are met: (1) the Commission's general jurisdiction grant under Title I covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its *statutorily mandated responsibilities*.[30] The court agreed that condition one had been met. Cable Internet services falls within the general jurisdiction granted to the Commission under Title I. The court held, however, that the FCC had failed to satisfy the second condition because statements of policy could not be considered to be statutorily mandated responsibilities under the Communications Act.[31]

The court detailed each case heard by the Supreme Court and by the D.C. Circuit where ancillary jurisdiction was the basis for the FCC's authority to act in the case. In each case, the court found that where the FCC had ancillary authority to exercise jurisdiction, the FCC's argument for jurisdiction related to a specific grant of authority to regulate in a related area and did not rely solely on a policy statement, as the Commission had done here. The court expressed concern that if it had adopted the FCC's argument and allowed ancillary authority to rest on statements of policy in the Communications Act, the FCC's authority to regulate would have been nearly boundless and the agency could find reason to regulate in many new areas where Congress had not granted specific authority to do so.

The court also addressed the other statutory provisions upon which the FCC claimed to rely for jurisdiction.[32] Some of these statutory provisions, such as Section 706 of the Communications Act,[33] arguably might grant the FCC specific authority to regulate in an area reasonably related to

[26] 403 F. 3d 689, 691-92 (D.C. Cir. 2005).

[27] *See* United States v. Southwestern Cable Co., 392 U.S. 157 (1968), United States v. Midwest Video Corp., 406 U.S. 649 (1972), FCC v. Midwest Video Corp., 440 U.S. 589 (1979).

[28] Comcast v. Federal Communications Commission, 600 F. 3d 642 (D.C. Cir. 2010).

[29] *Id*. at 649.

[30] *Id*. at 45.

[31] *Id*. at 653.

[32] *Id*. at 654 - 656.

[33] Section 706 of the Communications Act states that "the Commission ... shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." The court agreed that this could be a direct mandate to regulate. The Commission, however, is legally bound by its previous interpretation of §706. The Commission had previously found that §706 did not constitute an independent grant of authority. In the (continued...)

the regulation of cable Internet services. In each case, however, the court found the FCC had failed in some way to properly advance the argument for jurisdiction on the basis of these other statutory provisions. Therefore, the court found that it could not hold that the FCC had ancillary authority to regulate cable Internet services based upon any of these specific grants of regulatory authority.

The Open Internet Rules

The decision of the D.C. Circuit in *Comcast v. FCC*[34] has thrown the agency's current authority to regulate broadband Internet network management into doubt. Broadband Internet services are currently classified as information services, to which Title I of the Communications Act applies.[35] The FCC does not possess direct authority to regulate services classified under Title I,[36] and was unsuccessful in its initial attempt to assert ancillary authority over broadband Internet network management in the *Comcast* case. The agency considered a number of options for moving forward with issuing network management rules.[37] Among them were the potential reclassification of broadband services to bring them under the umbrella of telecommunications services, which the FCC does have direct authority to regulate.[38] In the end, however, the FCC ultimately decided not to reclassify broadband services.[39]

On December 21, 2010, the FCC, in a 3-2 vote along party lines, adopted new net neutrality regulations.[40] The rules were published in the *Federal Register* on September 21, 2011, and will take effect on November 28, 2011.[41] The rules are high-level and general in nature because the FCC plans to enforce the rules through adjudication, on a case-by-case basis. As a result major questions remain regarding the scope and application of the rules, despite the fact that they have been adopted. For example, assuming the FCC has the authority to issue and enforce the rules, it is unclear, because the rules are vague, exactly which actions by broadband service providers the

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court's opinion, the Commission could not rely on §706 as an independent grant of statutory authority in this case, because it had previously held that §706 was not an independent grant of authority and it is bound by its own interpretation of the section. *Id*. at *30 – 31. The Commission does have the option of conducting a rulemaking to reinterpret §706 as an independent grant of regulatory authority. The Commission would have to complete that rulemaking before asserting §706 as a source of ancillary authority. *See* FCC v. Fox Television Stations, Inc., 129 S.Ct. 1800, 1811 (2009).

[34] Comcast v. Federal Communications Commission, 600 F.3d 642 (D.C. Cir. 2010). (*Comcast*) CRS Report R40234, *The FCC's Authority to Regulate Net Neutrality After Comcast v. FCC*, by Kathleen Ann Ruane.

[35] *See*, Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, 17 FCC Rcd 4798 (2002) (Cable Modem Declaratory Ruling).

[36] *Id*.

[37] Press Release, Chairman Julius Genachowski, FCC, The Third Way: A Narrowly Tailored Broadband Framework (May 6, 2010). ["Genachowski Statement"]. Press Release, Austin Schlick, FCC, A Third-Way Legal Framework for Addressing the *Comcast* Dilemma (May 6, 2010). ["Schlick Statement"].

[38] *Id.*

[39] Federal Communications Commission, Chairman Julius Genachowski, Remarks on Preserving Internet Freedom and Openness (December 1, 2010). Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-303136A1.pdf.

[40] In the Matter of Preserving the Open Internet, Broadband Industry Practices, FCC 10-201, GN Docket No. 09-191, WC Docket No. 07-52 (2010) (hereinafter "Open Internet Order").

[41] 76 *Federal Register* 59192 (2011).

FCC will deem in violation of the rules. However, it likely can be presumed that a scenario such as the one presented by the *Comcast* decision, described above, would violate the rules. Another major question is whether the FCC has the authority to issue the rules at all. The FCC did not choose to reclassify broadband Internet access under Title II and, therefore, cannot rely on its clear Title II authority to regulate. Nonetheless, the FCC appears to claim, at least in part, that it possesses direct authority to issue these rules, as well as ancillary authority. Because there is already an unfavorable court decision related to the FCC's ancillary authority in this area, it is unclear whether the agency's new argument to assert such authority will survive a court challenge.

The Rules

The FCC has adopted what it has termed basic rules of the road for broadband Internet access services and traffic management.[42] The Commission contends that the rules are necessary to keep the Internet open to all and to spur investment in new technologies and broadband infrastructure deployment. While the Commission acknowledges that there is only "one Internet," it also concedes that there may be differences in network structure and capabilities. Particularly, the Commission recognizes the difference between the technological capabilities of wireline or fixed broadband access providers and wireless broadband access providers.[43] Wireless, in the Commission's view, is still in the development stages and does not have the large capacities that wireline providers have. For that reason, more content management may be necessary on the part of wireless providers. As a result, the rules the Commission will apply to wireline and wireless are slightly different.

Application

The term "broadband Internet access service" is defined as,

> A mass market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.[44]

This definition applies to all broadband Internet access providers, be they cable, fiber, wireless, or some other access method, that offer their services to retail customers. In other words, they offer their services to residential customers, small businesses, and other end users. The term does not include access services offered to large-scale enterprise customers. Furthermore, the rules apply to all Internet traffic, not just to voice and video services.[45]

[42] *Id*. at ¶ 1.

[43] *Id*. at ¶ 49.

[44] *Id*. at ¶ 44.

[45] *Id*. at ¶ 45.

It is important to note that the rules apply only to Internet access services. They do not apply to so-called "edge service" providers, which are application and Internet content providers.[46] Edge services could encompass anything from blogs, to Google, to so-called app stores. The Commission noted that the Communications Act grants the FCC jurisdiction over "the utilization of networks and spectrum to provide communication by wire or radio."[47] Nonetheless, it appears the Commission may not believe this grant of jurisdiction over the utilization of these networks and spectrum encompasses authority to regulate the content of the communications travelling over those networks and spectrum. However, the Commission has asserted jurisdiction over the contents of communication in the past. For example, the fairness doctrine governed the contents of some broadcast communications.[48] The FCC's indecency regulations also restrict some broadcast content.[49] The Commission does not explicitly state in its order that it does not have jurisdiction to place any regulations on edge services. Given the agency's history of successfully regulating some communication content, the Commission may believe that it does have jurisdiction over edge services and may merely be refraining from exercising its jurisdiction at this time.

Wireline Rules

The Commission has imposed three basic rules on wireline (fixed) broadband service providers: a transparency rule, a rule against blocking, and a rule against unreasonable discrimination. The Commission worded the rules as general principles, but gave guidance to industry regarding what might be considered in compliance and in violation of the rules.

Transparency

The Commission adopted a transparency rule requiring fixed broadband service providers to supply to customers, both on their websites and at the time of sale, disclosure regarding the network management practices the provider employs.[50] This rule is geared toward providing the Commission and the public with a barometer by which to gauge network management. The goal appears to be to empower the public and consumer advocacy groups to hold broadband companies accountable to their own descriptions of their network management practices. The final rule reads,

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[46] *Id*. at ¶ 46.

[47] *Id*. at ¶ 50.

[48] In the Matter of Editorializing by Broadcast Licensees, 13 FCC Rept. 1246 (1949).

[49] See CRS Report RL32222, *Regulation of Broadcast Indecency: Background and Legal Analysis*, by Kathleen Ann Ruane. Despite the fact that the Commission has successfully regulated broadcast content in the past, that does not necessarily mean that the Commission will have the authority to regulate Internet content in the future. Aside from the question of whether the content of communications over the Internet is within the FCC's jurisdiction, the Supreme Court has held on a number of occasions that speech over the broadcast airwaves is entitled to a lower standard of scrutiny than speech over most other forms of media including cable and the Internet. *See* Reno v. ACLU, 521 U.S. 844 (1997)(applying strict scrutiny to regulation of indecent speech over the Internet); Turner Broadcasting v. FCC, 512 622 (1994) (finding regulations of speech over cable in general to be subject to strict scrutiny); FCC v. Pacifica Foundation, 438 U.S. 726 (1978)(upholding regulation of indecent speech over broadcast by applying a form of intermediate scrutiny); Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969)(upholding the constitutionality of the fairness doctrine by applying a form of intermediate scrutiny). Therefore, even if the content of these communications does fall under the FCC's jurisdiction, the constitutional scrutiny the FCC might face should it attempt to burden that speech may prove prohibitive to regulation.

[50] Open Internet Order, *supra* note 83, at ¶ 53.

> A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market and maintain Internet offerings.[51]

The rule is intended to allow discretion to broadband providers in determining exactly what information the providers will disclose. However, the Commission did provide suggestions for the type of information it would expect to see in these disclosures. Specifically the Commission identified three main topics the disclosures likely should cover: network practices, performance characteristics, and commercial terms.[52] Within the network management disclosures the Commission suggested that companies provide information regarding their congestion management practices, their application-specific management practices, and their device attachment rules. Within the performance characteristics section, the Commission suggested including a service description, including the expected performance level of the service, and the impact of specialized services that may be offered. Within the commercial terms section, the Commission has suggested inclusion of information such as pricing; privacy policies, including information regarding how the data collected by the provider is utilized; and redress options for resolving disputes.

The Commission stressed that these suggestions were neither necessary nor all-inclusive of what a broadband service provider should include in its disclosure. Rather, each broadband provider should consider its own network and services and tailor information to fit its particular service. Furthermore, the Commission stressed that this rule does not require broadband providers to disclose proprietary information.

No Blocking Rule

The no blocking rule is intended to ensure that end users can access any lawful content or application they wish over the Internet.[53] The Commission contends that the rule is necessary to ensure openness and competition in the provision of broadband Internet access services. Moreover, most, if not all, major broadband providers currently claim that they do not block any lawful content over their networks. The rule reads,

> A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or nonharmful devices, subject to reasonable network management.[54]

The rule covers all lawful communication over the Internet, including those communications that may not fit cleanly into the definition of application, services, or any other listed item. Furthermore, "no blocking" also means "no impairing or degrading" lawful content so as to render the content unusable, subject to reasonable network management.[55] As an example, applications that deliver video streaming over the Internet require a great deal of Internet

[51] *Id*. at ¶ 54.

[52] *Id* at ¶ 56.

[53] *Id*. at ¶ 62.

[54] *Id*. at ¶ 63.

[55] Open Internet Order, *supra* note 83, at ¶ 66.

capacity. Slowing down the speed at which the video is delivered to the end user may make the video unwatchable or otherwise disrupt the experience. Broadband service providers have the capability to intentionally slow down these delivery speeds. The Commission makes clear that such intentional slowing is a violation of the open Internet rules. However, the rule is subject to reasonable network management. As an example, at times of high volume of Internet traffic, in order to allow all of their customers to have Internet access in a given area, the broadband provider may find it necessary to slow the delivery of online products such as streaming video. Such slowing, when necessary as a management tool, likely would not be considered to be a violation of the no blocking rule, according to the Commission.

No Unreasonable Discrimination Rule

The rule against unreasonable discrimination is distinct from, yet closely related to, the rule against blocking. The unreasonable discrimination rule recognizes that many fixed broadband access providers are also Internet content providers; furthermore, they may have affiliations with some Internet content providers, but not all. As a result, fixed broadband Internet providers have both the capability and the incentive to favor the delivery of their own and their affiliates' Internet content over that of non-affiliated content to their subscribers. The rule, therefore, states,

> A person engaged in the provision of fixed broadband internet access service, insofar as such person is so engaged, shall not unreasonably discriminate in transmitting lawful network traffic over a consumer's broadband Internet access service. Reasonable network management shall not constitute unreasonable discrimination.[56]

The more transparent an access provider is about traffic management, the more likely it will be considered to be reasonable.[57] Furthermore, the more control granted to the end user to manage the content he or she wishes to receive, the more likely the management will be considered to be reasonable. Also, the rule does not preclude fixed broadband Internet providers from developing tiered levels of service, where heavy Internet users could pay more for faster speeds, and lighter users might pay less.[58] Nonetheless, the Commission expressed concern for "pay for priority" agreements wherein a broadband provider and a third party agree to favor some traffic over other traffic.[59] The Commission indicated that pay for priority agreements might violate the unreasonable discrimination prohibition. It is unclear what the difference between tiered services and pay for priority services might be. Presumably, the Commission will flesh out this distinction and many others as cases begin to come before the Commission.

Reasonable Network Management

To provide greater guidance as to what is permissible, the Commission also developed a definition for what activities will be considered to be reasonable network management. The definition reads,

[56] *Id*. at ¶ 68.
[57] *Id*. at ¶ 70.
[58] *Id*. at ¶ 72.
[59] *Id*. at ¶ 76.

> A network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.[60]

Legitimate purposes include, but are not limited to, ensuring network security and integrity, addressing traffic that is unwanted by end users, and reducing or mitigating the effects of congestion on the network. The scope of what constitutes reasonable network management as it is applied to differing network architectures (cable, fiber, wireless, etc.) will be more specifically defined by the Commission on a case-by-case basis as investigations of rule violations begin.

Wireless / Mobile Broadband

The rules the Commission established for mobile broadband are somewhat different than those for fixed broadband services. In the Commission's view, mobile broadband is at an earlier stage of development than fixed broadband, and is evolving rapidly.[61] Not only is it at an earlier development stage, but it also currently has less overall capacity for delivery of advanced Internet services, like streaming video, than fixed broadband services. As a result, the Commission has applied only the transparency and no blocking rules, subject to reasonable network management, to mobile broadband.[62] The Commission has promised to continue monitoring the development of mobile broadband and to revisit the potential to apply an unreasonable discrimination rule in the future.[63]

Transparency

The transparency rule applies to mobile broadband in much the same way that the rule applies to fixed broadband services.[64] Mobile broadband providers are not required to allow all third-party devices and applications to attach to their network, but mobile broadband providers must disclose their certification procedures for such devices and applications.

No Blocking Rule

The rule against blocking is slightly different for mobile broadband providers than it is for fixed broadband providers. The no blocking rule for mobile broadband reads,

> A person engaged in mobile broadband Internet access service, insofar as such person is so engaged, shall not block consumers from accessing lawful websites, subject to reasonable network management; nor shall such person block applications that compete with the provider's voice or video telephony services, subject to reasonable network management.[65]

This rule is more narrow than the no blocking rule that has been applied to fixed services in that it only prevents blocking of lawful websites, rather than preventing the blocking of all lawful

[60] Open Internet Order, *supra* note 83, at ¶ 82.

[61] *Id*. at ¶ 94.

[62] *Id*. at ¶ 96.

[63] *Id*. at ¶¶ 105 - 106.

[64] *Id*. at ¶ 97.

[65] *Id*. at ¶99.

Internet content. Importantly, it also prevents blocking of Internet services that might compete with a wireless provider's voice and video telephony services.[66] This likely means that wireless broadband providers cannot block programs like Skype from operating over their wireless networks.

Furthermore, the rule is subject to reasonable network management. Reasonable network management has the same meaning as the definition above. The Commission stated that the definition is broad enough to encompass different network architectures, and did not believe it necessary to develop a different definition for mobile and fixed network management.[67]

The FCC's Authority to Issue the Rules

As discussed in detail above, the Commission previously attempted to assert authority to regulate broadband Internet network management by arguing that such regulations were reasonably ancillary to the Commission's implementation of Section 230(b) of the Communications Act. The D.C. Circuit Court of Appeals rejected that assertion. Section 230(b) is a statement of policy, which does not give the Commission the statutory responsibility to act in any way.[68] In order to have ancillary authority, according to the appeals court, the Commission must ground its jurisdiction in a "statutorily mandated responsibility," and a statement of policy is insufficient to meet that standard.[69] As a result, the court invalidated the FCC's judgment against Comcast in that case. However, the court left open the possibility that the FCC might find authority to implement network management rules elsewhere in the Communications Act. In its analysis, the court specifically mentioned Section 706 of the Telecommunications Act of 1996 as a possible source for the requisite authority, but the court also found that the Commission was bound by its own interpretation of Section 706. The court found that the Commission had interpreted 706 as a direction to use its *existing* statutory authority to encourage broadband infrastructure deployment and competition, rather than as an independent grant of new rulemaking authority.[70]

Following the court's decision, the FCC explored a number of jurisdictional arguments. Among them were different arguments for asserting ancillary authority, as well as a suggestion to reclassify and regulate at least some aspect of broadband Internet services under Title II of the Communications Act with a promise to forbear from applying the most stringent aspects of Title II to these services. In the end, the Commission has chosen not to reclassify broadband Internet services as telecommunications services. They will remain information services, regulated primarily under Title I of the act.

Section 706

The FCC centers its jurisdictional argument around Section 706 of the Telecommunications Act of 1996.[71] Because the FCC chose not to reclassify broadband Internet access services as telecommunications services, it was believed that the Commission would again attempt to argue

[66] Open Internet Order, *supra* note 83, at ¶¶ 101 - 102.

[67] *Id*. at ¶ 103.

[68] Comcast v. Federal Communications Commission, 600 F. 3d 642, 658-659 (D.C. Cir. 2010).

[69] *Id*. at 658-659.

[70] *Id*. at 658.

[71] Codified at 47 U.S.C §1302.

that it has ancillary authority to oppose the open Internet rules. That, however, does not appear to be the case in relation to its jurisdictional argument under Section 706. It appears that the FCC is claiming that Section 706 grants the FCC the *direct* authority to impose the open Internet rules.[72] If the Commission has had direct authority to implement these rules all along, it may seem strange that the Commission initially attempted to assert its ancillary (indirect) authority. The FCC explains this apparent discrepancy in this way: "Indeed our authority under Section 706(a) is generally consistent with—albeit narrower than—the understanding of ancillary jurisdiction under which the Commission operated" prior to the *Comcast* decision.[73] As a result, the Commission, in its view, had never had occasion to read Section 706 as a specific grant of rulemaking authority because it had previously believed itself to possess more expansive authority to regulate under its indirect ancillary jurisdiction.[74]

Section 706(a), the Commission's main source of authority under the section, reads,

> In general, the Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[75]

Advanced telecommunications capability is defined as follows:

> without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.[76]

The Commission argues that this provision "provides the Commission with the specific delegation of legislative authority to promote the deployment of advanced services, including by means of the open Internet rules."[77]

In the *Comcast* decision, because the statutory language says "shall encourage," the D.C. Circuit acknowledged that Section 706 contains what could arguably be a "direct mandate."[78] It is unclear whether the court was referring to a direct mandate arguably sufficient as a jurisdictional hook upon which the Commission might hang its ancillary authority argument, or a mandate to directly impose the open Internet rules, as the Commission attempts to do in this order.

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[72] *See* Open Internet Order, ¶ 117.

[73] *Id*. at ¶ 122.

[74] Commissioner McDowell, in his dissenting statement, describes it this way. "In other words, apparently, the agency's confused understanding of the limits of its ancillary authority meant that the Commission then did not have to rest on §706(a) in order to overreach by 'pursu[ing] a stand-alone policy objective' not moored to a 'specifically delegated power." Dissenting Statement of Commissioner Robert M. McDowell, Open Internet Order, FCC 10-201, at 135 – 172, available at http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db1223/FCC-10-201A1.pdf.

[75] 47 U.S.C. §1302(a).

[76] 47 U.S.C. §1302(d).

[77] Open Internet Order, *supra* note 83, at ¶ 122.

[78] Comcast v. Federal Communications Commission, 600 F. 3d at 658.

Nonetheless, the D.C. Circuit believed that the Commission had already foreclosed on this possibility by finding that Section 706 granted the Commission no new regulatory authority.

Despite the court's analysis, the Commission argues that Section 706 grants direct authority to issues these rules. First, the Commission argues that the D.C. Circuit was mistaken in its characterization of the FCC's interpretation of Section 706.[79] The D.C. Circuit read the FCC's prior interpretation of 706 to mean that the FCC believed that Section 706 granted the agency no new regulatory authority.[80] Indeed, the agency seemed to say precisely that when it found that Section 706(a) gave the Commission an affirmative obligation to encourage the deployment of advanced telecommunications services (which includes broadband services) using its *existing* regulatory, forbearance, and adjudicatory powers.[81] The Commission disagrees with the court and clarifies that its previous interpretation of Section 706(a) dealt only with its forbearance authority.[82] The Commission argues that it found that Section 706(a) did not grant the FCC the power to forbear from regulation above and beyond the authority already granted to the Commission under Section 10 of the act. In other words, Section 706(a) directed the Commission to use its existing forbearance authority and forbearance process to encourage the deployment of advanced services. However, the language of the statute directs the Commission also to use "price cap regulation ... and other regulating methods that remove barriers to infrastructure investment."[83] It is this language that the FCC contends grants new regulatory authority.

The Commission argues that Congress "necessarily invested the Commission with the statutory authority to carry out" price cap regulation, regulatory forbearance, and other measures that promote competition in the telecommunications market, as well as other regulatory methods that would promote infrastructure investment when it enacted 706.[84] The Commission, therefore reads Section 706(a) as an authorization "to address practices, such as blocking VoIP communications, degrading or raising the cost of online video, or denying end users material information about their broadband service, that have the potential to stifle overall investment."[85] The Commission seems to be saying that the open Internet rules, which govern the management of these networks after they have been deployed, are necessary to encourage the deployment of broadband networks.

It appears, however, that the FCC made precisely this argument to the D.C. Circuit in the *Comcast* case, and the court rejected the argument. The Court quoted the FCC's order first interpreting Section 706: "[S]ection 706(a) does not constitute an independent grant of forbearance authority *or of authority to employ other regulating methods*."[86] In the court's opinion, that language directly contradicted the FCC's assertion that the interpretation applied only to the FCC's forbearance authority, and refused to accept the FCC's argument. In future litigation, the FCC may argue that the *Open Internet Order* is the first occasion on which the agency has interpreted the entirety of Section 706, despite the D.C. Circuit's analysis to the

[79] Open Internet Order, *supra* note 83, at ¶ 118.

[80] Comcast v. Federal Communications Commission, 600 F. 3d at 658 – 659.

[81] Deployment of Wireline Serv. Offering Advanced Telecomms. Capability et al., 13 FCC Rcd 24012, 24046 (1998).

[82] Open Internet Order, *supra* note 83, at ¶ 119.

[83] 47 U.S.C. §1302(a).

[84] Open Internet Order, *supra* note 83, at ¶ 120.

[85] *Id*.

[86] Comcast v. Federal Communications Commission, 600 F. 3d at 659 (quoting Deployment of Wireline Serv. Offering Advanced Telecomms. Capability et al., 13 FCC Rcd at 24044) (emphasis in original).

contrary. The agency may argue that its interpretation of Section 706, as well as its interpretation of its own order interpreting Section 706, is entitled to judicial deference.[87] The degree of deference accorded, whether deference is warranted at all, may depend on the circumstances and the posture of the case. It is, therefore, unclear to what extent the D.C. Circuit's previous rejection of the FCC's argument for jurisdiction under Section 706 will affect the FCC's argument going forward.

The Commission further relies on a different case from the D.C. Circuit Court of Appeals to support its interpretation of Section 706. Indeed, the court in *Ad Hoc Telecom v. FCC* found that Section 706 speaks in very broad terms and instructs the FCC to facilitate broadband deployment. The court went on to say that "the general and generous phrasing of Section 706 means that the FCC possesses significant, albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband—a statutory reality that assumes great importance when parties implore courts to overrule FCC decisions on this topic."[88] However, that case occurred in a deregulatory context. The case involved a challenge to an FCC order to *forbear* from regulation, rather than impose new regulations. Furthermore, the FCC had complied with the requirements of Section 10 forbearance proceedings, using its existing forbearance authority to encourage broadband deployment, as it previously had interpreted Section 706 to direct. This case, therefore, is arguably consistent with the *Comcast* court's interpretation of Section 706. The *Comcast* court argued as much in responding to the FCC's citation of *Ad Hoc Telecom*. The *Comcast* court opined,

> we cited section 706 merely to support the Commission's choice between regulatory approaches clearly within its statutory authority under other sections of the Act, and upheld the Commission's refusal to forbear from certain regulation of business broadband lines as neither arbitrary nor capricious. Nowhere did we question the Commission's determination that section 706 does not delegate any regulatory authority.[89]

The *Ad Hoc Telcomm* case did not determine whether the FCC had authority to issue regulations beyond authority it already possessed prior to the enactment of Section 706 because the question was not at issue. That question remains open and may be at the heart of any challenge to the FCC's open Internet rules.[90]

Commissioner McDowell, who voted against the rules, takes issue with the Commission's interpretation of Section 706.[91] McDowell notes that the 1996 act and Section 706, specifically, were intended to be *deregulatory* in nature. Indeed, the very case the Commission cites as supporting its interpretation of Section 706 involved the FCC's choice to ease the regulatory

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[87] "Judicial deference is the degree to which a court will uphold and respect the validity of an agency's interpretation of a statutory provision during judicial review of the agency's decisions. The amount of deference that an agency interpretation of its own statute will receive from a reviewing court 'has been understood to vary with the circumstances.'" CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by Todd Garvey and Daniel T. Shedd, (citing United States v. Mead Corp., 533 U.S. 218, 228, 236-37 (2001).

[88] 572 F. 3d 903, 906-907 (D.C. Cir. 2009).

[89] Comcast v. Federal Communications Commission, 600 F. 3d at 659.

[90] Argument has yet to begin in the challenge filed by Verizon, Inc. to the Open Internet Order. Once briefing has begun the primary arguments at issue may come into sharper relief. Verizon v. FCC, D.C. Cir. 11-1014 (D.C. Cir. 2011).

[91] Dissenting Statement of Commissioner Robert M. McDowell, Open Internet Order, FCC 10-201, at 135 – 172, available at http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db1223/FCC-10-201A1.pdf (hereinafter McDowell Statement).

burdens on special access providers.[92] In Commissioner McDowell's analysis, the imposition of the open Internet rules not only has no basis in the statute, but also would have the opposite effect that the Commission claims.[93] McDowell believes that rules governing network management would stifle investment and would not serve the goals of Section 706 even if 706 did grant the FCC the authority to regulate broadband network management. Commissioner McDowell, however, does not believe that 706 grants such authority, because broadband Internet services are information services, and nothing in Section 706 grants the FCC the authority to regulate information services.[94] The FCC has also admitted on previous occasions that it does not have direct authority to regulate information services.[95]

Commissioner McDowell's criticism appears to be unaddressed by the Commission in its order. This may be because the Commission determined that the statutory delegation to advance deployment of "advanced telecommunications services" covers broadband Internet services.[96] If these rules encourage the deployment of advanced telecommunications services, broadband Internet services are advanced telecommunications services, and the Commission has been granted statutory authority to regulate the deployment of advanced telecommunications services by Section 706, as the Commission argues is the case, then perhaps further parsing of information services versus telecommunications services was viewed to be unnecessary. However, there may be an important distinction between the authority to encourage the deployment of advanced telecommunications services and the authority to regulate the services themselves. The Commission appears to believe that the regulation of the services themselves encourages their deployment by promoting competition in the market for the provision of the services. It will likely require the determination of a reviewing court to clarify whether the Commission's interpretation is correct, or at least reasonable in the light of judicial deference accorded to agency interpretations of the statutes the agency has been charged with implementing.

Commissioner McDowell further notes that if Section 706 is broad enough to grant the FCC the authority to issue the open Internet rules, then it is difficult to see where that authority to regulate the Internet ends.[97] The FCC answers this charge by arguing that its authority in this area is limited in three ways.[98] First, the Commission argues that its jurisdiction must be read in conjunction with Sections 201 and 202 of the Communications Act, which limit the Commission's subject matter jurisdiction to "interstate and foreign commerce in wire and radio." While, this appears to be a broad grant of jurisdiction, nonetheless, the Commission reads it to be a limiting principle. Second, the FCC's authority under Section 706 is limited only to actions that would encourage the deployment of advanced telecommunications systems to all Americans. However, this is precisely what Commissioner McDowell and other critics of the order claim the

[92] *See Ad Hoc Telecomm*, 527 F. 3d at 904.

[93] McDowell Statement, *supra* note 129, at 155.

[94] *Id*. at 155-157.

[95] *See*, Comcast Decision, 23 FCC Rcd 13028 (2008), FCC's Network Management Principles, 20 FCC Rcd 14986 (2005).

[96] As noted above, advanced telecommunications capabilities are defined in §706 "without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." 47 U.S.C. §1302. This may be broad enough to encompass broadband Internet services, though that does not necessarily mean that it grants the Commission the direct authority to impose the open Internet rules.

[97] McDowell Statement, *supra* note 129, at 159.

[98] Open Internet Order, *supra* note 83, at ¶ 121.

open Internet rules do not encourage.[99] Lastly, the manner in which the Commission takes action under Section 706 must comport with the public interest, convenience, and necessity. As a result, the Commission argues that its Section 706 authority is "not unfettered." However, determinations of what is in the public interest are largely left to the discretion of the agency implementing the rules.[100] It is unclear what, if any, restraint or limitation the requirement of acting in the public interest might place on the FCC in this context.

The Commission further cites Section 706(b) as a source of authority for issuing the open Internet rules. Section 706(b) reads,

> The Commission shall, within 30 months after the date of enactment of this Act [enacted Oct. 10, 2008], and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.[101]

Recently, the Commission found that broadband services are not being deployed to all Americans in a reasonable and timely fashion.[102] Commissioner McDowell notes that the Commission made this determination in spite of the fact that 95% of all Americans have access to broadband services.[103] In light of its determination that broadband deployment has been unsatisfactory, the Commission cites its mandate to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market" as another source of authority for issuing the rules.[104] The Commission argues that the rules will promote competition in the market by preventing anticompetitive activity such as blocking of unaffiliated applications or discrimination against unaffiliated content providers. It is possible that the Commission conflates competition for the provision of advanced telecommunications services (meaning among Internet service providers) with competition among Internet content providers. It is unclear whether regulating the management of broadband networks to prevent unfair treatment of different content providers will promote competition for the provision of broadband Internet access services. The Commission does not explain the nexus between the two in its order. However, if there is a court challenge to the order, perhaps further explanation will be forthcoming at that time. It is also possible that a nexus between the two is not required. It may be that the language of Section 706(b) is broad enough to encompass the management of content over broadband lines within the scope of the provision of broadband/advanced telecommunications services.

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[99] McDowell Statement, *supra* note 129, at 153 - 159.

[100] The FCC's ability to determine what would be in the public interest is broad, but presumably not unlimited. However, it is not clear whether, or in what manner, such determinations would be considered by a hypothetical reviewing court. *See, e.g.*, 5 U.S.C. §706.

[101] 47 U.S.C. §1302(b).

[102] Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to §706 of the Telecommunications Act of 1996, 25 FCC Rcd 9556, 9558 (2010).

[103] McDowell Statement, *supra* note 129, at 158.

[104] Open Internet Order, *supra* note 83, at ¶ 123.

Other Sources of Authority

The Commission does not base its jurisdictional argument solely on Section 706. The Commission also argues that it has a number of jurisdictional hooks in Titles II, III, and VI to assert ancillary authority to regulate broadband network management.[105] In order to assert ancillary jurisdiction the Commission must show that the attempted action is within its jurisdiction and the action is "reasonably ancillary to the effective performance of a statutorily mandated responsibility."[106] According to the D.C. Circuit, that means an exercise of ancillary authority will only be valid if the action is in support of the Commission's performance of one of its mandated duties.[107] The Commission in this order argues that its ancillary authority generally stems from its specific authorities to promote competition and investment in voice, video, and audio services.[108] The Commission does not limit its open Internet rules to the provision of voice, video, and audio services because "it would not be sound policy to attempt to implement rules concerning only voice, video, or audio transmissions over the Internet."[109] However, the Commission gives no explanation for why such policy would be unsound.

Commissioner McDowell, in his rebuttal, does not believe these jurisdictional assertions are sufficient.[110] McDowell argues that "for the ancillary authority arguments to prevail here, the Order must identify specific subsections within Title II, II or VI that provide the ancillary hook, and then show how the Commission's assertion of power will advance the regulated services directly subject to those particular provisions. Existing court precedent shows that sweeping generalizations are not sufficient."[111]

Nonetheless, the Commission does cite specific sections of Titles II, III, and VI, which grant the Commission rulemaking authority. The questions for a reviewing court may be (1) whether the Commission has adequately argued that some regulation of Internet traffic is necessary for the Commission to achieve its enumerated responsibilities; and (2) if the Commission does have ancillary authority to enact rules governing network management to preserve competition in the discrete industries over which it does have direct responsibility, whether that justifies the regulation of all broadband Internet network management.[112]

Title II

The Commission cites Title II as its authority to regulate voice services.[113] The primary jurisdictional argument here would appear to be that regulation of broadband Internet

[105] *Id*. at ¶ 125.

[106] Comcast v. Federal Communications Commission, 600 F. 3d at 658.

[107] *Id*.

[108] Open Internet Order, *supra* note 83, at ¶ 124.

[109] *Id*.

[110] McDowell Statement, *supra* note 129, 159 – 160.

[111] *Id*. at 160.

[112] The *Comcast* court required that each assertion of ancillary jurisdiction be "independently justified." 600 F. 3d at 651. It is unclear exactly how that requirement will apply to this order. Perhaps the FCC intends to assert a different jurisdictional argument for each adjudication it undertakes in order to independently justify each action. On the other hand, it is possible that the FCC may argue that, taken together, its ancillary jurisdiction arguments in this order are sufficient to satisfy the requirement of "independent justification."

[113] Open Internet Order, *supra* note 83, at ¶ 125.

management is reasonably ancillary to the Commission's regulation of voice services, because VoIP voice services are currently being used as interchangeable services with traditional telephone services and the use of VoIP is heavily affecting the market for traditional telephone services. Section 201 of the Communications Act grants the Commission the broad authority to ensure that charges and practices related to the provision of telecommunications services be just and reasonable.[114] This provision, historically and in its most basic interpretation, applied to common carriers providing traditional telephone services. The FCC, in its order, argues that interconnected VoIP services are increasingly being substituted for traditional telephone services.[115] Furthermore, there are companies that provide both traditional voice services and broadband Internet services. These companies have the "incentive and ability to block, degrade, or otherwise disadvantage the service of their online voice competitors."[116] Because of these market realities, the Commission argues that Section 201 grants the Commission the authority to prevent anticompetitive practices through the open Internet rules.

Commissioner McDowell argues that the assertion of ancillary authority under Section 201 to prevent discrimination is inapt.[117] Section 201 does not reference discrimination; it references just and reasonable rates. If any part of Title II would support an anti-discrimination rule, it would be Section 202, which specifically prevents unreasonable discrimination, according to McDowell. However, the Commission does not mention Section 202 as a source of authority. In response to McDowell's criticism, the Commission may argue that the anticompetitive practices it seeks to prevent may result in unjust and unreasonable rates, which Section 201 grants the Commission the authority to prevent. This argument may develop further should the Commission's authority be challenged in court.

The Commission further cites Section 251(a), which requires telecommunications carriers to interconnect with one another as a source of ancillary authority.[118] The Commission noted that VoIP services typically allow their subscribers to call customers of traditional phone networks. If VoIP services could be blocked or degraded, then the traditional phone customers would also suffer. To the extent, therefore, that VoIP services are information services, the Commission argues that it has ancillary authority to issue the open Internet rules, and to the extent VoIP services are telecommunications services, interference by the broadband provider with the communication would likely be a direct violation of Section 251(a). The Commission declined to determine whether VoIP service providers are telecommunications carriers.[119]

Title III

The Commission cites Title III as its authority to regulate some video and audio services, particularly broadcast radio and television.[120] The Commission argues that the open Internet rules

[114] 47 U.S.C. §201.

[115] Open Internet Order, *supra* note 83, at ¶ 125.

[116] *Id*.

[117] McDowell Statement, *supra* note 129, at 163.

[118] Open Internet Order, *supra* note 83, at ¶ 126.

[119] Commissioner McDowell criticized this jurisdictional assertion as well. He noted that §251 places a duty on telecommunications carriers to interconnect, but the Commission refused to determine whether VoIP providers were, in fact, telecommunications carriers. If they are not telecommunications carriers, then the "effect of the order is to do indirectly what the Commission is reluctant to do explicitly." McDowell Statement, *supra* note 129, at 164.

[120] Open Internet Order, *supra* note 83, at ¶ 127.

are necessary for the Commission to perform its Title III "responsibilities to ensure the orderly development … of local television broadcasting' and the 'more effective use of radio.'"[121] The Commission notes that many broadcasters, both radio and television, are now providing their content over the Internet in one form or another as well. Many MVPDs are broadband Internet service providers as well, and, as a result, may have the incentive to block or degrade content offered by broadcasters over their Internet connections, or the broadband provider might choose to charge unreasonable fees for delivery of that content over the Internet. Without the open Internet rules, the Commission argues impairment of delivery of content over the Internet might also impair broadcasters' ability to provide high quality broadcast content.

McDowell finds this argument to be tenuous.[122] He argues that the Commission does not cite any specific grant of statutory authority to support its ancillary jurisdiction, as McDowell would argue the *Comcast* case required.[123] Instead the Commission cites its Title III responsibilities in general and notes that broadcast licensees are now also supplying content online. In McDowell's reading, this is not a sufficient basis for the assertion of ancillary authority. Again, however, the arguments both for and against this jurisdictional assertion may be more fully informed by a court decision.

Title VI

The Commission also argues that under Title VI it has the authority to protect competition in the multichannel video programming distribution market (MVPD market). "A cable or telephone company's interference with the online transmission of programming by DBS operators or stand-alone online content aggregators that may function as competitive alternatives to traditional MVPDs would frustrate Congress's stated goals" including "promoting 'competition and diversity in the [MVPD] market"; "increasing the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive [it]"; and "spurring the development of communications technologies."[124] For this proposition, the Commission cites specifically Section 628 which prohibits cable companies from engaging in unfair or deceptive acts or practices the purpose of which is to impede MVPDs from delivering satellite cable or satellite broadcast programming.[125] It further directed the FCC to issue rules proscribing such practices and specified that telephone companies offering video programming were subject to the same rules as cable operators.

As it had noted previously, the Commission reiterated that many broadband Internet access providers are also MVPD providers. These dual providers may have the incentive to block or degrade the Internet content of their MVPD competitors. As a result, the Commission argues that the open Internet rules are ancillary to the performance of its rulemaking authority to promote competition in the MVPD market under Section 628.[126]

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[121] *Id*. at ¶ 128.

[122] McDowell Statement, *supra* note 129, at 164.

[123] For its part, in the order, the Commission cited 47 U.S.C. §§303 and 307 as its sources of statutory authority. Section 303 grants the Commission the authority to allocate broadcasting zones and directs the Commission to "generally encourage the larger and more effective use of radio in the public interest." Section 307 grants the Commission the authority to issue spectrum licenses. *See* Open Internet Order, *supra* note 83, fn. 402-403. McDowell may find these provisions too general, or policy oriented to qualify as anchors for ancillary jurisdiction in this instance.

[124] Open Internet Order, *supra* note 83, at ¶ 129.

[125] 47 U.S.C. §548.

[126] Open Internet Order, *supra* note 83, at ¶ 131.

Commissioner McDowell also disagrees with this assertion of ancillary jurisdiction. He argues that, though Section 628 does specifically grant rulemaking authority to the Commission over video services provided by MVPDs, the jurisdictional hook is too tenuous to justify the open Internet rules.[127] There has never been an example of broadband service providers degrading the provision of broadband video services, a scenario which seems to be the primary motivation for the enactment of the rules. It seems to Commissioner McDowell, therefore, that the Commission might be attempting to fix a market that is not "broken."

Spectrum Licensing

The Commission has the authority to grant spectrum licenses and broad authority to place conditions on those licenses.[128] It has imposed network management rules on specific licenses in the past, particularly the 700 megahertz spectrum license.[129] Furthermore, the Commission has the authority to retroactively apply requirements to license and has decided to apply the network management rules to all mobile broadband providers.[130] Therefore, the Commission argues that it has the authority to impose these rules on spectrum licensees. Again, Commissioner McDowell finds the assertion of ancillary jurisdiction to be too generalized. The Commission could have cited narrower provisions to apply the transparency and no blocking rules to these entities.[131] The approach taken here, McDowell argues, is contrary to the holding of the *Comcast* case.

Reporting to Congress

Lastly, the Commission cites Section 4(k) as authority to issue the transparency rules in the open Internet order. Section 4(k) requires the Commission to supply an annual report to Congress which must contain the information the Commission believes to be necessary to provide Congress with a clear picture of the regulation of interstate wire and radio communication.[132] The report must also contain recommendations as to what additional legislation might be desirable. The *Comcast* court appeared to agree that this provision could grant the Commission authority to impose disclosure requirements on broadband Internet service providers. The court said "certain assertions of the Commission authority could be reasonably ancillary to the Commission's statutory responsibility to report to Congress. For example the Commission might impose disclosure requirements on regulated entities in order to gather data needed for such a report."[133] It is possible, therefore, that should the no blocking or anti-discrimination open Internet rules be struck down, the transparency rules may be upheld on the jurisdictional basis asserted here.

[127] McDowell Statement, *supra* note 129, at 166.

[128] 47 U.S.C. §307.

[129] Open Internet Order, *supra* note 83, at ¶ 134.

[130] 47 U.S.C. §316(a)(1).

[131] McDowell Statement, *supra* note 129, at 165 – 166.

[132] 47 U.S.C. §154(k).

[133] 600 F.3d at 659.

Constitutional Issues

A number of industry commenters argued that the imposition of the open Internet rules violated their First Amendment rights.[134] These commenters argued that management of their broadband networks was equivalent to the editorial judgments made by cable and satellite providers when choosing which programming to provide to their customers.[135] The Supreme Court has upheld such editorial decisions to be speech protected by the First Amendment in the context of cable operators' programming choices,[136] and commenters argue that broadband network management stands on the same legal ground. Under this legal theory, rules that burden a broadband provider's ability to discriminate in the provision of content over its broadband network burden free speech and may be unconstitutional.

The Commission disagreed. First, the Commission distinguished between broadband Internet services and the editorial judgments made by cable programming and other MVPD providers.[137] Cable and satellite providers, it said, must make the editorial judgment of deciding which programs and which channels to provide to their customers. That was the critical factor in making those entities "speakers" in the Commission's reading of Court precedent.

The Commission argued that "broadband providers typically are best described not as 'speakers' but as conduits for speech."[138] The Commission reached this conclusion because, generally, it is the end users of broadband services (both content providers and individuals) who determine what content will be delivered to a particular computer (or other web surfing device). Furthermore, broadband providers do not market themselves on the basis of their editorial presence. To the contrary, from the Commission's point of view broadband providers market themselves based on their lack of intervention. The Commission, therefore, argues that broadband Internet access providers are not speakers, and network management is not speech entitled to First Amendment protection. The network management rules govern conduct only, the Commission reasons. From this point of view, if accepted by a reviewing court, the open Internet rules would not implicate the First Amendment.

The Supreme Court has yet to address whether the provision of broadband services or network management of broadband services is speech. There appears, however, to be case law contrary to the Commission's interpretation.[139] Federal district courts have twice concluded that the provision of broadband services is "speech" protected by the First Amendment.[140] However, neither case is controlling precedent in any federal court of appeals that might hear a challenge to the Open Internet Order. Commissioner McDowell, in his dissent, also argued that the provision of broadband services is speech and that management of the network, determining which traffic to prioritize and how to route is editorial conduct worthy of First Amendment protection in the same

[134] *See, e.g.*, AT&T Comments at 235–44; AT&T Reply at 167–73; Verizon Comments at 111–18; Verizon Reply at 108–17; TWC Comments at 44–50; TWC Reply at 51–56.

[135] Open Internet Order, *supra* note 83, at 140.

[136] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 636 (1994).

[137] Open Internet Order, *supra* note 83, at ¶¶ 140 – 142.

[138] *Id*.

[139] *See* Ill. Bell Tel. Co. v. Vill of Itasca, 503 F. Supp. 2d 928 (N.D. Ill. 2007); Comcast Cablevision of Broward Cnty., 124 F. Supp. 2d 685 (S.D. Fla. 2000).

[140] *Id*.

way as cable and satellite providers.[141] The Commission acknowledged these cases in a footnote, but disagreed with their interpretation. A definitive determination of whether the provision of broadband services constitutes speech protected by the First Amendment will likely have to be made by a reviewing court.

Even if the provision of broadband services constitutes protected speech, the Commission contends that the open Internet rules would survive constitutional scrutiny.[142] In the Commission's analysis, the open Internet rules do not discriminate on the basis of content or viewpoint. The regulations are triggered by the service provided and not by the content of any message conveyed. Therefore, the Commission argues, the rules would be reviewed by the courts as a content neutral restriction on speech that qualifies for what is known as intermediate scrutiny.[143] Unlike the more rigorous strict scrutiny, under which most burdens on free speech are reviewed, intermediate scrutiny requires only that the regulation further a government interest unrelated to the interest in suppressing free speech and that the regulation refrain from burdening more speech than is necessary.[144] The Commission argued that it would meet that standard because the government has an interest in preserving the open Internet and encouraging competition, and the rules, rather than burdening speech, actually protect the speech interests of all Internet speakers.[145] However, only a reviewing court can determine definitively which constitutional standards properly apply in this instance and whether the Commission has satisfied that standard.

Court Challenge

Following the publication of the rules in the *Federal Register*, Verizon, Free Press, and others filed appeals in various federal appeals courts challenging the rules.[146] The appeals were consolidated in the D.C. Circuit, and will be adjudicated by that court.[147] As of April 23, 2013, oral arguments in the case had yet to be scheduled. However, the parties have submitted their briefs to the court, and the case is expected to proceed.[148]

[141] McDowell Statement, *supra* note 129, at 169 – 172.

[142] Open Internet Order, *supra* note 83, at ¶ 145.

[143] *Id*. *See also*, Turner I, 512 U.S. 642, 660-662. CRS Report 95-815, *Freedom of Speech and Press: Exceptions to the First Amendment*, by Kathleen Ann Ruane.

[144] Turner I, 512 U.S. at 662.

[145] Open Internet Order, *supra* note 83, ¶ 146.

[146] *See* Notice of Multicircuit Petitions for Review, Pet. for Rev. of FCC's *In the Matter of Preserving the Open Internet*, *GN Docket No. 09-191; Broadband Industry Practices, WC Docket No. 07-52*, Report and Order. 25 FCC Rcd 17905 (2010), MDL No. ___, DC/1:11 -ca-01356, (J.P.M.L., October 5, 2011).

[147] Order Granting Mot. Cons., DC/1:11 -ca-01356, (J.P.M.L., October 6, 2011).

[148] Paul Barbagallo, Verizon First Amendment Challenge of Net Neutrality Tests Century of Regulation, BloombergBNA (January 24, 2013) available at http://www.cadc.uscourts.gov/internet/sixtyday.nsf/fullcalendar?OpenView&count=1000.

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