"THE LAW IS WHATEVER THE NOBLES DO": UNDUE PROCESS AT THE FCC

Barbara Esbin and Adam Marcus[†]

> Our laws are not generally known; they are kept secret by the small group of nobles who rule us. We are convinced that these ancient laws are scrupulously administered; nevertheless it is an extremely painful thing to be ruled by laws that one does not know.[1]

I. INTRODUCTION

Franz Kafka's parable *The Problem of Our Laws*, describes the problem of living under laws, the "very existence [of which] is at most a matter of presumption."[2] The problem is not that of discrepancies in interpretation of the law, but conflicting views of its very existence and how to orient one's behavior in such an uncertain atmosphere. In Kafka's tale, one tradition holds that the laws "exist and that they are a mystery confided to the nobility."[3] But this tradition cannot be proven because "the essence of a secret code is that it

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[†] Barbara Esbin is a Senior Fellow and Director of the Center for Communications and Competition Policy at The Progress & Freedom Foundation ("PFF"). Adam Marcus is a PFF Research Fellow & Senior Technologist. The views expressed in this article are those of the authors, and are not necessarily the views of the PFF board, fellows or staff. A shorter version of this article was published prior to the release of the order under discussion as Barbara Esbin, The Progress & Freedom Foundation, *"'The Law is Whatever the Nobles Do:" Undue Process at the FCC,* Progress on Point No. 15.12, Aug. 2008, http://www.pff.org/issues-pubs/pops/2008/pop15.12undueprocess.pdf. Due to a publication error, this electronic copy is modified from the published version, and should be cited in its place when possible. Cite as Barbara Esbin & Adam Marcus, *"The Law is Whatever the Nobles Do": Undue Process at the FCC*, 17 COMMLAW CONSPECTUS *1 (2009), http://commlaw.cua.edu//articles/v17/17.2/Esbin-Marcus-Revised.pdf.

[1] FRANZ KAFKA, *The Problem of Our Laws*, *in* THE COMPLETE STORIES 437, 437 (Willa & Edwin Muir trans., Nahum Glazer ed., 1971).

[2] *Id*.

[3] *Id*.

should remain a mystery." [4] Adherents of this tradition, although unable to directly know the law, study the actions of the nobles in order to conform their behavior, and "have attentively scrutinized the doings of the nobility since the earliest times," trying to discern main tendencies and draw logically ordered conclusions, only to find "that everything becomes uncertain, and [the] work seems only an intellectual game, for perhaps these laws . . . do not exist at all."[5]

Others hold this opinion and "try to show that, if any law exists, it can only be this: *The Law is whatever the nobles do*."[6] Those that hold this opinion reject the popular tradition as giving a false sense of security for confronting coming events: "This party see everywhere only the arbitrary acts of the nobility."[7] Paradoxically, the party believing there is no law remains small, because such a belief would also mean unacceptable repudiation of both the law and the nobility. The parable concludes: "The sole visible and indubitable law that is imposed upon us is the nobility, and must we ourselves deprive ourselves of that one law?"[8]

Kafka's parable holds certain applicability to the August 2008 decision of the Federal Communications Commission ("FCC" or "Commission") to extend regulatory authority over the broadband network management practices of Comcast Corporation ("Comcast") and "adjudicate" its behavior against a set of policy principles.[9] The FCC's means of asserting regulatory authority over broadband Internet service providers' ("ISP") network management practices is unprecedented, sweeping in its breadth, and seemingly unbounded by conventional rules of interpretation and procedure. We should all be concerned, for apparently what we have on our hands is a runaway agency, unconstrained in its vision of its powers.

In a sharply divided ruling, a majority of the FCC found that Comcast's management of its broadband Internet network contravened federal policies aimed at protecting "the vibrant and open nature of the Internet."[10] The ruling

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4 *Id*.

5 *Id*. at 437–38.

6 *Id*. at 428 (emphasis added).

7 *Id*. (quote as it appears in original).

8 *Id*.

9 *In re* 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," *Memorandum Opinion and Order*, 23 F.C.C.R. 13,028, ¶ 1 (Aug. 1, 2008) [hereinafter *Comcast P2P Order*].

10 Press Release, Fed. Commc'ns Comm'n, Commission Orders Comcast to End Discriminatory Network Management Practices (Aug. 1, 2008) [hereinafter Comcast Order Press Release], http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284286A1.pdf; *Comcast P2P Order, supra* note 9 (noting that two out of five Commissioner's dissented

was made on the allegations contained in a self-styled Formal Complaint[11] filed in November 2007 by Free Press and Public Knowledge, as well as a related petition for declaratory ruling,[12] seeking an FCC ruling "that an Internet service provider violates the FCC's *Internet Policy Statement* when it intentionally degrades a targeted Internet application."[13] In its *Comcast P2P Order*, the Commission concluded that Comcast had "unduly interfered with Internet users' right to access the lawful Internet content and to use the applications of their choice . . . [by deploying] equipment throughout its network to monitor

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from the Commission's action).

[11] *See In re* Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation For Secretly Degrading Peer-to-Peer Applications, *Formal Complaint*, (Nov. 1, 2007) [hereinafter *Free Press Complaint*], *available at* www.freepress.net/files/fp_pk_comcast_complaint.pdf. The complaint alleged that Comcast blocked innovative applications and that its methods were deliberatively secretive. *Id*. at 9. The complaint further alleged, as a general matter that "degrading applications violates the Commission's Internet Policy Statement, which the FCC has vowed to enforce." *Id*. at 16. Free Press argued that Comcast's actions with respect to its cable modem subscribers who utilize "peer-to-peer protocols"—particularly the BitTorrent application—violate three out of four of the FCC's Internet principles regarding consumers rights to run applications and use services of their choice; access lawful content of their choice; and enjoy "competition among network providers, application and service providers, and content providers." *Id*. at 13. In addition, it is alleged that "[s]ecretly degrading applications constitutes a deceptive practice." *Id*. at 22. Free Press requested that, *before ruling on the merits*, the FCC issue a preliminary injunction immediately, forbidding "Comcast from degrading any applications until" the Complaint was resolved. *Id*. And, when ruling on the merits, Free Press requested that the FCC impose a permanent injunction, and "the maximum forfeitures," under 47 U.S.C. § 503(b)(2)(D). *Id*. at 33–35.

[12] *In re* 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"; Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remanding 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; Broadband Industry Practices, *Petition for Declaratory Ruling*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52; WC Docket No. 07-52, at i (Nov. 1, 2007) [hereinafter *Free Press Petition for Declaratory Ruling*]; Comment Sought on Petition for Declaratory Ruling Regarding Internet Management Policies, *Public Notice*, 23 F.C.C.R. 340 (Jan. 14, 2008) [hereinafter *Free Press Declaratory Ruling Public Notice*]("The Wireline Competition Bureau seeks comment on a petition filed by Free Press *et al.* (Petitioners), seeking a declaratory ruling 'that the practice by broadband service providers of degrading peer-to-peer traffic violates the FCC's Internet Policy Statement' and that such practices do not meet the Commission's exception for reasonable network management;" the matter was designated "permit but disclose" and parties were instructed to file comments on the petition by referencing WC Docket No. 07-52).

[13] *Free Press Petition for Declaratory Ruling*, *supra* note 12, at i.

the content of its customers' Internet connections and selectively block specific types of connections known as peer-to-peer connections."[14]

The Commission characterized the question before it as "whether Comcast, a provider of broadband Internet access over cable lines, may selectively target and interfere with connections of peer-to-peer . . . applications under the facts of this case."[15] After rejecting Comcast's defense that its conduct was necessary to ease network congestion, the Commission concluded: "[T]he company's discriminatory and arbitrary practice unduly squelches the dynamic benefits of an open and accessible Internet and does not constitute reasonable network management."[16] The harm was compounded, according to the Commission, by Comcast's failure to disclose the practice to its customers.[17] Free Press and Public Knowledge asked the FCC to "impose a permanent injunction and the maximum forfeitures," which they calculated to be $195,000 per customer harmed.[18] The Commission was a little more lenient; it only required Comcast, within thirty days of the release of the Order, to provide information to the FCC regarding "the precise contours of the network management practices at issue here" and to submit a compliance plan together with disclosure concerning its transition to "non-discriminatory network management practices by the end of the year."[19]

Thus, Comcast was adjudged guilty of violating an FCC *policy statement*—not a rule—regarding the rights of consumers of Internet access or Internet-Protocol-enabled ("IP-enabled") services articulated by the FCC in its *Internet Policy Statement*.[20] Inasmuch as no notice of proposed rulemaking ("NPRM")

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[14] Comcast Order Press Release, *supra* note 10; *see Comcast P2P Order*, *supra* note 9, ¶ 1.

[15] *Comcast P2P Order*, *supra* note 9, ¶ 1.

[16] *Id*.

[17] *Id*.

[18] *Free Press Complaint*, *supra* note 11, at 24, 34.

[19] *Comcast P2P Order*, *supra* note 9, ¶ 54. Specifically, the Commission required Comcast to:

> (1) disclose to the Commission the precise contours of the network management practices at issue here, including what equipment has been utilized, when it began to be employed, when and under what circumstances it has been used, how it has been configured, what protocols have been affected, and where it has been deployed; (2) submit a compliance plan to the Commission with interim benchmarks that describes how it intends to transition from discriminatory to nondiscriminatory network management practices by the end of the year; and (3) disclose to the Commission and the public the details of the network management practices that it intends to deploy following the termination of its current practices, including the thresholds that will trigger any limits on customers' access to bandwidth.

Id.

[20] *In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommu-

or declaratory ruling was issued in the docket regarding the Commission's action against Comcast,[21] the only source of the behavioral constraint transgressed by Comcast was Commission policy, not law. Yet it must surely be a painful thing for Comcast to be judged by *laws* that it did not know existed, for only a rule of behavior—a law—properly can be enforced through agency adjudication.

It undoubtedly is true, as the FCC majority stated, that the agency in carrying out its statutory obligations under the Communications Act of 1934, as amended ("Communications Act" or "Act")[22] has discretion to choose to proceed by either adjudication—via enforcement actions directed at specific past behaviors—or by means of a prospective notice and comment rulemaking to establish industry-wide rules of behavior.[23] However, the Commission broke new ground from a legal and procedural perspective when it decided to combine these forms and find that one industry participant, Comcast, violated a set of policy principles the FCC itself had heretofore declared unenforceable.[24]

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nications 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, *Policy Statement*, 20 F.C.C.R. 14,986, ¶ 4 (Aug. 5, 2005) [hereinafter *Internet Policy Statement*].

[21] Parties seeking an FCC ruling with regard to the consistency of specific industry practices with the 1934 Communications Act, as amended ("Communications Act"), may file either a Petition for Declaratory Ruling or Petition for Rulemaking. Both types of proceedings are treated as notice and comment rulemaking dockets and are ordinarily used to resolve issues of prospective, industry-wide application. Usually, following action upon a Petition for Declaratory Ruling, the FCC will issue a document entitled Declaratory Ruling, as it did in the case of the *Cable Modem Declaratory Ruling* establishing the appropriate regulatory classification of broadband Internet access services provided over cable systems. *See*, *e.g.*, *In re* 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, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 F.C.C.R. 4798, ¶ 2 (Mar. 14, 2002) [hereinafter *Cable Modem Declaratory Ruling*].

[22] Communications Act of 1934, Pub. L. No. 73-416, 43 Stat. 1064 (codified in scattered sections of 47 U.S.C.), *amended by* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

[23] *See* SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 202 (1947).

[24] Kevin Martin, Acting FCC Chairman at the time of the *Comcast P2P Order* stated upon the adoption of the *Internet Policy Statement* three years earlier that "policy statements do not establish rules nor are they enforceable documents." News Release, Fed. Commc'ns Comm'n, Chairman Kevin J. Martin Comments on Commission Policy Statement (Aug. 5, 2005) [hereinafter *Martin Statement*]. It was widely recognized both at the time of their adoption and subsequently thereafter, that the policy principles contained in the *Internet Policy Statement* were merely aspirational, and were intended to provide nothing more than "guidance and insight" into the FCC's approach to the Internet. *See Internet Policy State-*

Dissenting from the *Comcast P2P Order*, Commissioner Robert McDowell called it "rulemaking by adjudication."[25] Conversely, one might think of the Commission's action as "adjudi-making."[26]

Whatever this innovative legal form is called, it appears to have resulted in factual findings that a single industry participant violated rules of behavior articulated for the first time in the very proceeding in which the accused was found guilty as charged. More troubling still, the adjudi-making was wholly lacking the protections afforded the subjects of more traditional administrative adjudications such as the need for sworn testimony, adherence to the rules of evidence, and the other procedural safeguards of a restricted adjudication.[27] Instead, Comcast appears to have been tried by the FCC in an open docket and through a series of en banc public hearings, been found wanting, and has been subjected to various compliance obligations while threatened with additional regulatory punishment if it fails to adhere to the obligations.

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ment, *supra* note 20, ¶ 3. Thomas Navin, then-Wireline Competition Bureau Chief, explained in a press conference immediately following adoption of the *Internet Policy Statement* that the principles it set forth "are not enforceable." *FCC Adopts a Policy Statement Regarding Network Neutrality*, TECH L,J., Aug. 5, 2005, *available at* http://www.techlawjournal.com/topstories/2005/20050805.asp. This understanding is further reflected in the subsequent *Broadband Industry Practices Inquiry*, where the Commission again hypothesized that it possessed ancillary jurisdiction to "adopt and enforce the net neutrality principles announced in the Internet Policy Statement," but then sought comment on the critical question whether it in fact has "the legal authority to enforce the Policy Statement." *In re* Broadband Industry Practices, *Notice of Inquiry*, 22 F.C.C.R. 7894, ¶¶ 4, 10 (Mar. 22, 2007) [hereinafter *Broadband Industry Practices Inquiry*]. Commissioner Copps, in reference to the *Internet Policy Statement*, wrote "[w]hile I would have preferred a rule that we could use to bring enforcement action, this is a critical step." *In re* Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; 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; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Consumer Protection in the Broadband Era, *Report and Order and Notice of Proposed Rulemaking*, 20 F.C.C.R. 14,853, 14,980 (Aug. 5, 2005) (Copps, Comm'r Concurring) [hereinafter *Wireline Broadband Order*].

[25] *Comcast P2P Order*, *supra* note 13, at 13,090 (McDowell, Comm'r, dissenting).

[26] 5 U.S.C. §551(4)–(8) (2006) (explaining that an agency action is, by definition, either a rulemaking or an adjudication; rulemaking is the process for making a rule and adjudication is the process for adopting an order). There is, therefore, no authority for the FCC's sui generis "adjudi-making."

[27] In a restricted proceeding, decision-makers cannot be lobbied outside the presence of other parties. *See* FCC Restricted Proceedings, 47 C.F.R. § 1.1208 (2008); *see also* 5 U.S.C. § 554(d) (2006).

Initial reaction to the FCC's action largely focused on the merits or drawbacks of the decision to initiate regulation of the network management practices of the nation's broadband ISPs.[28] In other words, reaction focused on whether enforcing the *Internet Policy Statement* against Comcast was a good or bad policy decision. From a policy perspective, most experts seem to agree that broadband ISPs should (1) deliver the services they have contracted to deliver; (2) adequately inform their subscribers about the services they have purchased; (3) not impede consumer access to or use of lawful content, applications, and devices; and (4) generally behave in a neutral manner with respect to transmission of bits to the greatest extent possible.[29] But that is not to say

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[28] *See* Laura H. Phillips, Deborah J. Salons & Alisa R. Lahey, *Future of Telecommunications*, *in* 26TH ANNUAL INSTITUTE ON TELECOMMUNICATIONS POLICY & REGULATION 135, 155–56 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 14384, 2008); *see also* Letter from Lawrence Lessig, C. Wendell and Edith M. Carlsmith Professor of Law and Director of the Center for Internet and Society at Stanford Law School, to Marlene H. Dortch, Secretary, Fed. Commc'n. Comm'n., *available at* http://lessig.org/blog/2FCC.pdf; Saul Hansell, *F.C.C. Vote Sets Precedent on Unfettered Web Usage*, N.Y. TIMES, Aug. 2, 2008, at C1; Grant Gross, *FCC Action Against Comcast Meets Mixed Reactions*, PC WORLD, Aug. 1, 2008, *available at* http://www.pcworld.com/businesscenter/article/149277/fcc_action_against_comcast_meets_mixed_reactions.html; John Eggerton, *Reaction to FCC's Comcast Ruling*, BROAD. & CABLE, Aug. 1, 2008, *available at* http://www.broadcastingcable.com/index.asp?layout=articlePrint&articleID=CA6583693; Ted Hearn, *FCC Hammers Comcast On File Sharing*, MULTICHANNEL NEWS, Aug. 1, 2008, *available at* http://www.multichannel.com/article/134182-FCC_Hammers_Comcast_On_File_Sharing.php.

[29] *See, e.g., Network Neutrality: Competition, Innovation, and Nondiscriminatory Access: Hearing Before the Telecom & Antitrust Task Force of the H. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Timothy Wu, Professor, Columbia Law School) (discussing rules regarding rules governing discriminatory actions by broadband providers); US Broadband Coalition, A Call to Action for a National Broadband Strategy, http://bb4us.net/id10.html (last visited Apr. 23, 2008) (outlining the goals of a national broadband strategy adopted by a broad coalition of communications providers, consumers, public interest groups, and state and local governments, which include broadband Internet access that is, to maximum extent possible, open to all users and service, content and applications providers; network operators must have the right to manage their networks responsibly, pursuant to clear standards; markets for the Internet and broadband should be as competitive as reasonably possible; and broadband networks should provide network performance, capacity and connections necessary to enable America to be globally competitive); *In re* Broadband Industry Practices, WC Docket No. 07-52, *Comments of Google, Inc*., at 21–22 (June 15, 2007) (accessible via FCC Electronic Comment Filing System) (commenting that most participants in net neutrality debate agree that prohibited practices include blocking, impairing, or degrading Internet traffic, and the unilateral imposition of terminating charges on Web companies; most also agree that permitted practices include reasonable network management and differential, but not discriminatory, business practices); *In re* Broadband Industry Practices, WC Docket No. 07-52, *Comments of the United States Telecom Association*, at 9–10 (June 10, 2007) (explaining that industry-developed principles supplied a foundation for the FCC to develop its own set of guidelines in its broadband pol-

that consumers will invariably benefit if non-technical government officials are making decisions, on a case-by-case basis, about what is and what is not reasonable management of the networks that collectively comprise the Internet.

This Article will focus on the significant defects in the FCC's dual claims that it has ancillary authority to enforce national Internet policy, and that it may simultaneously exercise that authority by adjudicating the merits of the *Free Press Complaint*. The remainder of this Article is divided into four sections: Part II discusses the regulatory history relevant to the *Comcast P2P Order*. Part III examines the doctrine of ancillary jurisdiction and the FCC's unavailing extension of that doctrine in the *Comcast P2P Order*. Part IV analyzes defects in the FCC's approach to the controversy together with the manner in which it resolved the dispute. Finally, Part V discusses policy implications.

II. THE FCC'S APPROACH TO BROADBAND NETWORK MANAGEMENT PRACTICES

In the last seven years, the FCC has determined that it is preferable to treat broadband Internet access services as information services subject only to its Title I ancillary jurisdiction.[30] As will be explained in Part III, the FCC's Title I ancillary jurisdiction must be exercised ancillary to regulatory mandates contained elsewhere in the Communications Act. The Act's regulatory mandates are split into separate titles by type of service or provider: Title II for common carriers; Title III for radio communications; Title VI for cable communications.[31] Converged Internet Protocol-based digital broadband services delivered anytime, anywhere over a multiplicity of physical platforms have long challenged this framework.[32] Therefore, it is necessary to review the agency's prior

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icy statement).

[30] *See Cable Modem Declaratory Ruling*, *supra* note 21, ¶¶ 7, 38; *Wireline Broadband Order*, *supra* note 24, ¶ 108–09; *In re* United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, *Memorandum Opinion and Order*, 21 F.C.C.R. 13,281, ¶ 9 (Nov. 3, 2006) [hereinafter *Broadband Over Power Line Order*].

[31] *See* 47 U.S.C. §§ 201, 301, 601 (2000). Section 153(10) defines the term "common carrier" and section 153(33) defines the term "radio communications." Section 602, in contrast, contains definitions pertinent to the FCC's statutory mandates over the provision of "cable services," a term defined in section 602(6) but does not define the term "cable communications." The significance of this omission is discussed *infra* Part III.B.1.e.. The Telecommunications Act of 1996 added many definitions to Title I, including the definition of "information service" in section 153(20), "telecommunications" in section 153(43) and "telecommunications service" in section 153(46). Telecommunications Act of 1996, Pub. L. No. 104-104, §§ 3(a), 110 Stat. 56, 58–59 (1996); 47 U.S.C. §§ 153(20), (43), (46).

[32] *See* Barbara S. Esbin, The Progress & Freedom Foundation, *FCC Reform: Scalpel or Steamroller?*, Progress on Point No. 15.15, at 5, Sept. 2008, http://www.pff.org/issues-

decisions and actions concerning the cable modem service specifically, and broadband Internet access service more generally, before assessing the *Comcast P2P Order's* ancillary jurisdiction claims.

A. Cable Modem Declaratory Ruling

The case against Comcast involved its provision of broadband Internet access service.[33] The question of the appropriate regulatory treatment of Internet access provided over cable systems by cable operators came to the FCC's attention shortly after passage of the Telecommunications Act of 1996 ("1996 Act"), yet it was not resolved until 2002.[34] In its *Cable Modem Declaratory Ruling*, the Commission recognized that the Communications Act did not clearly indicate how cable modem service should be classified or regulated, and that it had the authority to address the classification question to "fill gaps where statutes are silent."[35] The Commission assessed and rejected arguments that the cable Internet access service fell within the statutory definition of a cable service.[36] That left the Commission with two other classifications: telecommunications service or information service.[37] Applying tests developed to

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pubs/pops/2008/pop15.15FCCreform.pdf.

[33] *See Comcast P2P Order*, *supra* note 9, ¶¶ 6–11 .

[34] *See* Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past,* 7 COMMLAW CONSPECTUS 37, 42 (1999) [hereinafter Esbin, *Internet Over Cable*]; Barbara Esbin & Gary Lutzker, *Poles, Holes and Cable Open Access: Where the Global Information Superhighway Meets the Local Right-of-Way*, 10 COMMLAW CONSPECTUS 23, 30–32 (2001); *Cable Modem Declaratory Ruling*, *supra* note 21, ¶ 7.

[35] *Cable Modem Declaratory Ruling*, *supra* note 21, ¶ 32.

[36] *See id*. ¶¶ 60–68.

[37] *Id.* ¶ 34 n. 139. The 1996 Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46) (2000). "Telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). "Information service" is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20). As the Commission has noted:

> The term "information service" follows from a distinction drawn in its [three] *Computer Inquiries* . . . between bottleneck common carrier facilities and services for the transmission or movement of information on the one hand and, on the other, the use of computer processing applications to act on the content, code, protocol, or other aspects of the subscriber's information. The latter are "enhanced" or information services. This distinction was incorporated into the Modification of Final Judgment ("MFJ"), which governed the Bell Operating Companies after the Bell System Break-Up, and into the

help it distinguish between the predecessor categories of basic and enhanced services, the Commission held that the cable Internet service—which it designates as "cable modem service"—like the service provided by non-facilities based ISPs, were is more properly treated as an information service under the Act.[38] The Commission also excluded cable modem service from the category of telecommunications service on the ground that the cable modem providers were *using* telecommunications to provide end users with an integrated transmission and data processing capability rather than *offering* them telecommunications service—that is, a pure transmission path for the transmission of information of the user's choosing.[39] Finally, the Commission clarified that cable modem service is an interstate information service on the basis of an "end-to-end analysis, in this case on an examination of the location of the points among which the cable modem service communications travel"—often in different states and countries.[40]

The Commission justified its classification on the basis of the texts of statutory mandates and definitions, relevant precedents, and its policy of applying a light touch to new Internet services so that they may exist in a "minimal regulatory environment."[41] In considering the issues, the Commission stated that it was guided by several overarching principles pursuant to sections 706 and 230(b)(2) directing the agency to encourage the deployment of advanced telecommunications capability by "regulatory forbearance, measures that promote competition . . . or other regulating methods that remove barriers to infrastruc-

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1996 Act. The Commission has confirmed that the two terms—enhanced services and information services—should be interpreted to extend to the same functions.

Cable Modem Declaratory Ruling, *supra* note 21, ¶ 34 n.139 (citations omitted).

38 *Cable Modem Declaratory Ruling*, *supra* note 21, ¶¶ 36–38 ("As currently provisioned, cable modem service supports such functions as e-mail, newsgroups, maintenance of the user's World Wide Web presence, and the [Domain Name Service]. Accordingly, we find that cable modem service, an Internet access service, is an information service. . . . As currently provisioned, cable modem service is a single, integrated service that enables the subscriber to utilize Internet access service through a cable provider's facilities and to realize the benefits of a comprehensive service offering.")

39 *Id.* ¶¶ 39–41 (rejecting commenters urging the Commission "to find a telecommunications service inherent in the provision of cable modem service."). The Commission also refused to apply *Computer II* requirements to cable modem service providers for the purpose of requiring them to create a stand-alone transmission service and offer it to third-party ISPs and other information service providers under tariff pursuant to the Commission's *Computer II* service requirements. *See id.* ¶¶ 42–45. The Commission declined to extend *Computer II* for this purpose, noting that it has never applied the *Computer II* requirements to any entity besides traditional wireline services. *Id.* ¶ 44. As the majority stated, "EarthLink invites us, in essence, to find a telecommunications service inside every information service, extract it, and make it a stand-alone offering to be regulated under Title II of the Act. Such radical surgery is not required." *Id.* ¶ 43.

40 *Id.* ¶ 59.

41 *Id.* ¶¶ 4–6.

ture investment,"[42] while seeking "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services unfettered by Federal or State regulation."[43]

Second, the Commission stated its belief that "*broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market. In this regard, we seek to remove regulatory uncertainty that in itself may discourage investment and innovation*. And we consider how best to limit unnecessary and unduly burdensome regulatory costs."[44]

Third, the Commission sought

> to create a rational framework for the regulation of competing services that are provided . . . over multiple electronic platforms, including wireline, cable terrestrial wireless and satellite. *By promoting development and deployment of multiple platforms, we promote competition in the provision of broadband capabilities, ensuring that public demands and needs can be met*.[45]

It is noteworthy that the Commission chose to classify cable modem service as an information service—a then *unregulated* category of service—in order to promote the overarching deregulatory principles contained in sections 706 and 230(b)(2): that broadband infrastructure deployment and innovation should be encouraged by preserving "the competitive free market that presently exists for the Internet and other interactive computer services," such as the cable modem service, in a manner that is "unfettered by Federal or State regulation."[46] The Commission also sought comment on whether it should impose various regulatory obligations on the provision of the service pursuant to its ancillary jurisdiction in the NPRM accompanying the *Cable Modem Declaratory Ruling*; however, it has never promulgated any rules pursuant this rulemaking proceeding.[47] The *Cable Modem Declaratory Ruling* was ultimately affirmed in 2005

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42 47 U.S.C. § 706(a) (2000); *Cable Modem Declaratory Ruling*, *supra* note 21, ¶ 4.

43 47 U.S.C. § 230(b)(2); *Cable Modem Declaratory Ruling*, *supra* note 21, ¶ 4. Section 230 defines interactive computer service to "mean[] any information service, system, or access software provider that provides or enables computer access . . . including specifically a service or system that provides access to the Internet." 47 U.S.C. § 230(f)(2). Comcast's high-speed Internet access service falls well within section 230's definition of interactive computer service. *See id.*; *Comcast P2P Order*, *supra* note 9, ¶¶ 2–8.

44 *Cable Modem Declaratory Ruling*, *supra* note 21, ¶ 5 (emphasis added).

45 *Id.* ¶ 6 (emphasis added).

46 *See id.* ¶ 4; 47 U.S.C. § 230(b)(2).

47 *See Cable Modem Declaratory Ruling*, *supra* note 21, ¶¶ 75–79 (seeking comment on the extent to which the FCC should exercise Title I authority to regulate the facilities-based provision of interstate information services and which "explicit statutory provisions, including expressions of congressional goals, that would be furthered by the Commission's exercise of ancillary jurisdiction over cable modem service," including sections 1, 203(b), 706 and any additional bases for asserting ancillary jurisdiction). Nor has the Commission completed any other rulemaking proceedings initiated for the same purposes with respect to

by the Supreme Court in its decision in *National Cable & Telecommunications Association v. Brand X Internet Services*.[48]

B. Wireline Broadband Order

Shortly after the *Brand X* decision, the Commission issued the *Wireline Broadband Order*, which established a "new regulatory framework for broadband Internet access services offered by wireline facilities-based providers."[49] The FCC defined "wireline broadband Internet access service, for purposes of this proceeding, [as] a service that uses existing or future wireline facilities of the telephone network to provide subscribers with Internet access capabilities."[50] The Commission stated that it was acting to further the deregulatory goals identified in the *Wireline Broadband NPRM*, which it claimed were reinforced by the Supreme Court's action in *Brand X*.[51]

The FCC went on to describe its action in the *Wireline Broadband Order* as establishing a technology-neutral "minimal regulatory environment" for broadband Internet access, stating:

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broadband Internet services provided over other technologies. *See*, *e.g.*, *In re* Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; 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, *Notice of Proposed Rulemaking*, 17 F.C.C.R. 3019, ¶¶ 108–110 (Feb. 14, 2002) [hereinafter *Wireline Broadband NPRM*]; *In re* IP-Enabled Services, *Notice of Proposed Rulemaking***,** 19 F.C.C.R. 4863, ¶¶ 38–41 (Feb. 12, 2004) [hereinafter *IP-Enabled Services NPRM*]. *See also Broadband Industry Practices Inquiry*, *supra* note 24, ¶¶ 13, 16; *Comcast P2P Order*, *supra* note 13, 13,089–90 (McDowell, Comm'r, dissenting) ("[T]he Commission [in the *Wireline Broadband Order*] clearly contemplated initiating a rulemaking in response to allegations of misconduct, emphasizing its 'authority to promulgate regulations'—regulations not written at that time, or today. Such intentions were, I thought, reinforced in 2007 when I voted to adopt the *Broadband Industry Practices Notice*, the first step in a *rulemaking* proceeding designed to determine whether rules governing network management practices were necessary . . . . The additional action I contemplated was the logical move from an NOI to an NPRM—not an unprecedented, and likely unsustainable, jump to rulemaking by adjudication.") (emphasis in original).

48 545 U.S. 967, 986, 1002–03 (2005).

49 *Wireline Broadband Order*, *supra* note 24, ¶ 1. By its terms, the *Wireline Broadband Order* applies to "providers of telecommunications for Internet access or IP-enabled services." *Id*. at ¶ 96.

50 *Id*. ¶ 9.

51 *Id.* ¶¶ 1–2 (noting that "[u]nlike the *Cable Modem Declaratory Ruling* . . . which addressed a service and its transmission component that had not previously been classified under the Act or subjected to any network access requirements," the FCC needed to "consider that legacy regulation in determining the appropriate regulatory framework for wireline broadband Internet access service providers."); *Wireline Broadband NPRM*, *supra* note 47, ¶ 5.

> First, this Order encourages the ubiquitous availability of broadband to all Americans by, among other things, removing outdated regulations. . . . Second, the framework we adopt in this Order furthers the goal of developing a consistent regulatory framework across platforms by regulating like services in a similar functional manner . . . . Finally, the actions we take in this Order allow facilities-based wireline broadband Internet access service providers to respond to changing marketplace demands effectively and efficiently, spurring them to invest in and deploy innovative broadband capabilities that can benefit all Americans, consistent with the Communications Act . . . .[52]

In the *Wireline Broadband Order*, the FCC reasoned that wireline broadband Internet access service should be treated as an information service because it offers end users "the capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[53] The FCC also determined that neither the Act nor Commission precedent required the treatment of broadband transmission as a telecommunications service when offered to a third-party ISP, though providers could choose to offer it as such.[54] Further, use of the transmission component of wireline broadband Internet access service as part of a facilities-based provider's offering of that service to end users over its own transmission facilities is telecommunications and not a telecommunications service under the Act.[55] Finally, the Commission eliminated the *Computer Inquiry* requirements applicable to wireline broadband Internet access services offered by facilities-based providers.[56]

Thus, wireline broadband Internet access and cable modem services were classified as Title I information services to place them in a light-touch regulatory environment in furtherance of a deregulatory policy focusing on encouraging broadband facilities—or infrastructure—deployment.[57]

C. Broadband Consumer Protection NPRM

The *Wireline Broadband Order*, unlike the FCC's *Cable Modem Declara-*

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[52] *Wireline Broadband Order*, *supra* note 24, ¶ 1.

[53] *Id.* ¶ 14.

[54] *Id.* ¶ 103.

[55] *Id.* ¶ 104.

[56] *Id.* ¶¶ 4, 80, 82. The FCC's *Computer Inquiry* requirements obligate "facilities-based carriers that provide broadband Internet access service directly or through an affiliate [to] make the telecommunications transmission component available to unaffiliated ISPs as a common carrier service." *Id.* ¶ 49.

[57] Employing similar reasoning, the FCC subsequently classified broadband access to the Internet over power line and broadband over wireless networks as interstate information services. *Broadband Over Power Line Order*, *supra* note 30, ¶¶ 7–11; *see also In re* Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, *Declaratory Ruling,* 22 F.C.C.R. 5901, ¶¶ 18, 22–26 (Mar. 22, 2007).

tory Ruling, re-classified a service that the FCC had treated as a common carrier telecommunications service.[58] Therefore, it was necessary for the Commission to seek "comment on what effect classifying wireline broadband Internet access service as an information service would have on other regulatory obligations."[59] The Commission noted: "Title II obligations have never generally applied to information services, including Internet access services," but that when it has "deemed it necessary to impose regulatory requirements on information services, it has done so pursuant to its Title I ancillary jurisdiction."[60] After the Commission noted that it may exercise its ancillary jurisdiction when Title I of the Act gives it subject matter jurisdiction over the service to be regulated and the assertion of jurisdiction is "reasonably ancillary to the effective performance of [its] various responsibilities,"[61] the Commission speculated that "both of the predicates for ancillary jurisdiction are *likely* satisfied for any consumer protection, network reliability, or national security obligation that we may subsequently decide to impose on wireline broadband Internet access service providers."[62] Accordingly, in the NPRM adopted with the *Wireline Broadband Order*, the FCC specifically sought comment on what obligations it should impose pursuant to its Title I authority "to further consumer protection in the broadband age."[63] With the exception of CPNI obligations, this rulemaking remains pending.[64]

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58 *Wireline Broadband Order*, *supra* note 24, ¶ 2.

59 *Id*. ¶ 108.

60 *Id*. Here the FCC is referring to its *Computer II Final Decision*. *See In re* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), *Final Decision*, 77 F.C.C.2d 384, ¶¶ 114, 119, 125, 132 (Apr. 7, 1980) [hereinafter *Computer II Final Decision*]. The FCC also cites its action extending section 255 accessibility obligations—voicemail and interactive menu service—to certain information service providers. *See In re* Implementation of Section 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, Report and Order and Further Notice of Inquiry*, 16 F.C.C.R. 6417, ¶ 93 (July 14, 1999).

61 *Wireline Broadband Order*, *supra* note 24, ¶ 109 (quoting United States v. Sw. Cable Co., 392 U.S. 157, 178 (1968)).

62 *Id.* (emphasis added).

63 *Id.* ¶ 111. The attached *Broadband Consumer Practices NPRM* comprises paragraphs 146 to 159 of the *Wireline Broadband Order*. Comment was sought on whether the FCC could rely on market forces or should exercise its ancillary jurisdiction to impose regulations to extend consumer protection in the traditional telecommunications service areas of customer proprietary network information ("CPNI"), slamming, truth-in-billing, network outage reporting, section 214 discontinuance, section 254(g) rate averaging requirements, and federal and state involvement. *Id*. ¶¶ 147–58.

64 *In re* Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services, *Report and Order and Further Notice of Proposed Rulemaking*,

The *Wireline Broadband Order* was—and remains—controversial for its deregulation of traditional wireline carrier broadband transmission services through an act of regulatory classification.[65] Perhaps because of evident discomfort at this radical transformation of a long-standing regulatory framework reflected in the separate statements of several FCC Commissioners in response to the *Wireline Broadband Order*, the FCC simultaneously adopted a set of four Internet principles, or policies, in a separate *Internet Policy Statement.*[66]

The separate statements of the Commissioners upon the adoption of the *Wireline Broadband Order* and the *Internet Policy Statement* are instructive. FCC Chairman Kevin Martin wrote: "The Commission also adopts today a Policy Statement that *reflects each Commissioner's core beliefs about certain rights all consumers of broadband Internet access should have*. Competition has ensured consumers have had these rights to date, and I remain confident that it will continue to do so."[67] Commissioner Kathleen Abernathy did not mention the *Internet Policy Statement* in her statement, but made plain that the Commission's intent in the *Wireline Broadband Order* was not the complete deregulation of wireline broadband providers, but rather to free them from legacy regulation so that a new "minimally regulated framework for the digital era" could be created pursuant to the FCC's ancillary jurisdiction.[68] Commissioner Michael Copps, concurring in the *Wireline Broadband Order*, stated

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22 F.C.C.R. 6927, ¶ 55 (Mar. 13, 2007) (concluding that the FCC has ancillary jurisdiction under Title I to impose CPNI requirements on providers of interconnected VoIP service). No party sought review of the CPNI Order; thus its conclusion regarding the FCC's ancillary jurisdiction has not been tested in court.

65 *Wireline Broadband Order*, *supra* note 24, ¶ 3; *see Net Neutrality Hearing: Hearing Before the Subcomm. Commerce, Science, and Transp. of the S. Comm. on Commerce, Sci., and Transp.* 109th Cong. 26 (Feb. 7, 2006) (statement of Earl W. Comstock, President and CEO, COMPTEL) (stating "[t]he FCC's new approach will prove catastrophic precisely because the Internet depends on basic common carrier rules to ensure the availability of an essential ingredient, namely the transmission capacity over which Internet applications reach businesses and consumers."); J. Steven Rich, Brand X *and the* Wireline Broadband Report and Order: *The Beginning of the End of the Distinction Between Title I and Title II Services*, 58 FED. COMM. L.J. 221, 239 (2006) ("[T]he key conclusion of the *Wireline Broadband Report and Order* is as controversial, or more so, than the *Declaratory Ruling.*"). *But cf*. Jeffery A. Eisenach, The Progress & Freedom Foundation, *Broadband Policy: Does the U.S. Have It Right After All?*, Progress on Point No. 15-14, at 1–2, Sept. 2008, http://www.pff.org/issues-pubs/pops/2008/pop15.14USbroadbandpolicy.pdf ("The results show that the relatively deregulatory American approach to broadband policy has produced highly desirable results, including high levels of investment and innovation, nearly ubiquitous broadband availability, high and increasing levels of penetration, falling prices, and high levels of consumer satisfaction.").

66 *See Internet Policy Statement*, *supra* note 20, ¶ 4.

67 *Wireline Broadband Order*, *supra* note 24, at 14,975 (Martin, Chairman, approving) (emphasis added).

68 *Id*. at 14,978 (Abernathy, Comm'r, approving).

that despite his misgivings, digital subscriber line services "*will* be reclassified," leaving only Title I available to the FCC in its efforts to protect broadband consumers.[69] Commissioner Copps characterized the policy statement's principles as critical to "guide [the Commission's] effort to preserve and promote the openness that makes the Internet so great."[70]

As Commissioner Copps elaborated:

> [The] Statement lays out a path forward under which the Commission will protect network neutrality so that the Internet remains a vibrant, open place where new technologies, business innovation and competition can flourish. . . . *While I would have preferred a rule that we could use to bring enforcement action*, this is a critical step. And, with violations of our policy, I will take the next step and push for Commission action.[71]

Similarly, Commissioner Jonathan Adelstein praised the adoption of the policy statement for articulating:

> a core set of principles for consumers' access to broadband and the Internet. These principles are designed to ensure that consumers will always enjoy the full benefits of the Internet. I am also pleased that these principles, *which will inform the Commission's future broadband and Internet-related policymaking,* will apply across the range of broadband technologies."[72]

D. Internet Policy Statement

The *Internet Policy Statement*, adopted contemporaneously with the *Wireline Broadband Order*, cites policies contained in sections 230(b) and 706(a) as its underpinnings, and recites the FCC's view that it "has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications."[73] Additionally, "to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers, the Commission adopt[ed] the following principles," each with the purpose "[*t*]*o encourage broadband deployment and 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;
- consumers are entitled to competition among network providers, application and

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69 *Id.* at 14,979 (Copps, Comm'r, concurring).

70 *Id.* at 14,980 (Copps, Comm'r, concurring).

71 *Id*. (emphasis added).

72 *Id.* at 14,983–84 (Adelstein, Comm'r, concurring) (emphasis added).

73 *Internet Policy Statement*, *supra* note 20, ¶¶ 2, 4 (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 976 (2005)).

service providers, and content providers.[74]

The FCC committed itself to incorporating the principles set forth in the *Internet Policy Statement* "into its ongoing policymaking activities."[75] The *Internet Policy Statement* emphasized that the FCC was "*not adopting rules in this policy statement*. The principles . . . adopt[ed] are subject to reasonable network management."[76]

FCC Chairman Kevin Martin released *Comments on the Commission's Policy Statement* upon its adoption, explaining:

> The policy statement we adopt today lists four principles that are based on this fundamental ability to access any website available to the public. *While policy statements do not establish rules nor are they enforceable documents*, today's statement does reflect core beliefs that each member of this Commission holds regarding how broadband Internet access should function.[77]

In closing, the Chairman stated, "cable and telephone companies' practices already track well the [I]nternet principles we endorse today. I remain confident that the marketplace will continue to ensure that these principles are maintained. I am also confident, therefore, that regulation is not, nor will be, required."[78]

Thus, the four Internet principles articulate consumer entitlements, but contain no corresponding articulation of ISP obligations. Additionally, the sole mention of the rights of service providers' is in the phrase subjecting the four principles to reasonable network management, which is the extent of the Commission's guidance on the topic.[79] Thus, this statement of principles was intended—as the policy statement plainly says—to provide "guidance and insight into [the Commission's] approach to the Internet and broadband that is consistent with . . . Congressional directives,"[80] rather than to establish normative and enforceable rules of provider behavior.

E. Broadband Industry Practices Inquiry

Two years after the adoption of the *Internet Policy Statement*, the FCC initiated an industry-wide inquiry into the broadband network management practices of facilities-based broadband ISPs.[81] The inquiry was initiated:

> [T]o enhance [the Commission's] understanding of the nature of the market for

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74 *Id.* ¶ 4.
75 *Id.* ¶ 5.
76 *Id.* ¶ 5 n.15 (emphasis added).
77 *Martin Statement*, *supra* note 24.
78 *Id.*
79 *See Internet Policy Statement*, *supra* note 20, ¶ 5 n.15.
80 *Id.* ¶ 3.
81 *See Broadband Industry Practices Inquiry*, *supra* note 24, ¶ 1.

> broadband and related services, whether network platform providers and others favor or disfavor particular content, how consumers are affected by these policies, and whether consumer choice of broadband providers is sufficient to ensure that all such policies ultimately benefit consumers. We ask for specific examples of beneficial or harmful behavior, and *we ask whether any regulatory intervention is necessary*.[82]

It is not evident what precisely prompted the FCC to initiate the *Broadband Industry Practices Inquiry*. The Commission noted that its recent reviews of telecommunications carrier transactions had not adduced evidence of conduct inconsistent with the *Internet Policy Statement*.[83] Nonetheless, in those proceedings, it had "specifically recognized the applicants' commitments to act in a manner consistent with the principles set forth in the Policy Statement, and their commitments were incorporated as conditions of their mergers."[84] Further, the Commission noted that in its review of the transaction involving Adelphia, Time-Warner, and Comcast, it "found that the transaction was not likely to increase the incentives for the applicants to engage in conduct harmful to consumers, and found no evidence that the applicants were operating in a manner inconsistent with the [Internet] Policy Statement."[85] In contrast to the license transfer approvals involving telecommunications carriers that contained voluntary commitments to abide by the *Internet Policy Statement*, the *Adelphia-Time Warner-Comcast Order* did not contain a voluntary commitment on the part of the applicants to abide by the *Internet Policy Statement*.[86] The FCC nonetheless stated that, "[i]f in the future evidence arises that any company is willfully blocking or degrading Internet content, affected parties may file a

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[82] *Id.* (emphasis added).

[83] *Id*. ¶ 3 nn.6 & 8.

[84] *Id*. (citing *In re* SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order*, 20 F.C.C.R. 18,290, ¶ 144 (Oct. 31, 2005) [hereinafter *SBC-AT&T Merger Order*]; *In re* Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control, *Memorandum Opinion and Order*, 20 F.C.C.R. 18,433, ¶ 143 (Oct. 31, 2005) [hereinafter *Verizon-MCI Merger Order*]; *In re* AT&T Inc. and BellSouth Corporation Application for Transfer of Control, *Memorandum Opinion and Order*, 22 F.C.C.R. 5662, ¶¶ 152, 153 (Dec. 29, 2006) [hereinafter *AT&T-BellSouth Merger Order*].

[85] *Broadband Industry Practices Inquiry*, *supra* note 24, ¶ 3; *In re* Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee, Time Warner Inc., Transferor, to Comcast Corporation, Transferee, *Memorandum Opinion and Order*, 21 F.C.C.R. 8203, ¶¶ 217, 223 (July 13, 2006) [hereinafter *Adelphia-Time Warner-Comcast Order*].

[86] *Broadband Industry Practices Inquiry*, *supra* note 24, ¶ 3; *Adelphia-Time Warner-Comcast Order*, *supra* note 85, ¶ 223.

complaint with the Commission,"[87] noting its view that the *Internet Policy Statement* "contains principles against which the conduct of Comcast [and] Time Warner . . . can be measured."[88]

The *Broadband Industry Practices Inquiry* declared that the FCC "has the ability to adopt and enforce the net neutrality principles it announced in the *Internet Policy Statement*" and could do so pursuant to Title I because the two predicates for the exercise of ancillary jurisdiction are met with respect to the policy statement's four principles.[89] This belief rests upon the Commission's earlier *Wireline Broadband Order*, in which the agency stated "that both of the predicates for ancillary jurisdiction are likely satisfied for any consumer protection, network reliability, or national security obligation that [it] may subsequently decide to impose on wireline broadband Internet access service providers."[90]

In the *Broadband Industry Practices Inquiry*, the Commission posed a series of questions concerning the "behavior of broadband market participants," including packet prioritization, network management, and pricing practices.[91] The Commission also questioned whether it should amend the *Internet Policy Statement* to "incorporate a new principle of nondiscrimination," and if so, how it should be defined and operated.[92] The Commission concluded by asking whether it "*ha*[*d*] *the legal authority to enforce the Policy Statement* in the face of particular market failures or other specific problems."[93]

Thus, until release of the *Comcast P2P Order*, the Commission's long-standing regulatory goal for cable modem service was to permit the service to continue to exist in "a minimal regulatory environment."[94] Although the Commission sought comment on whether it should impose regulatory obligations on the provision of cable modem broadband Internet access pursuant to its ancillary jurisdiction in the *Cable Modem Notice of Proposed Rulemaking*, it has never promulgated any rules pursuant to that rulemaking proceeding.[95] Nor has

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87 *Adelphia-Time Warner-Comcast Order*, *supra* note 85, ¶¶ 220.

88 *Id.* ¶ 223.

89 *Broadband Industry Practices Inquiry*, *supra* note 24, ¶¶ 4, 5 (emphasis added). The two predicates are subject matter jurisdiction conferred by Title I, and "assertion of jurisdiction is reasonably ancillary to the effective performance of the Commission's responsibilities." *Id.* ¶ 5.

90 *Id*. ¶ 5 (quoting *Wireline Broadband Order*, *supra* note 24, ¶ 109).

91 *Id.* ¶¶ 8, 9.

92 *Id*. ¶ 10.

93 *Id*. ¶ 11 (emphasis added). The Commission also asked: "[w]ould regulations further our mandate to 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans'? . . . [and] [a]ssuming it is not necessary to adopt rules at this time, what market characteristics would justify the adoption of rules?" *Id*.

94 *Wireline Broadband Order*, *supra* note 24, ¶ 1.

95 *See Cable Modem Declaratory Ruling*, *supra* note 21, ¶¶ 72–112.

the Commission completed work on any of the other rulemaking proceedings it initiated concerning the network management practices of facilities-based broadband ISPs.[96] Finally, it is quite evident from its repeated inclusion of the question in rulemaking notices that the FCC understood that it was in fact an uncertain proposition as to whether the agency could impose additional regulatory constraints on providers of broadband Internet access services pursuant to its ancillary jurisdiction.

F. Free Press Complaint and Related Petitions for Declaratory Ruling or Rulemaking

In its November 2007 *Complaint*, Free Press requested that the Commission "find that Comcast . . . violat[ed] the FCC's [Internet] Policy Statement and engag[ed] in deceptive practices."[97] Free Press requested that the FCC sanction Comcast for "secretly degrading peer-to-peer protocols," an action Free Press alleged specifically "violates the FCC's Internet Policy Statement."[98] Comcast was alleged to have degraded service to customers utilizing the peer-to-peer file sharing application BitTorrent.[99] On January 11, 2008, the Commission's Enforcement Bureau transmitted the *Free Press Complaint* to Comcast and requested a response, which the company subsequently delivered to the Enforcement Bureau on January 25, 2008.[100]

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[96] *See*, *e.g.*, *Wireline Broadband Order*, *supra* note 24, ¶¶ 146–59; *IP-Enabled Services NPRM*, *supra* note 47, ¶ 1; *see also Broadband Industry Practices Inquiry*, *supra* note 24; *Comcast P2P Order*, *supra* note 9, at 13,089–90 (McDowell, Comm'r, dissenting) ("[T]he Commission [in the *Wireline Broadband Order*] clearly contemplated initiating a rulemaking in response to allegations of misconduct, emphasizing its 'authority to promulgate regulations'—regulations not written at that time, or today. Such intentions were, I thought, reinforced in 2007 when I voted to adopt the *Broadband Industry Practices Notice*, the first step in a *rulemaking* proceeding designed to determine whether rules governing network management practices were necessary. . . . The additional action I contemplated was the logical move from an NOI to an NPRM—not an unprecedented, and likely unsustainable, jump to rulemaking by adjudication." (citations omitted)).

[97] *Free Press Complaint*, *supra* note 11, at 35.

[98] *Id.* at i.

[99] *See Comcast P2P Order*, *supra* note 9, ¶¶ 2, 4. BitTorrent "employs a decentralized distribution model: Each computer in a BitTorrent 'swarm' is able to download content from the other computers in the swarm, and in turn each computer also makes available content for those same peers to download, all via TCP connections. *Id.* ¶ 4.

[100] *Id*. ¶¶ 9 n.28, 10 n.36 (citing Letter from Kris A. Monteith, Chief, Enforcement Bureau, Fed. Commc'ns Comm'n, to Mary McManus, Senior Director of FCC and Regulatory Policy, Comcast Corporation, File No. EB-08-IH-1518 (Jan. 11, 2008) and Letter from Mary McManus, Senior Director of FCC and Regulatory Policy, Comcast Corporation, to Kris A. Monteith, Chief, Enforcement Bureau, Fed. Commc'ns Comm'n, File No. EB-08-IH-1518, at 5 (Jan. 25, 2008)). Neither the Enforcement Bureau letter nor Comcast's response are available in the public file of the proceeding.

At the same time it filed the *Complaint*, Free Press filed a *Petition for Declaratory Ruling* seeking a declaration "that the practice by broadband service providers of degrading peer-to-peer traffic violates the FCC's Internet Policy Statement" and that such practices do not fall within the Commission's exception for reasonable network management.[101] The FCC released the *Free Press Petition* for public comment and requested that interested parties file comments in WC Docket No. 07-52, the same docket established for the *Broadband Industry Practices Inquiry.*[102] The FCC also announced that it would treat the matter as a permit-but-disclose proceeding in accordance with the Commission's ex parte rules.[103] Permit-but-disclose treatment normally is accorded to non-adjudicatory public notice and comment rulemaking proceedings.[104] The *Free Press Petition* contains factual allegations and legal arguments that virtually are identical to the *Free Press Complaint*, including its

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[101] *Free Press Petition for Declaratory Ruling*, *supra* note 12, at 3; *Free Press Declaratory Ruling Public Notice*, *supra* note 12, at 340.

[102] *Free Press Declaratory Ruling Public Notice*, *supra* note 12, at 340.

[103] *Id.* Permit-but-disclose is a designation used to distinguish restricted adjudications from public notice-and-comment proceedings for purposes of contact with and between agency officials and parties to a proceeding or litigation before the FCC. 47 C.F.R. §§ 1.1200, 1.1206 (2007). In un-restricted permit-but-disclose proceedings, parties may contact the FCC outside the presence of other parties to a proceeding, but are required to file an ex parte notice describing the contact. *Id.* § 1.1206 (2007). In contrast, in a restricted proceeding, outside parties and the parties to the proceeding are not permitted to contact agency officials outside the hearing of the other parties. *Id.* § 1.1208 (2007). *See generally In re* Amendment of 47 C.F.R. § 1.1200 *et seq.* Concerning Ex Parte Presentations in Commission Proceedings, *Report and Order*, 12 F.C.C.R. 7348 (Mar. 13, 1997) [hereinafter *Ex Parte Revision Order*] (revising the Commission's ex parte rules).

[104] 47 C.F.R. S§ 1.1206. The FCC has a "long-standing practice of treating rulemakings (other than broadcast allotment proceedings) as permit-but-disclose after the issuance of a notice of proposed rulemaking." *Ex Parte Revision Order*, *supra* note 103, ¶ 34. In the *Ex Parte Revision Order*, the Commission explained "rulemakings, unlike adjudications, often involve a need for continuing contact between the Commission and the public to develop policy issues. Further, we are confident that a permit-but-disclose procedure in rulemakings gives interested persons fair notice of presentations made to the Commission and ensures the development of a complete record. In this regard, we find that proceedings involving the issuance of policy statements, interpretive rules, and rules issued without notice and comment are substantially similar to those involving the notice-and-comment rulemaking, and we shall add an express provision to the rules treating them as subject to permit-but-disclose procedures once they are issued." *Id*. The Commission further explained that "petitions for rulemaking . . . should continue to be treated as exempt proceedings," *Id*. ¶ 28 and "in exempt proceedings, ex parte presentations generally may be made without limitation." *Id*. ¶ 6. Finally, the Commission found "[l]ike a notice of inquiry, a petition for rulemaking initiates a process that is tentative and preliminary to the consideration of a proposed rule. Therefore, it is desirable to permit the maximum degree of free discussion, and there is no danger of prejudicing interested persons." *Id*. ¶ 28 (citation omitted). In contrast, most informal non-hearing adjudications are treated as restricted proceedings. *Id*. ¶ 11. *See* 47 C.F.R. §§ 1.1204(b)(2), 1.1206(a)(2).

request that Comcast's action be subject to preliminary and permanent injunction and significant forfeitures.[105]

Contemporaneous with the filing of the *Free Press Complaint* and *Free Press Petition*, online video service provider Vuze Inc. ("Vuze")[106] filed a "Petition to Establish Rules Governing Network Management Practices by Broadband Network Operators," which the FCC also released for public comment in WC Docket No. 07-52.[107] Vuze requested that the FCC initiate a rulemaking proceeding "to clarify what constitutes 'reasonable network management,' by broadband network operators and to establish that such network management does not permit network operators to block, degrade or unreasonably discriminate against lawful Internet applications, content or technologies as used in the Commission's *Internet Policy Statement*."[108] The FCC designated the *Vuze Petition* as it had the *Free Press Petition*, as a permit-but-disclose proceeding.[109] The *Vuze Petition* notes: "Though many Internet companies, consumer groups and others have urged the Commission to promulgate clearly enforceable rules to address the parameters of acceptable network management, the Commission has not done so to date and has instead sought to collect information, including examples of actual harm."[110]

As the FCC's Broadband Network Management webpage explains: "To further its review of broadband network management practices, the Commission . . . conducted en banc hearings, open to the public, to hear from expert panelists on the subject to help the Commission evaluate particular broadband practices and to examine developments in the broadband marketplace."[111] These hearings took place over the first seven months of 2008, and seemed to examine not only network management practices, but also Comcast's alleged actions.

In February 2008, the FCC held an en banc public hearing at Harvard Law

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105 *See generally Free Press Complaint*, *supra* note 11, at ii; *Free Press Petition for Declaratory Ruling*, *supra* note 12, at 33.

106 Vuze, Inc. offers Peer-to-Peer networking through BitTorrent technology. Vuze, Our Technology, http://www.vuze.com/technology.html (last visited Mar. 19, 2009).

107 Comment Sought on Petition for Rulemaking to Establish Rules Governing Network Management Practices by Broadband Network Operators, *Public Notice*, 23 F.C.C.R. 343 (Jan. 14, 2008) [hereinafter *Vuze Petition Public Notice*].

108 *Id*. at 343; *see Internet Policy Statement*, *supra* note 20, at ¶ 5 n.15.

109 *Vuze Petition Public Notice*, *supra* note 107, at 343; *see Internet Policy Statement*, *supra* note 20, at ¶ 5 n.15.

110 *In re* Vuze, Inc. Petition to Establish Rules Governing Network Management Practices by Broadband Network Operators; Broadband Industry Practices, *Petition for Rulemaking*, WC Docket No. 07-52, at i (Nov. 14, 2007) (available through FCC Electronic Comment Filing System) [hereinafter *Vuze Petition*].

111 FCC, Broadband Network Management, http://www.fcc.gov/broadband_network_management (last visited Mar. 19, 2009).

School as part of its *Broadband Industry Practices Inquiry*.[112] According to the news release announcing the event, the purpose of the hearing was to permit the Commission to "hear from expert panelists regarding broadband network management practices." [113] The hearing was presided over by the FCC Chairman and attended by the four other Commissioners. It consisted of two panel discussions and a technology demonstration; the first panel examined policy perspectives and the second focused on technological perspectives.[114] A Comcast representative participated on the first panel.[115] Shortly thereafter, in March 2008, Comcast and BitTorrent reached an agreement concerning Comcast's handling of its peer-to-peer network traffic; both companies agreed that there was no need for government involvement.[116]

The FCC conducted a second en banc public hearing on broadband network management practices at Stanford University in April 2008; Comcast did not participate.[117] The news release announcing the agenda and list of witnesses stated that the purpose of the hearing was to permit the FCC to "hear from expert panelists regarding broadband network management practices and Internet-related issues."[118] Similar to the Harvard hearing, the Stanford hearing was presided over by the FCC Chairman with the other Commissioners in attendance and consisted of two panel discussions; the first addressed network management and consumer expectations and the second addressed consumer access to emerging Internet technologies and applications.[119] The hearing also included a public comment period.

A third public en banc hearing was conducted on the topic "Broadband and the Digital Future" on July 21, 2008 at Carnegie Mellon University.[120] Similar

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112 News Release, Fed. Commc'ns Comm'n, FCC Announces Agenda and Witnesses for Public Hearing En Banc Hearing in Cambridge, Massachusetts on Broadband Network Management Practices (Feb. 20, 2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280373A1.pdf.

113 *Id*.

114 *Id*.

115 *Id*.

116 Grant Gross, *Comcast, BitTorrent to Work Together on Network Management*, INFOWORLD, Mar. 27, 2008, http://www.infoworld.com/article/08/03/27/Comcast-BitTorrent-to-work-together-on-network-management_1.html.

117 *See* News Release, Fed. Commc'ns Comm'n, FCC Announces Agenda and Witnesses for Public En Banc Hearing at Stanford University on Broadband Network Management Practices (Apr. 16, 2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281597A1.pdf.

118 *Id*.

119 *Id*.

120 *See* News Release, Fed. Commc'ns Comm'n, FCC Announces Additional Panelist for Public En Banc Hearing at Carnegie Mellon University on Broadband and the Digital Future (July 21, 2008) [hereinafter FCC July 21 News Release], *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-283866A1.pdf.

to the other two hearings, the Carnegie Mellon hearing was presided over by the FCC Chairman and attended by the other Commissioners. It consisted of two panel discussions, "The Future of Digital Media" and "The Broadband of Tomorrow," together with a public comment period.[121] Comcast did not participate as a panelist in this hearing.

These en banc hearings were clearly conducted in an informal manner and as part of the *Broadband Industry Practice Inquiry* rather than as part of a formal adjudication of the *Free Press Complaint*, which would have been conducted as a restricted—as opposed to public—proceeding.[122] They were typical of the sorts of quasi-legislative informational fact and opinion gathering exercises conducted by administrative agencies in the performance of their rulemaking functions.[123] No administrative hearing officer or Administrative Law Judge presided over the hearings, there are no indications that the FCC's Enforcement Bureau was either present or involved with their preparation, and the Commission itself selected panel topics and participants and conducted the hearings.[124] Expert panelists gave informational presentations, not sworn testimony, and unlike expert witness presentations in a judicial proceeding, were not subjected to cross-examination by Comcast or any other party.

G. The Mystical Union of Statutory Authority and the Internet Policy Statement

As discussed above, the FCC cites no direct delegation of authority by Congress authorizing the agency either to establish rules governing, or to adjudicate disputes concerning, broadband network management practices in the *Comcast P2P Order*.[125] Rather, the FCC's action rests exclusively on the

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[121] *Id*.

[122] 47 C.F.R. § 1.1208 (2007); *see* 47 C.F.R. § 1.1202(e) (defining a matter designated for hearing as "[a]ny matter that has been designated for hearing before an administrative law judge or which is otherwise designated for hearing in accordance with procedures in 5 U.S.C. § 554."); *see also infra* Part IV.C & n.730 (discussing procedural infirmities)

[123] *See Comcast P2P Order*, *supra* note 9, at 13,088 (McDowell, Comm'r, dissenting) (noting the FCC has "quasi-executive, -legislative and –judicial powers.").

[124] *See*, *e.g*., FCC July 21 News Release, *supra* note 120.

[125] This is not surprising. As Commissioner McDowell recognized in his dissenting statement, Congress has repeatedly tried and failed to enact legislation granting the FCC such direct regulatory authority over facilities-based providers of broadband Internet access services. *See Comcast P2P Order*, *supra* note 9, at 13,089–90 (McDowell, Comm'r, dissenting); *see also* Communications Opportunity, Promotion, and Enhancement Act of 2006, H.R. 5252, 109th Cong. § 201; Internet Freedom Preservation Act, S. 215, 110th Cong. § 2 (2007); Network Neutrality Act of 2006, H.R. 5273, 109th Cong. § 4 (2006); Internet Freedom Preservation Act, S. 2917, 109th Cong. § 2 (20076); Internet Non-Discrimination Act of 2006, S. 2360, 109th Cong. § 5 (2006); Communications, Consumer's Choice, and

Commission's claimed authority to directly vindicate and enforce federal policy against providers of broadband Internet access services through an exercise of its ancillary jurisdiction.[126]

Former FCC Chairman William Kennard described the jurisdictional basis for the *Comcast P2P Order* as "murky."[127] Murky may be an understatement. The *Comcast P2P Order* defies easy analysis, and the Commission's repeated disclaimers that it is doing precisely what the *Comcast P2P Order* seems to do—establish new, prospective standards of behavior for broadband Internet service providers—compounds the problem.[128]

The confusion originates with the allegations contained in the *Free Press Complaint*, which is what the FCC purported to adjudicate. Free Press simply cited the *Internet Policy Statement* in describing why Comcast should be sanctioned for its network management practices.[129] Free Press later clarified that when its Complaint had referred to enforcing the *Internet Policy Statement*, it really meant "making policy based on announced principles set fourth in a Policy Statement by using adjudication to enforce rights guaranteed to consumers, and which the FCC must ensure because of obligations imposed on the FCC by the Communications Act."[130]

As discussed in the *Comcast P2P Order*, the FCC purported to "exercise authority over the complaint [as] reasonably ancillary" to its authority, respectively, under sections 1, 201, 230(b), 256, 257, 601(4), and 706 of the Act.[131] However, the consumer entitlements that Comcast is alleged to have violated derive purely from the *Internet Policy Statement*. The Commission's reasoning linking behavioral norms articulated in the *Internet Policy Statement* and the cited provisions of the Communications Act has the sinuosity of a Mobius-strip. It is nearly impossible to tell where the Internet policy principles leave off and statutory commands begin, as the following excerpt from the *Comcast*

Broadband Deployment Act of 2006, S. 2686, 109th Cong. § 901 (2006); Internet Freedom Preservation Act of 2008, H.R. 5353, 110th Cong. § 4 (2008).

126 *See Comcast P2P Order*, *supra* note 9, ¶¶ 13–15; *see also id.* at 13,090 (McDowell, Comm'r, dissenting).

127 John Eggerton, *Kennard: FCC on Shaky Ground in Comcast Decision*, BROAD. & CABLE, Aug. 21, 2008, http://www.broadcastingcable.com/index.asp?layout=articlePrint&articleID=CA6589526.

128 *See Comcast P2P Order*, *supra* note 9, ¶¶ 45–46.

129 *Free Press Complaint*, *supra* note 11, at i.

130 *See* 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," *Ex Parte Communication of Free Press*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52, WC Docket No. 07-52, supp. 2 at 2 (June 12, 2008) (accessible via the FCC Electronic Comment Filing System) [hereinafter *Free Press June 12 Ex Parte*].

131 *Comcast P2P Order*, *supra* note 13, ¶¶ 15–21.

P2P Order demonstrates:

> On its face, Comcast's interference with peer-to-peer protocols appears to contravene the federal policy of "promot[ing] the continued development of the Internet" because that interference impedes consumers from "run[ning] applications . . . of their choice," rather than those favored by Comcast, and that interference limits consumers' ability "to access the lawful Internet content of their choice," including the video programming made available by vendors like Vuze. Comcast's selective interference also appears to discourage the "development of technologies"—such as peer-to-peer technologies—that "maximize user control over what information is received by individuals . . . who use the Internet" because that interference (again) impedes consumers from "run[ning] applications . . . of their choice," rather than those favored by Comcast. [132]

In support of the foregoing propositions, the Commission cites section 230(b)(1) of the Act, paragraph four of the *Internet Policy Statement*, comments submitted in the record of the *Broadband Industry Practices Inquiry*, and a law review article.[133] The Commission found that "Comcast's discriminatory network management practices [that interfere with user applications] *also* run afoul of federal policy" in the following ways:

> they reduce the rapidity and efficiency of the public Internet, *see supra* para. 16, *cf.* 47 U.S.C. § 151, impede competition, *see supra* para. 16, *cf.* 47 U.S.C. § 151, inhibit the deployment of advanced technologies, *see supra* para. 18, *cf.* 47 U.S.C. § 157 nt, improperly shift traffic (and hence costs) to providers who offer DSL as a common carrier service, *see supra* para. 17, *cf.* 47 U.S.C. § 201, prevent the seamless and transparent flow of information across public telecommunications networks, *see supra* para. 19, *cf.* 47 U.S.C. § 256, erect barriers to entry for entrepreneurs, *see supra* para. 20 *cf.* 47 U.S.C. § 257, and degrade an individual's ability to access a diverse array of content over the Internet, *see supra* paras. 20–21, *cf.* 47 U.S.C. §§ 257, 521(4).[134]

In other words, by using the signal "cf," the FCC signaled its understanding that these statutory provisions were not directly applicable to the behavior under examination.[135] Nonetheless, the *Comcast P2P Order* wavers back and forth between outright declarations that Comcast violated the rights of consumers as described in the *Internet Policy Statement*, to declarations that the company has "run afoul of federal policy" as embodied in the Communications Act.[136] The Commission purports to be enforcing the rights guaranteed to consumers in the *Internet Policy Statement* through case-by-case adjudication and

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[132] *Id.* ¶ 43 (alterations in original) (citations omitted).

[133] *Id.* ¶ 43 nn.194–200.

[134] *Id.* ¶ 43 n.201.

[135] The Bluebook explains the use of "cf." as follows: "Cited authority supports a proposition different from the main proposition but sufficiently analogous to lend support." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a), at 47 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005). The Bluebook is "the best known and most widely used [legal] citation manual." Carol M. Bast & Susan Harrell, *Has the Bluebook Met Its Match? The ALWD Citation Manual*, 92 LAW LIBR. J. 337, 339 (2000).

[136] *Comcast P2P Order*, *supra* note 9, ¶ 43 & n.201.

justifies its action by claiming that in so doing the Commission is carrying out its statutory responsibilities under the Act, pursuant to its ancillary jurisdiction. In short, the *Comcast P2P Order* seems to rest on a mystical union achieved between the FCC's *Internet Policy Statement* and the provisions of the Communications Act to which the Commission claims its exercise of regulatory authority is reasonably ancillary.

H. Summary

Whether considered individually or as a group, the *Wireline Broadband Order*, *Internet Policy Statement*, and *Broadband Industry Practices Inquiry* fail to provide the basis for an enforcement action predicated upon violation of the *Internet Policy Statement*.

The FCC's *Internet Policy Statement* contained four broadband Internet access service consumer entitlements, which it made subject to "reasonable network management."[137] The FCC had not, however, adopted any legally binding rules of behavior incorporating either the principles contained in the *Internet Policy Statement* relevant to the allegations contained in the *Free Press Complaint*.[138] The FCC had not incorporated a voluntary commitment by Comcast to abide by the *Internet Policy Statement* in its *Adelphia-Time Warner-Comcast* license transfer approval order.[139] Finally, it is quite evident from its repeated inclusion of the question in rulemaking notices that the FCC understood that it was in fact an uncertain proposition as to whether the agency could impose additional regulatory constraints on providers of broadband Internet access services pursuant to its ancillary jurisdiction.[140]

According to the Commission's *Internet Policy Statement*, Congress established a national Internet policy by incorporating section 230 into the Act.[141] The Commission claimed to be clarifying the contours of this policy in its own policy statement, and it committed to both incorporate this clarified policy in its on-going policy-making activities and to take undefined action to address violations of the policy principles in the future.[142] However, this chain of logic does not support the agency's jurisdictional claims: policy clarifying policy combined with a pledge to make more policy based on the clarified policy does not create legally binding rules against which ISP behavior may be adjudicated.

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137 *See Internet Policy Statement*, *supra* note 20, ¶ 5 & n.15.
138 *See supra* Part II.D.
139 *See supra* notes 85–88(discussing the *Adelphia-Time Warner-Comcast* transaction).
140 *See supra* Part II.A–E.
141 *Internet Policy Statement*, *supra* note 20, ¶ 2.
142 *Id*. ¶¶ 3–5.

Moreover, the *Internet Policy Statement* itself was not an implementation of specific provisions of the Communications Act, and the FCC's premise that it may regulate the network management practices of broadband ISPs as reasonably ancillary to sections 230(b) and 706, is, to date, untested in court.[143] Although the FCC had expressed its opinion that it possessed ancillary jurisdiction to support an assertion of regulatory jurisdiction over the network management practices of broadband ISPs, it had repeatedly also sought comment on whether in fact such jurisdiction existed.[144]

The *Wireline Broadband Order*, *Internet Policy Statement*, and *Broadband Industry Practices Inquiry* fail to definitively establish the FCC's ancillary authority either to enforce federal Internet policy or to adopt rules codifying this policy into legally binding norms of behavior.[145] Instead, these actions demonstrate only the existence of relevant federal policies contained in disparate provisions of the Communications Act and the Commission's untested belief that it has ancillary authority to take regulatory action against a cable modem service provider to enforce them. Such faith-based ancillary jurisdiction, unless and until tested in court, remains in the realm of belief rather than established law.

It is thus apparent that the FCC has done precisely what Free Press suggested: "ma[de] policy based on announced principles set fourth in a Policy Statement by using adjudication to enforce rights guaranteed to consumers, and which the FCC must ensure because of obligations imposed on the FCC by the Communications Act."[146] Yet the FCC was not interpreting the Communications Act for the purpose of judging Comcast's conduct. The provisions of the Act are cited solely in support of the Commission's claim that it has ancillary jurisdiction that it may exercise to adjudicate the allegations in the *Free Press Complaint*.

For the reasons stated below, however, these provisions of the Act do not supply the ancillary jurisdiction the FCC claims, and the *Internet Policy Statement* does not contain enforceable rules. While the FCC may have alternative and as yet unarticulated theories of ancillary jurisdiction to support a future exercise of jurisdiction over the network management practices of broadband ISPs, none of the theories it advanced in the *Comcast P2P Order* justify its action. Additionally, the Act does not obligate the FCC to enforce the consumer entitlements contained in the *Internet Policy Statement*. The FCC therefore lacks delegated authority over the matter, lacks rules to enforce, and the

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143 *See infra* Part III.A.
144 *See supra* Part II.E.
145 *See supra* Part II.B, D–E.
146 *Free Press June 12 Ex Parte*, *supra* note 130, supp. 2 at 2.

Order must be considered *ultra vires*.

For analytical clarity, we tease out the various sources of authority upon which the FCC relies, first addressing the core jurisdictional issue before proceeding to analyze the application of that doctrine to the *Free Press Complaint*. Our analysis of the Commission's claims concerning its ancillary jurisdiction in Part III, below, begins with a review of the relevant Supreme Court cases establishing the doctrine of ancillary jurisdiction and surveys recent decisions of the U.S. Court of Appeals for the D.C. Circuit that further illuminate the contours—and particularly the limits—of the doctrine. These cases, taken together, establish what we call the "bounded nature of the doctrine." Next, we demonstrate that none of the provisions of the Communications Act cited by the Commission, whether considered singly or together, provide a basis for an exercise of ancillary jurisdiction over the network management practices of Comcast, and that the Commission therefore, overstepped its statutory authority by adjudicating the *Free Press Complaint*.

III. THE FCC LACKS ANCILLARY JURISDICTION TO ENFORCE THE INTERNET POLICY STATEMENT

A. The Doctrine of Ancillary Jurisdiction is Not Unbounded

The FCC's ancillary authority—or jurisdiction—is a judicially-recognized doctrine that permits the FCC to regulate matters or entities not explicitly covered by the provisions of the Communications Act in circumstances where: (1) the Commission's general jurisdictional grant under Title I covers the subject matter of the regulations; and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities.[147] That is, as even the FCC recognizes, "[t]o be 'reasonably ancillary,' the Commission's rules must be reasonably ancillary *to something*."[148] Although the courts have repeatedly stated that the FCC has "broad authority" under this doctrine to implement statutory purposes, they have also recognized that the FCC's ancillary authority nonetheless has limits.[149]

The most authoritative cases on ancillary jurisdiction are the original Supreme Court decisions establishing and delimiting the doctrine: *Southwestern*

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[147] United States v. Sw. Cable Co. (*Sw. Cable*), 392 U.S. 157, 177–78 (1968); *see* Am. Library Ass'n v. FCC, 406 F.3d 689, 700 (D.C. Cir. 2005).

[148] *Comcast P2P Order*, *supra* note 9, at ¶ 15 n.63 (emphasis added).

[149] *See Sw. Cable*, 392 U.S. at 177–78; FCC v. Midwest Video Corp. (*Midwest Video II),* 440 U.S. 689, 696 (1979).

Cable, Midwest Video I and *Midwest Video II.*[150] These decisions are discussed at length, as they are critical to understanding the proper scope of the FCC's ancillary authority. Taken together, these three Supreme Court cases establish a limited or "bounded" doctrine that permits the FCC to act where the Act applies—generally to wire and radio communications—even where the Act contains no express regulatory mandates for the agency to implement over that subject matter. However, this jurisdiction extends only insofar as the FCC can demonstrate that its action is reasonably required for the implementation of one or more of the agency's express regulatory obligations. In other words, the courts have recognized that the FCC's subject matter jurisdiction must be interpreted broadly, but the FCC's ability to impose regulatory constraints on the provision of the expansive array of communications falling within its jurisdiction is far more circumscribed. Above all, Title I ancillary jurisdiction is a derivative, not generative, source of authority and it must be exercised in furtherance of the Commission's regulatory responsibilities contained in other titles of the Act.[151]

1. The Scope of Ancillary Jurisdiction Recognized by the Supreme Court is Limited

a. Southwestern Cable

The question presented in *Southwestern Cable* was whether the FCC, prior to the enactment of Title VI, had authority under the Act to regulate cable television systems—then known as "community antenna television" ("CATV")—and if so, whether the FCC had the authority to issue an order restricting the expansion of a television broadcast station's service via cable beyond certain broadcast contours.[152] The FCC had justified the distant signal importation rules under review as necessary—if not imperative—to prevent a feared destruction or serious degradation of the service offered by television broadcast stations.[153]

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[150] *See Sw. Cable*, 392 U.S. at 178; U.S. v. Midwest Video Corp. (*Midwest Video I*), 406 U.S. 649, 669–70 (1972); *Midwest Video II*, 440 U.S. at 697.

[151] *See* Am. Library Ass'n v. FCC, 406 F.3d 689, 708 (D.C. Cir. 2005); *see also* W. Kenneth Ferree, The Progress & Freedom Foundation, *Elephants Do Not Hide in Mouse Holes*, Progress Snapshot No. 4.16, at 3, Aug. 2008, http://www.pff.org/issues-pubs/ps/2008/ps4.16wholesalealacarte.html.

[152] *Sw. Cable*, 392 U.S. at 160–61.

[153] *Id*. at 164–66. The challenged rules required that cable systems bringing competing signals into the service area of a broadcast station whose signal they also carried to avoid duplication of the local station programming on the same day such programming was

First, the Court found that the FCC had broad subject matter jurisdiction over "all interstate and foreign communication by wire or radio," which includes cable systems as they are comprised within the term "communication by wire or radio."[154] The Court also found that there was no doubt that cable providers were engaged in interstate communications.[155] Additionally, the Court observed that in 1934 Congress could not foresee every form of wire or radio communications and therefore built flexibility for the FCC into the Act to allow the Commission to effectively perform its express regulatory obligations.[156] Thus, where an activity is covered by Title I's broad grant of authority over wire and radio communication, Titles II and III do not otherwise limit the FCC's *subject matter jurisdiction*. That is, the FCC's subject matter jurisdiction is not limited to common carrier wire or radio communications or radio and television broadcasting services.

Next, the Court acknowledged that the FCC "ha[d] reasonably concluded that regulatory authority over CATV is *imperative* if it is to perform with effectiveness certain of its other responsibilities."[157] In particular, the FCC needed to exert jurisdiction over cable to carry out its "core obligation" pursuant to section 307(b) of "providing a widely dispersed radio and television service" that is equitably distributed "among states and communities," and its section 303(f) and (h) obligation "to prevent interference among . . . stations."[158] Accordingly, the Court found that the FCC reasonably concluded that the successful performance of its responsibilities for the orderly development of local television broadcasting "demands prompt and efficacious regulation of [CATV] systems," and that it would not "prohibit administrative action imperative for the achievement of an agency's ultimate purposes" in the absence of evidence that Congress intended to so limit the agency.[159] Based on these findings, the Court determined that the FCC has authority under section 152(a) that is "restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[160] Additionally, the Court found "[t]he Commission may, for these purposes, issue 'such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,' as 'public convenience, interest or

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broadcast, and to refrain from importing new distant signals into the 100 largest television markets unless first demonstrating that the service would comport with the public interest. *Id*. at 166–67.

154 *Id*. at 167–68 (quoting 47 U.S.C. 152(a) (1964)).

155 *Id*. at 168–69.

156 *Id*. at 172–73.

157 *Id*. at 173 (emphasis added).

158 *Sw. Cable*, 392 U.S. at 173–74.

159 *Id*. at 177.

160 *Id*.

necessity requires.'"[161] Significantly, the Court refrained from expressing any view "as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes."[162]

Southwestern Cable established a jurisdictional doctrine of limited scope: the exercise of ancillary regulatory authority is appropriate when imperative for the effective performance of the FCC's express statutory mandates such that its absence would thwart the successful performance of these duties. In the case of the distant signal importation rules, the statutory authority to which cable regulation was reasonably ancillary was the FCC's core obligations with respect to television broadcast stations contained in several provisions of Title III.[163] Only after an appropriate jurisdictional foundation is recognized may the Commission resort to its authority pursuant to section 303(r) to issue rules, regulations, and prescribe restrictions.[164] The Supreme Court went no further in *Southwestern Cable* than to find ancillary authority over the subject matter of cable television, and regulatory authority for the distance signal importation rule ancillary to Title III. In short time the Court would be asked to determine the applicability of the Commission's regulatory authority of other aspects of cable television service.

b. Midwest Video I

After its ancillary jurisdiction over cable systems was upheld in *Southwestern Cable*, the FCC expanded the cable regulatory framework, and industry challenges quickly followed. Four years after *Southwestern Cable*, *Midwest Video I* provided the Court with the opportunity to further refine the FCC's ancillary jurisdiction in a challenge to the recently crafted program origination rules.[165] A plurality of the Court stated:

> [T]he critical question in this case is whether the Commission has reasonably determined that its origination rule will "further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services . . . ."[166]

The plurality found the program origination rule reasonably ancillary to the effective performance of the FCC's various responsibilities for the regulation

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161 *Id*.
162 *Id*.
163 *See id*.
164 *See Sw. Cable*, 392 U.S. at 177; 47 U.S.C. § 303(r) (2000).
165 *See* United States v. Midwest Video Corp. (*Midwest Video I*), 406 U.S. 649 (1972).
166 *Id*. at 667–68. In other words the question is "whether the Commission's program-origination rule is 'reasonably ancillary to the effective performance of (its) various responsibilities for the regulation of television broadcasting.'" *Id*. at 662–63.

of television broadcasting, and therefore within the agency's authority.[167] Specifically, the program origination rules were ancillary to the FCC's obligation to "facilitate the more effective performance of [its] duty to provide a fair, efficient, and equitable distribution of television service to each of the several States and communities" in granting station licenses pursuant to section 307(b) of the Act.[168]

The plurality opinion reviewed the limited extent of the Court's action in its earlier decision in *Southwestern Cable*:

> We . . . held that § 2(a) is itself a grant of regulatory power and not merely a prescription of the forms of communication to which the Act's other provisions governing common carriers and broadcasters apply. . . . *This conclusion, however, did not end the analysis, for § 2(a) does not in and of itself prescribe any objectives for which the Commission's regulatory power over [cable] might properly be exercised.* We accordingly went on to evaluate the reasons for which the Commission had asserted jurisdiction and found that "the Commission has reasonably concluded that regulatory authority over [cable] is *imperative* if it is to perform with appropriate effectiveness certain of its other responsibilities. . . . In particular, we found that the Commission had reasonably determined that "the unregulated explosive growth of [cable]," especially through "its importation of distant signals into the service areas of local stations" and the resulting division of audiences and revenues, threatened to "deprive the public of the various benefits of the system of local broadcasting stations" that the Commission was charged with developing and overseeing under § 307(b) of the Act. . . . We therefore concluded, without expressing any view "as to the Commission's authority, if any, to regulate [cable] under any other circumstances or for any other purposes," [to] . . . issue "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law," as "public convenience, interest, or necessity requires."[169]

The plurality concluded, "the Commission's legitimate concern in the regulation of [cable] is not limited to controlling the competitive impact [cable] may have on broadcast services."[170] Rather, the Commission has "various responsibilities for the regulation of television broadcasting," that go beyond simply "assuring that broadcast stations operating in the public interest do not go out of business."[171] These other responsibilities include "requiring [cable] affirmatively to further statutory policies," in recognition of the fact that cable systems "have arisen in response to public need and demand for improved television service and perform valuable services in this respect."[172] Accordingly, the plurality found the challenged regulation was reasonably ancillary to several of the Commission's statutory responsibilities with respect to broadcast regulation, and was supported by substantial record evidence that it would

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167 *Id*. at 670.
168 *Id*. at 670 (citing 47 U.S.C. § 307(b) (2000)).
169 *Id*. at 660–62 (emphasis added) (citations omitted).
170 *Id*. at 664.
171 *Id*.
172 *Midwest Video I*, 406 U.S. at 664–65.

promote the public interest.[173]

Midwest Video I reaffirmed three things. First, section 2(a) is not merely a prescription of the forms of communication to which Title II and III apply—that is, a source of subject matter jurisdiction.[174] Second, section 2(a) is a source of regulatory power—ancillary authority—but the section does not itself prescribe the objectives for which the Commission's regulatory power over cable may properly be exercised.[175] Third, *Midwest Video I* reaffirmed that the objectives of the exercise of regulatory power—that to which the challenged exercise is reasonably ancillary—must derive from the Commission's other regulatory responsibilities.[176] Chief Justice Burger concurred only in the result in *Midwest Video I* on the ground that cable regulation was within the Commission's Title III jurisdiction over broadcast stations.[177] Justice Burger wrote:

> Candor requires acknowledgement, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts. The almost explosive development of [cable] suggests the need of a comprehensive re-examination of the statutory scheme as it relates to this new development, so that the basic policies are considered by Congress and not left entirely to the Commission and the courts.[178]

The *Midwest Video I* dissenting opinion found the challenged cable regulation completely beyond the jurisdiction granted to the FCC by Congress.[179] Significantly, the dissenting Justices warned that the upshot of the decision "is to make the Commission's authority over activities 'ancillary' to its responsibilities greater than its authority over any broadcast licensee," a result only properly achieved by congressional amendment to the Act.[180] It is apparent that the view that cable was within the scope of the Commission's delegated authority for the regulation of television broadcasting was grounded, to a significant degree, in the view that cable was either "an auxiliary to broadcasting through the retransmission by wire of intercepted television signals to viewers otherwise unable to receive them because of distance or local terrain" or was itself a form of broadcasting, which the FCC already had extensive powers to regulate under Title III.[181]

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173 *Id*. at 670–74.
174 *See id*. at 662–63.
175 *See id.*
176 *See id*. at 670.
177 *See id*. at 675 (Burger, J., concurring) ("[Cable] is dependent totally on broadcast signals and is a significant link in the system as a whole and therefore must be seen as within the jurisdiction of the Act.").
178 *Midwest Video I*, 406 U.S. at 676.
179 *See id*. at 679 (Douglas, J., dissenting).
180 *Id*. at 681.
181 *Id*. at 650 (majority opinion).

c. Midwest Video II

The next set of FCC cable regulations promulgated under ancillary jurisdiction presented for Supreme Court review proved to be a bridge too far for a majority of the Court. In *Midwest Video II*, the challenged rules: (1) prescribed a series of interrelated obligations ensuring the set aside of public, educational, and governmental ("PEG") and leased access channels on cable systems of a designated size; (2) deprived the cable operators of "all discretion regarding who may exploit their access channels and what may be transmitted over such channels"; and (3) instructed the cable operators to "issue rules providing for first-come, nondiscriminatory access on public and leased channels."[182]

Before addressing the merits, the Court reviewed its prior ancillary jurisdiction cases. *Southwestern Cable* upheld the Commission's regulatory effort because it was justified as "imperative to prevent interference with the Commission's work in the broadcasting area."[183] With respect to *Midwest Video I*, the Court stated "[f]our Justices, in an opinion by Mr. Justice Brennan, reaffirmed the view that the Commission has jurisdiction over cable television and that such authority is delimited by its statutory responsibilities over television broadcasting," whereas the "Chief Justice, in a separate opinion concurring in the result, admonished that the Commission's origination rule '[strained] the outer limits' of its jurisdiction."[184] The Court reiterated that the FCC's regulations were upheld in *Midwest Video I* because they promoted "long-established goals of broadcasting regulation."[185]

Against this backdrop, the *Midwest Video II* Court found the FCC's challenged access rules qualitatively different from those previously approved and in contravention of statutory limitations designed to safeguard the journalistic freedom of broadcasters, particularly the command of § 3(h) of the Act that a "person engaged in . . . broadcasting shall not . . . be deemed a common carrier."[186] Unlike the local programming origination rules, which compelled cable operators to assume a more positive role in the composition of their programming comparable to that of television broadcasters,[187] the access rules "transferred control of the content of cable access channels from cable operators to members of the public who wished to communicate by the cable medium."[188] Although section 3(h) by its terms precludes the FCC from compelling televi-

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182 FCC v. Midwest Video Corp. (*Midwest Video II*), 440 U.S. 689, 693–94 (1979).
183 *Id*. at 706–07.
184 *Id*. at 698–99.
185 *Id*. at 707.
186 *Id*. at 700; 47 U.S.C. § 153(10) (2000).
187 *See id*. at 700.
188 *Id*.

sion broadcasters to act as common carriers,[189] the Court held "that same constraint applies to the regulation of cable systems," [190] and the FCC exceeded its jurisdiction by attempting to "relegat[e] cable systems, *pro tanto*, to common-carrier status" with its access rules.[191] As Justice White indicated:

> Of course, § 3(h) does not explicitly limit the regulation of cable systems. But without reference to the provisions of the Act directly governing broadcasting, the Commission's jurisdiction under § 2(a) would be unbounded. . . . Though afforded wide latitude in its supervision over communication by wire, the Commission was not delegated unrestrained authority.[192]

With respect to congressional guidance the Court stated, "Congress has restricted the Commission's ability to advance objectives associated with public access at the expense of journalistic freedom of persons engaged in broadcasting," and the force of that limitation "is not diminished by the variant technology involved in cable transmissions."[193] Unlike the regulations that were found within the scope of the FCC's ancillary authority in *Southwestern* and *Midwest Video I*, where a lack of congressional guidance led the Court to defer to the Commission's judgment concerning the scope of its authority, "here there are strong indications that agency flexibility was to be sharply delimited."[194]

Thus, in *Midwest Video II*, the Supreme Court restricted the scope of *Midwest Video I* by finding that if the basis for jurisdiction over cable is that the Commission's authority is ancillary to the regulation of broadcasting, the cable regulation imposed may not be antithetical to a basic regulatory parameter established for broadcasting. The Court reiterated that any exercise of ancillary jurisdiction under section 2(a) of the Act must make "reference to the provisions of the Act directly governing" the activity to which the requirement is alleged to be ancillary.[195] In other words, a permissible exercise of ancillary jurisdiction must be reasonably ancillary to provisions authorizing the Commission to regulate the activities of providers of communications by wire or radio under the operative Titles of the Act, and must not be contrary to any

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189 *See* 47 U.S.C. § 153(10); *id*. at 695.

190 *Midwest Video II*, 440 U.S. at 705 n.15.

191 *Id*. at 700.

192 *Id*. at 706.

193 *Id*. at 707.

194 *Id*. at 708. The dissenting opinion, authored by Justice Stevens, took issue with the view that section 3(h), one of the definitional sections contained in Title I of the Act, "places limits on the Commission's exercise of powers otherwise within its statutory authority because a lawfully imposed requirement might be termed a 'common carrier obligation.'" *Id.* at 710–11 (Stevens, J., dissenting). The dissent viewed the rules at issue as an example of the FCC's "flexibility to experiment" in choosing to replace the mandatory local origination rule upheld in *Midwest Video I* with what the agency viewed as the less onerous local access rules. *Id.* at 713.

195 *Id*. at 706 (majority opinion).

express provision of the Act. As implied by the phrase "*ancillary* jurisdiction," the authority exercised must be *in relation to* something else. Otherwise, the doctrine of ancillary jurisdiction would extend the Commission's regulatory jurisdiction beyond the bounds explicitly established by Congress. It is evident therefore, that ancillary jurisdiction is highly fact-specific; each Commission exercise of this authority must be judged on the facts presented.

d. Ancillary Jurisdiction in Adjudications

It is noteworthy that all three Supreme Court cases—*Southwestern Cable* and *Midwest Video I* and *Midwest Video II*—involve the agency's rulemaking and not adjudicatory functions. From that, one may reasonably infer that an exercise of ancillary jurisdiction should occur only in agency rulemakings. Ancillary jurisdiction is an amorphous concept, originated by the FCC and sanctioned by the courts; it is therefore uncertain until the last appeal is exhausted whether any given exercise of ancillary jurisdiction is lawful. Such a doctrine has a place in the context of rulemaking proceedings imposing general rules of prospective effect; it is ill suited by its nature to sustain adjudications, which predominantly are retrospective in effect.[196] The extension of the doctrine to adjudications as the Commission sought to do in the *Comcast P2P Order*, if recognized, would introduce devastating uncertainty for all entities falling within the FCC's subject matter jurisdiction.

In the *Comcast P2P Order*, the Commission, nonetheless, rejected arguments advanced by Comcast that its ancillary authority does not extend to adjudications, but must first be exercised in a rulemaking proceeding.[197] The FCC responded, "[T]he D.C. Circuit has affirmed the Commission's exercise of ancillary authority in an adjudicatory proceeding and in the absence of regulations before."[198] The FCC cites only one precedent supporting the exercise of ancillary authority in any context other than a rulemaking: *CBS v. FCC*, in which the court concluded, "the Commission had, in the context of an adjudication, reasonably construed its ancillary authority to encompass television networks."[199]

CBS v. FCC originated with a complaint filed by the Carter-Mondale Presidential Committee alleging that the three broadcast television networks—CBS, NBC and ABC—violated their statutory obligation to provide reasonable ac-

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196 *See supra* note 23 and accompanying text.

197 *See Comcast P2P Order*, *supra* note 9, ¶ 38.

198 *Id*.

199 *Id.* ¶ 38 n.167 (citing CBS, Inc. v. FCC, 629 F.2d 1, 26–27 (D.C. Cir. 1980), *aff'd*, 453 U.S. 367 (1981).

cess pursuant to section 312(a)(7).[200] By a slim majority the FCC found that the networks had violated section 312(a)(7) and directed the networks to inform the Commission how they intended to fulfill their obligation under the Act; the networks appealed.[201] The statutory provision at issue empowered the FCC to revoke a station's license for "willful or repeated failure to allow [legally qualified candidates] reasonable access to or to permit purchase of reasonable amounts of time for use of [the] broadcast station."[202] The FCC interpreted section 312(a)(7) as including two severable elements, one establishing a reasonable access obligation and the other a specific remedy, and argued that the access obligation was not written in such a way as to expressly "identify the entities subject to the obligation."[203] Given the purpose of the provision—to allow reasonable access to or to permit purchase of reasonable amounts of broadcast station use time—the FCC interpreted the provision as imposing an obligation on the individual stations and the networks "who, by practice and contractual relationship, control the best practical means of efficiently acquiring national access."[204]

The court observed that "[t]he access right accorded to presidential candidates by [s]ection 312(a)(7) would have been robbed of much of its intended significance if the candidate were forced to go from station to station around the country assembling his own network."[205] After reviewing the legislative history, the court concluded: "there is support in the legislative history for the contention that Congress intended section 312(a)(7) to apply to the[se] networks."[206] The court further observed that "[e]ven if section 312(a)(7) by itself does not afford the Commission power to mandate reasonable network access, such jurisdiction is 'reasonably ancillary' to the effective enforcement of the individual licensee's [s]ection 312(a)(7) obligations, and hence, within the Commission's statutory authority."[207] The court pointed to other provisions of Title III permitting the Commission to exercise jurisdiction over chain broadcasting and the breadth of the FCC's recognized jurisdiction to regulate broadcast activities, concluding that the "Commission's action in applying [s]ection 312(a)(7) to the networks is an exercise of its powers 'reasonably ancillary' to

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200 *In re* Complaint of Carter-Mondale Presidential Committee, Inc. against The ABC, CBS and NBC Television Networks, *Memorandum Opinion and Order*, 74 F.C.C.2d. 631, ¶ 1 (1979) [hereinafter *Carter-Mondale Order*]; 47 U.S.C. § 312(a)(7) (2000).

201 *Id.*; *CBS*, 629 F.2d at 8–9. Dissenting Commissioners Lee and Washburn protested the order's interference with the editorial discretion of broadcasters. *Id*. n.9.

202 47 U.S.C. § 312(a)(7).

203 *CBS*, 629 F.2d at 25.

204 *Id*. at 26.

205 *Id*.

206 *Id*.

207 *Id*. (citing United States v. Sw. Cable Co., 392 U.S. 157, 178 (1968)).

the effective enforcement of the provision."[208]

In the underlying order, the FCC had reasoned that:

> [T]he legislative intent in enacting Section 312(a)(7) was both to impose a general obligation of access on the broadcast media and to establish license revocation as one remedy for violation of that obligation. We will, therefore, interpret Section 312(a)(7) as applying to the combination of licensees in a network as well as to individual licensees. This interpretation is not only the most reasonable one under the circumstances but also one that is supported by cases which recognize that the Commission has ancillary jurisdiction to regulate matters closely tied to its express statutory obligations.[209]

The FCC reasoned further:

> Even if Section 312(a)(7) does not directly impose an obligation on the networks, such an obligation is clearly imposed on network-affiliated licensees under the statute. Our power to adjudicate complaints involving requests for access to the networks is surely "reasonably ancillary to the effective performance of the Commission's various responsibilities."[210]

It is evident, therefore, that although the D.C. Circuit previously affirmed the Commission's exercise of ancillary jurisdiction in an adjudicatory proceeding, it did not do so in the absence of binding legal requirements. The legal requirement at issue in *CBS v. FCC* was quite clearly section 312(a)(7) of the Act.[211] The Commission could reasonably choose to effectuate Congressional intent in enacting section 312(a)(7) by relying on case-by-case adjudication because the nature of the right established in that provision is an individual right of access to broadcast station facilities and airtime by "legally qualified candidate for Federal elective office on behalf of his candidacy." [212] Both the underlying Commission order and the opinion of the D.C. Circuit rest on the dual grounds that the statute as written applied to the broadcast networks and that the FCC had the power to implement its provisions under its ancillary jurisdiction. Thus, the case does not support the FCC's broad view that it may lawfully exercise its ancillary authority in an adjudicatory proceeding in the absence of regulations. At most, *CBS v. FCC* suggests that in an appropriate case arising under a provision of the Act that establishes a legal requirement, the FCC has ancillary authority to extend the reach of that obligation where it is "reasonably ancillary to the effective enforcement of the Commission's various responsibilities," and therefore, within its statutory authority.[213] Clearly

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[208] *Id.* at 27.

[209] *Carter-Mondale Order*, *supra* note 200, ¶ 25.

[210] *Id.* ¶ 25 n.9. In making this determination, the FCC relied on *Southwest Cable*, and other cases recognizing the FCC's authority over the broadcast networks under various provisions of the Act. *See id*.

[211] *See CBS*, 629 F.2d at 14, 34.

[212] *Carter-Mondale Order*, *supra* note 200, ¶ 17; 47 U.S.C. § 312.

[213] *Carter-Mondale Order*, *supra* note 200, ¶ 25 n.9 (quoting United States v. Sw. Cable Co., 392 U.S. 157, 178 (1968)).

there must be a closer nexus between the interpretation enforced in the adjudication and the underlying statute than is present in the *Comcast P2P Order*.

2. The Bounded Nature of Ancillary Jurisdiction Has Been Recognized by the D.C. Circuit

The Supreme Court's bounded view of the scope of the Commission's ancillary jurisdiction has become somewhat obscured by a succession of lower court rulings, some of which appear to support the view reflected in the *Comcast P2P Order* that the agency may ground its ancillary jurisdiction solely in the general grant of regulatory authority contained in Title I of the Act.[214] As demonstrated below in Parts IV.B and 3, however, Title I was not the sole source of an exercise of ancillary jurisdiction by the courts in any of the cases relied upon by the Commission in the *Comcast P2P Order*. We first discuss two recent D.C. Circuit Court cases confirming the limited scope of the FCC's ancillary authority.

a. MPAA v. FCC

In *MPAA*, the D.C. Circuit addressed the question whether the FCC had delegated authority under section 1 of the Act to enact video description rules.[215] The 1996 Act added to the Communications Act two rules covering video programming accessibility: section 613(a)–(d), which dealt with closed captioning and section 613(f), which addressed video description technologies.[216] The closed captioning provision required the FCC to conduct an inquiry, produce a report, and prescribe regulations.[217] In contrast, for video description, section 613(f) required only that the FCC produce a report for Congress.[218] By a three-to-two vote, the FCC concluded that it had statutory authority to promulgate video description rules.[219] Although the FCC had relied on a

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214 *See*, *e.g.*, Am. Library Ass'n v. FCC, 406 F.3d 689 (D.C. Cir. 2005) (holding that the FCC's authority is not absolute and that in order to use its ancillary jurisdiction the regulation must be within the FCC's jurisdiction under Title I and "the subject of the regulation must be reasonably ancillary to the effective performance" of the FCC's duties); Motion Picture Ass'n of Am. v. FCC (*MPAA*), 309 F.3d 796 (D.C. Cir. 2002) (holding that portions of the Act did not permit the FCC to adopt rules regulating program content);.

215 *MPAA*, 309 F.3d at 798.

216 47 U.S.C. § 613(a)–(d), (f) (2000).

217 § 613(a)–(b).

218 § 613(f).

219 *In re* Digital Broadcast Content Protection, *Report and Order & Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 23,550, ¶¶ 29–34 (Nov. 4, 2003) [hereinafter *Broadcast Flag Order*].

combination of sections 1, 2(a), 4(i), and 303(r) for its authority, at oral argument counsel for the Commission essentially conceded that "if the agency cannot find its authority in section 1 then the video description regulations must be vacated by the court."[220] A majority of the D.C. Circuit agreed, and the rules were vacated.[221]

The *MPAA* majority found that Chevron deference[222] was inapplicable because the FCC had exceeded its delegated authority.[223] The court found that the FCC lacked delegated authority under section 1 to enact video description rules because the rules implicated the content of video programming, and as such, went well beyond the agency's charge to "ensure that all people of the United States, without discrimination, have access to wire and radio communications transmissions."[224] The Court elaborated:

> Both the terms of [section] 1 and the case law amplifying it focus on the FCC's power to promote the accessibility and universality of transmission, not to regulate program content. Neither the FCC's Order nor its brief to this court cite any authority to suggest otherwise. To regulate in the area of programming, the FCC must find its authority in provisions other than [section] 1.[225]

The *MPAA* majority also confirmed that the FCC may avail itself of section 303(r) and 4(i) authority *only* where Congress has delegated regulatory authority in an area.[226] With respect to section 303(r), the provision "simply [could not] carry the weight of the Commission's argument" that it may regulate video description because it is a "valid communications policy goal" and the rules are "in the public interest."[227] The court observed that simply because the FCC claims an action is taken in the public interest and to carry out the provisions of the Act does not mean it is necessarily *authorized* by the Act; "[t]he FCC must act pursuant to delegated authority before any 'public interest' inquiry [is] made under [section] 303(r)."[228] Nor did the *MPAA* majority find the FCC's argument that section 4(i), standing alone, gives it authority to promulgate the disputed rules, adopting the reasons cited by then-Chairman Powell in his dissent to the Commission order adopting the rules:

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220 Motion Picture Ass'n of Am. v. FCC (*MPAA*), 309 F.3d 796, 803 (D.C. Cir. 2002).

221 *Id*. at 803, 807.

222 *See generally* Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (explaining that on an issue of statutory interpretation where Congress is silent, courts will defer to the interpretation of the administrative agency charged with implementing the statute so long as the administrative agency's interpretation is reasonable).

223 *MPAA*, 309 F.3d at 800–01.

224 *Id*. at 803–04.

225 *Id*. at 804; *see*, *e.g*., 47 U.S.C. § 531 (2000) (governing designation of cable channels for public, educational, or governmental use).

226 *MPAA*, 309 F.3d at 805–06.

227 *Id*. at 806.

228 *Id*.

> It is important to emphasize that section 4(i) is not a stand-alone basis of authority and cannot be read in isolation. It is more akin to a "necessary and proper" clause. Section 4(i)'s authority must be "reasonably ancillary" to other express provisions. And, by its express terms, our exercise of that authority cannot be "inconsistent" with other provisions of the Act. The reason for these limitations is plain: Were an agency afforded *carte blanche* under such a broad provision, irrespective of subsequent congressional acts that did not squarely prohibit such action, it would be able to expand greatly its regulatory reach.[229]

The agency's remaining jurisdictional argument—that section 2(a) supported the challenged regulations—was summarily rejected for similar reasons.[230] Finally, the court stated:

> [I]f there were any serious question about [the] proper result in this case, all doubt is resolved by reference to [section] 713. In [section] 713(f), Congress authorized the Commission to *produce a report*—nothing more, nothing less. . . . Once the Commission completed the task of preparing the report on video description, its delegated authority on the subject ended.[231]

It would be a mistake to view the *MPAA* case—as the Commission does in the *Comcast P2P Order*—as simply standing for the proposition that section 1 does not encompass the subject of video programming content.[232] First, *MPAA* stands for the proposition that where the Act authorizes the FCC to produce a report, but not to undertake other regulatory responsibilities with regard to the subject matter, the agency's delegated authority on the subject ends with the production of the report. Second, the *MPAA* majority makes clear that FCC *subject matter* authority under section 1 may be broad, but its *regulatory* authority is not unlimited. As the court explained, "[t]o regulate in the area of programming, [as opposed to merely "promoting" broad statutory goals], the FCC must find its authority in provisions other than section 1."[233] In other words, Title I alone cannot satisfy both prongs of the test for ancillary jurisdiction; there must be a hook in one of the titles delegating *regulatory* responsibilities to the agency upon which to hang an exercise of ancillary jurisdiction.

b. American Library Association v. FCC

In *American Library Association*, the D.C. Circuit found the FCC's broadcast flag rules—which sought to regulate consumers' use of television receiver equipment after the completion of the broadcast transmission—outside the

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229 *Id*. (quoting *Broadcast Flag Order*, *supra* note 219, at 15,276 (Powell, Chmn., dissenting).

230 *Id.* at 806.

231 *Id*. at 807.

232 *See Comcast P2P Order, supra* note 9, ¶ 16 n.76.

233 *See MPAA*, 309 F.3d at 804.

scope of the FCC's delegated authority.[234] The *American Library Association* court reiterated that:

> The FCC, like other federal agencies, "literally has no power to act . . . unless and until Congress confers power upon it." . . . The Commission "has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress." . . . Hence, the FCC's power to promulgate legislative regulations is limited to the scope of the authority Congress has delegated to it.[235]

The FCC had relied solely on its ancillary jurisdiction under Title I to justify its action in the broadcast flag proceeding.[236] Sections 1, 2(a) and (3) were cited to support the view that the Commission had the "authority to promulgate regulations to effectuate the goals and provisions of the Act even in the absence of an explicit grant of regulatory authority, if the regulations are reasonably ancillary to the Commission's specific statutory powers and responsibilities."[237] However, because the *American Library Association* court found the broadcast flag rules to emanate from an *ultra vires* action by the FCC, "the regulations cannot survive judicial review under *Chevron/Mead.*"[238] As Judge Edwards explained:

> Our judgment is the same whether we analyze the FCC's action under the first or second step of *Chevron.* "In either situation, the agency's interpretation of the statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue." In this case . . . the FCC's interpretation of its ancillary jurisdiction reaches well beyond the agency's delegated authority under the Communications Act.[239]

After reviewing the *Southwestern Cable, Midwest Video I* and *Midwest Video II* decisions, the *American Library Association* court described the Supreme Court's approach to ancillary jurisdiction as "cautionary" despite the fact that the challenged exercises of authority pertained to subjects within the FCC's general grant of jurisdiction under Title I.[240] The broadcast flag rules floundered because they were outside the scope of the FCC's subject matter jurisdiction under the first prong of the test for ancillary jurisdiction.[241] In the case of the broadcast flag rules, the D.C. Circuit found "great caution" to be warranted because the broadcast flag rested on no apparent statutory foundation other than Title I, "*and, thus, appear*[*s*] . . . *ancillary to nothing*."[242] As the

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234 *See* Am. Libr. Ass'n v. FCC, 406 F.3d 689, 707 (D.C. Cir. 2005).
235 *Id*. at 698 (citations omitted) (alterations in original).
236 *Id*. at 699–700.
237 *Id*. at 698.
238 *Id*. at 699.
239 *Id*. (citations omitted).
240 *Id*. at 702–03.
241 *Id*. at 701, 703 (explaining that the first prong of the test requires that the regulation cover "interstate or foreign communication by wire or radio" and finding that the broadcast flag rules did not do so).
242 *Am. Libr. Ass'n*, 406 F.3d at 702 (emphasis added).

D.C. Circuit noted:

> We can find nothing in the statute, its legislative history, the applicable case law, or agency practice indicating that Congress meant to provide the sweeping authority the FCC now claims over receiver apparatus. And the agency's strained and implausible interpretations of the definitional provisions . . . do not lend credence to its position. As the Supreme Court has reminded us, Congress "*does not . . . hide elephants in mouseholes.*"[243]

The *American Library Association* court found that the FCC has never possessed ancillary jurisdiction under the Act to regulate consumer electronics devices usable for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission.[244] Neither had the Commission, "in the more than 70 years of the Act's existence . . . claimed such authority nor purported to exercise its ancillary jurisdiction in such a far-reaching way."[245] The court further underscored this point:

> The FCC argues that the Commission has "*discretion*" *to exercise* "*broad authority*" over equipment used in connection with radio and wire transmissions, "*when the need arises*, even if it has not previously regulated in a particular area." This is an extraordinary proposition. "The [Commission's] position in this case amounts to the bare suggestion that it possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority in that area. We categorically reject that suggestion. Agencies owe their capacity to act to the delegation of authority" from Congress. The FCC, like other federal agencies, "literally has no power to act . . . unless and until Congress confers power upon it."[246]

Taken together, *MPAA* and *American Library Association* confirm the scope of the FCC's ancillary jurisdiction is far more limited than the Commission portrays it to be in the *Comcast P2P Order*. As the D.C. Circuit has affirmed, the FCC has no power to act unless and until Congress confers such power.[247] The doctrine of ancillary jurisdiction does not give the FCC liberty to claim plenary authority to regulate in a given area simply because Congress has endowed the agency with some authority in that area. Further, Title I may provide the source of the FCC's ancillary authority, but Title I alone cannot provide the basis for the promulgation of regulations that claim the force of law. Instead, such regulations must make reference to specific regulatory authority contained elsewhere in the Act to be considered reasonably ancillary to the Commission's delegated authority. A rule or action resting upon no apparent statutory foundation other than Title I would be, in the words of the D.C. Circuit, ancillary to nothing.[248]

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243 *Id*. at 704 (emphasis added).
244 *Id.* at 705 (citations omitted).
245 *Id.* at 705 (citations omitted).
246 *Id*. at 708 (emphasis added) (citations omitted).
247 *Id*. at 698.
248 *See id*. at 691–92.

3. Other Supreme Court Cases Cited by the Commission do not Alter the Bounded Nature of the Doctrine

a. AT&T Corp. v. Iowa Utilities Board

Likely in recognition of the fact that the principal ancillary jurisdiction cases do not support its action, the FCC first attempts to bolster its position by citing the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*.[249] The Commission quotes a single sentence: "the Commission has 'broad authority' under its ancillary authority to regulate interstate and foreign communications 'even where the Act does *not* apply.'"[250] Reliance on this language to support the Commission's position that its ancillary jurisdiction is virtually unlimited, however, is misplaced. *Iowa Utilities Board* involved an appeal from a decision by the U.S. Court of Appeals for the Eighth Circuit striking down the FCC's implementation of the local competition provisions of the 1996 Act; it was not a review of an exercise of the FCC's ancillary jurisdiction, nor does it provide an expansion of the Supreme Court's prior rulings on the subject.[251]

The core question presented in *Iowa Utilities Board* was whether the FCC had the jurisdiction to implement certain pricing and non-pricing provisions added by the 1996 Act insofar as some of the FCC rules implicated the provision of intrastate telecommunications services.[252] The Court upheld the Commission's jurisdiction pursuant to the express delegation of regulatory authority under the Act.[253] In reaching this conclusion, the Supreme Court rejected an argument that the statement in section 2(b) of the Act that "[n]othing . . . shall be construed to apply *or to give the Commission jurisdiction*" required an explicit application to intrastate service before Commission jurisdiction could be found to exist.[254]

The respondents had argued that the phrase "or to give the Commission jurisdiction" would have "no operative effect . . . if every 'application' of the Act automatically entailed Commission jurisdiction."[255] The Supreme Court rejected this imaginative argument:

> The fallacy in this reasoning is that it ignores the fact that [section] 201(b) *explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act ap-

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[249] *Comcast P2P Order*, *supra* note 9, ¶ 15 (quoting AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 380 (1999)).

[250] *Id*.

[251] AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 377–79, 386 (1999).

[252] *See id*. at 370–71.

[253] *Id*. at 377–78 (explaining that the Commission relied on authority granted to it in section 201(b)).

[254] *Id*. at 379–80.

[255] *Id*. at 380.

> plies. . . . For even though "Commission jurisdiction" always follows where the Act "applies," Commission jurisdiction (so-called "ancillary" jurisdiction) *could* exist even where the Act does *not* "apply." The term "apply" limits the substantive reach of the statute (and the concomitant scope of primary FCC jurisdiction), and the phrase "or to give the Commission jurisdiction" limits, in addition, the FCC's *ancillary* jurisdiction.[256]

The Court was not passing on a challenge to the FCC's ancillary jurisdiction; it was merely noting the *existence* of the doctrine together with its limitations and did not address its application in a specific instance. In fact, the Court specifically noted, "[t]he Commission could not, for example, regulate any aspect of intrastate communication *not* governed by the 1996 Act on the theory that it had an ancillary effect on matters within the Commission's primary jurisdiction."[257]

b. The Language in National Cable and Telecommunications Association v. Brand X *Regarding Ancillary Jurisdiction is Dicta*

The Commission's primary ancillary jurisdiction argument in the *Comcast P2P Order* begins with the claim that "any assertion the Commission lacks the requisite authority over providers of Internet broadband access services, such as Comcast, has been flatly rejected by the U.S. Supreme Court."[258] The Court, the FCC argued, rejected this argument in its decision in *National Cable and Telecommunications Association* v. *Brand X* reviewing the FCC's *Cable Modem Declaratory Ruling*.[259] According to the Commission, the "Court specifically stated that 'the 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.'"[260] The problem with the FCC's reliance upon *Brand X* is that the sole question presented to the Supreme Court was whether the Commission appropriately classified the cable modem service as an information service under Title I; the Commission did not rely upon its ancillary jurisdiction in making that determination, and the Supreme Court did not have before it a challenged exercise of ancillary jurisdiction.[261]

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256 *Id*.
257 *Id*. at 381 n.8.
258 *Comcast P2P Order*, *supra* note 9, ¶ 14.
259 *Id*.
260 *Id.* (citation omitted).
261 Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs. (*Brand X*), 545 U.S. 967, 968 (2005). In *Brand X*, the Court wrestled with the question of whether a cable company

The *Brand X* Court first observed that the Commission's initial conclusion—that cable Internet service is an information service because it offers consumers "a comprehensive capability for manipulating information using the Internet via high-speed telecommunications"—was unchallenged.[262] At the same time, the Commission concluded that the cable Internet service was not a telecommunications service because although cable companies use telecommunications to provide consumers with Internet service, they do not offer the telecommunications element on a stand-alone basis.[263] The integrated character of the Internet service offering "led the Commission to conclude that cable modem service is not a 'stand-alone' transparent offering of telecommunications."[264] The *Brand X* majority held that this analysis "passe[d] *Chevron's* first step" because the word "offer" in the definition of telecommunications service is subject to two or more linguistic uses and therefore the Commission's choice among them is entitled to deference by the courts.[265]

The *Brand X* majority found that the FCC's construction of the "information service" category as comprehending cable modem service was a reasonable policy choice under *Chevron's* second step, and rejected several arguments focused on alleged regulatory consequences that would automatically flow from the classification decision.[266] The Court stated, "[t]he Commission's construction . . . was more limited than respondents assume."[267] The FCC's ruling was challenged on the grounds that it was inconsistent with the Commission's treatment of facilities-based Internet service offerings of local tele-

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provides "telecommunications services" or "information services" under the Communications Act of 1934 and the Telecommunications Act of 1996. Under the 1996 Act, providers of "information services" are subject to much less strict regulation than providers of "telecommunications services." *Id*.

262 *Id*. at 987.

263 *Id*.

264 *Id*. at 988 (quoting *Cable Modem Declaratory Ruling*, *supra* note 21, ¶¶ 41–43).

265 *Id.* at 989. As the *Brand X* Court indicated:

> The question, then, is whether the transmission component of cable modem service is sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering. . . . We think that they are sufficiently integrated, because "[a] consumer uses the high-speed wire always in connection with the information-processing capabilities provided by Internet access, and because the transmission is a necessary component of Internet access."

Id. at 990–91 (internal quotation). Furthermore:

> Because the term "offer" can sometimes refer to a single, finished product and sometimes to the "individual components in a package being offered" . . . the statute fails unambiguously to classify the telecommunications component of cable modem service as a distinct offering. This leaves federal telecommunications policy in this technical and complex area to be set by the Commission, not be warring analogies.

Id. at 991–92.

266 *See id*. at 997–1000.

267 *Brand X,* 545 U.S. at 998.

phone carriers who were required to make the telephone lines used to transmit digital subscriber line service available to competing ISPs on nondiscriminatory, common-carrier terms.[268] The *Brand X* majority disagreed, finding that the FCC had provided a reasoned explanation for this apparent disparity.[269]

Unquestionably, the sole issue presented to and decided by the Court in *Brand X* was "the proper regulatory classification under the Communications Act of broadband cable Internet service."[270] Specifically, the question was: into which of the two relevant categories of regulated entities—telecommunications carriers or information service providers—do cable ISPs fit?[271] After describing the mandatory obligations that attach to the telecommunications carrier classification under the Act, the *Brand X* Court simply observed "[i]nformation-service providers, *by contrast*, are not subject to mandatory common-carrier regulation under Title II, though the Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications."[272]

Thus, the first *Brand X* quote cited by the FCC concerning its ability to exercise ancillary jurisdiction over information service providers cannot be considered decisional and therefore fails to support the FCC's assertion that the Supreme Court has flatly rejected "any assertion the Commission lacks the requisite statutory authority over providers of Internet broadband access services, such as Comcast."[273] That question was neither presented to nor ruled upon by the Court. Moreover, the key issue in the *Comcast P2P Order* is not whether the FCC has subject matter over providers of Internet broadband access service; a proposition not seriously debated. Rather, the question is whether the FCC can impose specific regulatory obligations upon such providers pursuant to its ancillary jurisdiction[274]—a question not presented to the Supreme Court in *Brand X.*

Nor does the second *Brand X* quote cited by the Commission, "that 'the

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[268] *Id*. at 994–95.

[269] *Id*.

[270] *Id.* at 975.

[271] Although another statutory category relevant to the classification of Internet services provided by cable operators under the Act was "cable services," both the FCC and the Court of Appeals for the Ninth Circuit had rejected such a classification and consequently the cable service classification was not presented to the *Brand X* Court as a possible choice. *See Brand X*, 545 U.S. 967, 967; *Cable Modem Declaratory Ruling*, *supra* note 21, ¶¶ 31–33. *See generally* Esbin, *Internet Over Cable*, *supra* note 34 (discussing the appropriate classification of cable modem service before the FCC changed the classification).

[272] *Brand X,* 545 U.S. at 976 (emphasis added). The observation, moreover, is contained in the opening background portion of the decision. *See id*. at 976–77.

[273] *Comcast P2P Order, supra* note 9, ¶ 14.

[274] *Id*. at 14–15.

Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction,'"[275] either standing alone or in conjunction with the first, provide a basis for the exercise of ancillary jurisdiction over broadband network management practices. Again, the question *whether* the FCC can "impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction"[276] was neither presented for decision nor ruled upon by the Supreme Court in *Brand X*.[277] At best, the *Brand X* majority's observation about ancillary jurisdiction indicates that if presented with the issue, the Supreme Court likely would find FCC subject matter jurisdiction over facilities-based broadband Internet providers, a point that Comcast did not contest.[278] More importantly, the critical question of the FCC's authority *to act* pursuant to ancillary jurisdiction was expressly recognized by the *Brand X* majority to be an open question before the FCC in the *Cable Modem Notice of Proposed Rulemaking* which accompanied the *Cable Modem Declaratory Ruling*[279]—no more, and no less.

In short, the Supreme Court could not and did not rule upon the question whether any given regulation of facilities-based information service providers would be reasonably ancillary to the Commission's statutory responsibilities in a specific instance. All statements in *Brand X* concerning the FCC's ancillary jurisdiction to impose specific regulatory duties on facilities-based ISPs must be considered dicta insofar as it was relied upon by the Commission its *Comcast P2P Order*.[280] Thus, *Brand X* provides no basis of support for the Commission's authority to enforce federal policy by exercising jurisdiction over the *P2P Complaint* to regulate Comcast's broadband network management practices.

It is instructive, however, that Justice Scalia's dissent in *Brand X*, foreshadowed potential limits on the FCC's use of the doctrine of ancillary jurisdiction to create whole new regulatory or non-regulatory schemes under the Act.[281] Justice Scalia criticized what he characterized as the FCC's attempt "to concoct" a "whole new regime of *non*-regulation . . . through an implausible read-

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[275] *Id*. ¶ 14 (quoting *Brand X*, 545 U.S. at 996).

[276] *Brand X*, 545 U.S. at 996.

[277] *See id*. at 1002–03.

[278] *In re* Broadband Industry Practices, *Ex Parte Communication of Comcast Corporation*, WC Docket No. 07-52, at 4–5 (July 10, 2008) [hereinafter *Comcast July 10 Ex Parte*] (accessible via FCC Electronic Comment Filing System) (addressing several issues, none of which involved the Supreme Court's possible ancillary jurisdiction over the matter).

[279] *See Brand X*, 545 U.S. at 996.

[280] While dicta may be cited in legal argument, it does not have the full force of legal precedent, as it was not part of the basis for the judgment. 20 AM. JUR. 2d *Courts* § 134 (2005).

[281] *See Brand X*, 545 U.S. at 1005 (Scalia, J., dissenting).

ing of the statute;" in so doing the Commission "exceeded the authority given it by Congress."[282] The FCC's approach to the cable Internet classification question, according to Justice Scalia, "mocks the principle that the statute constrains the agency in any meaningful way."[283] The dissent criticized the FCC for unacceptably turning "statutory constraints into bureaucratic discretions," by playing fast-and-loose with statutory definitions and potentially using its "undefined and sparingly used 'ancillary' powers" to then re-impose the very sorts of common carrier regulatory obligations it had attempted to avoid through its decision that cable Internet service was not a telecommunications service.[284] After the dissent noted that although the *Cable Modem Declaratory Ruling* had contained a "self-congratulatory paean to its deregulatory largesse," the FCC had simultaneously sought comment on "whether, under its Title I jurisdiction [it] should require cable companies to offer other ISPs access to their facilities on common-carrier terms."[285]

Tellingly, the dissent observed that having concluded that cable ISPs

> are not providing "telecommunications services," there is reason to doubt whether it can use its [ancillary] powers to impose common-carrier-like requirements, since [section] 153(44) specifically provides that a "telecommunications carrier shall be treated as a common carrier under this chapter *only to the extent* that it is engaged in providing telecommunications services," and "this chapter" includes Titles I and II.[286]

The dissent's views—albeit in the minority on the classification issue presented in *Brand X*—portend significant judicial review problems for any FCC

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[282] *Id*.

[283] *Id*. at 1014.

[284] *Id*. at 1013–14.

[285] *Id*. Justice Scalia went on to speculate that the FCC could use its ancillary powers to alter its conclusion that the definition of telecommunications carrier did not apply to cable Internet service, not by changing the law—its construction of the Title II definitions to exclude cable modem service from common carrier obligations—but by changing the underlying facts:

> Under its undefined and sparingly used "ancillary" powers, the Commission might conclude that it can order cable companies to "unbundle" the telecommunications component of cable-modem service. And presto, Title II will then apply to them, because they will finally be "offering" telecommunications service! Of course, the Commission will still have the statutory power to forbear from regulating them under [section] 160 (which it has already tentatively concluded it would do). . . . Such Mobius-strip reasoning mocks the principle that the statute constrains the agency in any meaningful way.

Id. at 1014. Although the FCC has not acted on the NPRM issues cited by the dissent, one could argue that its action imposing a non-discrimination carriage requirement on Comcast in the context of its adjudication of the *Free Press Complaint* effectively requires Comcast to offer its Internet access service on a common carrier basis. *See* 47 U.S.C. §§ 153(44), 202(a) (prohibiting unreasonable discrimination in common carrier charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service).

[286] *Brand X*, 545 U.S. at 1014 n.7.

attempt to impose common carrier-like non-discrimination obligations on facilities-based ISPs generally, and specifically in the agency's "adjudication" of the *Free Press Complaint* against Comcast. Taken as a whole, not only does *Brand X* fail to support the Commission's claims about its ancillary jurisdiction over these matters, the decision calls into question the Commission's analysis of the its statutory authority in this area.

B. The Provisions of the Communications Act Cited by the FCC Do Not Support Its Actions

Many commentators have noted the shaky jurisdictional basis for the FCC's action.[287] The FCC majority, citing various precedents, rests its action against Comcast on its subject matter jurisdiction over interstate communications in wire and radio and its ability to use ancillary jurisdiction under various provisions of the Act to make policy through adjudication.[288]

The FCC rejected the view that its authority over the practices of facilities-based ISPs is "uncertain as a general matter" and specifically rejected Comcast's arguments that it lacked jurisdiction over the company's network management practices because there was nothing in the Act to which such authority was reasonably ancillary.[289] That is, that the action would fail for lack of a statutory hook upon which to hang it.[290] The Commission disagreed, and cited several statutory provisions, or hooks, on which to hang its ancillary authority.

First, the Commission found that "[p]eer-to-peer TCP connections provided through Comcast's broadband Internet access service are undoubtedly a form of 'communication by wire,' so the subject matter at issue here clearly falls within the Commission's general jurisdictional grant under Title I."[291] Here the FCC is on solid ground. Once Congress included the category of information services in Title I and the Commission had classified cable Internet service as

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287 *See* Eggerton, *Kennard: FCC on Shaky Ground on Comcast Decision*, *supra* note 127 (quoting former FCC Chairman's description of the jurisdictional basis as "murky"); *see also* Posting of David Sohn to Center for Democ. and Tech., PolicyBeta—Digital Policy in Process, FCC "Enforcement" Against Comcast?, http://blog.cdt.org/2008/07/16/fcc-enforcement-against-comcast/ (July 16, 2008); Robert Poe, *FCC's Comcast Ruling No Great Victory for Network Neutrality*, VOIP–NEWS, Aug. 4, 2008, http://www.voip-news.com/feature/fcc-comcast-ruling-080408/.

288 *See supra* note 131 and accompanying text; *Comcast P2P Order*, *supra* note 9, at 13,082–83 (Adelstein, Comm'r, concurring) (citing *Brand X*, 545 U.S. at 996).

289 *Comcast P2P Order*, *supra* note 9, ¶ 15 n.58.

290 John Blevins, Jurisdiction as Competition Promotion: A Unified Theory of the FCC's Ancillary Jurisdiction 19 (2008) (unpublished manuscript), *available at* http://works.bepress.com/john_blevins/2/.

291 *Comcast P2P Order, supra* note 9, ¶ 15 (citation omitted).

an "information service," no one—not even Comcast[292]—challenged the FCC's subject matter jurisdiction over the service. Nonetheless, the FCC quickly departed the safe shores of its subject matter jurisdiction over communication by wire when it turned to the thornier question of the something to which its exercise of authority in this case was reasonably ancillary.

Although it places principal reliance upon section 230(b) of the Act, the Commission relies on no fewer than six additional provisions of the Act as supporting its ancillary jurisdiction to adjudicate the *Free Press Complaint*, including sections 1, 201, 256, 257, 601(4), and 706.[293] Unfortunately, whether considered individually or together, they fail to provide the requisite jurisdictional basis for its action. For the reasons discussed below, sections 230(b), 1, 706(a), and 601(4) cannot serve as a means for enforcing behavioral norms against Comcast because a private party cannot violate Congressional policies or purposes which, like these, consist of no more than hortatory exclamations or statements of broad purpose in the Act.[294] Nor can sections 201, 256 or 257 provide the necessary jurisdictional reference as they concern solely communications services provided by common carriers, bear no reasonable relationship to the network management practices at issue, and otherwise fail to enlarge the scope of the FCC's existing jurisdiction over providers of broadband information services.

1. Statutory Provisions Establishing Only Broad Policies or Purposes Cannot Support the Exercise of Ancillary Jurisdiction to Regulate Behavior

Sections 230(b), 706(a), and 601(4) set forth only regulatory purposes or policy goals to be furthered through the exercise of the Commission's expressly delegated statutory duties contained elsewhere.[295] They cannot be construed to establish statutorily mandated responsibilities. In other words, they

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[292] *See Comcast July 10 Ex Parte*, *supra* note 278, at 5 n.15. In the *Comcast P2P Order*, the FCC accuses Comcast of "making representations to one tribunal, benefiting from those representations, and then turning around to assert precisely the opposite claims to a second tribunal." *Comcast P2P Order, supra* note 9, ¶ 23. But the FCC elides the critical distinction between its broad scope of its subject matter jurisdiction and the more narrowly focused question whether it may impose specific forms of regulation on services within its subject matter jurisdiction pursuant to its ancillary jurisdiction.

[293] *Comcast P2P Order*, *supra* note 9, ¶¶ 15–21.

[294] *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 24 n.18 (1981) (explaining that findings in a statute were "merely an expression of federal *policy*" that were "hortatory, not mandatory"); Accuracy in Media, Inc. v. FCC, 521 F.2d 288, 297 (D.C. Cir. 1975) (referring to section 396(g) of the Communications Act as a "guide to Congressional oversight policy and as a set of goals . . . not a substantive standard, legally enforceable by agency or courts;" also referred to as "this hortatory language.").

[295] *See* 47 U.S.C. §§ 157(a), 230(b), 521(4) (2000).

establish broad regulatory goals or ends but not the means for achieving them. No precedent exists for permitting the FCC to exercise its ancillary authority to impose affirmative regulatory obligations pursuant to the various policy statements contained in the Act as opposed to operative regulatory provisions. Such quasi-legislative actions, in the absence of a clear delegation of regulatory authority to the FCC from Congress, must be considered *ultra vires*. Moreover, even assuming one of these provisions could be read to provide a basis for some form of ancillary regulatory action, they do not support the action taken with respect to the *Free Press Complaint*.

a. Section 230(b)

Section 230(b) was the FCC's first landfall in its odyssey to locate the source of the regulatory authority to which its enforcement action in the *Comcast P2P Order* was reasonably ancillary.[296] The FCC refers to "the national Internet policy enshrined in section 230(b) of the Act"[297] and states that it has "recognized its responsibility for overseeing and enforcing"[298] that policy. The Commission claimed that its jurisdiction over the P2P dispute was ancillary to the effective performance of its responsibility for "the national Internet policy enshrined in section 230(b) of the Act."[299] According to the Commission, Congress—somewhat like Moses and the Ten Commandments—inscribed "the national Internet policy" onto the Communications Act.[300] As the Commission indicated in its *Comcast P2P Order*:

> When Congress drafted a national Internet policy in 1996, it did not do so on an empty tablet. Instead, Congress inscribed these policies into section 230 of the Communications Act—the very same Act that established this Commission as the federal agency entrusted with "regulating interstate and foreign commerce in communication by wire." As Congress was no doubt aware, section 1 of the Act requires the Commission to "execute and enforce 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." Given section 230's placement within the Act, we think that the Commission's ancillary authority to take appropriate action to further the policies set forth in section 230(b) is clear.[301]

In other words, regardless of the purpose of the operative provisions crafted by Congress and placed in section 230, the FCC believes it may take *any* ac-

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296 *See* § 230(b); *see also* Dan G. Barry, *The Effect of Video Franchising Reform on Net Neutrality: Does the Beginning of IP Convergence Mean That It is Time for Net Neutrality Regulation?*, 24 SANTA CLARA COMPUTER & HIGH TECH. L. J. 421, 442 (2008).

297 *Comcast P2P Order, supra* note 9, ¶ 15.

298 *Id*. ¶ 13.

299 *Id*. ¶ 15.

300 *See id*.

301 *Id*. (citations omitted).

tion pursuant to its section 4(i) authority that it finds appropriate to "further the policies set forth in section 230(b)."[302] This view of the FCC's authority under section 230(b) is as extraordinary as it is untenable.

First, section 230(b) is more convincingly understood to stand for precisely the opposite proposition: that the FCC is prohibited from regulating the terms and conditions of the provision of Internet access services.[303] Second, the tools Congress created to implement the policies contained in section 230(b) are limited to civil immunity from damages for service providers and users that restrict access to certain objectionable material.[304] There is no gap in these provisions for the Commission to fill by regulating the network management practices of facilities-based ISPs. Lastly, acceptance of the FCC's view of the statute would be akin to finding that the agency has plenary authority over the Internet and the provision of interactive computer services simply because it possesses some authority in the area, a proposition roundly rejected by the courts.[305]

To the extent section 230(b) embodies national Internet policy, that policy expressly directs government to refrain from imposing new Internet regulations.[306] Although the FCC has cited section 230(b) in previous orders,[307] it has

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[302] *See id*.

[303] As introduced, the legislation that ultimately became the 1996 Act explicitly stated that "[n]othing in this Act shall be construed to grant any jurisdiction or authority to the Commission with respect to economic or content regulation of the Internet or other interactive computer services." 141 Cong. Rec. H8469 (daily ed. Aug. 4, 1995) (section (d) of amendment number 2-3 offered by Mr. Cox of California).

[304] *See* 47 U.S.C. § 230(c) (2000) (granting immunity for interactive computer service providers from suit under libel laws).

[305] *See* Am. Library Ass'n v. FCC*,* 406 F.3d 689, 708 (D.C. Cir. 2005).

[306] *See* Internet Freedom and Family Empowerment Act, H.R. 1978, 104th Cong. § 2 (1995). The Internet Freedom and Family Empowerment Act was the precursor legislation to the ultimate language adopted in section 230.

[307] For example, when the FCC declined to allow local exchange carriers to assess interstate per-minute access charges on ISPs, it cited section 230. *In re* Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges, *First Report and Order*, 12 F.C.C.R. 15,982, ¶ 344 (May 7, 1997). The FCC also declined to regulate peering relationships between Internet backbone providers because it recognized that premature regulation "might impose structural impediments to the natural evolution and growth process which has made the Internet so successful." *In re* Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, *Report*, 14 F.C.C..R. 2398, ¶ 105 (Jan. 28, 1999) (citing Comments of SBC Commun. Inc., at 12). In its declaratory ruling classifying cable modem service as an information service, the FCC quoted section 230 for the overarching principle of seeking "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." *Cable Modem Declaratory Ruling*, *supra* note 21, ¶ 4 (quoting 47 U.S.C. § 230(b)(2) (2000)). It fur-

never relied upon the provision to support increased regulation of the Internet or providers of interactive computer services.[308]

Section 230's operative provisions—subsections (c) and (d)—create protection for Good Samaritan blocking and screening of offensive material by interactive computer service users and providers, and imposes content filtering and notice obligations on providers of interactive computer services.[309] Section 230(c) states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[310] The sole obligation imposed on providers of interactive computer services is the obligation to provide notice to their customers of available parental controls so that parents may block objectionable content.[311] Section 230's entire policy provision is as follows:

> It is the policy of the United States—
>
> (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
>
> (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
>
> (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Inter-

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ther stated that it was "mindful of the need to minimize both regulation of broadband services and regulatory uncertainty in order to promote investment and innovation in a competitive market." *Id*. ¶ 73. The FCC also cited section 230 in two orders preempting state regulation of VoIP services. *In re* Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, *Memorandum Opinion and Order*, 19 F.C.C.R. 22,404, ¶ 35 (Nov. 9, 2004) [hereinafter *Vonage Order*]; *In re* Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service, *Memorandum Opinion and Order*, 19 F.C.C.R. 3307, ¶ 18 (Feb. 12, 2004). As recently as 2004, the Commission referred to "Congress's clear intention, as expressed in the 1996 Act, that [information services] remain 'unfettered' by federal or state regulation" and its own "hands-off" approach to the Internet. *IP-Enabled Services NPRM*, *supra* note 47, ¶ 39 ("[C]ourts have recognized the preeminence of federal authority in the area of information services, particularly in the area the Internet and other interactive computer services. This finding is consistent with Congress's clear intention, as expressed in the 1996 Act, that such services remain 'unfettered' by federal or state regulation and with our own 'hands-off' approach to the Internet.") (citations omitted).

[308] The *Internet Policy Statement* adopted in August 2005 was the first instance in which the FCC claimed that section 230 gave it authority to impose regulations against ISPs. That document was not an order, and contemporary statements of FCC Commissioners clearly indicate that it was not enforceable. *See supra* Part II.D. In its subsequent *Broadband Industry Practices Inquiry*, the Commission asked if it had the legal authority to enforce the Policy Statement and specifically noted that "[t]he Policy Statement did not contain rules." *Broadband Industry Practices Inquiry*, *supra* note 24, ¶11 n.20.

[309] *See* 47 U.S.C. § 230(c)–(d) (2000).

[310] § 230(c)

[311] § 230 (d).

> net and other interactive computer services;
>
> (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
>
> (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.[312]

Nowhere does the policy provision grant any authority to the FCC to impose regulations on ISPs. Nor does the legislative history support the Commission's belief that by placing section 230 in the Act, Congress delegated to the Commission roving authority to develop rules and regulations to implement the policies contained in section 230(b).[313] To the contrary, not only did the drafters of Section 230 "not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet,"[314] they gave the FCC no express role in implementing its provisions.[315] To the extent that section 230 speaks to any regulatory mandate for the FCC, it is solely to *preclude* the agency—or anyone else—from treating "the provider or user of an interactive computer

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312 § 230(b).

313 *See* 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox). The Commission's strained attempt to read the provision as supporting its action on the ground that section 230's emphasis is on "'maximiz[ing] user control' and 'empowering parents'" and its claims that its action against Comcast furthers user control over the content received by means of Internet connections is unpersuasive. *See Comcast P2P Order, supra* note 9, ¶ 15 n.69. The primary object of the statute is to establish civil immunity from damages for "good Samaritan" blocking and screening of offensive material provided over the Internet by another information content provider, without the need for additional regulatory involvement in Internet content regulation. Section 230(c) and (d) implement the policies contained in subsection (b) by means of limiting Internet service provider liability for third party content and requiring providers to disclose to users the existence of available parental controls, not by regulating the network management practices of Internet service providers. The Commission's view that it is unconstrained in its ability to add to Congress' chosen means of implementing the policies contained in section 230(b) by imposing new regulatory restraints on Internet service providers is simply wrong.

314 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

315 The Commission relies on one of its own prior orders claiming that by "codifying its Internet policy in the Commission's organic statute, Congress charged the Commission with ongoing responsibility to advance that policy consistent with our other statutory obligations" in support of its ancillary jurisdiction to "enforce federal policy" and regulate broadband network management practices. *Comcast P2P Order, supra* note 9, ¶ 12 n.45, ¶ 15 n.69 (quoting *Vonage Order*, *supra* note 307, ¶ 35). In the *Vonage Order*, the Commission stated that "[w]hile [it] acknowledge[s] that the title of section 230 refers to 'offensive material' the general policy statements regarding the Internet and interactive computer services contained in the section are not similarly confined to offensive material."). Notwithstanding the statements contained in the *Vonage Order*, the Commission may not enlarge its statutory authority at will by finding that the provision of some authority in an area gives it plenary authority over that subject matter. *See* Am. Library Ass'n v. FCC, 406 F.3d 689, 708 (D.C. Cir. 2005); *see also* Motion Picture Ass'n of Am. v. FCC (*MPAA*), 309 F.3d 796, 804–06 (D.C. Cir. 2002).

service as the publisher or speaker of any information provide by another information content provider."[316] Even assuming *arguendo* the Commission is correct that by placing the radically *de*regulatory section 230 in the Act, Congress was somehow charging the agency "with ongoing responsibility to advance that policy consistent with [its] other statutory obligations,"[317] there remains a significant distinction between advancing overarching *policy goals* and promulgating a ruling concerning broadband network management practices that has the force of *law*. And it is evident that Congress did not contemplate the latter role for the Commission in enacting section 230.

i. Legislative History of Section 230

On February 1, 1995, Senators Exon (D-NE) and Gorton (R-WA) introduced S. 314, the Communications Decency Act ("CDA").[318] This bill would have made it a crime to send any material objectionable to minors between any two computers connected to the Internet.[319] When the House version of the 1996 Act was introduced in May 2005, several prominent House members including Speaker of the House Newt Gingrich, publicly announced their opposition to the CDA.[320]

On June 30, 1995, Representatives Christopher Cox (R-CA) and Ron Wyden (D-OR) introduced H.R. 1978, the Internet Freedom and Family Empowerment Act[321] in response to the CDA, which Wyden believed was "doomed to fail because their idea of a Federal Internet Police will make the Keystone Cops look like Cracker Jack crime fighters."[322] In August, the Cox-Wyden bill was amended to the House's version of the 1996 Act.[323] When introducing the amendment, Rep. Cox explained it as follows:

> Mr. Chairman, our amendment will do two basic things: First, it will protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, let us say, who takes steps to screen indecency and offensive material for their customers. . . . Second, it will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet because frankly the Internet has grown up to be

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316 47 U.S.C. § 230(c)(1) (2000).

317 *Comcast P2P Order, supra* note 9, ¶ 15 n.69.

318 *See* Communications Decency Act of 1995, S. 314, 104th Cong.

319 *See id*. § 2.

320 Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 66–67, 74 (1996).

321 *See* Internet Freedom and Family Empowerment Act, H.R. 1978, 104th Cong. (1995).

322 141 CONG. REC. H8287 (daily ed. Aug. 2, 1995) (statement of Sen. Wyden).

323 141 CONG. REC. H8450 (daily ed. Aug. 4, 1995).

> what it is without that kind of help from the Government. . . . We want to help [the Internet] along this time by saying Government is going to get out of the way and let parents and individuals control it rather than Government doing that job for us.[324]

The Cox-Wyden amendment was approved by a 420-to-4 vote, and the House passed its version of the 1996 Act by a 305-to-117 vote.[325] When the House and Senate met to reconcile the different versions of the Act, the Senate version contained the CDA and the House version contained the Internet Freedom and Family Empowerment Act.[326] It was believed that only one of the two plans would survive in the final version of the 1996 Act.[327] Surprisingly, both plans were included, but the explicit limitation on FCC regulation proposed by the Cox-Wyden amendment was eliminated.[328] On February 8, 1996, President Clinton signed the 1996 Act.[329] That same day, the American Civil Liberties Union ("ACLU") and Electronic Privacy Information Center ("EPIC") filed a lawsuit arguing that the CDA was unconstitutional.[330] On June 26, 1997, on appeal from a lower court ruling, the Supreme Court ruled that the CDA was overly broad and vague in its definitions of the types of Internet communications it criminalized, but section 230 survived.[331]

In view of this legislative history, it is apparent that section 230 was intended to set forth a policy of non-regulation or un-regulation of the Internet and Internet services generally, and to create a shield against publisher or speaker liability on the part of ISPs for third-party content.[332] The goal of section 230 was to empower parents and individuals—and not the government—to set controls to deal with material they found objectionable on the Internet.[333] The key finding in section 230 with respect to Internet service regu-

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[324] 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995).

[325] H.R. 1555, A0004, 104th Cong., 141 CONG. REC. 21,999, 22,054, 22,083–84 (1995).

[326] *See* Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J. L. & TECH. 569, 595–96 (2001).

[327] *See Congressman Cox and Wyden Demonstrate New Internet Blocking Technologies*, CNET, July, 17, 1995, http://findarticles.com/p/articles/mi_m0EIN/is_/ai_17278694; Centr. for Democ. and Tech., The Communications Decency Act: Legislative History, http://www.cdt.org/speech/cda/cda.shtml (last visited Jan. 16, 2009).

[328] *See* Ken S. Myers, *Wikimmunity: Fitting the Communications Decency Act to Wikipedia*, 20 HARV. J.L. & TECH. 164, 174 (2006).

[329] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (enacted Feb. 8, 1996); *see* Guy Lamolinara, *Wired for the Future: President Clinton Signs Telecom Act at LC*, http://www.loc.gov/loc/lcib/9603/telecom.html (last visited Jan. 16, 2009).

[330] Reno v. ACLU, 521 U.S. 844, 849, 861 (1997).

[331] *See id*. at 885.

[332] *See* Jason Oxman, *The FCC and the Unregulation of the Internet* 24 (FCC Office of Plans and Policy, Working Paper No. 31, 1999), www.fcc.gov/Bureaus/OPP/working_papers/oppwp31.doc (describing 30 years of FCC policy decisions concerning computer applications that created the deregulatory environment in which the Internet could flourish).

[333] *See*, *e.g*., 47 U.S.C. § 230(a), (c) (2000).

lation, subsection (a)(4), states "The Internet and other interactive computer services have *flourished, to the benefit of all Americans, with a minimum of government regulation*."[334] It follows then, as expressed in section 230(b)(2), that Congress declared it to be the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[335]

ii. The FCC's Flawed Interpretation of Section 230

As clear as the legislative history is, the FCC nonetheless rejected arguments advanced by Comcast that section 230(b)(2) embodies the "clear intent of Congress that the Internet not be regulated" and that it deprives the Commission of legal authority to adjudicate the dispute over Comcast's network management practices.[336] According to the Commission, "Comcast places too much weight on the last few words of this federal policy, and we reject Comcast's construction of this language."[337] The Commission advanced three reasons for its position. First, the policy embodied in section 230 "cannot reasonably be read to prevent *any* governmental oversight of providers of broadband Internet access services."[338] Second, the Commission has previously rejected an interpretation of section 230(b)(2) that would "place a flat-out ban on any government action that might affect the Internet and the market for broadband Internet access services."[339] Third, "Comcast . . . waived the argument" by failing to petition the Commission to reconsider its prior statement in the *Adelphia-Time Warner-Comcast Order* to the effect that it had the ability to adjudicate complaints alleging violations of its *Internet Policy Statement*.[340]

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334 § 230(a)(4) (emphasis added).
335 § 230(b)(2).
336 *Comcast P2P Order, supra* note 9, ¶ 24.
337 *Id*.
338 *Id*. ¶ 25.
339 *Id*. ¶ 26.
340 *Id*. ¶¶ 27. The FCC claims that Comcast has waived the argument that the agency lacks jurisdiction to adjudicate actions under the four policy principles by not "petition[ing] the Commission to reconsider its ability to adjudicate such complaints." *Id.* Specifically, the Commission notes Comcast had the opportunity to seek reconsideration after the FCC stated in the *Adelphia-Time Warner-Comcast Order* 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." *Adelphia-Time Warner-Comcast Order*, *supra* note 85, ¶ 220 (approving the acquisition of Adelphia cable systems by Comcast and Time Warner). The FCC also stated in that proceeding that the Commission's *Internet Policy Statement* "contains principles against which the conduct of Comcast . . . can be measured." *Id*. ¶ 223. The FCC cites no statutory provisions supporting its claim to have jurisdiction to rule upon

Under the first justification, the Commission argued that section 230(b)(2) discusses preservation of the "market that presently exists for the Internet and other interactive services," a market that substantially consisted at the time of passage of the 1996 Act of dial-up Internet access services provided over regulated telephone networks.[341] The Commission stated, "It is inconceivable that Congress was unaware of or intended to eliminate this regulatory framework given its stated purpose of '*preserv[ing]* the vibrant and competitive free market.'"[342] There are several problems with this analysis.

The fact that the FCC regulated the common carrier provision of basic telecommunications services utilized for dial-up access to the Internet in 1996 is irrelevant to the Congressional statement of policy that the free market that then existed for "the Internet and other interactive computer services" be preserved. The Commission itself has long classified the types of data processing services provided by ISPs as enhanced or information services for the express purpose of keeping them free from Title II regulation.[343] As the Commission has found, the provision of telecommunications services and information services under the Act are mutually exclusive.[344] Cable modem services were just being developed in 1996 and have since become widely adopted: yet they have never successfully been subjected to common carrier regulation at either the federal, state, or local level.[345] Through its choice of language in section

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such a complaint, nor is it self-evident what it meant by its vow in the *Adelphia-Time Warner-Comcast Order* to measure Comcast's behavior against unenforceable policy principles. No court would have considered as ripe a petition challenging such vague prognostications about undefined future events. *See* Tex. v. United States, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'"),(quoting Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 581 (1985)); *see also* Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967) (explaining that ripeness prevents courts from "entangling themselves in abstract disagreements over administrative policies"); *infra* Part IV.C.2 (discussing notice). In summary, Comcast cannot be considered to have waived its ability to challenge the FCC's ancillary jurisdiction to adjudicate the *Free Press Complaint*).

341 *Comcast P2P Order, supra* note 9, ¶ 25.

342 *Id.* (quoting 47 U.S.C. § 230(b)(2) (2000)).

343 *See Computer II Final Decision*, *supra* note 60, ¶¶ 5, 7; Computer and Commc'ns Indus. Ass'n v. FCC, 693 F.2d 198, 207 (D.C. Cir. 1982); *see also* Oxman, *supra* note 332, at 24.

344 *In re* Federal-State Joint Board on Universal Service, *Report to Congress*, 13 F.C.C.R. 11,501, ¶ 13 (Apr. 10, 1998).

345 Attempts by local franchising authorities to subject cable modem services to various "open access" requirements were ultimately overturned by the courts. *See Cable Modem Declaratory Ruling*, *supra* note 21, ¶¶ 75, 96, 98; Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S. 967, 1002–03 (2005); AT&T Corp. v. City of Portland, 216 F.3d 871, 879–80 (9th Cir. 2000); *see also* Esbin & Lutzker, *supra* note 34, at 28–29 (discussing attempts by local franchising authorities to impose cable open access on cable operators as franchising requirements).

230(b)(2), Congress sought to preserve the free market for the provision of such enhanced or information services as those provided by Comcast. Once the Commission itself classified facilities-based Internet access service provided by cable operators as information services, they too fell under the ambit of this congressional policy. Accordingly, the Commission's attempt to exercise ancillary jurisdiction to impose regulatory constraints on a facilities-based provider of broadband Internet access service cannot stand because it contravenes this express Congressional policy, as well as long-established FCC policy.

Second, the Commission relies on its own prior—and un-reviewed—orders finding that section 230(b)(2) did not preclude its imposition of local number portability, telephone consumer privacy protections, and 911 service obligations on providers of interconnected VoIP service.[346] With respect to local number portability, the Commission stated that section 230(b)(2) "was not meant to displace the policy of 'preserv[ing] an efficient numbering administration system that fosters competition among all communications services in a competitively neutral and fair manner.'"[347] Similar arguments were advanced in the *Comcast P2P Order* concerning the FCC's imposition of consumer privacy protections and 911 service obligations.[348]

VoIP providers utilize Internet Protocol to provide services that are functionally equivalent to traditional circuit-switched voice services.[349] The services may or may not be provided over the Internet.[350] The *VoIP E911 Order* was

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346 *Comcast P2P Order, supra* note 9, ¶ 26 (citing *In re* Telephone Number Requirements for IP-Enabled Services Providers; Local Number Portability Porting Interval and Validation Requirements; IP-Enabled Services; Telephone Number Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues; Final Regulatory Flexibility Analysis; Numbering Resource Optimization, *Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking*, 22 F.C.C.R. 19,531, ¶ 29 n.101 (Oct. 31, 2007)); *In re* Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enable Services, *Report and Order and Further Notice of Proposed Rulemaking*, 22 F.C.C.R. 6927, ¶ 59 n.188 (Mar. 13, 2007); *In re* IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers, *First Report and Order and Notice of Proposed Rulemaking*, 20 F.C.C.R. 10,245, ¶ 29 n.95 (May 19, 2005) [hereinafter *VoIP E911 Order*]. For a criticism of this exercise of ancillary jurisdiction see Susan Crawford, *The Ambulance, The Squad Car, & The Internet*, 21 BERKELEY TECH. L.J. 873, 928–29 (2006).

347 *Comcast P2P Order*, *supra* note 9, ¶ 26.

348 *See id*.

349 VoIP "is a technology that allows you to make voice calls using a broadband Internet connection instead of a regular (or analog) phone line." Fed. Commc'ns Comm'n, IP-Enable Services, http://www.fcc.gov/voip/ (last visited Jan. 16, 2009).

350 As defined by the Commission, "[t]he term 'interconnected' refers to the ability of the user generally to receive calls from and terminate calls to the public switched telephone network . . . including commercial mobile radio services . . . networks." *VoIP E911 Order*, *supra* 346, ¶ 1 n.1.

justified in part as an exercise of the FCC's ancillary jurisdiction.[351]

However, the Commission's view that the statement of policy in section 230(b)(2) should not be read to bar its regulation of the provision of interconnected VoIP services under express statutory mandates concerning the provision of similar voice telephony services is not dispositive. The fact that section 230(b)(2) does not, as the FCC has stated, impose a "flat-out ban on any government action"[352] in this area fails to demonstrate that the provision thereby permits any particular action.

Pursuant to *Southwestern Cable*, *Midwest Video I* and *Midwest Video II*, ancillary jurisdiction may be exercised where it is *imperative* to the effective performance of the Commission's regulatory responsibilities and is not contrary to any provision of the Act.[353] The Commission itself has recognized that *Midwest Video II* restricted the scope of ancillary jurisdiction by adding that the regulation imposed pursuant to this doctrine "cannot be antithetical to a basic regulatory parameter established" for the service or provider to which the challenged rule is reasonably ancillary.[354] Regulating the network management practices of information service providers like Comcast is unrelated to the provisions of section 230 concerning offensive material, parental controls, and intermediary liability for third party content.[355] The Commission's action cannot even be considered *relevant*, let alone *imperative*, to the effective implementation of section 230(b). Moreover, it is plainly antithetical to the policy expressed in section 230(b)(2) that the Internet and interactive computer services such as the services provided by Comcast remain unfettered by Federal regulation. Regulating the network management practices of ISPs, therefore, cannot be considered reasonably ancillary to section 230(b). The Commission may not rely upon section 230(b) to support its action in its *Comcast P2P Order*.

b. Section 1

The next stop on the FCC's journey to locate its regulatory authority is section 1 of the Act.[356] Section 1 provides the reasons for the Communications Act: "For the purpose of regulating interstate and foreign commerce in com-

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[351] *VoIP E911 Order*, *supra* 346, ¶ 29 (finding that the Commission could exert ancillary jurisdiction over interconnected VoIP service providers solely by reference to its Title I responsibilities).

[352] *Comcast P2P Order*, *supra* note 9, ¶ 26.

[353] United States v. Sw. Cable Co. (*Sw. Cable*), 392 U.S. 157, 178 (1968); Midwest Video Corp. v. FCC (*Midwest Video I*), 571 F.2d 1025, 1031 (8th Cir. 1978); FCC v. Midwest Video Corp. (*Midwest Video II*), 440 U.S. 689, 697 (1979).

[354] *Wireline Broadband Order*, *supra* note 24, ¶ 109 n.340.

[355] 47 U.S.C. § 230(b)(4) (2000).

[356] 47 U.S.C. § 151 (2000).

munication by wire and radio so as to make available, so far as possible . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges,"[357] and the creation of the Commission "for the purpose of . . . centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication . . . ."[358] The Commission opined that acting on the *Free Press Complaint* "is reasonably ancillary to this delegation of authority in several ways": (1) "prohibiting unreasonable network discrimination directly furthers the goal of making broadband Internet access service both 'rapid' and 'efficient'"; and (2) "exercising jurisdiction over the complaint . . . promote[s] the goal of achieving 'reasonable charges.'"[359]

The Commission's argument, citing *Midwest Video II*, that the Supreme Court "has never rejected section 1 as a basis for [its] ancillary jurisdiction" is an untenably slender reed upon which to support such an exercise.[360] The Supreme Court has never *rejected* section 1 standing alone as a basis for the exercise of ancillary jurisdiction because it has never been presented with such a case posing the question. In the two instances in which challenged cable regulations grounded in ancillary jurisdiction were upheld, the Supreme Court explicitly held that the action was ancillary to the Commission's Title III responsibilities to regulate television broadcasting.[361] In the third Supreme Court case on the subject, *Midwest Video II*, as discussed above, the Court established

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357 *Id*.

358 *Id*.

359 *Comcast P2P Order, supra* note 9, ¶ 16. In support of the first goal, the Commission reasoned that Comcast's practice of inhibiting consumer access to certain content had the effect of making the service slower even when doing so would not necessarily ease network congestion, and that such practices could also make "Internet communications as a whole, less efficient." *Id.* In support of the second goal, the Commission reasoned that by intervening to stop Comcast's practice of inhibiting the ability of consumers with cable modem service to access high-definition video over the Internet, the resulting competition to cable "should result in downward pressure on cable television prices, which have increased rapidly in recent years." *Id.* Setting the obvious frailty of these arguments aside for the moment, rates for the many cable service tiers have been de-regulated since 1999. *See* 47 U.S.C. § 543(c)(4). The only rates still subject to regulation at the local franchising authority level—those for basic cable service—have been de-regulated in many communities by virtue of the presence of "effective competition" by other multichannel video programming distributors. *See* 47 U.S.C. §§ 533(a)(3), 543(b)(1), 543(d), 543(l)(1). Thus, the FCC cannot justify the exercise of jurisdiction over Comcast's network management practices as "reasonably ancillary" to its responsibilities over cable rate levels.

360 *See Comcast P2P Order*, *supra* note 9, ¶ 16 n.76. (citing FCC v. Midwest Video Corp. (*Midwest Video II*), 440 U.S. 689 (1979)).

361 *See* United States v. Sw. Cable Co., 392 U.S. 157, 178 (1968); United States v. Midwest Video Corp. (*Midwest Video I*), 406 U.S. 649, 663 (1972).

firm limits on the scope of the FCC's ancillary jurisdiction by explicitly reaffirming that any exercise of such authority under Title I must not only make "reference to the provisions of the Act directly governing" the activity to which the requirement is alleged to be ancillary,[362] but must also not be contrary to the express provisions of the Act concerning that activity.[363] Section 1 does not directly govern any specific activity; it is one of ten general provisions of Title I that articulate the broad purposes of the Act—that the Commission was created to carry out—and establishes its overarching goals.[364]

To support its argument, the Commission cites the Supreme Court's decision in *Midwest Video II*,[365] two D.C. Circuit cases,[366] two cases from other circuits,[367] and one of its own prior orders.[368] The Commission's claim that the D.C. Circuit and other Circuits have accepted section 1 standing alone as a basis for the exercise of ancillary jurisdiction is contradicted by the courts' rulings themselves.[369] None of these cases were decided solely under Title I, and none of these cases demonstrate judicial acceptance of this sweepingly broad interpretation of the doctrine of *virtually unlimited* ancillary jurisdiction.

Turning to the D.C. Circuit cases, the FCC notes[370] that in *CCIA v. FCC*, the court stated that "[o]ne of [the Commission's] *responsibilities* is to assure a nationwide system of wire communications services at reasonable prices."[371] From this the FCC concludes that the D.C. Circuit "and others have consequently upheld actions premised on our section 1 ancillary authority."[372] *CCIA*

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362 *Midwest Video II,* 440 U.S. at 706; *see supra* Part III.A.1.c.

363 *See Midwest Video II,* 440 U.S. at 706.

364 *See* 47 U.S.C. § 151 (2000).

365 *Comcast P2P Order, supra* note 9, ¶ 16 n.76 ("[T]he Supreme Court has never rejected section 1 as a basis for our ancillary jurisdiction—at issue in *FCC v. Midwest Video Corp.* [*Midwest Video II*], 440 U.S. 689 (1979), was a regulation that the Commission had promulgated as ancillary to its broadcasting responsibilities (Title III), and the Court struck down that regulation because it effectively imposed a common carrier regime on cable systems, which Congress had 'outright reject[ed]' in other statutory provisions . . . . ").

366 *Id.* (citing Computer & Comm'cns Indus. Ass'n v. FCC (*CCIA*), 693 F.2d 198, 212–13 (D.C. Cir. 1982) and Rural Tel. Coal. v. FCC, 838 F.2d 1307, 1315 (D.C. Cir. 1988)).

367 *Id.* (citing GTE Serv. Corp. v. FCC, 474 F.2d 724, 730–31 (2d Cir. 1973) and Gen. Tel. Co. of the Sw. v. United States, 449 F.2d 846, 854–55 (5th Cir. 1971)).

368 *Comcast P2P Order, supra* note 9, ¶ 16 n.76 (citing *VoIP E911 Order*, *supra* note 346). Needless to say—as interesting as they are—the Commission's own views of its ancillary jurisdiction cannot be relied upon by the Commission as authoritative precedent unless and until they have been accepted by a reviewing court.

369 *Comcast P2P Order, supra* note 9, ¶ 16 n.76.

370 The fact that the *Comcast P2P Order* states that "the court in this case *noted*" instead of stating that the court *held* tacitly admits that this statement was mere dicta. *Comcast P2P Order, supra* note 9, ¶ 16 n.76 (emphasis added). *See also supra* note 280 (discussing dicta).

371 Computer Commc'ns Indus. Ass'n v. FCC (*CCIA*), 693 F.2d 198, 213 (D.C. Cir. 1982) (emphasis added).

372 *See Comcast P2P Order, supra* note 9, ¶ 16 n.76.

involved review of an FCC rulemaking known as the *Second Computer Inquiry* ("*Computer II*"), in which the Commission found that enhanced data processing services and customer premises equipment ("CPE") were not within the scope of its Title II jurisdiction, but were within its ancillary jurisdiction under sections 152 and 153 of the Communications Act.[373] As such, the FCC imposed a structural separation requirement on AT&T under which it could offer enhanced services and CPE to consumers only through separate subsidiaries.[374]

The *CCIA* court first observed that when the FCC decided to move away from its previous framework governing enhanced services, it was "compelled to choose a new regulatory approach to fulfill its statutory duty 'to make available . . . to all the people of the United States a rapid, efficient, nationwide, and world-wide wire and radio communication service.'"[375] The Commission could either regulate all data communications service and consumer premises equipment under Title II, or none, and it chose the latter route.[376]

The parties in *CCIA* challenged these rules on the grounds that the FCC "overreached its ancillary jurisdiction."[377] The *CCIA* court's analysis proceeded from the view that "the Commission's decision in *Computer II* [is] a demarcation of the scope of Title II jurisdiction in a volatile and highly specialized field and a concomitant substitution of alternative regulatory tools for traditional Title II regulation in this field."[378] The court found the FCC's justifications for not "subject[ing] enhanced services or CPE to Title II regulation . . . sustainable on either grounds asserted by the Commission."[379] That is, that they are not common carrier communications activities, and that even if some could be so classified, "the Commission is not required to subject them to Title II regulation where, as here, it finds that it cannot feasibly separate regulable from nonregulable services."[380] As an alternative to Title II regulation, "the Commission used its ancillary jurisdiction to impose . . . a structural regulation scheme only through a separate subsidiary;"[381] an appropriate use of its resources under circumstances where the difficulty of isolating activities subject

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373 *CCIA*, 693 F.2d at 205, 207 ("Section 152 gives the Commission jurisdiction over 'all interstate and foreign communication by wire or radio,' and section 153 defines 'communication by wire' as 'the transmission of writing, signs, signals pictures and sounds of all kinds . . . incidental to such transmission.'").

374 *Id*. at 205–208.

375 *Id*. at 207.

376 *Id*.

377 *Id*. at 209.

378 *Id*.

379 *Id*.

380 *Id*. at 210.

381 *Id*. at 211.

to Title II outweighs the benefits to be gained by that regulation.[382] Therefore, the court was "faced only with the issue whether the Commission's discretion extends to deciding what regulatory tools to use in regulating common carrier service."[383]

Thus, the CPE unbundling and structural separation requirements were upheld as necessary to accomplish the Commission's responsibilities for regulating common carrier services pursuant to Title II. That is, when the *CCIA* court stated that "[regulation of] both enhanced services and CPE was necessary to assure wire communications at reasonable rates,"[384] the reference must have been to the FCC's specific statutory mandate to ensure reasonable rates for basic transmission services pursuant to sections 201 through 203, rather than the more general purposes stated in section 1 of the Act.

It is section 201(b), not sections 2 or 3, which declares unjust or unreasonable rates for common carrier communication services unlawful.[385] While the court found that enhanced services and CPE easily fell within the FCC's subject matter jurisdiction under sections 2 and 3 of the Act, it upheld the *Computer II* regulations on carrier-provided enhanced services and CPE as "reasonably ancillary" to the FCC's specific regulatory responsibilities to ensure that rates charged by common carriers are just and reasonable, pursuant to Title II of the Act.[386]

The Commission also relies on the D.C. Circuit's decision in *Rural Telephone Coalition v. FCC*,[387] but this case does not support the Commission's ability to impose regulations solely pursuant to section 1 of the Act. The challenged actions before the court in *Rural Telephone* were certain interim measures the FCC had taken as the communications industry "adjust[ed] to the dissolution" of the Bell System and its system of implicit subsidies for universal service.[388] Specifically, the case involved the FCC's creation of interstate ac-

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[382] *Id.* at 211. The rule imposed pursuant to ancillary jurisdiction is referred to in the quoted passage as an "alternative" to Title II regulation, yet it is evident from the *CCIA* decision as whole that the structural separation rule was imposed ancillary to the FCC's Title II regulatory responsibilities for the provision of basis transmission services by communications common carriers. The *CCIA* decision is not a model of clarity on this point. *Id*. at 207.

[383] *Id*. at 212. In the passage quoted, the *CCIA* court acknowledges that the relevant jurisdictional question is the FCC's ability to choose among the regulatory tools at its disposal "in regulating common carrier services." *Id*. In other words, the action was ancillary to its responsibilities for Title II common carrier services.

[384] *Id*. at 213.

[385] 47 U.S.C. § 201(b) (2000).

[386] *CCIA*, 693 F.2d at 213.

[387] *Comcast P2P Order*, *supra* note 9, ¶ 16 fn. 76 (citing Rural Tel. Coal. v. FCC, 838 F.2d 1307, 1315 (D.C. Cir. 1988)..

[388] *Rural Tel*., 838 F.2d at 1310.

cess charges and an included mechanism for explicit funding of support for universal telephone service.[389] The access charges were created pursuant to the Commission's authority to regulate the rates, terms, and conditions of common carrier services pursuant to sections 201, 202, and 203 of the Act.[390] This is evident from the underlying Commission order establishing high cost apportionment of universal service reviewed by the D.C. Circuit.[391]

The D.C. Circuit upheld the FCC's creation of a universal service funding mechanism as within its statutory authority under sections 1 and 4(i) "in order to further the objective of making communication service available to all Americans at reasonable charges."[392] It found that "the Commission's action . . . [fell] within the 'expansive powers' delegated to it by the Communications Act."[393] The court in *Rural Telephone* further observed that "[h]ad the Commission proposed the Universal Service Fund for the purpose of subsidizing the incomes of impoverished telephone users, it would have exceeded its authority under section 154(i), as the provision of public welfare is not among its functions."[394] The most sensible reading of this decision is that the FCC's extensive Title II responsibilities for common carrier services provided the hook upon which the Commission's jurisdiction to create the universal service support mechanism rested.

In other cases not cited by the FCC, the D.C. Circuit has explicitly stated that ancillary jurisdiction must find a source outside Title I to which the challenged regulations may be said to be reasonably ancillary. In *National Association of Regulatory Utilities Commissioners v. FCC*—a 1976 case involving a challenge to an FCC rule preempting state common carrier regulation over the use of cable system leased access channels for two-way point-to-point non-video communications—the D.C. Circuit explained that "each and every asser-

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389 *Id*. at 1314–15.

390 *See In re* MTS & WATS Market Structure*, Third Report and Report*, 93 F.C.C.2d. 241, ¶¶ 37–38, 41, 45–46 (Dec. 22, 1982), *aff'd in principal part sub nom.* Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*,* 737 F.2d 1095 (D.C. Cir. 1984).

391 As the Commission held:

> The basic provisions for the protection of universal service recommended by the Joint Board represent a sound balancing of concern for the promotion of universally available telephone service at reasonable rates and the need to prevent uneconomic bypass of the local exchange . . . . We also agree with the Joint Board's plan to direct assistance to high cost areas. This approach will promote universal service by enabling telephone companies and state regulators to establish local exchange service rates in high cost areas that do not greatly exceed nationwide average levels.

In re Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, *Decision and Order*, 96 F.C.C.2d 781, ¶¶ 29–30 (Dec. 1, 1983).

392 *Rural Tel.*, 838 F.2d at 1315; *see* 47 U.S.C. §§ 151, 154(i) (2000).

393 *Rural Tel*., 838 F.2d at 1315 (citing NBC v. United States, 319 U.S. 190, 219 (1943)).

394 *Id*.

tion of jurisdiction" to regulate in a particular manner "must be independently justified as reasonably ancillary to" a specific statutorily mandated responsibility.[395] The court found that "pre-emption of regulatory power of two-way, non-video cable communications is not within the 'ancillary to broadcasting' standard as developed in *Midwest* [*Video I*], even absent the apparent applicability of the [section] 152(b) jurisdictional bar."[396]

In reaching this conclusion, the court reviewed in detail the three Supreme Court cases addressing the scope of the FCC's ancillary authority over cable communications and determined that the cases failed to support "the Commission's argument that it has blanket jurisdiction over all activities which cable systems may carry on."[397] To the contrary, the D.C. Circuit found that the Supreme Court's plurality decision in *Midwest Video I* "devoted substantial attention to establishing the requisite 'ancillariness' between the Commission's authority over broadcasting and the particular regulation before the Court," and that the Chief Justice's concurring opinion suggested that "some attempted regulations of cable operations would fall outside the delegated power."[398] Additionally, the D.C. Circuit held that "the [Supreme] Court's reasoning in both *Southwestern* and *Midwest* [*Video I*] compels the conclusion that the cable jurisdiction, which they have located primarily in § 152(a), is really incidental to, and contingent upon, specifically delegated powers under the Act."[399]

The *NARUC II* court rejected the Commission's argument that blanket jurisdiction over cable was "essential, if the 'goal of a nationwide broadband communications grid' is to be achieved."[400] The court was "not convinced that this goal of [a] nationwide communications network must, in all cases, take precedence, especially where the Commission jurisdiction is explicitly denied under other provisions of the Act."[401] As the court elaborated:

> This long term goal which the Commission sets out for itself apparently has its roots in the general purpose section of the Act, 47 U.S.C. § 151 (1970). While that section does set forth worthy aims toward which the Commission should strive, it has not heretofore been read as a general grant of power to take any action necessary and proper to those ends. Especially in view of our conclusion that [section] 152(b) seems to bar Commission jurisdiction in this case, we are extremely dubious about the legal substance of this argument by the Commission, even if the facts were available to support it.[402]

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395 Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC (*NARUC II*), 533 F.2d 601, 612 (D.C. Cir. 1976). In this case, the mandated responsibility was over broadcasting. *Id.*

396 *Id*. at 617.

397 *Id*. at 612–13.

398 *Id*. at 613.

399 *Id*. at 612.

400 *Id*. at 613.

401 *Id*.

402 *Id*. at 614 n.77 (citation omitted).

Yet another D.C. Circuit decision, *Southwestern Bell Telephone v. FCC*, also undermines the Commission's expansive view of its section 1 authority.[403] *Southwestern Bell Telephone* involved the FCC's attempt to regulate the provision of dark fiber by requiring phone companies to provide dark fiber under tariff.[404] Although the case did not involve an ancillary jurisdiction challenge, its language is instructive on the D.C. Circuit's understanding of the doctrine:

> The Act gives the Commission specific regulatory responsibilities regarding common carriers under [T]itle II of the Act, and broadcasting under [T]itle III. In addition, the Commission has general regulatory jurisdiction over "all interstate and foreign communications by wire or radio . . . ." The Commission's general jurisdiction over interstate communication and persons engaged in such communication, however, "is restricted to that reasonably ancillary to the effective performance of [its] various responsibilities" under [T]itles II and III of the Act.[405]

These cases, together with the more recent D.C. Circuit decisions in *MPAA* and *American Library Ass'n* are consistent with this limited view of the FCC's ancillary authority. They therefore fail to support the FCC's expansive view of its section 1 powers as advanced in the *Comcast P2P Order.*

Other circuit courts also share the D.C. Circuit's view that the Commission's ancillary jurisdiction is incidental to, and contingent upon, its authority under Titles II or III, contrary to the Commission's suggestion in its *Comcast P2P Order*.[406] The Commission relies on two other circuit court cases to establish its authority to exercise ancillary jurisdiction solely pursuant to section 1 of the Act.[407]

First, *GTE Service Corp. v. FCC*, was cited in the *Comcast P2P Order* as "upholding the Commission's section 1 authority."[408] *GTE*, however, was cited by the Ninth Circuit in *California v. FCC* for precisely the opposite conclusion: "upholding the FCC's regulation of enhanced services as ancillary to Commission's authority over interstate basic telephone services."[409] The *GTE* decision upheld the Commission's rules governing the provision of non-regulated computer data processing services by communications common car-

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403 *See* Sw. Bell Tel. Co. v. FCC, 19 F.3d 1475 (D.C. Cir. 1994).

404 *Id*. at 1477–78. Dark fiber is deployed fiber optic cable without "electronic and other equipment necessary to power . . . the glass fiber." *Id.* at 1478.

405 *Id*. at 1479 (citations omitted); *see* FCC v. Midwest Video Corp. (*Midwest Video II*), 440 U.S. 689, 694 (1979); United States v. Midwest Video Corp. (*Midwest Video I*), 406 U.S. 649, 656 (1972).

406 The question whether the Commission may exercise jurisdiction ancillary to its Title VI responsibilities for cable communications, discussed *infra* Part III.C.1.f, has yet to be presented to the appellate courts.

407 *See Comcast P2P Order, supra* note 9, ¶ 16 n.76.

408 *Id.*; GTE Serv. Corp. v. FCC, 474 F.2d 724, 730–31 (1973).

409 California v. FCC, 905 F.2d 1217, 1240 n.35 (9th Cir. 1990).

riers as being within the scope of the FCC's authority over common carriers.[410] The Second Circuit's references in *GTE* to the Commission's "broad and comprehensive rule-making authority in the new and dynamic field of electronic communication"[411] are not the sole basis for the decision.[412]

The Ninth Circuit, in *California v. FCC*, squarely rejected the FCC's attempt to justify rules preempting intrastate structural separation requirements on its Title I authority alone.[413] After noting that the "FCC attaches great significance to its decision to regulate enhanced services pursuant to Title I, rather than Title II," the court rejected the Commission's argument that it was not bound by the restriction of its jurisdiction contained in section 2(b)(1) because that pertained only to cases in which the Commission had chosen to exercise its Title II authority to regulate common carriers.[414] The Ninth Circuit found that the Commission's argument misconceived the nature of its ancillary authority:

> Title I is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to the Commission's specific statutory responsibilities. . . . In the case of enhanced services, the specific responsibility to which the Commission's Title I authority is ancillary [is] to its Title II authority over common carrier services.[415]

The FCC also cited *General Telephone Company of the Southwest v. United States*, a Fifth Circuit decision involving review of a Commission rule prohibiting telephone companies from providing cable services through affiliates unless they allowed cable operators to attach to phone company utility poles.[416] The court declined to decide the full scope of the Commission's ancillary jurisdiction in the area of cable regulation under section 2(a) of the Act, "since [it was] of the opinion that that section together with [s]ection 1 and [s]ection 214 provide ample jurisdiction for the Commission's orders."[417] The *General Tele-*

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410 *GTE*, 474 F.2d at 729–31.

411 *Id*. at 731.

412 *Id*. at 729–32 (upholding the Commission's "maximum separation" rules governing the entry of communications common carriers into the non-regulated field of data processing services as supported by the Commission's concern that its "carriers provide efficient and economic [telephone] service to the public").

413 *California*, 905 F.2d at 1240 & n35.

414 *Id*. at 1240 n.35 (citation omitted).

415 *Id*. (citations omitted).

416 *See Comcast P2P Order, supra* note 9, ¶ 16 n.76; Gen. Tele. Co. of the Sw. v. United States (*General Telephone*), 449 F.2d 846, 850 (5th Cir. 1971).

417 *General Telephone*, 449 F.2d at 854. Section 214 requires carriers to obtain from the Commission a certificate of "public convenience and necessity" prior to constructing new lines or acquiring or operating any line; the FCC is permitted to "'attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require.'" 47 U.S.C. § 214(a); *see General Telephone*, 449 F.2d at 854. The court noted that this specific authorization is "supplemented by Section 4(i) of the Act (47

phone court stated:

> While the Commission is specifically charged with the regulation of common carriers under Title II and broadcasters under Title III, it nonetheless has the additional and overriding responsibility, as enunciated in *Section 1* (*47 U.S.C. § 151*), to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges." The development of [cable] services is a part of this broader purpose. The Commission is obliged to discharge its responsibilities in this area as best it can and it has chosen in this instance to implement the national policy by limiting the involvement of common carriers, over which the Commission has unquestioned jurisdiction, in [cable] operations.[418]

The Fifth Circuit thus recognized that section 1's broad purposes may be effectuated through the FCC's ancillary jurisdiction only when the exercise is reasonably ancillary to its much more narrowly-tailored regulatory authority under Titles II and III of the Act.

In conclusion, in virtually every instance in which the courts have upheld the FCC's reliance upon its Title I ancillary jurisdiction, the agency's action was also supported by its express statutory responsibilities to regulate the activities of television broadcast stations and other radio licensees under Title III or the provision of telecommunications services by common carriers under Title II.[419] The Commission's argument boils down to little more than an assertion that it may exercise its ancillary jurisdiction in any case where its action may be said to further the general goals of section 1. This is an unsupportable view of the Commission's ancillary jurisdiction, as it "mocks the principle that the statute constrains the agency in any meaningful way."[420] If accepted, it would obviate the need for any other provision of the Act. In other words, if the FCC's view that section 1, standing alone, supports the exercise of ancillary jurisdiction over Comcast's broadband network management practices, then the rest of the Act is rendered no more than surplus usage. Unfortunately for the Commission, the courts have already rejected this sweeping view of its powers and have instead consistently held that "Title I is not an independent source of regulatory authority; rather, it confers on the FCC only such power

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U.S.C. § 154(i)) which permits the agency to 'make such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.'" *Id*.; *see* 47 U.S.C. §§ 151, 154(i), 214 (2000).

418 *General Telephone*, 449 F.2d at 854–55 (emphasis added).

419 In addition to the cases discussed above, see Mobile Commc'ns Corp. of Am. v. FCC, 77 F.3d 1399, 1406 (D.C. Cir. 1996) (approving exercise of ancillary authority pursuant to the FCC's statutory responsibility under section 309(a) to grant licenses in the public interest); New England Tel. & Tel. Co. v. FCC, 826 F.2d 1101, 1107-09 (D.C. Cir. 1987) (approving ancillary authority to impose prospective rate reductions "absolutely necessary" given the mandates of sections 204 and 205 of the Act);

420 *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1014 (2005) (Scalia, J., dissenting).

as is ancillary to the Commission's specific statutory responsibilities."[421]

The Commission's position that Title I may satisfy both prongs of the test for ancillary jurisdiction is untenable because Title I is considered the source of ancillary jurisdiction;[422] the position, thus, is akin to saying that the FCC can regulate if its actions are *ancillary to its ancillary* jurisdiction, and that is one *ancillary* too many.[423]

c. Section 706

Section 706 is titled Advanced Telecommunications Incentives.[424] As the Commission recognizes, section 706(a) provides that the "Commission shall encourage the deployment on a reasonable and timely basis of advanced tele-

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[421] California v. FCC, 905 F.2d 1217, 1240 n.35 (9th Cir. 1990) (rejecting the FCC's attempt to preempt state regulation of structural separation requirements and inconsistent nonstructural safeguards on the grounds that they would negate its *Computer III* policy of permitting the integration of basic and enhanced services offered on an interstate basis; the FCC cannot rely on its claimed justification that section 2(b)(1), limiting its authority over intrastate common carrier services, was inapplicable because it has chosen to regulate enhanced services pursuant to Title I rather than Title II because "[i]n the case of enhanced services, the specific responsibility to which the Commission's Title I authority is ancillary to its Title II authority is over common carrier services."); *see Sw. Cable*, 392 U.S. at 178 (finding the FCC's Title I authority "restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities"); Motion Picture Ass'n of Am. v. FCC, 309 F.3d 796, 805 (2002) (finding that the "FCC must look beyond § 1 to find authority for regulations that significantly implicate program content"); Am. Library Ass'n v. FCC, 406 F.3d 689, 692 (D.C. Cir. 2005) (vacating broadcast flag rules imposed solely under FCC's Title I authority because, lacking a "statutory foundation," they were therefore "ancillary to nothing"); *see also* Illinois Citizens Comm. for Broad. v. FCC, 467 F.2d 1397, 1399 (7th Cir. 1972) The Seventh Circuit agreed with an FCC determination that it has no power to regulate the construction of an office tower, claimed to interfere with the reception of broadcasting television reception, under either its direct statutory authorization or its ancillary authority. *Id*. at 1401. The court observed that *Sw. Cable* recognized a very limited extension of the FCC's authority over activities clearly falling within its subject matter jurisdiction under Title I, but even there the Supreme Court "appeared to be treading lightly." *Id*. at 1400. In view of this, the petitioners' argument that "if the 'communications' substantially are within the FCC's power to regulate, so are all activities which 'substantially affect communications,' was rejected on the grounds that the argument was "too broad" as it "would result in expanding the FCC's already substantial responsibilities to include a wide range of activities, whether or not actually involving the transmission of radio or television signals much less being remotely electronic in nature." *Id*.

[422] *See* United States v. Sw. Cable Co., 392 U.S. 157, 178 (1968); United States v. Midwest Video Corp. (*Midwest Video I*), 406 U.S. 649, 653–58 (1972).

[423] As the D.C. Circuit put it, an exercise of ancillary jurisdiction cannot rest solely on Title I because it would "thus appear ancillary to nothing." Am. Library Ass'n v. FCC, 406 F.3d 689, 702 (D.C. Cir. 2005).

[424] Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 153 (codified at 47 U.S.C. § 157 note (2000)).

communications capability to all Americans."[425] Section 706(a) further provides that the Commission is to pursue this policy 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."[426] Congress defined advanced telecommunications capability 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" and "without regard to any transmission media or technology."[427]

Apart from its responsibility to encourage the deployment of advanced telecommunications capability by utilizing various deregulatory or regulating methods that "remove barriers to infrastructure investment," the Commission's sole statutory mandate pursuant to section 706(b) is to conduct a regular inquiry concerning the availability of advanced telecommunications capability to all Americans in a reasonable and timely fashion.[428] Only upon a negative finding is the Commission empowered to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[429]

The Commission found that exercising jurisdiction over the *Free Press Complaint* would be reasonably ancillary to this provision in several ways. First, it found that the practice of degrading consumer ability to share or access video content effectively "results in the limiting of 'deployment' of an 'advanced telecommunications capability,' *i.e.*, the ability to 'originate and receive high-quality . . . video telecommunications using any technology.'"[430] Second, the Commission "predict[ed] that prohibiting network operators from blocking or degrading consumer access to desirable content and applications on-line will result in increased consumer demand for high-speed Internet ac-

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425 *Comcast P2P Order, supra* note 9, ¶ 18; 47 U.S.C. § 157(a) (2000). Section 706 was added as a footnote to section 157, contained in Title I of the Act, by the Telecommunications Act of 1996. § 157. Section 157, entitled "New Technologies and Services," states that it "shall be the policy of the United States to encourage the provision of new technologies and services to the public." § 157(a). The Commission is directed to determine "whether any new technology or service proposed in a petition or application is in the public interest within one year" of filing, and to conclude any proceeding for a new technology or service that the Commission itself initiates within one year. § 157(b). Section 706 of the Act was moved to its own section of the code in December 2008. 47 U.S.C.A. § 1302 (West 2008).

426 Pub. L. No. 104-104, § 706(a).

427 § 706(c); *see Comcast P2P Order, supra* note 9, ¶ 18.

428 § 706(b).

429 *Id*.

430 *Comcast P2P Order, supra* note 9, ¶ 18.

cess, and therefore, increased deployment to meet that demand."[431] Finally, the Commission found that "the expenditure of both creative and financial capital on such content and applications is much less likely if large numbers of Internet users will be unable to access them in an unfettered manner."[432]

Setting aside the highly speculative nature of the Commission's predictions in this case, even Free Press recognized that section 706(a) provides only a "general instruction to the FCC" to promote broadband deployment.[433] However, this congressional policy—as the Supreme Court has described it—is not an independent grant of substantive regulatory power.[434] The Commission has confirmed this reading of the plain language of the statute: Section 706 confers no substantive authority on the Commission but rather sets forth policy guidance to be used in exercising authority conferred elsewhere in the Act.[435] Ac-

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[431] *Id*.

[432] *Id*. The Commission cites exactly one source of record evidence supporting these predictive judgments. *Id*. ¶ 18 n.85 ("[W]e agree with Free Press that the unimpeded availability of high-definition content on-line will lead to increased adoption of broadband Internet access, as well as consumer demand for network upgrades that would result in higher speeds that would allow such content to be accessed more quickly."); *see Free Press June 12 Ex Parte*, *supra* note 130, supp. 1 at 22.

[433] *Free Press June 12 Ex Parte*, *supra* note 130, at 20–24.

[434] Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power, 534 U.S. 327, 339 (2002).

[435] *See Comcast P2P Order, supra* note 9, ¶ 18; *see also In re* Deployment of Wireline Services Offering Advanced Telecommunications Capability; Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services; Petition of US West Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services; Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Technology; Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act; Petition of the Association for Local Telecommunications Services (ALTS) for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Services Under Section 706 of the Telecommunications Act of 1996; Southwestern Bell Telephone Company, Pacific Bell Company, and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. § 160 for ADSL Infrastructure and Service, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 F.C.C.R. 24,011, ¶ 77 (Aug. 6, 1998) [hereinafter *First Advanced Services Order*]; *In re* Deployment of Wireline Services Offering Advanced Telecommunications Capability; Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services; Petition of US West Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services; Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Technology; Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act; Petition of the Association for Local Telecommunications Services (ALTS) for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Services Under Section 706 of the Telecommunications Act of 1996; Southwestern Bell Telephone Company, Pacific Bell Company, and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of

cordingly, the FCC cannot assert ancillary jurisdiction solely to promote the goals of section 706(a) because that provision does not grant any authority or impose any specific mandatory obligation on the Commission, as the agency itself has previously recognized:

> [S]ection 706(a) does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods. Rather, we conclude that section 706(a) directs the Commission to use the authority granted in other provisions, including forbearance authority granted under section 10(a), to encourage the deployment of advanced services.[436]

As discussed above, the Commission may not rely on its ancillary jurisdiction simply because an action may be said to further a "'valid communications policy goal and [is] in the public interest."[437] Rather, the Commission must support its actions as necessary, if not imperative, to effectuate a specific delegated regulatory responsibility, and the action must support long established regulatory goals in the area of regulation relied upon.[438] Also, as noted above, the D.C. Circuit has recognized that statutory provisions that "order[] the Commission to produce a report" do "nothing more, nothing less" and that "[o]nce the Commission complete[s] the task of preparing the report . . . its delegated authority on the subject end[s]."[439] Thus, consistent with the D.C. Circuit's decision in *MPAA*, once the FCC discharges its obligation to conduct its periodic inquiries and produce the required reports to Congress pursuant to section 706(b), "its delegated authority on the subject end[s]."[440] Section 706 may continue to serve as a guidepost for FCC regulatory actions, but standing alone, it may not provide the hook for its exercise of ancillary jurisdiction over the *Free Press Complaint*.

Moreover, an exercise of ancillary jurisdiction must not be contrary to statutory limits on the scope of agency authority, nor may it be contrary to long-established policy in the area of advanced telecommunications deployment.[441] In the case of section 706, the FCC has long pursued a deregulatory policy for the express purpose of "encourag[ing] the deployment on a reasonable and

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the Telecommunications Act of 1996 and 47 U.S.C. § 160 for ADSL Infrastructure and Service, *Order on Reconsideration*, 15 F.C.C.R. 17,044, ¶ 5 (Aug. 3, 2000); *In re* Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order and Further Notice of Proposed Rulemaking*, 22 F.C.C.R. 5101, ¶¶ 62–64 (Dec. 20, 2006).

436 *First Advanced Services Order*, *supra* note 435, ¶ 69.

437 Motion Picture Ass'n of Am. v. FCC (*MPAA*), 309 F.3d 796, 806 (D.C. Cir. 2002).

438 United States v. Midwest Video Corp. (*Midwest Video I*), 406 U.S. 649, 663–65 (1972); *see supra* Part III.A.1.b.

439 *MPAA*, 309 F.3d at 807.

440 *Id*.

441 *See* FCC v. Midwest Video Corp. (*Midwest Video II*), 440 U.S. 689, 706–07 (1979).

timely basis of advanced telecommunications capability to all Americans" focused on spurring infrastructure investment.[442] By exercising regulatory authority to dictate the network management policies of a facilities-based broadband ISP—a move that will likely deter rather than encourage infrastructure investment—the FCC both contravenes the statutory purpose and reverses its own long-standing policy objectives.[443] The Commission's action, therefore, cannot be deemed reasonably ancillary to the accomplishment of the purposes of section 706; to the contrary, it is more likely to contravene statutory goals. Again, even assuming that section 706 could be read to support an exercise of ancillary jurisdiction for the purposes cited by the Commission—which is doubtful—such an action would only be appropriate in an agency rulemaking proceeding.

d. Section 601

Section 601 sets forth the purposes of Title VI of the Act, much as section 1 sets forth the purposes of the Communications Act, and, like sections 1 and 230, imposes no statutorily mandated responsibilities on the Commission.[444] Rather, section 601 establishes only the broad ends to which the Commission's delegated regulatory authority under Title VI—the means—may be applied. Among the six statutory purposes contained in section 601, the Commission selected subsection four as supporting its ancillary jurisdiction.[445] That provision identifies as a purpose of Title VI: to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public."[446] The five other statutory purposes taken together reflect congressional goals for the establishment of "a national policy concerning cable communications" that "establish[es] guidelines for the exercise of Federal, State, and local authority" to regulate cable systems; "encourage[s] the growth and development of cable systems"; protects cable operators from "unfair denials of [franchise] renewal"; and "promote[s] competition in cable communications and minimize[s] unnecessary regulation that would impose an undue economic burden on cable systems."[447]

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[442] 47 U.S.C. § 157(a) note (2000); *see Cable Modem Declaratory Ruling*, *supra* note 21, ¶¶ 4, 47, 73; *Wireline Broadband Order*, *supra* note 24, ¶ 77.

[443] Presumably, by imposing additional obligations on broadband providers based on weak legal grounds, the Commission increases the uncertainty in the market, thereby discouraging additional investment.

[444] *Compare* 47 U.S.C. § 521 (2000) (listing the purposes of section 601) *with* 47 U.S.C. §§ 151, 230.

[445] *See Comcast P2P Order, supra* note 9, ¶¶ 21–22.

[446] 47 U.S.C. § 521(4); *see Comcast P2P Order*, *supra* note 9, ¶ 21.

[447] 47 U.S.C. § 521(1), (3), (5)–(6). Even assuming that section 601 may support the

It bears noting that although Title VI has yet to be recognized as a source of regulatory responsibilities supporting an exercise of the Commission's ancillary jurisdiction, there is no jurisprudential impediment to its use for such purposes. However, consistent with *Southwestern Cable, Midwest Video I*, and *Midwest Video II*, such actions must be imperative for the successful performance of the Commission's statutory responsibilities under Title VI, and must not contravene the regulatory framework Congress established in that title—tests that the *Comcast P2P Order* cannot pass.

Section 601 was added to the Communications Act by the Cable Communications Act of 1984,[448] which was intended as a deregulatory act, eliminating unnecessary state and local cable regulation and delineating the appropriate role of federal and state and local franchising authorities vis-à-vis cable communications.[449] Title VI was established to govern cable communications, but the term itself is not defined in the statute. The section 602 definitions appear to confine the scope of the Commission's Title VI mandatory statutory responsibilities to the provision of cable services and multichannel video programming distributor ("MVPD") services by cable operators and other MVPDs, including telephone companies providing video programming services and operators of open video systems.[450] With limited exceptions, the operative provisions of Title VI are addressed to the provision of one-way multichannel video programming services by cable operators and other entities.[451]

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exercise of ancillary jurisdiction to, for example, "promote competition in cable communications," arguably a goal identified by the Commission in the *Comcast P2P Order, supra* note 9, ¶ 16, it would only support the Commission's ability to engage in a rulemaking. See discussion *infra* Part III.A.1.d, on the impropriety of relying on ancillary jurisdiction in an adjudication.

[448] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780 (codified as 47 U.S.C. §§ 521–73); *see* Nat'l Cable & Telecomms. Ass'n, History of Cable Television, http://www.ncta.com/About/About/HistoryofCableTelevision.aspx (last visited Feb. 10, 2009) (providing a history of cable television).

[449] *See* J. Michael Shepherd et al., *Panel Discussion on Self-Regulation*, 57 ANTITRUST L.J. 809, 817 (1989).

[450] "Cable communications" is not a defined term in the Act. Section 552(6) defines the key term "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6). "Video programming" means "programming provided by, or generally considered comparable to programming provided by a television broadcast station." § 522(20). "Other programming service" is defined as "information that a cable operator makes available to all subscribers generally." § 522(14). "MVPD" is defined as "a person such as, but not limited to, a cable operator, a multichannel multipoint distributor service, a direct satellite broadcast service . . . who makes available for purchase, by subscribers or customers, multiple channels of video programming." § 522(13). The provision of video programming services by telephone companies is governed by section 651. § 571.

[451] *See* 47 U.S.C. §§ 522, 571(a)(3), 573(a).

In the *Cable Modem Declaratory Ruling*, the Commission expressly rejected classifying cable modem service as a Title VI cable service because Internet access services are highly interactive two-way services affording subscribers the ability to access and interact with all the content available on the Internet in a manner wholly inconsistent with the notion of "one-way transmission to subscribers . . . of video programming, or other programming service."[452] According to the Commission, the amount of subscriber interaction needed "to use" the cable modem service placed it outside the scope of Title VI.[453]

In the *Comcast P2P Order*, the Commission reasoned that, unlike Title VI generally, section 601(4) by its terms is not limited to "cable services" but applies more broadly to "cable communications."[454] Accordingly, in the *Comcast P2P Order*, the Commission stated that it "interpret[s] 'cable communications' in this instance to include those communications, such as peer-to-peer transfers, facilitated by broadband Internet access service provided by cable operators such as Comcast."[455] Continuing, the Commission stated:

> To the extent that our adjudicatory action promotes a diversity of information sources for Comcast's end users by enabling them to access more easily a wider variety of content than Comcast previously allowed, this core purpose of Title VI of the Act is satisfied by our assertion of authority in this area.[456]

Thus, in the Commission's view, pursuant to section 601(4), it is free to exercise its ancillary jurisdiction over the array of communications services provided by cable operators simply because the services are provided by cable operators. This is a breathtaking expansion of the Commission's regulatory powers, and it is highly unlikely that Congress ever contemplated such an open-ended delegation of regulatory authority under section 601. Acceptance of the Commission's interpretation of its powers under section 601 would render superfluous the remaining, carefully crafted provisions of Title VI.

The Commission attempts to address this problem in the *Comcast P2P Order* by referencing statements by the Supreme Court in *Midwest Video I* in which the Court rejected an argument that sections 1 and 303(g)—relied upon by the Commission in support of its cable local origination rules—"merely state objectives without granting power for their implementation."[457] According to the Commission, the Supreme Court upheld the local origination rules as "'founded on those provisions for the policies they state, and not for any regu-

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[452] 47 U.S.C. § 522(6)(A); *Cable Modem Declaratory Ruling*, *supra* note 21, ¶ 67.
[453] *Cable Modem Declaratory Ruling*, *supra* note 21, ¶¶ 65–67.
[454] *Comcast P2P Order, supra* note 9, ¶¶ 21.
[455] *Id*.
[456] *Id*.
[457] *Id*., ¶ 22 (quoting United States v. Midwest Video Corp. (*Midwest Video I*), 406 U.S. 649, 669 n.28 (1972)).

latory power they might confer.' Rather, the Court explained that '[t]he regulatory power itself may be found . . . in 47 U.S.C. §§ 152(a), 303(r).'"[458] The quoted passage omits the Court's citation to *Southwestern Cable*, which makes plain that this simply is a reference to the statutory sources of the Commission's ancillary jurisdiction previously recognized by the Court.[459] The Commission relies on the quoted material to support its claim that it may base an exercise of its ancillary jurisdiction solely on policy or purpose statements contained in the Act. Yet, the quote is contained in a footnote; the *Midwest Video I* text preceding and following the footnote demonstrates, however, that the local origination rules were upheld on other grounds.[460] Consistent with this analysis, the Court in *Midwest Video I* found the FCC's action reasonably ancillary, not solely—if at all—to a general statutory policy or goal, but to a specific mandated statutory responsibility contained in Title III:

> But in both cases the rules serve the policies of [sections] 1 and 303(g) of the Communications Act on which the cablecasting regulation is specifically premised, *and also, in the Commission's words, "facilitate the more effective performance of* [*its*] *duty to provide a fair, efficient, and equitable distribution of television service to each of the several States and communities" under § 307(b)*. In sum, the regulation preserves and enhances the integrity of broadcast signals and therefore is "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[461]

Finally, it is noteworthy that the Commission's novel interpretation of section 601 has effectively reversed its *Cable Modem Declaratory Ruling* to the extent the *Comcast P2P Order* finds that at least a portion of the cable modem service constitutes cable communications governed by Title VI.[462] Under the FCC's new approach, section 601 can only serve as a basis for the Commission's ancillary jurisdiction over cable modem service providers. By this action, the FCC has created just the sort of regulatory disparity it sought to avoid in each of its earlier broadband Internet access classification rulings. In each case, the Commission intentionally classified all facilities-based broadband Internet access services as Title I information services so that all providers would be able to compete on a level playing field in a minimally regulated environment.[463]

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458 *Id.* ¶ 22 (quoting *Midwest Video I*, 406 U.S. at 669 n.28).

459 *See Midwest Video I*, 406 U.S. at 669 n.28.

460 *See id.* at 669–70.

461 *Id*. (emphasis added) (citations omitted).

462 *See Cable Modem Declaratory Ruling*, *supra* note 21, ¶ 7 ("[C]able modem service, as it is currently offered, is properly classified as an interstate information service, not as a cable service."); *Id.* ¶ 68 ("Our determination that cable modem service is not a cable service does not mean that the cable operator cannot provide the service, just that the service is not subject to Title VI.").

463 *See*, *e.g.*, *Wireline Broadband Order*, *supra* note 24, ¶¶ 1, 4, 5; *Broadband Over*

The Commission's attempt to pick and choose among these statutory purposes to find one that can arguably support its action in its *Comcast P2P Order* highlights a key problem with basing an exercise of ancillary jurisdiction on the many policy and statutory purpose statements contained with the Communications Act: in any given specific instance, the purpose statement will fall into unacceptable contradiction of another statement of statutory purpose. While that is a tolerable state of affairs for statements of broad policy goals, it is intolerable when it comes to the Commission's actions in its quasi-legislative rulemaking or quasi-judicial adjudicatory function, where the Commission simply has no authority to take action unless it has been delegated that authority by Congress. Ancillary jurisdiction to accomplish statutory *policies*—as opposed to specific statutory *mandates*—would give the agency virtually unlimited authority to regulate whenever and wherever it chose, a result not countenanced by any court.

In conclusion, for the reasons stated above, the Commission may not exercise its ancillary jurisdiction simply because it declares that its action furthers a valid policy objective such as that contained in sections 1, 601(4) or section 706. A proper exercise of ancillary jurisdiction must not only comprehend a subject matter within the Commission's express charge from Congress, it must be imperative to the successful accomplishment of a statutory mandate, as opposed to policy statement, contained in one of the operative titles of the Act, and cannot conflict with the regulatory regime to which it is said to be reasonably ancillary.

2. The Commission May Not Rely Upon the Provisions of Title II Cited in its Decision to Support its Exercise of Ancillary Jurisdiction

In addition to its misplaced reliance on provisions of the Act articulating only broad policies, the FCC relies upon three provisions contained in Title II pertinent to common carriers to support its exercise of ancillary jurisdiction over the *Free Press Complaint*: sections 201, 256 and 257.[464] Given the FCC's decision in the *Cable Modem Declaratory Ruling* that cable modem service does not constitute a telecommunications service under section 153(46), reliance upon any provision of the Act explicitly governing common carriers to support its action against Comcast is highly questionable.[465] The specific justi-

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Power Line Order, *supra* 30, ¶¶ 1–2.

[464] *Comcast P2P Order, supra* note 9, ¶¶ 17, 19–20; 47 U.S.C. §§ 201, 256, 257 (2000).

[465] *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1006–20 (2005) (Scalia, J., dissenting) (dissecting the Commission's argument that cable modem service is not a telecommunications service but contains a telecommunications component..

fications supplied by the Commission do not strengthen its position.

a. Section 201

Pursuant to section 201, "[a]ll charges, practices, classifications, and regulations for and in connection with [common carrier] service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful."[466] The Commission reasoned that its action was reasonably ancillary to its section 201 authority because Comcast's interference "with its users' ability to upload content" would cause the computer attempting to download that content "to look for another source," which in some cases will be a computer connected to a common carrier's network.[467] The Commission further speculates that depending on the amount of traffic shifted, the DSL provider may need to purchase or build additional capacity, and depending on the terms of its traffic exchange agreements, might owe increased payments, thus increasing its costs.[468] The Commission argues that this "would have implications for the DSL provider's charges and the arrangements it must make pursuant to section 201."[469] Thus, according to the FCC, Comcast's conduct acted to "shift the costs and burdens of carrying traffic away from Comcast and onto Title II carriers" with whom it interconnects.[470] The Commission believes such behavior "directly impacts Title II carriers and thus implicates [its] section 201 authority."[471]

At the outset, it must be noted that the cost-shifting scenario spun out by the Commission is completely speculative and unsupported by *any* record evidence. The FCC cites no traffic studies, complaints by common carrier DSL service providers, or any indication of the number of wireline broadband ISPs—using DSL or some other technology—actually experiencing increased traffic flows and costs due to Comcast's conduct. Nor does the Commission support its decision by citing record evidence of carrier rate increases due to carrier cost increases that could arguably be considered unreasonable, and hence a basis for FCC action under section 201. In other words, even if section 201 could theoretically provide the basis for an exercise of ancillary jurisdic-

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466 47 U.S.C. § 201(b) (2000).

467 *Comcast P2P Order, supra* note 9, ¶ 17.

468 *Id*.

469 *Id*.

470 *Id*.

471 *Id*. The FCC notes that it has permitted some facilities-based carriers to choose whether to offer the transmission portion of wireline broadband Internet access service as non-common carriage or common carriage, without attempting to quantify the number of providers who have elected to provide DSL on a common carrier basis. *Id.* ¶ 17 n.80.

tion to adjudicate or regulate the reasonableness of the network management practices of a cable modem service provider, the Commission has failed to make the case in this instance. Regardless, it is highly doubtful that section 201 can provide such a basis.

By its terms, section 201 requires common carriers to charge just and reasonable rates.[472] The question whether the a common carrier's costs have been unduly raised by the action of a non-common carrier is wholly distinct from the question under section 201 whether the rates charged by the affected common carrier to its end users are just and reasonable. Accordingly, section 201 can provide no basis for the exercise of ancillary jurisdiction over Comcast's network management practices.

b. Section 256

The next Title II provision cited by the Commission—section 256—similarly is incapable of supporting the claimed ancillary jurisdiction.[473] Section 256, entitled "Coordination for interconnectivity," states that its purposes are "to promote nondiscriminatory accessibility by the broadest number of users and vendors of communications products and services to public telecommunications networks used to provide telecommunications services" and "to ensure the ability of users and information providers to seamlessly and transparently transmit and receive information between and across telecommunications networks."[474] Congress explicitly limited the Commission to two core functions under section 256.

First, the Commission "establish[es] procedures for [its] oversight of coordinated network planning by telecommunications carriers and other providers of telecommunications service for the effective and efficient interconnection of public telecommunications networks used to provide telecommunications service."[475] Second, it participates "in a manner consistent with its authority and practice prior [to the date of enactment of this section], in the development by appropriate industry standard-setting organizations of public telecommunications network interconnectivity standards."[476] Significantly, section 256(c), which addresses the Commission's Authority, states that "[n]othing in this sec-

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472 47 U.S.C. § 201(b) (2000).

473 *Comcast P2P Order, supra* note 9, ¶ 19; 47 U.S.C. § 256 (2000).

474 47 U.S.C. § 256(a). As used in section 256, the term "public telecommunications network interconnectivity" means "the ability of two or more public telecommunications networks used to provide telecommunications service to communicate and exchange information without degeneration, and to interact in concert with one another." § 256(d).

475 § 256(b)(1).

476 § 256(b)(2).

tion shall be construed as expanding or limiting any authority that the Commission may have under law in effect before" the date of enactment of the 1996 Act."[477]

In other words, pursuant to section 256, the Commission's added statutory responsibilities are limited strictly to establishing procedures for its oversight of coordinated public telecommunications network planning. Additionally, it may participate with industry standards-setting bodies in the development of public telecommunications network interconnectivity standards, consistent with its authority over such matters prior to enactment of the 1996 Act.[478] The provision otherwise does not expand upon the Commission's statutory authority. Moreover, section 256 contains the word "telecommunications" in connection with "carrier," "network," or "service" no fewer than eighteen times;[479] it cannot reasonably be read to support FCC regulatory authority over the network management practices of a cable modem service provider.

The Commission attempts to skirt these obvious problems with relying on section 256 to provide the hook for its ancillary jurisdiction by arguing that even if Comcast's "cable plant-based Internet access network is not, when viewed in isolation, a 'public telecommunications network,' it clearly interconnects with such networks."[480] To explain the significance of this assumed fact, the Commission again hypothesizes actions by a Comcast customer—in this case a VoIP customer—who "*may* utilize [the] service to call a customer using a traditional land-line telephone connected to the public switched telephone network."[481] Similarly, Comcast's customers may also "share content with customers of local exchange carriers, whose networks are used to provide telecommunications services . . . and are thus 'public telecommunications networks.'"[482] Finally—channeling its section 201 hypothetical—the Commission notes that Comcast's practices *may* "have the effect of shifting traffic to other carriers' telecommunications networks."[483] The Commission concludes:

> It is therefore a reasonable exercise of the Commission's ancillary authority to section 256 to promote the ability of Comcast customers and customers of other networks, including public telecommunications networks, to share content and applications with each other, without facing operator-erected barriers, *i.e.,* to "seamlessly and transparently transmit and receive information," and without allowing Comcast to shift costs and burdens to those networks.[484]

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477 § 256(c).
478 *See id*.
479 *See* § 256.
480 *See Comcast P2P Order, supra* note 9, ¶ 19.
481 *Id*. (emphasis added).
482 *Id*.
483 *Id*.
484 *Id*. (citation omitted).

Unfortunately, an obvious impediment to basing an exercise of ancillary jurisdiction on section 256 is the provision's express statement that it does not expand the Commission's authority in any manner. Additionally, it is impeded by the section's express terms authorizing the Commission to do nothing more than establish telecommunications network interconnectivity oversight procedures and participate in industry standards-setting body efforts aimed at promoting the statutory purposes.[485] No matter how many theoretical linkages the Commission may hypothecate to connect Comcast's cable modem network with a public telecommunications network, the Commission's action cannot be considered reasonably ancillary to a provision directing that it do nothing other than establish procedures and participate in industry standards-setting activities. Again, the grant of some authority over a subject does not give the FCC plenary authority in the area.[486]

c. Section 257

Similarly, section 257 does not support the Commission's exercise of ancillary jurisdiction in this instance. Section 257, entitled "Market entry barriers proceeding," directs the Commission, within fifteen months after enactment of the 1996 Act, to:

> complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this Act (other than this section), market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services.[487]

Further, every three years following the completion of the aforementioned proceeding, the Commission is "to review and report to Congress" on "any regulations prescribed to eliminate barriers within its jurisdiction" and any "statutory barriers identified under subsection (a) . . . that the Commission recommends be eliminated consistent with the public interest."[488] Congress expressly directed the Commission, "[i]n carrying out subsection (a) . . . [to] seek to promote the policies and purposes of [the Act] favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity."[489]

Thus, the provision created new obligations for the Commission consisting of a single rulemaking proceeding and a continuing reporting obligation, with-

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485 47 U.S.C. § 256(b) (2000).
486 Am. Library Ass'n v. FCC, 406 F.3d 689, 708 (D.C. Cir. 2005).
487 47 U.S.C. § 257(a).
488 § 257(c).
489 § 257(b).

out expanding the scope of its regulatory authority over providers of either telecommunications or information services.[490] It is therefore highly doubtful that section 257, standing alone, may be relied on to support an exercise of ancillary jurisdiction not necessary for the accomplishment of an express statutory mandate contained elsewhere in the Act. Consistent with the principle established by the D.C. Circuit in *American Library Association*,[491] once the FCC has discharged its rulemaking and reporting obligations under section 257, its delegated authority over the matter ends.[492]

Even if section 257 could be read theoretically to support the FCC's ancillary authority in an appropriate case, the Commission's action on the *Free Press Complaint* fails to pass muster. In the *Comcast P2P Order*, the FCC made several determinations regarding the success of the Internet. The Commission reasoned that the success of the Internet has been "directly linked to its particular architectural design"; that variances from its standard protocols and practices or contravention of these protocols and practices "damages the Internet as a whole"; and that entrepreneurs would have to "spend considerable time and resources in an effort to accommodate Comcast's particular network management practices."[493] From this predicate, the FCC concludes that by

> exercising authority over this complaint, [it is] able to ensure that Comcast's actions do not inappropriately hinder entry by "entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services." In addition by facilitating such entry, [it] also promote[s] the Act's policies favoring "a diversity of media voices" and "technological advancement."[494]

The record evidence cited in support of this conclusion, however, indicates that rather than acting as a barrier to market entry, Comcast's network management and disclosure practices might have constituted merely a hindrance to the easy uploading and distribution of content by subscribers to multichannel online video distributors such as Vuze.[495] Even Vuze acknowledged that it had been "able to minimize any serious impact on its service" by "implement[ing] a number of counter-measures."[496] Thus, the FCC is lacking a factual basis on which to build its ancillary authority, even assuming such authority could reasonably be exercised pursuant to section 257. In short, the FCC had no basis to

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490 § 257(a)–(c).

491 *See* discussion *supra* Part III.B.2.b.

492 *See* Motion Picture Ass'n of Am. v. FCC (*MPAA*), 309 F.3d 796, 807 (2002) (Providing that in the case of section 713(f) where Congress solely authorized the Commission to produce a report, its delegated authority on the matter was limited to producing the report).

493 *Comcast P2P Order, supra* note 9, ¶ 20.

494 *Id*.

495 *See id*. ¶ 20 n.96; *see also Vuze Petition*, *supra* note 110, at 11.

496 *Vuze Petition*, *supra* note 110, at 11.

take any action pursuant to section 257 concerning Comcast's network management practices.

C. Summary of Ancillary Jurisdiction Analysis

Contrary to the Commission's beliefs, the doctrine of ancillary jurisdiction is bounded and the Commission cannot expand its regulatory authority at will. Although the courts have repeatedly stated that the FCC has "broad authority" under this doctrine to implement statutory purposes, they have also recognized that the FCC's ancillary authority is not unlimited.[497] *Southwestern Cable, Midwest Video I* and *Midwest Video I,*[498] taken together circumscribe the FCC's ability to impose regulatory constraints on the array of communications falling under the FCC's subject matter jurisdiction to actions imperative to implementing or achieving express statutory mandates found in the operative titles of the Act.[499]

Further, the seven provisions of the Act on which the Commission relies—sections 1, 201, 230(b), 256, 257, 601(4), and 706—fail to provide the requisite jurisdictional basis for its action. Sections 1, 230(b), 706(a), and 601(4) cannot serve as a means for enforcing behavioral norms against Comcast because a private party cannot violate Congressional policies or purposes that, like these, consist of no more than hortatory exclamations or statements of broad purpose.[500] Nor can sections 201, 256, and 257 provide the necessary jurisdictional reference as they concern solely communications services provided by common carriers, bear no reasonable relationship to the network management practices at issue, or otherwise fail to enlarge the scope of the FCC's existing jurisdiction over providers of broadband information services. There may be alternative theories of the FCC's ancillary jurisdiction that could be cited in support of its exercise of regulatory authority over providers of broadband Internet access services in an appropriate rulemaking proceeding. However, the lawfulness of the *Comcast P2P Order* must be judged on the

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497 *Sw. Cable*, 392 U.S. at 172; FCC v. Midwest Video Corp. (*Midwest Video II*), 440 U.S. 689, 698 (1979).

498 *See Sw. Cable*, 392 U.S. at 178; U.S. v. Midwest Video Corp. (Midwest Video I), 406 U.S. 649 (1972); *Midwest Video II*.

499 *See supra* Part III.A.1.

500 *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 24 n.18 (1981) (holding that findings in a statute were "merely an expression of federal *policy*" that were "hortatory, not mandatory")(emphasis in original); Accuracy in Media, Inc. v. FCC, 521 F.2d 288, 297 (D.C. Cir. 1975) (referring to section 396(g) of the Communications Act, entitled "Purposes and Activities of Corporation" as a "guide to Congressional oversight policy and as a set of goals to which the Directors of CPB should aspire . . . not a substantive standard, legally enforceable by agency or courts;" also referred to as "this hortatory language.").

statutory bases articulated therein, a review we do not believe the Order can withstand.

The Commission's attempts to bolster its ancillary jurisdiction analysis through reliance on *Iowa Utilities Board* and *Brand X* flounder by virtue of the fact that neither decision involved challenges to an exercise of ancillary jurisdiction by the Commission. All statements concerning the doctrine in these decisions, therefore, must be considered dicta. Moreover, taken as a whole, not only does *Brand X* fail to support the Commission's claims about its ancillary jurisdiction over these matters, the decision calls into question the Commission's analysis of its statutory authority in this area.

In summary, ancillary jurisdiction is an amorphous but bounded doctrine and each Commission exercise of this authority must be judged on the facts presented. It is properly limited to rulemaking proceedings imposing general rules of prospective effect. Because of the high level of uncertainty surrounding the doctrine, it is ill-suited by its nature to sustain adjudications, which are predominantly retrospective in effect. A proper exercise of ancillary jurisdiction must not only comprehend a subject matter within the Commission's express charge from Congress, it must be imperative to the successful accomplishment of a mandate contained in one of the operative titles of the Act, and cannot conflict with the regulatory mandates to which it is said to be reasonably ancillary. The Commission is not free to exercise its ancillary jurisdiction simply because it declares that an action furthers a valid policy objective; it must remain within the bounds of the authority delegated to it by Congress.

IV. UNDUE PROCESS

At the outset, what we know of the "undue process" used to resolve the *Free Press Complaint* concerning Comcast's network management practices is not reassuring. At the time the FCC decided to exercise jurisdiction over Comcast's alleged throttling of BitTorrent traffic, the actual dispute between BitTorrent and Comcast had been resolved.[501] Moreover, the Commission had no enforceable rules governing broadband network management practices, and its action rests solely upon hortatory policy statements.[502] Even more disturbing is the manner in which the Commission conducted its resolution of the *Free Press Complaint*.

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[501] *See*, *e.g.*, John Eggerton, *Comcast: Challenged Network Management Techniques Have Ended*, BROAD. & CABLE, Jan. 6, 2009, http://www.broadcastingcable.com/article/161687Comcast_Challenged_Network_Management_Techniques_Have_Ended.php.

[502] *See supra* Part III (arguing that the FCC improperly relied on the *Internet Policy Statement* in crafting the *Comcast P2P Order*).

The FCC acknowledges in the *Comcast P2P Order* "the question of whether [it] has jurisdiction to decide an issue is entirely separate from the question of how the Commission chooses to address [the] issue."[503] As demonstrated in the previous Part of this article, the FCC's claim that it may adjudicate the dispute concerning Comcast's network management practices pursuant to its ancillary jurisdiction cannot withstand scrutiny, and it is doubtful it possesses ancillary jurisdiction to regulate broadband network management practices for the reasons advanced in the *Comcast P2P Order*. This Part examines how the Commission chose to exercise its purported jurisdiction. The FCC alternately claims that the *Internet Policy Statement* is enforceable and that it can simultaneously announce new policies and impose them in an adjudicatory proceeding. Each of these claims is examined in turn.

A. An Agency Cannot Vindicate Policy Not Codified in a Statutory Mandate or Legislative Rule

Federal agencies can carry out their statutory responsibilities either through rulemaking or adjudication.[504] The Administrative Procedure Act ("APA") defines rulemaking as the "process for formulating, amending, or repealing a rule."[505] A rule is "an agency statement of general or particular applicability and *future effect* designed to implement, interpret, or prescribe law or policy . . . ."[506] In contrast, adjudication is the process through which an order is formulated, and an "order" is a "final disposition" in "a matter other than rule making."[507] In other words, under the APA, any final agency action that is not labeled rulemaking is considered an adjudication. In terms of rulemaking:

> When an agency wishes to promulgate a rule, the default position under the Administrative Procedure Act . . . requires public notice, an opportunity for comment, and the issuance of a "concise and general statement of basis and purpose." The resulting documents are called "legislative rules" because they are capable of binding with the force of statutes.[508]

Agencies can also issue interpretive rules and policy statements, which are collectively referred to as non-legislative rules.[509] Non-legislative rules are exempt from notice-and-comment requirements and can be made effective im-

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503 *Comcast P2P Order, supra* note 9, ¶ 38.

504 *See*, *e.g.*, John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 895 (2004).

505 5 U.S.C. § 551(5) (2006).

506 § 551(4) (emphasis added).

507 § 551(6)–(7).

508 Manning, *supra* note 504, at 893.

509 This Article uses the simpler term "interpretive" instead of the APA's "interpretative." 5 U.S.C. § 553(b)(3)(A).

mediately upon publication in the Federal Register.[510] The *Attorney General's Manual on the Administrative Procedure Act* defines interpretive rules as "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."[511]

In contrast, policy statements are defined as "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."[512] Note that "legislative rules, interpretive rules, and policy statements all may involve interpretation of a statute. Therefore, sometimes an agency pronouncement can properly be characterized both as an interpretation and a policy statement."[513] However, there is an important difference between a general statement of policy containing an interpretation and an interpretive *rule*. As Professor John Manning explains:

> The central inquiry in all nonlegislative rule cases is this: Is the agency document, properly conceived, a legislative rule that is invalid because it did not undergo notice-and-comment procedures, or a proper interpretative rule or general statement of policy exempt from such procedures? . . . [I]f an agency seeks to specify its regulatory intentions in a legally operative way (without notice-and-comment rulemaking), it must be able to defend the resultant document as an "interpretive rule"—something defensible as an interpretation rather than as an exercise of delegated lawmaking authority. In practice, this framework requires the agency to show that the document in question merely *implements* policies already established by more formal means in statutes or legislative regulations. An agency cannot rely on (binding) interpretative rules to break new policymaking ground.[514]

The distinction between a valid policy statement and an invalid legislative rule "turns on an agency's intention to bind itself to a particular legal posi-

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[510] § 553(b).

[511] ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 15 (1947), *reprinted in* FEDERAL ADMINISTRATIVE SOURCEBOOK 33, 30 n.3 (William F. Funk et al, eds., 2000), *available at* http://www.law.fsu.edu/library/admin/1947cover.html. *The Attorney General's Manual on the Administrative Procedure Act* was intended "as a guide to the agencies in adjusting their procedures to the requirements of the Act" and was originally produced by George T. Washington, the Assistant Solicitor General, who had assisted with the drafting of the Act. *Id*. at 38; *see* Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 n.17 (D.C. Cir. 1974) ("The Attorney General's Manual is entitled to considerable weight because of the very active role that the Attorney General played in the formulation and enactment of the APA.").

[512] ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, *supra* note 511 at 30 n.3.

[513] JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 75–76 (2006); *see* Presbyterian Med. Ctr. of the Univ. of Pa. v. Shalala, 170 F.3d 1146, 1147, 1150–51 (D.C. Cir. 1999) (holding that a Department of Health and Human Services rule that required parties seeking Medicare reimbursement to provide contemporaneous documentation was a permissible interpretative rule); Nat'l Latino Media Coal. v. FCC, 816 F.2d 785, 788–89 (D.C. Cir. 1987) (holding that a decision by the FCC to award telecommunications by a lottery in case of a tie among the applicants was a permissible interpretative rule).

[514] Manning, *supra* note 504, at 917, 923–24.

tion."[515] Although general statements of policy are generally classified as non-legislative rules, they are not binding; only interpretive non-legislative rules are binding. The D.C. Circuit has held that a general statement of policy cannot "create[] a new regime" in which the agency "bases enforcement actions on the policies or interpretations formulated in the document."[516] The D.C. Circuit has also found that "[t]he real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations, which the [APA] authorizes to contain only documents 'having general applicability and *legal effect*.'"[517]

To understand the FCC's actions in the *Comcast P2P Order* one must first determine the role of the *Internet Policy Statement*. When the FCC issued the *Internet Policy Statement* in 2005, it characterized it as an unenforceable policy statement.[518] In the *Internet Policy Statement, Wireline Broadband Order*, and *Broadband Practices Inquiry*, the FCC signaled that it would need to adopt the principles as enforceable rules before adjudicating disputes arising under the principles.[519] As recently as April 2007, the FCC reiterated that "[t]he Policy Statement did not contain rules."[520] Furthermore, it seems evident that the Commission initiated the *Broadband Practices Inquiry* for the purpose of gathering legislative facts to determine the need for regulatory intervention in the specific area of broadband industry practices, and that no further rulemaking activities have followed the initiation of this docket.[521] The *Internet Policy*

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515 U.S. Tel. Ass'n v. FCC, 28 F.3d 1232, 1234 (D.C. Cir. 1994).

516 Appalachian Power Co. v. EPA, 208 F.3d 1015, 1021-24 (D.C. Cir. 2000) ("If an agency acts as if a [general statement of policy] issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document . . . [then] it should have been, but was not, promulgated in compliance with notice and comment rulemaking procedures.").

517 Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 539 (D.C. Cir. 1986) (quoting 44 U.S.C. § 1510 (1982) (emphasis added)); *see* 5 U.S.C. § 552(a)(1)(D) (2006).

518 See *supra* note 24.

519 *See supra* Part II.B, D–E.

520 *Broadband Industry Practices Inquiry*, *supra* note 24, ¶ 11 n.20.

521 *See Broadband Industry Practices Inquiry, supra* n.24, ¶¶ 1, 8–11.

> In this Notice of Inquiry, we seek to enhance our understanding of the nature of the market for broadband and related services, whether network platform providers and others favor or disfavor particular content, how consumers are affected by these policies, and whether consumer choice of broadband providers is sufficient to ensure that all such policies ultimately benefit consumers. We ask for specific examples of beneficial or harmful behavior, and we ask whether any regulatory intervention is necessary.

Id. ¶ 1. The Commission also sought "a fuller understanding of the behavior of broadband market participants . . . ," asked "commenters to describe today's pricing practices for broadband and related services," "whether the Policy Statement should be amended," and "[f]inally, does the Commission have the legal authority to enforce the Policy Statement in the face of particular market failures or other specific problems?" *Id.* ¶¶ 8–11.

Statement has not been published in the Code of Federal Regulations—it has not even been published in the Federal Register. The *Internet Policy Statement* is thus clearly not an enforceable legislative rule, as the Commission itself understood at the time of its adoption. Even assuming *arguendo* that the *Internet Policy Statement* could be considered a binding "interpretive rule," binding interpretive rules cannot be used to make new policy. Nor can the FCC retroactively treat a non-binding general statement of policy as a binding interpretive rule, as that would effectively turn the *Internet Policy Statement* into a legislative rule that would itself be invalid for failure to undergo notice-and-comment procedures.

When the FCC took action against Comcast in 2008, it based its action exclusively on its claimed authority to directly vindicate and enforce federal policy against providers of broadband Internet access services.[522] In the *Comcast P2P Order*, the FCC "agree[d] with Free Press that its Complaint is reasonably interpreted to rest on *the statutory provisions interpreted in and cited by the Internet Policy Statement*."[523] However, the FCC cannot recant its earlier position that the *Internet Policy Statement* did not establish enforceable rules.[524] Even if the FCC's prior repeated acknowledgments that the *Internet Policy Statement* did not establish rules were ignored, the *Internet Policy Statement* cannot properly be classified as a binding interpretive rule.

Agencies can issue interpretive rules to "resolve . . . ambiguities" or to transform a "vague . . . duty or right into a sharply delineated duty or right."[525] Interpretive rules cannot be used to make new laws, rights, and duties.[526] Accordingly, courts have developed various tests to determine if an agency's classification of a document as an interpretive rule is proper. If the rule invokes "specific statutory provisions, and its validity stands or falls on the correctness of the agency's interpretation of those provisions," it may be deemed a proper interpretive rule.[527] Similarly, if the justification for the rule consists of "rea-

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[522] *See Comcast P2P Order, supra* note 9, ¶¶ 13–15.

[523] *Id.* ¶ 41 n.177.

[524] *See* discussion *supra* notes 125–127 and accompanying text.

[525] Health Ins. Ass'n of Am., Inc. v. Shalala, 23 F.3d 412, 423 (D.C. Cir. 1994).

[526] *See*, *e.g.*, Orengo Caraballo v. Reich, 11 F.3d 186, 195 (D.C. Cir. 1993) ("Ultimately, an interpretative statement simply indicates an agency's reading of a statute or a rule."); Gen. Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc) ("[I]f by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule."); Gibson Wine Co. v. Snyder, 194 F.2d 329, 331 (D.C. Cir. 1952) ("Generally speaking, . . . 'regulations', 'substantive rules' or 'legislative rules' are those which create law, usually implementary to an existing law; whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means.").

[527] *See* United Techs. Corp. v. EPA, 821 F.2d 714, 719–20 (D.C. Cir. 1987).

soned statutory interpretation, with reference to the language, purpose and legislative history" of the relevant provision, the court is likely to view it as an interpretive rule.[528] Finally, if a rule "clarifies a statutory term" or "reminds parties of existing statutory duties," the court will consider it to be an interpretive rule.[529]

There is, however, no ambiguity needing interpretation in the statutory provisions cited by the Commission with respect to either network management practices or consumer entitlements regarding broadband Internet access service.[530] The FCC previously stated, "Congress's clear intention, as expressed in the 1996 Act, [was] that [information services] remain 'unfettered' by federal or state regulation."[531] The *Comcast P2P Order* locates the source of federal policy being vindicated squarely in section 230 of the Act:

> Unlike newspapers or radio or broadcast television or even on-demand television, the Internet gives Americans "a great degree of control over the information that they receive." Consequently, the Internet "offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development and myriad avenues for intellectual activity." Recognizing the Internet's dynamic potential, Congress set forth the federal policies of "promot[ing] the continued development of the Internet" and of encourag[ing] the development of technologies [that] maximize user control over what information is received by individuals . . . who use the Internet" as part of the Telecommunications Act of 1996.[532]

The Commission claims that its charge under this federal policy is to "encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet,"[533] and states that it has recognized in its *Internet Policy Statement* "its responsibility for overseeing and enforcing the 'national Internet policy' Congress had established in section 230(b)."[534] Through the *Internet Policy Statement*, the FCC claims it simply "clarified the contours of this policy."[535] Specifically and most relevantly:

> The Commission instructed providers of broadband Internet access services that "consumers are entitled to run applications and use services of their choice" and "to access lawful Internet content of their choice," subject to reasonable network management

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528 *Gen. Motors Corp*., 742 F.2d at 1565; *see United Techs. Corp.*, 821 F.2d. at 720 (noting that an agency rule qualified as an interpretive rule because its validity "depended on whether or not the Agency had correctly interpreted congressional intent").

529 Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan, 979 F.2d 227, 236 (D.C. Cir. 1992).

530 *See Comcast P2P Order, supra* note 9, at 13,088 (McDowell, Comm'r, dissenting).

531 *IP-Enabled Services NPRM, supra* note 47, ¶ 39 (emphasis added).

532 *Comcast P2P Order, supra* note 9, ¶¶ 13–15 (quoting 47 U.S.C. §§ 230(a)(2), (4); (b)(1), (3)) (alteration in original).

533 *Internet Policy Statement*, *supra* note 20, ¶ 4.

534 *Comcast P2P Order, supra* note 9, ¶ 13.

535 *Id*.

[practices].[536]

The *Comcast P2P Order* also cites section 706(a), in which Congress charged the Commission with "encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[537] There is no ambiguity in this charge with respect to broadband network management practices or consumer entitlements regarding broadband Internet access services to be resolved by the Commission's *Internet Policy Statement*. The Commission cannot reasonably claim that the *Internet Policy Statement* is simply reminding facilities-based broadband Internet access providers of an existing statutory duty or right.[538] The FCC has required several parties to commit to abiding by the *Internet Policy Statement* as a condition to obtaining merger approval, which would not be necessary if there was a statutory duty already imposed on all such ISPs.[539]

Additionally, the Commission claims that the *Internet Policy Statement* reflected the FCC's understanding of its "duty to preserve and promote the vibrant and open character of the Internet as the telecommunications marketplace enters the broadband age."[540] As explained in more detail in Part III, Congress has not delegated legislative power to the FCC to enforce its *Internet Policy Statement*.[541] Further, even if the FCC did have the power, it clearly did not intend to exercise it in issuing the *Internet Policy Statement*.[542]

As the title of the *Internet Policy Statement* makes clear, the document should be classified as a non-legislative, non-binding general statement of policy under the APA. The *Internet Policy Statement* was just that; a statement of broad policy principles that the Commission said it would incorporate in *future* policymaking activities. As the D.C. Circuit notes:

> A general statement of policy . . . does not establish a "binding norm." It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply

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536 *Id*. (quoting *Internet Policy Statement*, *supra* note 20, ¶ 4).

537 Telecommunications Act of 1996, Pub L. No. 104-104, § 706(a), 110 Stat. 153 (1996).

538 Health Ins. Ass'n of Am. v. Shalala, 23 F.3d 412, 423 (D.C. Cir. 1994); *see Internet Policy Statement*, *supra* note 20, ¶¶ 4–5.

539 *See*, *e.g.*, *AT&T-BellSouth Merger Order*, *supra* note 84, at 5807 app. F; *SBC-AT&T Merger Order*, *supra* note 84, at 18,911 app. F; *Verizon-MCI Merger Order*, *supra* note 84, at 18,512. Significantly, the FCC did not impose such conditions on the Adelphia/Time Warner/Comcast license transfer. *See Adelphia-Time Warner-Comcast Order*, *supra* note 85, ¶ 223.

540 *Comcast P2P Order, supra* note 9, ¶ 13. Additionally, the *Comcast P2P Order* reflected the FCC's commitment to incorporate the principles set forth in the *Internet Policy Statement* "'into its on-going policymaking activities.'" *Id.* (quoting *Internet Policy Statement*, *supra* note 20, ¶ 5).

541 *See supra* Part III.A.

542 *See Internet Policy Statement*, *supra* note 20, ¶¶ 2–3.

> or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy. A policy statement announces the agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy.[543]

The FCC's adjudicatory action against Comcast thus must be evaluated against the commands of the Act itself "just as if the policy statement had never been issued."[544] As we demonstrated in Part III, the FCC failed to demonstrate that Congress delegated direct or ancillary regulatory authority over Comcast's network management practices under the statutory provisions it cites. The question of whether the FCC can properly introduce and apply new binding policies in an adjudicatory proceeding is explored below.

B. Rulemaking by Adjudication

The FCC majority justified its decision to enforce the *Internet Policy Statement* through adjudication by pointing out that courts have recognized that agencies have discretion to choose between proceeding by adjudication or rulemaking in carrying out their statutory responsibilities.[545] As a general matter, that is indisputably true, but only in a much more limited sense than is relied upon by the Commission. Although administrative agencies may choose to regulate through adjudication as well as rulemaking, the Supreme Court has shown a clear preference for rulemaking: "The function of filling in the interstices of [a statute] should be performed, as much as possible, through this

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[543] Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38–39 (D.C. Cir. 1974) (citations omitted).

[544] *Id*.

[545] As the Supreme Court had previously indicated, "[n]ot every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations." SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 202 (1947). However, "there may be situations where the [agency's] reliance on adjudication would amount to an abuse of discretion." NLRB v. Bell Aerospace Co. (*Bell Aerospace Co.*), 416 U.S. 267, 295 (1974). The 9th Circuit contemplated that "[s]uch a situation may present itself where the new standard, adopted by adjudication, departs radically from the agency's previous interpretation of the law, where the public has relied substantially and in good faith on the previous interpretation, where fines or damages are involved, and where the new standard is very broad and general in scope and prospective application." Pfaff v. U.S. Dep't of Hous. & Urban Dev., 88 F.3d 739, 748 (1996) (citing *Bell Aerospace Co*., 416 U.S. at 295); Ford Motor Co. v. FTC, 673 F.2d 1008, 1009 (9th Cir. 1981); Patel v. INS, 638 F.2d 1199, 1203–05 (9th Cir. 1980); Ruangswang v. INS, 591 F.2d 39, 44 (9th Cir. 1978).

quasi-legislative promulgation of rules to be applied in the future."[546] Proceeding via adjudication to "enunciate and enforce new federal policy"[547] is most appropriate for cases where "the administrative agency could not reasonably foresee" yet "must be solved despite the absence of a relevant general rule."[548] Comcast's network management practices were not an instance where the FCC had to proceed by adjudication to address a problem that could not have been foreseen.[549] For the reasons discussed below, the FCC abused its discretion by enunciating and enforcing new federal policy on broadband network management practices through adjudication of the *Free Press Complaint*.

1. The Comcast P2P Order Improperly Announces New Policy Through Adjudication

As the Supreme Court has found, "[i]n order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose."[550] Although an agency is free to "announce new principles in an adjudicative

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546 *Chenery II*, 332 U.S. at 202.

547 *Comcast P2P Order, supra* note 9, ¶ 28.

548 *Chenery II*, 332 U.S. at 202–03.

549 In March of 2005, the FCC took action against Madison River Communications, a local exchange carrier, for intentionally blocking a specific application. *See In re* Madison River Communications, LLC and affiliated companies, *Order*, 20 F.C.C.R. 4295 (Mar. 3, 2005) [hereinafter *Madison River Order*]. Although Madison River was clearly subject to Title II, the basis on which the Commission premised its decree was not clear. The *Internet Policy Statement* was adopted in August 2005, more than two years before Free Press filed its complaint and four days shy of three years before the FCC adopted the *Comcast P2P Order*. Furthermore, by the time the FCC issued the *Comcast P2P Order*, Comcast had announced that it would migrate to protocol-agnostic network management techniques by the end of 2008. Press Release, Comcast Corp., Comcast and BitTorrent Form Collaboration to Address Network Management, Network Architecture and Content Distribution, (Mar. 27, 2008), *available at* http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=740. Assuming that the FCC could articulate an adequate jurisdictional basis, had it wanted to ensure that Comcast would honor its announcement to change its network management practices, it could have sought a consent decree with Comcast as it did with Madison River Communications. *In re* Madison River Communications, LLC and affiliated companies, *Consent Decree*, 20 F.C.C.R. 4296, ¶ 1 (Mar. 3, 2005). Seeking a consent decree rather than issuing an order would also likely have led to a quicker resolution. The Madison River consent decree was resolved less than a month after the letter of inquiry ("LOI") was issued. The LOI was issued on February 11, 2005. *Id*. ¶ 3. The decree was signed on March 3, 2005. *Madison River Order*, *supra*, at 4295. The *Comcast P2P Order*, by comparison, was issued nine months after the filing of the Free Press Complaint. *Comcast P2P Order, supra* note 9, at 13,028. And considering that in March of 2008 Comcast had already announced it would take the actions that the FCC eventually required of it, a consent decree would likely have been easy to secure.

550 Morton v. Ruiz, 415 U.S. 199, 237 (1974).

proceeding," it is improper to do so when the adverse consequences of reliance on past agency decisions are substantial, when liability is imposed for past actions taken in good faith reliance on prior agency pronouncements, when the affected party has not had a full opportunity to be heard before the agency makes its determination, or when fines or damages are involved.[551] Reliance on adjudication in such cases would amount to an abuse of discretion.[552]

a. The FCC Departed Radically from Prior Interpretations of Section 230

As Part III explains, the Commission cited seven statutory provisions as well as the *Internet Policy Statement,* as the basis for its actions. Although the *Comcast P2P Order* is "murky"[553] about which provisions are cited to establish jurisdiction and which are provisions that Comcast violated, the clearest statement on this is that "Comcast's interference with peer-to-peer protocols appears to contravene the federal policy of 'promoting the continued development of the Internet.'"[554] As the history of section 230 discussed in Part III.B.1.a illustrates, this quote is taken completely out of context. The only active rule contained in section 230 that accompanies this hortatory language is that "[n]o provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken . . . to restrict access to or availability of material that the provider . . . considers to be . . . otherwise objectionable, *whether or not* such material is constitutionally protected."[555] It is not at all clear how adjudication of unpublished rules that force broadband providers to change their business plans[556] serves the congressional purpose of section 230(b), which unequivocally declares the policy of the United States to be that the Internet remain "unfettered by Federal or state regulation."[557]

The FCC's determination that it is a violation of this provision for an ISP to "determine[] how it will route some connections based not on their destinations

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551 NLRB v. Bell Aerospace Co., 416 U.S. 267, 295–96 (1974).

552 Pfaff v. U.S. Dep't of Hous. & Urban Dev., 88 F.3d 739, 748 (9th Cir. 1996) (citing *Bell Aerospace Co.,* 416 U.S. at 294–95).

553 *See* Eggerton, *Kennard: FCC on Shaky Ground on Comcast Decision*, *supra* note 127 (quoting former FCC Chairman William Kennard).

554 *Comcast P2P Order, supra* note 9, ¶ 43 (citing 47 U.S.C § 230(b)(1) (2000)).

555 47 U.S.C. § 230(c)(2) (emphasis added).

556 CRAIG MOFFETT, WEEKEND MEDIA BLAST: BE CAREFUL WHAT YOU WISH FOR 1–2 (2008); Jonathan Make, *FCC Comcast Order May Prompt Broadband Usage Caps*, COMM. DAILY, Aug. 5, 2008, at 3.

557 47 U.S.C. 230(b)(2). As discussed *supra* Part III, it is directly contrary to this policy, and for this reason, among others, the FCC lacks ancillary jurisdiction to adjudicate the *Free Press Complaint*.

but on their contents" lies beyond reason.[558] This statute was enacted specifically to allow ISPs to filter the content traversing their networks without fear of liability; yet the FCC is now holding Comcast liable for managing traffic on its network by targeting a specific type of data. The *Comcast P2P Order* departs radically from the agency's prior interpretations of section 230 and its repeated prior statements that the *Internet Policy Statement* would not be enforced.[559]

b. Comcast Appears to Have Relied Substantially and in Good Faith on the FCC's Prior Interpretations of the Law

Comcast presumably instituted the disputed network management practices based either on its understanding of the FCC's prior interpretations of section 230 and the enforceability of the *Internet Policy Statement*, or its belief that its network management practices complied with the *Internet Policy Statement*'s exception for reasonable network management.[560] Comcast's reliance was substantial in that it would not have incurred the likely large cost of purchasing and installing the network management equipment[561] were it not for that interpretation.

There is no evidence cited in the record that Comcast's reliance was in bad faith. Although the *Comcast P2P Order* mentions that "Vuze found that the peer-to-peer TCP connections of Comcast customers were interrupted more consistently and more persistently than those of any other provider's customers,"[562] Vuze itself admitted that its process measured "all network interruptions, and cannot differentiate between reset activity occurring in the ordinary course and reset activity that is artificially interposed by a network operator."[563] Therefore, Vuze did not "draw[] . . . firm conclusions from its network monitoring study."[564]

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558 *Comcast P2P Order, supra* note 9, ¶ 41.

559 *See Internet Policy Statement*, *supra* note 20, ¶ 6 n.15; *see also In re* Broadband industry Practices, *Comments of Comcast Corporation*, WC Docket No. 07-52, at 24 (Feb. 12, 2008) (accessible via the FCC Electronic Comment Filing System) [hereinafter *Comments of Comcast Corporation*].

560 *See Comments of Comcast Corporation*, *supra* note 559, at 33, 45 (asserting that Comcast's network management practices were fully "consistent with the principles articulated in the Commission's *Internet Policy Statement*," and that the *Internet Policy Statement* did not create "legally binding rules.").

561 *See id*. at 18–20.

562 *Comcast P2P Order, supra* note 9, ¶ 42.

563 Letter from Henry Goldberg, Counsel, Vuze, Inc., to Marlene H. Dortch, Secretary, FCC 1 (Apr. 22, 2008) (accessible via the FCC Electronic Comment Filing System).

564 *Id*.

In the *Order*, the FCC accepts that easing network congestion is a "critically important interest."[565] The agency also accepts that "all network providers must manage bandwidth in some manner"[566] and that providers need "flexibility to engage in the reasonable network management practices."[567] Comcast's original network management practices, the practices complained of by Free Press, apparently were designed—even if not properly executed—to manage with a light touch, prioritizing time sensitive data by slowing down peer-to-peer file transfers which are not time sensitive. Comcast appears, therefore, to have relied substantially and in good faith on the FCC's prior interpretations of section 230 and the *Internet Policy Statement*.

c. The Comcast P2P Order Improperly Imposes Purely Prospective General Rules

As Justice Scalia explained in his concurring opinion in *Bowen v. Georgetown University Hospital*, "just as *Chenery* suggested that rulemaking was prospective, the opinions in *NLRB v. Wyman-Gordon* . . . suggested the obverse: that adjudication could *not* be purely prospective, since otherwise it would constitute rulemaking."[568]

The *Comcast P2P Order* states, "we tailor our analysis here to the particulars of the dispute at issue and do not attempt broad, prophylactic rules."[569] Yet the FCC admits that "[a]lthough our remedy *may* have some retroactive effect, its primary purpose is prospective. . . ."[570] The remedy and the newly-enacted rules at issue were both purely prospective. By the time the FCC issued the *Comcast P2P Order*, Comcast had announced that it would migrate to protocol-agnostic network management technique by year-end 2008.[571] As such, the remedy simply required[572] Comcast to "live[] up to its promise"[573] by disclosing

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565 *Comcast P2P Order, supra* note 9, ¶ 47. As the FCC stated, "Comcast justifies its practice as a means of easing network congestion, and we will assume without deciding that this is a critically important interest." *Id*.

566 *Id*. ¶ 50.

567 *Id*.

568 Bowen v. Georgetown Univ. Hosp., 488 U.S. 216, 221 (1988) (Scalia, J., concurring).

569 *Comcast P2P Order, supra* note 9, ¶ 36.

570 *Id*. ¶ 35 n.157 (emphasis added).

571 *See id*. ¶ 54.

572 *See Comcast P2P Order, supra* note 9, ¶ 54. *But see* 5 U.S.C. § 555(c) (2006) (stating that the "requirement of a report . . . may not be issued, made, or enforced except as authorized by law"). This rule has been applied to informal adjudications by the Supreme Court in *Pension Benefit Guarantee Corp. v. LTV Corp*. *See* 496 U.S. 633, 655–56 (1990).

573 *Comcast P2P Order, supra* note 9, ¶ 54. This reference to Comcast's promise to migrate to a protocol agnostic approach to traffic management highlights the fact that there was no longer an underlying dispute between Comcast and BitTorrent for the FCC to adju-

the details of its new network management plans and its schedule for migrating to the new network management technique that it had already publicly stated it was implementing.[574] The sections below discuss three new rules established in the *Comcast P2P Order*, the first of which is the reasonable network management standard.

i. The Reasonable Network Management Standard

In law, the exception can sometimes swallow the rule. That appears to be what has happened in this case. The reasonable network management standard was originally articulated as an exception to the four principles espoused in the *Internet Policy Statement*.[575] That is, the consumer entitlements were made expressly subject to reasonable network management.[576] That phrasing implied a right on behalf of the provider to engage in reasonable network management even if that affected the rights of consumers. In the *Comcast P2P Order*, reasonable network management was transmuted into an across-the-board limitation on provider behavior that can be enforced virtually without reference to the four principles. Although restated many times in slightly different ways, it is a general rule in the same way that the FTC's decision in *Ford v. FTC* that dealerships are not allowed to credit a debtor for the wholesale value of the car yet sell the repossessed vehicle at retail was determined to be a general rule that should have been implemented by a rulemaking.[577] In the FCC's own language:

- "This *Order* addresses whether it is a reasonable network management practice for Comcast to *interfere* with its customers' use of peer-to-peer networking applications, including those that use the BitTorrent protocol."[578]
- It is "unreasonable network management" for an ISP to "*discriminate* among applications and protocols rather than treating all equally."[579]

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dicate. This strongly suggests that the FCC's action on the *Free Press Complaint* was an abuse of discretion, chosen instead of more properly issuing a declaratory ruling or rulemaking petitions or completing its *Broadband Industry Practices Inquiry* in an effort to address Internet traffic congestion issues.

574 *The Future of the Internet: Hearing Before the S. Comm. On Commerce, Sci. & Transp.*, 110th Cong. at 9 (2008) (statement of Kevin J. Martin, Chairman of the FCC), *available at* http://commerce.senate.gov/public/_files/KevinMartinFutureoftheInternet Testimony.pdf.

575 *Internet Policy Statement*, *supra* note 20, ¶ 5 n.15. The last sentence of the last footnote placed at the end of the *Internet Policy Statement* stated, "The principles we adopt are subject to reasonable network management." *Id*.

576 *See id*.

577 Ford Motor Co. v. FTC, 673 F.2d 1008, 1009–10 (9th Cir. 1981).

578 *Comcast P2P Order*, *supra* note 9, ¶ 2 (emphasis added).

579 *Id*. ¶ 41 (emphasis added).

- It is "unreasonable network management" for an ISP to "*determine[] how it will route some connections* based not on their destinations but on their contents. . . ."[580]
- "To the extent, however, that providers choose to utilize practices that are *not application or content neutral*, the risk to the open nature of the Internet is particularly acute and the danger of network management practices being used to further anticompetitive ends is strong."[581]

ii. Disclosure

The second new rule the FCC imposed on Comcast in its *Comcast P2P Order* concerns disclosure of network management practices to subscribers. In addition to probing whether a broadband ISP's network management practices focus on applications, protocols, destinations, and the contents of connections, the FCC introduced an entirely new requirement for determining whether a network management practice is reasonable: whether the ISP has *disclosed* its network practices to its customers: "A hallmark of whether something is reasonable is whether a provider is willing to disclose to its customers what it is doing."[582] Although the FCC argues "[it has] not adopted . . . general disclosure requirements for the network management practices of providers of broadband Internet access services,"[583] this is precisely the practical effect of its declaration that disclosure is a hallmark of the reasonableness of a network management practice.[584] It also explicitly states a rule for future behavior: "To the extent that Comcast wishes to employ capacity limits in the future, it should disclose those to customers in clear terms."[585]

iii. The "Strict Scrutiny" Standard of Review

The third new rule the FCC announced in the *Comcast P2P Order* is the standard of review the agency will use for evaluating reasonable network management. The *Comcast P2P Order* states that an ISP's "[network management] practice should further a critically important interest and be narrowly or carefully tailored to serve that interest."[586] This rule is restated a number of times in slightly different language:

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[580] *Id*. (emphasis added).
[581] *Id*. ¶ 50 (emphasis added).
[582] *Id*. ¶ 53 (emphasis added).
[583] *Id*. ¶ 52.
[584] This new requirement introduces a new layer of uncertainty: does disclosure trump an otherwise unreasonable network management practice? *See* Barbara Esbin, The Progress & Freedom Foundation, *Does Disclosure Trump Net Blocking?*, PFF Blog, Sept. 15, 2008, http://blog.pff.org/archives/2008/09/does_disclosure.html.
[585] *Comcast P2P Order*, *supra* note 9, ¶ 53.
[586] *Id.* ¶ 47.

- "there must be a tight fit between its chosen practices and a significant goal";[587]
- the ISP's means must be "carefully tailored" to its stated goal;[588]
- "[t]he company's justification for its practice must clear a high threshold";[589]
- "[i]t is incumbent on the Commission to be vigilant and subject such practices to a searching inquiry. . . ."[590]

This language evokes the strict scrutiny standard, which normally is appropriate only in cases involving a fundamental constitutional right or a suspect classification, and only when reviewing government actions.[591] But here, the FCC is attempting to impose this burden on Comcast to defend its network management practices.[592] The Commission cited two examples to support its decision that strict scrutiny was appropriate, neither of which is relevant to the present situation. [593] In the first, *Filing and Review of Open Network Architecture Plans*, the Commission did not impose strict scrutiny as a standard of review, it simply stated that "[b]ecause Ameritech, NYNEX, SWBT, and US

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[587] *Id*. ¶ 47.

[588] *Id*. ¶ 48.

[589] *Id*. ¶ 47.

[590] *Id*. ¶ 50.

[591] *See*, *e.g*., United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); Korematsu v. U.S., 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."); Turner Broadcasting System, Inc. v. FCC (*Turner I*), 512 U.S. 622, 640–41 (1994) ("[L]aws that single out the press, or certain elements thereof, for special treatment . . . are always subject to at least some degree of *heightened* First Amendment *scrutiny*." (internal citations omitted) (emphasis added)); Turner Broadcasting System, Inc. v. FCC (*Turner II*), 520 U.S. 180, 185 (1997) ("[W]hether the provisions were *narrowly tailored* to further important governmental interests" (emphasis added)); *see also* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800–01 (2006); The Supreme Court Historical Society, Interpreting the Equal Protection Clause, http://www.supremecourthistory.org/05_learning/subs/05_e.html (last visited Apr. 28, 2009).

[592] *See Comcast P2P Order*, *supra* note 9, ¶¶ 47–50. The Commission found Comcast's practices over inclusive for three reasons: "First, [the practices] can affect customers who are using little bandwidth simply because they are using a disfavored application. Second, it is not employed only during times of the day when congestion is prevalent. . . . And third, its equipment does not appear to target only those neighborhoods that have congested nodes." *Id*. ¶ 48 (citations omitted). Additionally, the Commission found Comcast's practices under inclusive because "[a] customer may use an extraordinary amount of bandwidth during periods of network congestion and will be totally unaffected so long as he does not utilize a disfavored application." *Id*. It also found that Comcast's solution was not "carefully tailored": "Comcast's practice falls well short of being carefully tailored to further the interest offered by the company." *Id*. ¶ 50. Finally, the other solutions "all appear far better tailored to Comcast's basic complaint that a 'disproportionately large amount of the traffic currently on broadband networks originates from a relatively small number of users.'" *Id.* ¶ 49 (quoting *Comments of Comcast Corporation*, *supra* note 559, at 25).

[593] *Comcast P2P Order*, *supra* note 9, ¶ 47 n.221.

West have not thus far demonstrated substantial progress in providing ESP access to OSS services, we will be examining their reports with a heightened level of scrutiny."[594] The fact that this level of scrutiny was not applied to reports from other Bell Operating Companies indicates that the use of the term "heightened level of scrutiny" was not meant in a legal sense. The other example is *Southwestern Bell Corp. v. FCC*, but the cited language is applicable only to rate-setting activities.[595] As Commissioner McDowell observed in his dissent:

> Perhaps most puzzling of all is the Commission's use of a "strict scrutiny" type standard to strike down the actions of a private party engaged in management of its network. The majority is too clever to call its standard of review "strict scrutiny," and with good reason. It is unprecedented, and inappropriate, for the Commission to judge the actions of a private actor by a standard that has generally been reserved for determining whether the *government* has trampled on the fundamental constitutional rights of *individuals*. The Commission certainly has never used it to restrain private parties in their interactions with other private parties. Using a strict scrutiny standard in this context, especially one wearing a transparent disguise, is sure to doom this order on appeal.[596]

Accordingly, the upshot of the *Comcast P2P Order* is the establishment of several very broad new rules concerning the reasonableness of broadband network management practices and the procedures the FCC will use to adjudicate future claims that are purely prospective in application.

2. The Cases Cited By the FCC Do Not Support It's Position That It Was Proper to Announce New Policy In an Adjudication

In the *Comcast P2P Order*, the FCC argues, "the Commission has often relied on adjudications rather than rulemakings to enunciate and enforce *new* federal policy."[597] Three examples are cited: the FCC's 1965 comparative broadcast licensing policy statement,[598] the *Carterfone* decision,[599] and the

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[594] *In re* Filing and Review of Open Network Architecture Plans, *Memorandum Opinion and Order*, 6 F.C.C.R. 7646, ¶ 47 (Nov. 21, 1991).

[595] Sw. Bell Corp. v. FCC, 896 F.2d 1378, 1381 (D.C. Cir. 1990); *see* Fed. Power Comm'n v. Natural Gas Pipeline Co. of Am., 315 U.S. 575, 586 (1942) ("The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority to make the pragmatic adjustments which may be called for by particular circumstances.").

[596] *Comcast P2P Order*, *supra* note 9, at13,091–92 (McDowell, Comm'r, dissenting).

[597] *Id*. ¶ 28 (Memorandum Opinion and Order) (emphasis added).

[598] Policy Statement on Comparative Broadcast Hearings, *Public Notice*, 1 F.C.C.2d 393 (1965) [hereinafter *Policy Statement on Comparative Broadcast Hearings*]; *see* Allied Broad., Inc., v. FCC, 435 F.2d 68 (D.C. Cir. 1970).

[599] *In re* Use of the Carterfone Device in Message Toll Telephone Service; Thomas F. Carter and Carter Electronics Corp., Dallas, Tex. (Complainants), v. Am. Telephone and

FCC's 1974 policy on children's programming.[600]

The *Comparative Broadcast Licensing Policy Statement* was necessary to cope with the rapid increase in the number of radio stations.[601] In contrast, the FCC's regulation of broadband ISPs up to this point has been minimal,[602] in keeping with its deregulatory stance towards broadband services specifically and the Internet generally.[603] In addition, the adjudication of Comcast's network management techniques did not involve an issue that the *Internet Policy Statement* could clarify. In contrast to the comparative licensing policy statement, which explained *how* the process would be handled, the *Internet Policy Statement* defines *what* entitlements consumers have regarding their broadband Internet access service.[604] Furthermore, the licensing process used in 1965 in-

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Telegraph Co., Associated Bell System Companies, Southwestern Bell Telephone Co., and General Telephone Co. of the Southwest (Defendants), *Decision*, 13 F.C.C.2d 420 (June 26, 1968) [hereinafter *Carterfone Order*].

600 *See In re* Petition of Action for Children's Television (ACT) for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children's Programming and the Establishment of a Weekly 14-Hour Quota of Children's Television Programs, *Children's Television Report and Policy Statement*, 50 F.C.C.2d 1 (Oct. 24, 1974), *reh's denied*, Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977) [hereinafter *Children's Television Report and Policy Statement*].

601 A number of events in the late 1950s and early 1960s resulted in a large increase in the number of radio and TV stations licensed. Battery-powered, pocket-sized transistor radios, first available in 1954, achieved mass popularity in the early 1960s. Transistor Radio: History, http://en.wikipedia.org/wiki/Transistor_radio (last accessed March 31, 2009). The FCC approved stereo FM broadcasting in 1961. *In re* Amendment of Part 3 of the Commission's Rules and Regulations to Permit FM Broadcast Stations to Transmit Stereophonic Programs on a Multiplex Basis, *Report and Order*, FCC 61-524, April 20, 1961, available at http://louise.hallikainen.org/BroadcastHistory/uploads/FM_Stereo_Final_RandO.pdf. Color television was first commercially transmitted in 1963. History of Radio: Later 20th Century Developments, http://en.wikipedia.org/wiki/History_of_radio#Color_television_and_digital (last accessed March 31, 2009). The result was that the number of radio stations increased from 4,142 in 1961 to 5,316 in 1965. American RadioWorks, Hearing America: A Century of Music on the Radio, Radio Station Growth, http://americanradioworks.publicradio.org/features/radio/d1.html (last accessed March 31, 2009).

602 The only case of the FCC taking action against an ISP is its consent agreement with Madison River Communications after the latter blocked VoIP on its network. *See Madison River Order*, *supra* note 549.

603 *See*, *e.g.*, *Wireline Broadband Order*, *supra* note 24 (classifying wireline broadband Internet access and cable modem services as Title I "information services" to place them in a "minimal regulatory environment" in furtherance of a deregulatory policy placing primacy on encouraging infrastructure deployment).

604 The *Internet Policy Statement* contains no direction concerning the rights of ISPs to manage their broadband networks other than to specify that such management must be "reasonable." *Internet Policy Statement*, *supra* note 20, ¶ 5 n.15*; compare Internet Policy Statement*, *supra* note 20 (discussing certain principles adopted by the Commission such as encouraging broadband deployment and preserving and promoting the open and interconnected nature of the public Internet) *with* Policy Statement on Comparative Broadcast Hear-

volved a formal review process,[605] whereas in the present controversy, there was almost no recognizable process and no statutory mandate for the FCC to discharge.

The *Comparative Broadcast Licensing Policy Statement* was issued for the purpose of "prevent[ing] undue delay" and achieving "a high degree of consistency of decision and of clarity" in a process that "commonly require[d] extended hearings into a number of areas of comparison."[606] The Commission felt it especially important to alert license applicants to the factors that would be focused on during the hearings because applicants were prohibited from modifying their applications once submitted.[607] The *Comparative Broadcast Licensing Policy Statement* would "also be of value to the examiners who initially decide the cases and to the Review Board to which the basic review of examiners' decisions in this area has been delegated."[608] As the *Comparative Broadcast Licensing Policy Statement* explained, "[s]ince we are not adopting new criteria which would call for the introduction of new evidence, but rather restricting the scope somewhat of existing factors and explaining their importance more clearly, there will be no element of surprise which might affect the fairness of a hearing."[609] The adjudication of Comcast's network management techniques is just the opposite, imposing new criteria calling for new evidence.

Although the 1965 *Comparative Broadcast Licensing Policy Statement* was applied in subsequent adjudications, it was limited to situations where the FCC was acting pursuant to its express statutory mandate to allocate broadcast licenses—it *needed* to decide to whom to allocate the licenses.[610] There was no such statutory requirement for the FCC to act on in the *Free Press Complaint*. The FCC could have instead acted on Free Press's request for a declaratory

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ings, *Public Notice*, 1 F.C.C. 2d 393, 393–94, 405 (July 28, 2005), *applied in In re* Applications of Lorain Community Broadcasting Co., Lorain, Ohio; Allied Broadcasting, Inc., Lorain, Ohio; Midwest Broadcasting Co., Lorain, Ohio for Construction Permits, Docket No. 16877 File No. BP-16940; Docket No. 16877 File No. BP-17297; Docket No. 16878 File No. BP-17302, *Order*, 18 F.C.C. 2d 686 (1969), *aff'd* Allied Broadcasting, Inc. v. FCC, 435 F.2d 68 (D.C. Cir. 1970) (explaining that the process is inherently complex and requires consistency and clarity of key decisions and policies).

605 *See* KPMG, LLP, HISTORY OF BROADCAST LICENSE APPLICATION PROCESS 5 (2000), *available at* http://www.fcc.gov/opportunity/meb_study/broadcast_lic_study_pt1.pdf.

606 *Policy Statement on Comparative Broadcast Hearings*, *supra* note 598, at 393.

607 *See Allied Broad., Inc.*, 435 F.2d at 70 n.9, 71 (noting that the FCC required "good cause" in order to amend an application); *see also Policy Statement on Comparative Broadcast Hearing*s, *supra* note 598, at 394–400 (discussing the factors that applicants should consider).

608 *Policy Statement on Comparative Broadcast Hearings*, *supra* note 598, at 393–94.

609 *Id*. at 400.

610 *See id.* at 393 (applying only when there were multiple applicants for a new station license).

ruling,[611] Vuze's request for a rulemaking,[612] or the open docket on the broader issues.[613]

The FCC's *Carterfone* decision was an appeal from an investigation of an AT&T tariff[614] that the carrier had interpreted to prevent the use of the Carterfone device by its customers.[615] The inventor of the device, Thomas Carter, brought a private antitrust action against AT&T, which was stayed while the matter was referred to the FCC under the doctrine of primary jurisdiction.[616] The Commission determined that it needed to hold a public hearing to "resolve 'the question of justness, reasonableness, validity, and effect of the tariff regulations and practices complained of,'" and designated five issues for hearing.[617]

The FCC agreed with the hearing examiner's recommendation of the resolution of the issue and held that to the extent the tariff prevented use of the Carterfone device by telephone subscribers that did not harm the network, the tariff was unlawful and unreasonably discriminatory under sections 201(b) and 202(a) of the Act.[618] The tariff was ordered stricken and the carrier permitted to file new tariff provisions consistent with the decision.[619] In reaching this decision, the FCC relied upon its earlier decision in the *Hush-a-Phone* case, in which it held "that a tariff prohibition of a customer supplied 'foreign attachment' was 'in [sic] unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental.'"[620] Thus, *Carterfone* can hardly be said to be a case in which the FCC applied new policy in the context of an adjudicatory proceeding. Furthermore, the decision did not impose new obligations on the regulated entity. Instead, as the FCC recognized, the *Carterfone* principles were subsequently codified as part 68 of the Commission rules in a rulemaking

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611 *See generally Free Press Petition for Declaratory Ruling*, *supra* note 12.

612 *See generally Vuze Petition*, *supra* note 110.

613 *See generally* WC Docket 07-52 (accessible through F.C.C. Electronic Document Management System) .

614 A tariff can be defined as "a document that carriers file with the Federal Communications Commission or a state public utility commission detailing the services, equipment, prices and terms it offers. Making the information public helps ensure that carriers offer the same rates and conditions to all customers." Brett Machtig, *Secrets of the Tariff Game*, NETWORK WORLD, Dec. 13, 1999, *available at* http://www.networkworld.com/news/1999/1213feat.html.

615 *Carterfone Order*, *supra* note 599, at 420–21.

616 *Id*. at 420.

617 *Id*. at 421–22.

618 *Id*. at 423, 426.

619 *Id*. at 425.

620 *Id.* at 423 (quoting Hush-a-Phone Corp. v. United States, 238 F.2d 266, 269 (D.C. Cir. 1956)).

proceeding.[621]

It is not evident why the FCC cited its 1974 policy on children's programming as an example of announcing new policy through adjudication, as the children's programming policy does not appear to support the FCC's present position that it may refine policy through adjudication.[622] After receiving a request from Action for Children's Television, the FCC initiated an inquiry into whether it should institute new rules for children's television programming.[623] In the resulting *Children's Television Report and Policy Statement*, the FCC ultimately decided that because of the television industry's self-regulatory measures, per se rules were not necessary regarding the number of hours devoted to children's programming, the amount of instructional children's programming, the provision of children's programming for specific age groups, or specific scheduling requirements.[624] The Commission believed that "with respect to programming and advertising designed for the child audience. . . . [E]very opportunity should be accorded to the broadcast industry to reform itself because self-regulation preserves flexibility and an opportunity for adjustment which is not possible with *per se* rules."[625] The only new ground broken in the report, if any, was the FCC's recognition that "broadcasters have a duty to serve all substantial and important groups in their communities, and children obviously represent such a group."[626] As with the comparative broadcast licenses example above, the FCC simply clarified the factors it would consider when renewing broadcasting licenses pursuant to established Title III statutory mandates.

Thus, the FCC lacks support for its assertion it may rely on an adjudication to enunciate and enforce new federal policy in this case. None of the authorities relied upon by the Commission support its decision to announce and enforce new federal policy through adjudication.

3. Internet Policy Should Not be Established in a Case-by-Case Fashion

The *Comcast P2P Order* expresses the FCC's preference "to adjudicate disputes regarding federal Internet policy on a case-by-case basis" and cites three reasons:[627]

- "[T]he Internet is a new medium, and traffic management questions like the one

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621 *Comcast P2P Order*, *supra* note 9, ¶ 40 & n.176.
622 *See id*. ¶ 28.
623 *Children's Television Report and Policy Statement*, *supra* note 600, ¶¶ 1–2.
624 *See id*. ¶¶ 19–27, 57.
625 *Id*. ¶ 57.
626 *Id*. ¶ 16.
627 *Comcast P2P Order*, *supra* note 9, ¶ 29.

presented here are relatively novel."[628]

- "Internet access networks are complex and variegated. We thus think it possible that the network management practices of the various providers of broadband Internet access services are 'so specialized and varying in nature as to be impossible to capture within the boundaries of a general rule.' . . . [G]iven the present record, we are not certain that a one-size-fits-all approach is good policy."[629]
- "Deciding to establish policy through adjudicating particular disputes rather than imposing broad, prophylactic rules comports with our policy of proceeding with restraint in this area at this time."[630]

Given the dynamic nature of Internet communications and networks, these arguments seem logical, but case-by-case adjudication is especially problematic for Internet service disputes. If "traffic management questions like the one presented here are relatively novel" and "Internet access networks are complex and variegated,"[631] how are ISPs to know how they can and cannot manage their networks? The rate of change of technology makes compliance with generally applicable standards of administrative procedure even more important in the Internet context. The obvious solution is to refrain from imposing broadband network management rules—and not attempt to enforce policy statements—until the environment reaches a level of maturity for which rulemaking proceedings are appropriate. This is not to suggest that the FCC should impose new rules on the Internet. Instead, if there were a demonstrated need for such regulatory intervention—and assuming the FCC had delegated authority under which to act—a well-defined rule is preferable to case-by-case adjudication of an unenforceable policy statement. Broadband ISPs need a clear understanding of what network management practices will be acceptable *before* they spend large sums of money to purchase and deploy network management solutions.

4. Summary

The foregoing discussion demonstrates that the *Comcast P2P Order* constitutes a radical departure from the FCC's previous interpretation of the relevant statutory provisions and the intent of its *Internet Policy Statement*. There is evidence that Comcast had relied substantially and in good faith on the previous interpretations, and that the Commission has announced a new standard of behavior for broadband ISPs and new standards for review of challenges to network management practices that are very broad and general in scope. For these reasons, and despite the FCC's failure to impose fines or damages, reli-

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628 *Id.* ¶ 30.
629 *Id.* ¶ 31 (quoting SEC v. Chenery Corp., 332 U.S. 194, 203 (1947)).
630 *Id.* ¶ 32.
631 *Id.* ¶¶ 30, 31.

ance on adjudication in this case amounts to an abuse of discretion under *Bowen* and *Pfaff*.[632]

The Commission's attempt to exercise ancillary jurisdiction to enforce the *Internet Policy Statement* through case-by-case adjudication produces a particularly lethal level of risk for service providers. This combination effects a "doubling down" of uncertainty for private entities who find themselves on the receiving end of allegations that they are violating vaguely defined policy principles while admitting of *no* meaningful jurisdictional or procedural constraints on agency power.

C. Other Procedural Infirmities

The *Comcast P2P Order* resulted in factual findings that a single-industry participant violated rules of behavior articulated for the first time in the very proceeding in which the accused was found guilty as charged. More troubling still, this "adjudi-making" was lacking the protections afforded the subjects of more traditional administrative adjudications, such as the need for sworn testimony, adherence to the rules of evidence, and the other procedural safeguards of a restricted formal adjudication.[633] Instead, the FCC apparently tried Comcast in an open docket through a series of en banc public hearings, found the company liable, and subjected it to various "compliance" obligations with the threat of additional regulatory punishments if it fails to adhere to those obligations.[634]

1. Established Procedures for Handling Complaints Were Not Followed

The FCC's enforcement powers are set forth in Titles I, II, and IV of the Act.[635] Typically, investigations, whether initiated by a complaint or by the Commission on its own motion, proceed in set stages.[636] None of these interim

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[632] *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 211–13 (1988); Pfaff v. U.S. Dep't of Hous. & Urban Dev., 88 F.3d 739, 748–49 (9th Cir. 1996).

[633] *See* 47 U.S.C. § 409(i) (2006); 47 C.F.R. §§ 1.351, .1208 (2007). In a "restricted" proceeding, decision-makers cannot be lobbied outside the presence of other parties.47 C.F.R. § 1.1208; *see* 5 U.S.C. § 554(d) (2006).

[634] *See Comcast P2P Order*, *supra* note 9, ¶¶ 11, 51, 54, 55.

[635] *See* 47 U.S.C. §§ 151, 154(i), 154(j), 208, 218, 403 (2000).

[636] The stages are: a staff investigation; issuance of a "Letter of Inquiry" requesting the respondent to answer questions concerning its activities; and evaluation of the responses. Subpoenas may also be issued in appropriate cases. *See*, *e.g.*, FCC, Complaint Process, http://www.fcc.gov/eb/oip/process.html (last visited Mar. 17, 2009) (explaining the stages of the complaint process for broadcast indecency); *see also* 47 C.F.R. § 1.331 (2007). If violations of the Act, the Commission's rules, or a Commission order are found, the Commission

steps on the path of enforcement appear to have been taken in the case of the *Free Press Formal Complaint*, leaving its precise path through the Commission uncertain.

It bears noting that Free Press filed a document in the form of a complaint and entitled it "Formal Complaint."[637] The FCC's section 208 formal complaint rule provides a strict set of procedural protections to ensure that due process is afforded to both the complainant and respondent.[638] A formal complaint must contain a "[c]itation to the section of the Communications Act and/or order and/or regulation of the Commission alleged to have been violated."[639] The *Free Press Complaint* did not cite any statutory provision that Comcast had violated.[640] The Commission's rules state that "[a]ny document purporting to be a formal complaint which does not state a cause of action under the Communications Act will be dismissed."[641] Thus, as Commissioner McDowell observed, the FCC should have dismissed the complaint.[642] Instead, the FCC felt it was "not bound by allegations contained within the four corners of the Free Press Complaint" and that "[w]hen information comes to [the] Commission's attention suggesting that there has been a violation of the agency's rules or policies, the Commission can take action, regardless of the title the submitting party puts on its submission."[643] This is a troubling proposition.

Additionally, as noted by Commissioner McDowell, "[o]ur rules mandate that formal complaints apply only to common carriers."[644] Comcast, however, is not acting as a common carrier in its provision of Internet access service.[645] Although the formal complaint rules were inapplicable to Comcast,[646] they are

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has a range of enforcement options, from monetary forfeitures to license revocation. 47 C.F.R. §§ 1.80(a), 1.85.

637 *Free Press Complaint*, *supra* note 11.

638 *See* 47 U.S.C. § 208.

639 47 C.F.R. § 1.721(a)(4).

640 *See Comcast P2P Order*, *supra* note 13, at 13,088, 13,090, 13,092 (McDowell, Comm'r, dissenting).

641 47 C.F.R. § 1.728(a).

642 *See Comcast P2P Order*, *supra* note 13, at 13,088–89 (McDowell, Comm'r, dissenting).

643 *Id.*, ¶ 41 n.177 (Memorandum Opinion and Order).

644 *Id.,* at 13,088 (McDowell, Comm'r, dissenting).

645 *See Cable Modem Declaratory Ruling*, *supra* note 21, ¶¶ 36, 38, 42, 43; *see also* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 975 (2005); discussion *supra* note 374.

646 Under section 208 of the Act, the Enforcement Bureau adjudicates formal complaints against common carriers. *See* 47 C.F.R. § 0.111 (2007). Formal Complaints filed pursuant to section 208 are governed by a strict set of procedures. *See* 47 U.S.C. § 208(b) (2000); 47 C.F.R. §§ 1.720–35. In non-technical terms, proceedings initiated under these rules are "adjudications" in which facts are found and conclusions of law are reached by agency staff and/or the full Commission. Where disputes cannot be resolved upon a paper record, they

instructive as to how the *Free Press Complaint* should have been treated by agency staff.[647]

Not only did the FCC lack enforceable rules of behavior to govern its adjudication of the *Free Press Complaint*, it lacked established procedures for adjudicating formal complaints against non-common carriers like Comcast.[648] Even assuming the Commission's rules for formal or informal complaints currently applicable to common carriers governed the *Free Press Complaint*, a party answering either type of complaint has a right to be apprised of the statu-

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may be referred for hearing before an Administrative Law Judge ("ALJ") pursuant to a "Hearing Designation Order." Consistent with the Administrative Procedure Act, among the many protections afforded litigants before an ALJ is the separation of agency "trial" and "decisional" staff. *See* 5 U.S.C. 554(d) (2006); 47 C.F.R. § 1.1202(c). Once a matter is sent for hearing before an ALJ, the Enforcement Bureau must designate "trial staff" and keep them from communicating with the ultimate agency decision-makers who will receive the recommendations of the ALJ. The Commission has also adopted rules that allow the section 208 complaint rules to be used to settle disability complaints under section 255 of the Act. *See In re* Implementation of Section 255 and 251(a)(2) of the Communications Act of 1934 as amended by the Telecommunications Act of 1996; Access to Telecommunications Services, Telecommunications Equipment and Customer Premises Equipment By Persons with Disabilities, *Report and Order and Further Notice of Inquiry*, 16 F.C.C.R. 6417, ¶ 110 (July 14, 1999). Those complaints, which are very rare, could involve equipment manufacturers. That is the only exception to the requirement that complaints pursuant to section 208 of the Act involve only common carriers. *See Id*.

647 Consumers and companies from time to time may send the FCC what they term to be a "Formal Complaint" against non-common carriers. It is standard practice to advise such entities that formal complaints may only be filed against common carriers and that the document that they have filed—often in the form of a letter—will not be treated as a formal complaint. They may also be told that the Commission might investigate the matter raised in their "complaint", but that they will not be a "party" to that investigation, will not be informed if such an investigation has been undertaken, and will not be advised as to status and/or disposition of any investigation. The Investigations & Hearings Division ("IHD") within the Enforcement Bureau handles informal complaints filed against common carriers, broadcast licensees and other entities within the jurisdiction of the FCC, as well as initiates its own investigations. *Informal* complaints against common carriers are generally governed by sections 1.716-1.719 of the Commission's rules. *See* 47 C.F.R. §§ 1.716–19 (2007).

648 In 2002 the FCC initiated a rulemaking seeking comments "on proposals to establish a unified, streamlined process for the intake and resolution of informal complaints filed by consumers" against non-common carrier entities regulated by the Commission. *In re* Establishment of Rules Governing Procedures to Be Followed When Informal Complaints are Filed by Consumers Against Entities Regulated by the Commission; Amendment of Subpart E of Chapter 1 of the Commission's Rules Governing Procedures to Be Followed When Informal Complaints are Filed Against Common Carriers; 2000 Biennial Regulatory Review*, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 17 F.C.C.R. 3919, ¶¶ 1, 17 (Feb. 14, 2002) ("*Currently, the rules contain no procedures for filing a 'formal' complaint in the non-common carrier context*. We propose to establish a formal complaint process that is similar to that which applies to common carriers." (emphasis added)). This rulemaking is still pending before the FCC; no rules concerning procedures for adjudicating formal complaints against non-common carriers have been adopted or published.

tory provision it is alleged to have violated.[649] Comcast was denied this right. Nor was the Free Press Complaint handled according to FCC policies that encourage parties to a dispute to avail themselves of staff-assisted mediation either prior to or after the filing of a complaint.[650] While the Commission is well within its rights to investigate alleged transgressions of its rules, it is not similarly free to take action against a violation of a Commission policy statement that has not been enacted into a rule, such as the *Internet Policy Statement*. The FCC should not be free to make up new rules of procedure and apply them as they are making them—or make them retroactive.

Ordinarily, when the agency is considering adoption of a rule that is prospective in nature and applicable to an entire industry—either by rulemaking or a declaratory ruling—the matter is handled by one of its policy bureaus, such as the Wireline Competition Bureau.[651] In such cases, WC docket numbers are assigned. When the FCC's Enforcement Bureau is resolving a formal complaint filed against a common carrier, its Market Disputes Resolution Division handles the matter and a MD file number is assigned.[652] In some cases, the Enforcement Bureau's Investigations and Hearings Division ("IHD") investigates complaints that are filed against non-common carriers and assigns an IH file number.[653]

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649 *See* 47 C.F.R. §§ 1.716(c), 1.721(a)(4)(5) (discussing the requirement that formal and informal complaints state what the carrier did in violation of the Act).

650 *See* FCC, Market Disputes Resolution Division, http://www.fcc.gov/eb/mdrd (last visited Mar. 19, 2009) [hereinafter Market Dispute Resolution Division].

651 *See*, *e.g.*, FCC, Wireline Competition Bureau, http://www.fcc.gov/wcb (last visited Mar. 19, 2009).

652 *See* Market Dispute Resolution Division, *supra* note 650. According to the Commission's website:

> The Market Disputes Resolution Division ("MDRD") is responsible for resolving complaints by market participants, entities or organizations against common carriers (wireline, wireless or international) for alleged violations of the Communications Act that are filed pursuant to Section 208 of the Act. The division also resolves complaints filed by cable operators, telecommunications carriers, utilities and other parties pursuant to Section 224 of the Communications Act relating to the reasonableness of rates, terms, and conditions for pole attachments.

Id.

Another division within the Enforcement Bureau, the Telecommunications Consumers Division ("TCD") is charged with "protecting consumers from fraudulent, misleading and other harmful practices involving telecommunications." FCC, Telecommunications Consumers Division, http://www.fcc.gov/eb/tcd (last visited Mar. 19, 2009). The functions performed within the Division include: "Investigating the practices of companies engaged in various telecommunications-related activities, including common carriers, manufacturers of telecommunications equipment, telemarketers and other companies utilizing telecommunications equipment for unsolicited advertisements"; and processing formal complaints arising from such activities. *Id*.

653 *See* FCC, Investigations and Hearing Division, http://www.fcc.gov/eb/ihd (last visited

The title of the item in the July 25, 2008 notice announcing the items for consideration at the August 1, 2008 Commission meeting was "Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices (WC Docket No. 07-52)."[654] The summary stated: "The Commission will consider a Memorandum Opinion and Order *addressing a complaint and other filings* concerning Comcast's network management practices."[655] Although the meeting notice referenced only a WC Docket number,[656] it later appeared from the captions of the separate and dissenting statements released when the *Comcast P2P Order* was adopted—as well as the caption of the released *Order*—that an IHD investigatory file had been opened for the *Free Press Formal Complaint* and that the file had been directly acted upon by the full Commission.[657]

This was the first public indication that the Commission had instituted a formal investigation of the *Free Press Complaint*. Yet, it remains unclear how the agency purported to be acting upon this IH file *within* the WC docket, the sole docket referenced in conjunction with the August 1 Commission meeting and identified in the *Comcast P2P Order*. Again, WC Docket No. 07–52 was initiated by the Wireline Competition Bureau upon the Commission's adoption of its *Notice of Inquiry*—not a Notice of Proposed Rulemaking—into

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Mar. 19, 2009). According to the FCC's website:

> The Investigations & Hearings Division is responsible for resolution of complaints against broadcast stations and other Title III licensees on non-technical matters such as indecency, enhanced underwriting, unauthorized transfer of control and misrepresentation. In addition, with regard to wireless licensees, the Division is responsible for enforcement of rules regarding auction collusion and misrepresentation. The Division also investigates industry allegations of violations of Title II of the Communications Act, as amended, and FCC rules and policies pertaining to common carriers. In addition, the Division conducts, or assists in, various other investigations being conducted by the Bureau and serves as trial staff in formal Commission hearings.

Id.

654 Public Notice, Fed. Commc'ns Comm'n, FCC to Hold Open Commission Meeting Friday, August 1, 2008 (Jul. 25, 2008), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-284078A1.pdf.

655 *Id*. (emphasis added).

656 *Id*.

657 *See Comcast P2P Order, supra* note 9, at 13,028; *Id.* at 13,065 (Martin, chairman, statement); *Id.* at 13,078 (Copps, Comm'r, statement); *Id.* at 13,081 (Adelstein, Comm'r, statement); *Id.* at 13,088 (McDowell, Comm'r, dissenting). Another seeming pre-requisite to a properly conducted enforcement action is issuance of either a "Notice of Apparent Liability" or an "Order to Show Cause" bearing the IH file number referenced in the caption of this item. This would have afforded Comcast a formal vehicle for defending against the allegations. Instead, the FCC relies on its "two public hearings," as opposed to a restricted factual investigation of the allegations, before rendering its decision. *See* Comcast Order Press Release, *supra* note 10, at 1.

broadband network management practices.[658] The *Free Press Petition for Declaratory Ruling* and the *Vuze Petition for Rulemaking* were added to that docket where they remain pending.[659]

The *Comcast P2P Order* addresses these procedural irregularities as follows:

> Because the questions addressed in the Free Press Complaint and in the Free Press Petition are substantially similar and because Free Press and Comcast have used WC Docket No. 07-52 as the vehicle for filings related to both the Complaint and the Petition, we address both here and consolidate the records of the two proceedings. We *also* note that the Free Press Petition *could be considered in part an informal complaint pertaining to Comcast's conduct*.[660]

In effect, what the FCC has said is that because the *Free Press Complaint* and *Petition* addressed substantially similar questions and because the respondent, Comcast, filed in defense of the underlying conduct in the docket housing the *Broadband Industry Practices Inquiry* and the *Free Press Petition*, the Commission is free to consolidate the records of the two proceedings and adjudicate the Complaint in a rulemaking docket.[661] That is, the FCC may do a mash-up of adjudication and rulemaking—an adjudi-making. This is untenable under the APA.[662]

Again, most importantly, what WC Docket No. 07-52 lacks—as noted by Commissioner McDowell—is an NPRM that proposes specific rules of conduct for broadband network operators and seeks public comment on both its proposals and the FCC's jurisdiction to enact such rules.[663] That is, assuming that the FCC has ancillary jurisdiction to adopt network management or other

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[658] *See Broadband Industry Practices Inquiry*, *supra* note 24, at 7894. The *Broadband Industry Practices Inquiry* states its purpose was to better inform the Commission about broadband industry practices and whether there is a need for "net neutrality" regulations. *See id*. ¶ 1. In other words, it was solely an information gathering exercise.

[659] *Free Press Petition for Declaratory Ruling*, *supra*, note 11, at 1; *Vuze Petition*, *supra* note 110, at 1. It appears that the separate issues raised by Vuze remain pending before the FCC. In addition, a related Public Knowledge January 14, 2008 Petition for Declaratory Ruling that Text Messages and Short Codes are Title II Services or a Title I Services Subject to Section 202 Nondiscrimination Rules was given a Wireless Telecommunications Bureau docket number and, although listed as a related petition on the FCC's "Broadband Network Management Practice" webpage, does not appear to have been the subject of the FCC's August 1 vote. *See* FCC, Broadband Network Management, http://www.fcc.gov/broadband_network_management/Welcome.html (last visited Jan. 25, 2009).

[660] *Comcast P2P Order, supra* note 9, ¶ 11 n.40 (emphasis added).

[661] *See id*. Its concluding premise, that it *could* consider the *Free Press Petition* to be in part an informal complaint pertaining to Comcast's conduct is also revealing. *Id*. The FCC has rules for adjudicating informal complaints, but chose not to comply with them in this case. *See* 47 C.F.R. § 1.717.

[662] *See supra* notes 25–26 and accompanying text.

[663] *Comcast P2P Order, supra* note 9, at 13,090 (McDowell, Comm'r, dissenting).

net neutrality rules—a doubtful proposition under the theories advanced by the Commission—it has not yet done so. It is evident, however, that the FCC has declared that Comcast has violated a norm of behavior for network operators in contravention of the FCC's *Internet Policy Statement*, the very declaration sought by Free Press in both its Petition and Complaint. Using the cover of a public rulemaking docket to gather evidence for use in what might ordinarily be a restricted investigation into the identical allegations against the same party is at least unorthodox and at most contrary to the APA.

2. Lack of Fair Notice

As the D.C. Circuit has explained:

> The Commission through its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting [FCC] rules. Otherwise the practice of administrative law would come to resemble "Russian Roulette." The agency's interpretation is entitled to deference, but if it wishes to use that interpretation to cut off a party's right, it must give full notice of its interpretation.[664]

The manner in which the FCC handled the *Free Press Complaint* raises troubling questions concerning whether Comcast received proper notice that the agency intended to enforce the *Internet Policy Statement* against the company in the absence of agency action codifying the policy principles into rules and publishing them in the Federal Register. These questions extend to the type of notice Comcast was provided concerning the nature of the proceedings against it. For example, was the company notified that the evidence taken in the public en banc hearings concerning network management practices would be used against it in adjudicating the *Free Press Complaint*, or did the company reasonably believe that these were legislative hearings to be used in the *Broadband Industry Practices Inquiry* docket to formulate generally applicable rules of prospective effect that would then be tested in a public notice-and-comment rulemaking proceeding?

The due process clause of the U.S. Constitution states that "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."[665] The D.C. Circuit has interpreted the Due Process Clause as "prevent[ing] . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires."[666] Even when an agency's interpretation of a statute is permissible, "if it wishes to use that interpretation to

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664 Satellite Broad. Co. v. FCC, 824 F.2d 1, 3–4 (D.C. Cir. 1987).

665 U.S. CONST. amend. V.

666 Gates & Fox Co. v. Occupational Safety & Health Review Comm'n, 790 F.2d 154, 156 (D.C. Cir. 1986).

cut off a party's right, it must give full notice of its interpretation."[667] For notice to be valid, the regulation must be "sufficiently clear to warn a party about what is expected of it."[668] As the court reasoned:

> Where . . . the regulations and other policy statements are unclear, where the petitioner's interpretation is reasonable, and where the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not 'on notice' of the agency's ultimate interpretation of the regulations, and may not be punished. [The agency] thus may not hold [the petitioner] responsible in any way—either financially or in future enforcement proceedings—for the actions charged in this case.[669]

As the D.C. Circuit has elaborated, "[t]he Commission through its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules."[670]

The *Comcast P2P Order* relies principally on the fact that the FCC had warned in its *Adelphia-Time Warner-Comcast Order* that the *Internet Policy Statement* "contains principles against which the conduct of Comcast . . . can be measured,'" thereby suggesting that Comcast should have been on notice that the principles would be enforced against it in an adjudicatory proceeding.[671] Missing from the FCC's citation of the *Adelphia-Time Warner-Comcast Order*, however, is its explicit acknowledgement that "the Commission chose not to adopt rules in the [*Internet*] *Policy Statement*."[672] Hence the emphasis is on *principles* against which conduct can be measured. However, a significant legal distinction exists between a regulatory agency measuring the conduct of a private entity against principles and judging conduct for conformity with a binding rule of law. In his dissent, Commissioner McDowell observes that even if the FCC's formal complaint rules were applicable to Comcast, they would require dismissal of the complaint because of its numerous defects, especially its failure to cite the specific provisions of the Communications Act alleged to be violated.[673] That is, the complaint failed to provide adequate notice.

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667 *Satellite Broad. Co.*, 824 F.2d at 4.

668 Gen. Elec. Co. v. EPA, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995) ("[W]hen sanctions are drastic . . . elementary fairness compels clarity in the statements and regulations setting forth the actions with which the agency expects the public to comply." (quotations omitted)); *see* Radio Athens, Inc. v. FCC, 401 F.2d 398, 404 (D.C. Cir. 1968).

669 *Gen. Elec. Co.*, 53 F.3d at 1333–34.

670 *Satellite Broad. Co.*, 824 F.2d at 3–4.

671 *Comcast P2P Order, supra* note 9, ¶ 27 (quoting *Adelphia-Time Warner-Comcast Order*, *supra* note 85, ¶ 223).

672 *See Adelphia-Time Warner-Comcast Order*, *supra* note 85, ¶ 223.

673 *Comcast P2P Order, supra* note 9, at 13,089 n.3 (McDowell, Comm'r, dissenting). Formal complaints must contain a "[c]itation to the section of the Communications Act and/or order and/or regulation of the Commission alleged to have been violated." 47 C.F.R. § 1.721(a)(4) (2007).

The case law is clear on proper notice requirements, yet the FCC argues, "Comcast's complaint here that it has not been afforded fair notice and due process is quite remarkable."[674] What is remarkable is the FCC's apparent disregard of established procedure and law. It is not sufficient notice to a potential defendant that the Internet policy principles could support a future adjudication, by referencing passing statements in other dockets to that effect, because the FCC repeatedly stated that the *Internet Policy Statement* was unenforceable. The FCC's transmittal letter to Comcast, which presumably did little more than refer Comcast to the *Free Press Complaint*, likely cannot be considered sufficient notice of the rules allegedly transgressed because the *Free Press Complaint* itself did not cite any statutory provision that Comcast had violated.[675] The *Free Press Complaint* simply cited the *Internet Policy Statement*.[676] Free Press was not even clear on what it meant in the complaint, as it had to subsequently clarify that when it referred to enforcing the *Internet Policy Statement*, it really meant "making policy based on announced principles set fourth in a Policy Statement by using adjudication to enforce rights guaranteed to consumers, and which the FCC must ensure because of obligations imposed on the FCC by the Communications Act."[677] Surely such linguistic acrobatics cannot be considered "sufficiently clear to warn a party about what is expected of it."[678]

The FCC has "struggle[d] to provide a definitive reading of the regulatory requirements" at issue.[679] Its stance on the enforceability of the *Internet Policy Statement* was not even completely consistent the day the policy was introduced. When the FCC issued the *Internet Policy Statement*, Chairman Martin himself admitted, "policy statements do not establish rules nor are they enforceable documents."[680] In the separate *Wireline Broadband Order* released the same day, the FCC stated, "[s]hould we see evidence that providers of telecommunications for Internet access or IP-enabled services are violating these principles, we will not hesitate to take action to address that conduct."[681] These statements can be reconciled only if the FCC's threatened action is understood to be a further rulemaking proceeding to develop the *Internet Policy Statement* into actual rules. Yet the FCC now argues that the *Wireline Broadband Order*

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674 *Comcast P2P Order, supra* note 9, ¶ 35.

675 *See Free Press Complaint*, *supra* note 11, at 2–9 (citing FCC policy as a basis for the complaint, but listing no authority under the Communication Act).

676 *Id*.

677 *Free Press June 12 Ex Parte*, *supra* note 130, add. 2 at 2.

678 Gen. Elec. Co. v. EPA, 53 F.3d 1324, 1328 (D.C. Cir. 1995).

679 *Id*. at 1334.

680 *Martin Statement*, *supra* note 24.

681 *Wireline Broadband Order*, *supra* note 24, ¶ 96.

together with the *Adelphia-Time Warner-Comcast Order* provide the industry sufficient notice that it would enforce the *Internet Policy Statement*.[682] Because the FCC cannot issue unenforceable proclamations and then wait for a rainy day to enforce them, it was reasonable for Comcast to believe that the *Internet Policy Statement* could not and would not be enforced against it.

3. Thin and Conflicting Evidence

The evidence cited in the *Comcast P2P Order* indicates that a disputed issue of material fact emerged during the FCC's en banc hearings and in the *Broadband Industry Practice Inquiry* docket on whether Comcast reasonably believed that its network management practices were consistent with the FCC's reasonable network management exception. As Comcast stated in a July 10, 2008 ex parte letter, "it is very difficult to determine exactly what happened to cause the observed behavior of the network and applications; . . . even some of the most highly credentialed and experienced computer scientists are not immune from improperly diagnosing a situation on the network."[683]

The record available to the decision-makers was contradictory on critical issues: (1) how often Comcast employed its traffic management practices; (2) the types of traffic it managed—uploads versus downloads; and (3) how management practices actually affected customers. Answering these questions is essential to determining whether Comcast's actions merely delayed peer-to-peer applications or whether they outright blocked them.[684] Reports on the percentage of traffic Comcast's management practices affected ranged wildly from between ten and seventy-five percent.[685] Comcast claimed that its prac-

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682 *Comcast P2P Order, supra* note 9, ¶¶ 13, 34, 35, 39 (arguing that the *Adelphia/Time Warner/Comcast Order* supplied Comcast notice that the FCC would enforce the principles contained in the *Internet Policy Statement* through case-by-case adjudication).

683 *In re* Broadband Industry Practices, *Ex Parte Communication of Comcast Corporation*, WC Docket No. 07-52, at 4 (July 10, 2008) [hereinafter *Comcast Technical Ex Parte*] (citation omitted) (accessible via FCC Electronic Comment Filing System). The letter was discussing a situation where researchers from the University of Colorado concluded they were receiving reset packets from Comcast's network equipment, but subsequently discovered that they were actually receiving reset packets sent by their own network equipment. *Id.*

684 *See Comcast P2P Order, supra* note 9, ¶ 44 ("We do not agree with Comcast's characterization [of merely delaying peer-to-peer applications] and instead find that the company has engaged in blocking.").

685 *Id.* ¶ 42 (stating that "independent evidence suggests that Comcast may have interfered with forty if not seventy-five percent of all such connections in certain communities."); *Comcast Technical Ex Parte*, *supra* note 683, at 3 (claiming that "even for the most heavily used P2P protocols, more than 90 percent of these flows are unaffected by Comcast's network management."); *see also* MAX PLANCK INST. FOR SOFTWARE SYS., GLASNOST: RESULTS FROM TESTING FOR BITTORRENT TRAFFIC BLOCKING, pt. 5 (2008), *available*

tices "merely delay[ed] unidirectional uploads, and then only during periods of peak network congestion"[686] and estimated that in the worst-case scenario, the delay would be "anywhere from a few milliseconds to a few minutes."[687] Yet one Comcast customer reported that "all of the customer's Gnutella upload requests were thwarted and approximately 40% of all his BitTorrent established upload connections were reset" and that "the level of interference with his use of peer-to-peer applications was approximately equal, regardless of the time of day or night, regardless of the day of the week, and despite the presumable differences in network congestion during prime time and non-prime time hours of use."[688]

In support of its conclusions, the FCC cites only five Comcast customers claiming that their Internet downloads were affected by Comcast's network management practices, two of which "had to wait hours if not days to download open-source software over their peer-to-peer clients."[689] This hardly seems like evidence sufficient to establish a prima facie case, let alone carry a burden of persuasion. But that begs the question as to why the FCC did not designate this disputed issue of material fact by hearing designation order for resolution by an Administrative Law Judge, as it would be compelled to do in a proper adjudication.

Finally, although the Commission did not conduct a proper investigation of Comcast's actions, it based its decision on facts presented as unsworn statements during its public en banc hearings. The FCC claims "[it] tailors [its] analysis here to the particulars of the dispute at issue."[690] As the FCC explained in the first paragraph of the *Comcast P2P Order*, "under the *facts* of this case. . . . [W]e conclude that the company's . . . practice . . . does not constitute reasonable network management."[691] The *Comcast P2P Order* later states that "the *evidence* reviewed above shows that Comcast selectively targeted and terminated the upload connections of its customers' peer-to-peer applications and

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at http://broadband.mpi-sws.mpg.de/transparency/results/ (finding that Comcast terminated between twenty and eighty percent of peer-to-peer uploading TCP connections, depending on the time of day).

686 *Comments of Comcast Corporation*, *supra* note 559, at 31.

687 *Id*. ¶ 32.

688 *Comcast P2P Order, supra* note 9, ¶ 9 (citing *In re* 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"; Vuze, Inc. Petition to Establish Rules Governing Network Management Practices by Broadband Network Operators; Broadband Industry Practices, *Comments of Robert M. Topolski*, WC Docket No. 07-52, WC Docket No. 08-7, at 3–4 (Feb. 25, 2008)).

689 *Id.* ¶ 42.

690 *Id*. at 36.

691 *Id*. ¶ 1 (emphasis added).

that this conduct significantly impeded consumers' ability to access the content and use the applications of their choice. These *facts* are the relevant ones here . . . ."[692] Given the Commission's claims of focusing on the facts, it is strange that it never did its own investigation and never presented those facts to Comcast in the form of a notice of apparent liability or order to show cause. As Commissioner McDowell stated:

> Even if the complaint was not procedurally deficient and we had rules to enforce, the next step would be to look at the strength of the evidence. The truth is, the FCC does not know what Comcast did or did not do. The evidence in the record is thin and conflicting. All we have to rely on are the apparently unsigned declarations of three individuals representing the complainant's view, some press reports, and the conflicting declaration of a Comcast employee. The rest of the record consists purely of differing opinions and conjecture. As the majority embarks on a regulatory journey into the realm of the unknowable, the evidentiary basis of its starting point is tremendously weak, to the point of being almost non-existent. In a proceeding of this magnitude, I do not understand why, in the absence of strong evidence, *the Commission did not conduct its own factual investigation under its enforcement powers*. The Commission regularly takes such steps in other contexts that, while important, do not have the sweeping effect of today's decision.[693]

Wholly apart from its lack of ancillary jurisdiction to intervene in this matter, the lack of rules to enforce, and the fact that Comcast and BitTorrent had reached an agreement, it is inconceivable that the FCC failed to do its own investigation.

4. Fundamental Unfairness

The foregoing procedural irregularities raise serious questions concerning the basis upon which the FCC judged Comcast's actions, and the conclusions it reached. Companies should be able to expect some type of consistency and fairness in how matters are handled by the FCC. If the FCC is resolving a formal complaint, the adjudication needs to be fair and follow its established rules of procedure.[694] What is so unusual about the action against Comcast—and so grossly unfair—is that it appears to be an enforcement action arising out of a rulemaking-type proceeding without the benefit of even of a notice of proposed rulemaking. A policy group, rather than the agency's enforcement staff, apparently conducted almost the entire proceeding. Such arbitrary actions by the nation's top communications regulator can hardly assure industry, investors, financial markets, or the citizenry that the laws are being faithfully carried out in their interest.

Even if the FCC correctly claimed that it could make policy decisions in the

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[692] *Id*. ¶ 44 (emphasis added).
[693] *Id*. at 13,092 (McDowell, Comm'r, dissenting) (emphasis added) (citation omitted).
[694] *See supra* note 646.

context of adjudications, it does not appear to have conducted a proper adjudication in this instance. En banc public hearings, with *unsworn* presenters or participants *selected by the adjudicator* are not adequate substitutes for the sort of formal hearing one would anticipate in a matter of this magnitude.[695]

Although the FCC repeatedly cites the voluminous record before it, the record in a public notice and comment rulemaking is far less rigorous—from an evidentiary standpoint—than the record created in a formal adjudication, with its requirement of testimony and opportunities for cross-examination.[696] As Commissioner McDowell observed in his dissent to the *Comcast P2P Order*, "the FCC does not know what Comcast did or did not do. The evidence in the record is thin and conflicting."[697]

These issues do not reflect simply a difference of opinion over regulatory policy. Given the FCC's compliance plan ordering Comcast to "[d]isclose the details of its discriminatory network management practices to the Commission,"[698] it confirms that the FCC did not conduct a factual investigation under its enforcement powers. Rather, the FCC engaged in a legislative process supporting only prospective, industry-wide rules of behavior, but wholly insufficient to support an adjudication against a single company under our Constitution and system of law.

Nonetheless, the FCC professed that with respect to Internet network management issues, adjudication is more appropriate than rulemaking because adjudication would target only the bad actors, avoiding problems of overbreadth.[699] In other words, the FCC claims that it took the most targeted and least regulatory means of protecting the open nature of the Internet.

Why is this so alarming? Because what the FCC has done is to proceed nei-

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695 A formal adjudication via hearing involves a hearing before an ALJ, pursuant to a Commission-adopted "Hearing Designation Order," conducted in accordance with recognized rules of evidence and procedure. *Cf.* Admin. Law and Regulatory Practice, Am. Bar Ass'n, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 21, 27 (2002) (discussing the necessary procedures for formal hearings under the Administrative Procedure Act and the role of an Administrative Law Judge).

696 In several cases, "expert witness" testimony constituting little more than an extended legal essay on the intersection of Internet architecture and public policy has been deemed inadmissible. *See*, *e.g.*, JOSEPH MENNN, ALL THE RAVE: THE RISE AND FALL OF SHAWN FANNING'S NAPSTER 236 (2003) ("In a long essay that was more legal advice to Judge Patel than expert testimony, and was therefore deemed inadmissible, [Lawrence] Lessig said that the early architecture of the Internet was both a serious threat to copyright protection and an unprecedented boon to free speech."); UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000).

697 *Comcast P2P Order*, *supra* note 9, at 13,092 (McDowell, Comm'r, dissenting).

698 Comcast Order Press Release, *supra* note 10, at 3.

699 *Comcast P2P Order*, *supra* note 9, at 13,067 (Martin, Chairman, statement); *Id.* at 13,083–84 (Adelstein, Comm'r, statement).

ther entirely by adjudication or rulemaking, but by some unnatural combination of the two—"adjudi-making" or "rule-ication"—where the loose world of legislative fact finding is used to essentially convict a leading industry participant in the court of public opinion. And it was done prior to the establishment of rules of behavior or a factual investigation conducted under the Commission's enforcement powers in accordance with due process of law and the APA.

V. CONCLUSION

One can only hope that both the Congress and the Courts will take a long, hard look at exactly whether and how the FCC saved the Internet from the clutches of private network operators. The ink was barely dry on the FCC's August 1 Press Release announcing its action against Comcast when stories indicating that bandwidth caps, metered and tiered bandwidth pricing was almost inevitable[700] in the wake of the FCC's apparent ruling that deep packet inspection and RST Injection network management tools are not acceptable behavior.[701] Unfortunately, rather than saving the Internet, the FCC sacrificed both the rule of law and imperiled the unfettered Internet, undermining longstanding federal Internet policy.

The FCC claims to be acting under its ancillary jurisdiction and stitched together a patchwork quilt of regulatory jurisdiction to justify adjudicating network management complains on a case-by-case basis. Yet, because none of the FCC's theories of ancillary jurisdiction pursuant to sections 1, 201, 230(b), 256, 257, 601(4) and 706 of the Act support its claimed ability to adjudicate the reasonableness of Comcast's broadband network management practices, and the *Internet Policy Statement* has no binding legal effect, it is very likely that the courts will find the *Comcast P2P Order* to be *ultra vires*. Because the *Internet Policy Statement* cannot be classified as an interpretive rule, it cannot be enforced against Comcast in an adjudicatory proceeding and the FCC's attempt to do so is likely to constitute an abuse of discretion.

In addition, serious flaws exist in the legal and procedural means that the FCC employed to find Comcast guilty of violating its *Internet Policy Statement*. The procedural vehicle chosen was a self-styled Formal Complaint filed against a non-common carrier, alleging acts of unreasonable network discrimination in contravention of an unenforceable *Internet Policy Statement*. This Formal Complaint was, at some point, mysteriously—or mystically—housed within a public notice and comment proceeding initiated by a *Notice of Inquiry*

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700 *See* MOFFETT, *supra* note 556, at 1–3; Make, *supra* note 556.
701 Comcast Order Press Release, *supra* note 10, at 2.

concerning industry-wide practices[702] that lacks a notice of proposed rulemaking informing the public of the nature of the rules under consideration. Nonetheless, the FCC claims that Comcast had adequate notice that the Commission would entertain complaints concerning network management practices because the FCC stated as much in the unchallenged 2006 *Order* approving the transfer of Adelphia's FCC licenses to Comcast and Time Warner, in which the FCC *declined* to impose specific network neutrality or network management license conditions.[703] The FCC suggests that by completing the underlying transaction, Comcast waived its right to challenge the warning.[704] Further, the FCC claimed that Comcast had an "opportunity to be heard" along with the other FCC-selected presenters at the two *en banc* public hearings hosted by the Commission on network management.[705] The FCC believed that this was adequate process upon which to adjudicate the Free Press Complaint.[706] To the contrary, it was both far too much *undue* process and far too little *due* process to satisfy even the most basic legal requirements for fair governmental action.

Not only did the FCC lack rules to interpret in its adjudication of the *Free Press Complaint*, it lacked established procedures for adjudicating formal complaints against non-common carriers like Comcast.[707] The FCC created new procedures and applied them against Comcast, establishing a new framework for adjudicating similar complaints in the future.[708] As if that were not enough, the FCC has essentially *deputized* the complainant, Free Press, and the rest of the populace of the nation to keep an eye on Comcast and report any

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[702] *Broadband Industry Practices Inquiry*, *supra* note 24, ¶¶ 8–11.

[703] *See Adelphia-Time Warner-Comcast Order*, *supra* note 85, ¶ 223.

[704] *See Comcast P2P Order*, *supra* note 9, at 13,091 (McDowell, Comm'r, dissenting). Commissioner McDowell stated:

> "For the same reasons, the majority's arguments that the *Adelphia-Time Warner-Comcast Order* somehow constituted notice of the Commission's intent to adjudicate the Policy Statement, and that Comcast's consummation of the merger approved in the *Adelphia-Time Warner-Comcast Order* constituted a waiver of its right to challenge such an adjudication, fail. *The Commission can not possibly be seen to have given notice to Comcast (or any other party) of a preference to adjudicate the Policy Statement because the Commission lacks the authority to adjudicate the matter in the absence of rules*."

Id. (emphasis added) (citations omitted).

[705] *See id.* at 13,078–79 (Copps, Comm'r, statement) ("Surely no one can credibly claim that this process has not provided the parties ample opportunity to present their cases.").

[706] *See id.* ¶¶ 1, 10, 11 (Memorandum Opinion and Order); *see also id.* at 13,078–79 (Copps, Comm'r, statement).

[707] *See supra* note 649. *Comcast P2P Order, supra* note 9, ¶¶ 17–19.

[708] *Id*. at 13,065–66 (Martin, Chairman, statement). Chairman Martin stated that the Commission adopted a framework, in that the burden of proof shifts to the broadband operator to show that its network management practices are reasonable if the Commission determines that legal content has been arbitrarily degraded or blocked and the broadband operator claims network management as its defense. *See id.* at 13,066.

new violations. It is Kafkaesque when the law is unknowable or revealed only in the actions of the nobility.[709]

Policy choices and goals will differ over time—the desirability of regulation will wax and wane depending on economic conditions and the technological capabilities of networks—but the desirability of fair and predictable legal procedures to implement and enforce policy goals is constant. Regardless of whether one believes that government-mandated norms of behavior for bandwidth providers[710] are good or bad policy, the only acceptable means by which government may impose such mandates is by remaining in conformity with the rule of law and by scrupulous compliance with its own procedures. Unlike the nobles in Kafka's parable, in our system of government, government officials do not "stand above the laws." If the government fails to comply with the rules constraining its behavior, how can it reasonably expect compliance with its mandates by regulated entities?

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[709] *See* KAFKA, *supra* note 1, at 437–38; Parker B. Potter, Jr., *Ordeal by Trial: Judicial References to the Nightmare World of Franz Kafka*, 3 PIERCE L. REV. 195, 198, 210 (2005) ("Kafka's vivid portrayals of faceless absurd bureaucratic institutions have resonated so deeply that his name has become an adjective, '. . . . In this vain then, invocations portraying predicaments as Kafkaesque do so by stressing more specifically the (a) *inescapability*, (b) *inscrutability*, (c) *incomprehensibility*, and (d) *inanity of situations*.").

[710] Tim Wu, Op-Ed., *OPEC 2.0*, N.Y. TIMES, Jul. 30, 2008, at A17.