



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

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December 2, 2010

Congressional Research Service

7-5700

www.crs.gov

R40234

Summary

In 2007, through various experiments by the media, most notably the Associated Press, it became clear that Comcast was intermittently blocking the use of an application called BitTorrent™ and, possibly, other peer-to-peer (P2P) file sharing programs on its network. Comcast eventually admitted to the practice and agreed to cease blocking the use of the P2P applications on its network. However, Comcast maintains that its actions were reasonable network management and not in violation of the Federal Communications Commission's ("FCC" or "Commission") policy.

In response to a petition from Free Press for a declaratory ruling that Comcast's blocking of P2P applications was not "reasonable network management," the FCC conducted an investigation into Comcast's network management practices. The FCC determined that Comcast had violated the agency's Internet Policy Statement when it blocked certain applications on its network and that the practice at issue in this case was not "reasonable network management." The FCC declined to fine Comcast because its Internet Policy Statement had never previously been the basis for enforcement forfeitures. Comcast appealed this decision to the U.S. Court of Appeals for the D.C. Circuit, as did other public interest groups.

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

The court's ruling has thrown into doubt the FCC's authority to regulate Internet network management. The FCC had announced the possibility of reclassifying the transmission component of broadband Internet services as a telecommunications service under Title II of the Communications Act. However, in a recent statement regarding the status of the rulemaking, Chairman Genachowski announced that the agency had abandoned its proposal to reclassify broadband Internet services. In his statement, the Chairman indicated that the FCC would anchor its authority to implement the new regulations in various sections of the Communications Act. As of this writing, the order the Chairman has circulated to the other commissioners had not been released to the public, so it is unclear how the FCC's current approach differs from its previously failed attempt to assert ancillary authority. If the FCC's new proposal is adopted, the FCC's assertion of ancillary authority to regulate in this area may, again, be subject to court challenge.

Congress could act to grant the FCC the authority necessary to adopt network management rules. If a law were enacted, the FCC would not have to rely on its ancillary jurisdiction to enforce network management rules. For further information on the policy aspects of this debate, see CRS Report RS22444, *Net Neutrality: Background and Issues*, by Angele A. Gilroy.

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Introduction

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

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

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

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

Proceedings at the FCC

FCC's Network Management Principles

Federal policy towards the Internet, as embodied in Section 240(b) of the Communications Act of 1934, as amended, is “to preserve the vibrant and competitive free market that presently exists for the Internet” and “to promote the continued development of the Internet.”¹ In Section 706 of the Communications Act, Congress instructs the FCC to encourage “the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”²

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

- consumers are entitled to access the lawful Internet content of their choice;
- consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement;
- consumers are entitled to connect their choice of legal devices that do not harm the network; and
- consumers are entitled to competition among network providers, application and service providers, and content providers.⁵

It is also important to note that upon adopting these precepts the FCC expressly stated that it was “not adopting rules in this policy statement” and that the principles adopted were “subject to

¹ 47 U.S.C. § 230(b)(2).

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

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

⁴ *Id.* at 14988.

⁵ *Id.*

reasonable network management.”⁶ The Commission termed the Policy Statement to be guidance and insight into its approach to the Internet that was intended to be consistent with Congressional directives. The Commission did not put the network management principles out for public comment, nor did it publish the principles in the Code of Federal Regulations.

The Ruling Against Comcast

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

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

After hearing comments from the public and from industry participants, the Commission determined that Comcast had violated its Internet Policy Statement, because its practice of degrading usage of P2P applications prevents consumers from using the lawful application of their choice and does not fall under the exception for reasonable network management.¹² The Commission was particularly troubled by what it determined to be Comcast’s lack of transparency regarding the company’s network management practices.¹³ The Commission found that Comcast was less than forthcoming about its network management practices and that only

⁶ *Id.* at n. 15.

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

⁸ *Id.*

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

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

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

¹² In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications and Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management,” 23 FCC Rcd 13028 (2008) [hereinafter Comcast Decision].

¹³ *Id.* at para. 52.

after independent evidence emerged that Comcast was not being truthful did the corporation admit to its true methods of traffic management related to P2P programs.¹⁴ The Commission noted that “[a] hallmark of whether something is reasonable is whether a provider is willing to disclose to its customers what it is doing.”¹⁵ Since Comcast, evidently, was not disclosing its practices, the Commission viewed its actions as suspect. Furthermore, the Commission found there were other effective methods for managing the heavy traffic generated by P2P programs that fell short of interfering with the applications’ ability to function.¹⁶

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

Comcast filed the requested documents with the FCC on September 19, 2008.²⁰ Comcast also filed a certification with the FCC on January 5, 2009, affirming that the company had fulfilled its promise to move to protocol-agnostic network management practices.²¹ The Commission sent a letter to Comcast on January 18, 2009, asking the company to clarify its treatment of VoIP services.²² The Commission expressed concern that Comcast made no distinction between VoIP

¹⁴ *Id.* at para. 53.

¹⁵ *Id.*

¹⁶ *Id.* at para. 49.

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

¹⁸ *Id.*

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

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

²¹ Letter from Kathryn A. Zachem, Vice President, Regulatory and State Legislative Affairs, Comcast to Marlene H. Dortch, Secretary, FCC, Re: In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices: Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management,” File No. EB-08-IH-1518, WC Docket No. 07-52 (January 5, 2009).

²² Letter from Dana R. Shaffer, Chief, Wireline Competition Bureau, and Matthew Berry, General Counsel, FCC, to Katherine A. Zachem, Vice President, Regulatory Affairs, Comcast Corporation, Re: In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices: Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable (continued...)

services in its filing, but, apparently, treats its own VoIP service offering differently than it treats other VoIP services. Furthermore, the Commission noted that if Comcast's VoIP service is a separate offering of a telephone service (distinct from the broadband offering), then it is possible that it should be classified as a "telecommunications service." Telecommunications services are subject to more stringent regulations under Title II of the Communications. The Commission, therefore, asked Comcast to explain why it omitted the effects its new network management practices would have on Comcast's VoIP service from its required filings and why Comcast's VoIP service should not be treated as a telecommunications service under Title II.

Comcast filed its answer with the Commission on January 30, 2009.²³ The company argued that Comcast's voice service is a separate service from its broadband offering. In the company's opinion, it, therefore, was not part of the ongoing discussions about Comcast's broadband network management practices and is not affected by the newly implemented management regime. Comcast also argued that the question of whether Comcast's voice service should be treated as a telecommunications service is irrelevant to the current proceedings, but, nonetheless, asserted that Comcast's voice offering is not a telecommunications service. The Commission has yet to take any action in response to Comcast's letter.

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

Court Opinion in Comcast v. FCC

On April 6, 2010, the D.C. Circuit vacated the FCC's order against Comcast because the FCC had failed to tie its assertion of ancillary authority to any "statutorily mandated responsibility."²⁵ After dispensing with the FCC's preliminary arguments against the court's jurisdiction, the panel applied the test for ancillary jurisdiction it had announced in *American Library Assn. v. FCC*,²⁶ and found the FCC's argument insufficient to satisfy the standards.

The Supreme Court recognizes that the FCC has so-called "ancillary authority" to regulate services that it has not been granted express authority to regulate.²⁷ The FCC did not claim that it had express authority to regulate cable Internet service. Rather, the agency argued that regulation

(...continued)

Network Management," File No. EB-08-IH-1518, WC Docket No. 07-52 (January 19, 2009).

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

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

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

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

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

of Internet services was “reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities.”²⁸ The FCC relied primarily upon Section 230(b) of the Communications Act, which states that “it is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services [and] to encourage the development of technologies which maximize user control over what information is received by individuals families and schools who use the Internet.”²⁹ The FCC argued that this statement of policy, along with the general rulemaking authority in Title I, was sufficient to assert ancillary jurisdiction over cable Internet network management.

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

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

The court also addressed the other statutory provisions upon which the FCC claimed to rely for jurisdiction.³² Some of these statutory provisions, such as Section 706 of the Communications Act,³³ arguably might grant the FCC specific authority to regulate in an area reasonably related to the regulation of cable Internet services. In each case, however, the court found the FCC had failed in some way to properly advance the argument for jurisdiction on the basis of these other statutory provisions. Therefore, the court found that it could not hold that the FCC had ancillary

²⁸ *Comcast v. Federal Communications Commission*, No. 08-1291, 2010 U.S. App. LEXIS 7039, at *2 (D.C. Cir. April 6, 2010).

²⁹ *Id.* at *17.

³⁰ *Id.* at *7.

³¹ *Id.* at *29 - 30.

³² *Id.* at *30 – 36.

³³ Section 706 of the Communications Act states that “the Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.” The court agreed that this could be a direct mandate to regulate. The Commission, however, is legally bound by its previous interpretation of Section 706. The Commission had previously found that Section 706 did not constitute an independent grant of authority. In the court’s opinion, the Commission could not rely on Section 706 as an independent grant of statutory authority in this case, because it had previously held that Section 706 was not an independent grant of authority and it is bound by its own interpretation of the section. *Id.* at *30 – 31. The Commission does have the option of conducting a rulemaking to reinterpret Section 706 as an independent grant of regulatory authority. The Commission would have to complete that rulemaking before asserting Section 706 as a source of ancillary authority. See *FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1811 (2009).

authority to regulate cable Internet services based upon any of these specific grants of regulatory authority.

Commission's Proposals to Assert Regulatory Authority Over Broadband Internet Services

The decision of the D.C. Circuit in *Comcast v. FCC*³⁴ has thrown the agency's current authority to regulate broadband Internet network management into doubt. Broadband Internet services are currently classified as information services, to which Title I of the Communications Act applies.³⁵ The FCC does not possess direct authority to regulate services classified under Title I,³⁶ and was unsuccessful in its initial attempt to assert ancillary authority over broadband Internet network management in the *Comcast* case. As a result, the agency announced the possibility of reclassifying the transmission component of broadband Internet services as a telecommunications service under Title II of the Communications Act.³⁷ The FCC hoped this potential reclassification would ground the FCC's authority to regulate broadband Internet services more firmly in the governing law. In his most recent statement addressing the issue of reclassification, Chairman Genachowski stated that the FCC has abandoned its plan to reclassify broadband Internet services, and would instead, presumably, proceed pursuant to its ancillary authority.³⁸ The Chairman's most recent statement is discussed below.

Background

In order to understand the uncertainty surrounding the FCC's authority over broadband Internet services, some background is needed. After the passage of the Telecommunications Act of 1996, the FCC found it necessary to determine what kind of service broadband Internet service was.³⁹ The agency's choices were to classify broadband Internet access as an information service,⁴⁰ over

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

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

³⁶ *Id.*

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

³⁸ Federal Communications Commission, Chairman Julius Genachowski, Remarks on Preserving Internet Freedom and Openness (Dec. 1, 2010). Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-303136A1.pdf.

³⁹ It is worth noting that the Ninth Circuit Court of Appeals had issued a ruling declaring that cable modem Internet service was a telecommunications service, prior to the FCC's decision to implement a rulemaking on this issue. *AT&T Corp. v. City of Portland*, 216 F.3d 871, 877-79 (9th Cir. 2002). However, as discussed *infra*, despite the FCC reaching the opposite conclusion, the Supreme Court upheld the FCC's interpretation of the Communications Act.

⁴⁰ Information services are 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).

which it would have no direct authority to regulate under Title I, or as a telecommunications service,⁴¹ over which it would have extensive authority to regulate under Title II. There was also an intermediate option. The FCC contemplated classifying the transmission component of a broadband Internet service as a telecommunications service, while classifying the processing component as an information service.⁴² The FCC ultimately chose to classify broadband Internet services as information services only.⁴³

At the time, in 2002, the provision of broadband Internet services arguably was still a nascent industry, and the FCC expressed a desire to avoid introducing into the developing market what it thought could be too many regulations.⁴⁴ However, this was a contentious question. The Supreme Court, in *NCTA v. Brand X*, made the final decision.⁴⁵ The question before the court was whether the FCC could define cable-modem services (i.e., cable broadband services) as information services. Opponents of that classification argued that the FCC did not have discretion to define cable modem services as an information service. The Court, however, sided with the FCC. What is important for the purposes of this discussion is that the Court did not say that cable modem services are clearly and unambiguously information services. Instead, the court said that the definitions of telecommunications services and of information services were ambiguous as they related to cable modem services, and that the FCC, as the agency with jurisdiction under the Communications Act, had the authority to interpret those definitions.⁴⁶ The Court gave deference to the FCC's determination that cable modem services should be defined as information services and determined that the FCC's classification of cable modem services in this way was reasonable.⁴⁷

However, three Justices dissented. Justice Scalia authored the dissent, concluding that cable modem services were actually two separate services: the computing service which was an information service, and the transmission service, which was a telecommunications service.⁴⁸ The classification that these Justices believed the Communications Act clearly mandated was the classification that the FCC recently proposed to apply to broadband Internet services.⁴⁹

⁴¹ Telecommunications services are defined 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).

⁴² The agency identified a portion of cable modem Internet services as "Internet connectivity," which is the portion the agency would seek to redefine as a telecommunications service today. See *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4809-11.

⁴³ *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4819.

⁴⁴ *Id.* at 14856.

⁴⁵ Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (*Brand X*).

⁴⁶ *Id.* at 987.

⁴⁷ *Id.* at 991, 1002-03.

⁴⁸ *Id.* at 1005 (Scalia, J., dissenting).

⁴⁹ See Genachowski Statement, *supra* note 4; Schlick Statement, *supra* note 4.

Three Possible Paths to Authority Under Current Law

Chairman Genachowski announced his intention to pursue what he termed “light touch” Title II regulation of broadband services in May of 2010.⁵⁰ As explained in the statement of the FCC’s General Counsel, it was the intention of the FCC to commence a rulemaking to reclassify only the transmission component of broadband access services (“Internet connectivity”) as a telecommunications service, while the data processing portion of the service would remain an information service.⁵¹ The Chairman argued that, in choosing only to reclassify the transmission component of broadband access services, the reach of the FCC’s jurisdiction would have been sufficiently narrowed so as to avoid giving the agency the authority to regulate Internet content. This plan, according to the Chairman at the time, also would have avoided the imposition of regulation so pervasive as to become burdensome.⁵²

In keeping with this announcement, on June 17, 2010, the FCC released a notice of inquiry (NOI) into the framework of broadband Internet services.⁵³ In the NOI, the agency asked for comment on a number of questions. The FCC made clear that its ultimate goal in issuing the NOI was to determine the best avenue for restoring the agency’s previous understanding of its authority to regulate broadband Internet services.⁵⁴ In other words, the FCC was seeking firmer ground for its authority to continue rulemakings along the lines of the broadband network management rulemakings⁵⁵ and the order it issued in 2007 finding Comcast to be in violation of the FCC’s network management policies.⁵⁶ In doing so, the FCC recognized that the D.C. Circuit’s decision in *Comcast v. FCC* had thrown the agency’s assertions of ancillary authority over broadband network management into considerable doubt.⁵⁷

The NOI listed three main potential paths forward and sought comment on the feasibility of each. The first question the NOI asked was whether the FCC could find a better way to assert ancillary authority over broadband Internet services.⁵⁸ The D.C. Circuit did not foreclose on the possibility of the FCC asserting ancillary authority in other ways. It merely rejected the FCC’s argument in that particular case.⁵⁹ Therefore, the FCC asked whether broadband Internet services may continue to be classified as information services while the agency asserts a different (or multiple different) statutory basis for exercising ancillary jurisdiction. There are a number of potential theories for ancillary jurisdiction for which the FCC sought comment.⁶⁰ It appears that ultimately,

⁵⁰ Genachowski Statement, *supra* note 4.

⁵¹ Schlick Statement, *supra* note 4.

⁵² Genachowski Statement, *supra* note 4.

⁵³ In the Matter of Framework for Broadband Internet Service, Notice of Inquiry, GN Docket No. 10-127 (2010) available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-114A1.pdf. [“NOI”]

⁵⁴ *Ibid.* at ¶¶ 1-2.

⁵⁵ See Preserving the Open Internet: Broadband Industry Practices, GN Docket no. 09-191, WC Docket No. 07-52, Notice of Proposed Rulemaking, 24 FCC Rcd 13064 (2009).

⁵⁶ See Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices et al., WC Docket No. 07-52, Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008).

⁵⁷ NOI, at ¶ 1.

⁵⁸ *Id.* at ¶ 30.

⁵⁹ See CRS Report R40234, *The FCC’s Authority to Regulate Net Neutrality after Comcast v. FCC*, by Kathleen Ann Ruane.

⁶⁰ NOI, at ¶¶ 32-51.

one of these options, or a combination thereof, will be the path the FCC will choose. Allowing broadband Internet services to remain information services will mean that the FCC may proceed straight to a network neutrality rulemaking without having to first engage in a reclassification rulemaking.

The other two potential paths towards firmer authority to regulate would have involved direct regulation under Title II of the Communications Act. Therefore, it would have been necessary to reclassify at least the Internet connectivity portion of broadband Internet services as a telecommunications service, because only telecommunications services are governed by Title II. The FCC asked for comment on how to define Internet connectivity for reclassification.⁶¹ Assuming the FCC chose one of these two paths, this reclassification would likely have been reviewed by the courts, in light of the fact that the Supreme Court upheld the agency's previous classification of broadband Internet services as a unified information service. However, as discussed earlier, *Brand X* gave deference to the FCC's interpretation of the Communications Act in this area.⁶² Furthermore, in the recent case *FCC v. Fox Television*, the Supreme Court held that when an agency issues a new (and different from its previous) interpretation of a statute it has the authority to implement, the agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one."⁶³ The agency must show only that its current interpretation is reasonable, though in some circumstances a more detailed justification for the change must be made than would otherwise be necessary if the agency was rulemaking on a blank slate.⁶⁴

Assuming that such a reclassification would have been upheld by the courts, the second potential path forward would have been to apply the full force of Title II regulation to broadband Internet connectivity (as the FCC would define it). The FCC sought comment on the potential effects of such a decision.⁶⁵ The third option was to apply limited Title II regulation to broadband and to forbear from applying the portions of Title II to broadband access services that the FCC deemed contrary to the public interest. Section 401 of the Telecommunications Act of 1996 requires the FCC to forbear from applying any regulation or provision under Title II to a provider of telecommunications services if the Commission determines that

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.⁶⁶

In their May 2010 statements, the Chairman and General Counsel argued that this provision would require forbearance from many of Title II's more onerous provisions, such as the rate

⁶¹ *Id.* at ¶¶ 52-66.

⁶² *Brand X*, 545 U.S. at 991.

⁶³ *FCC v. Fox Television Stations, Inc.* 129 S. Ct. 1800, 1811 (2009).

⁶⁴ *Id.*

⁶⁵ NOI, at ¶ 52.

⁶⁶ Codified at 47 U.S.C. § 160.

regulation and tariff provisions, because applying those provisions would not be consistent with the public interest.⁶⁷

The NOI asked for comment on this potential action.⁶⁸ It further asked for comment on the provisions on Title II from which the agency should not forbear. In particular, the NOI asked for comment on applying the provisions of Title II that the FCC had identified as likely to be needed to have adequate enforcement authority in its earlier press releases on this issue.⁶⁹ These provisions are Sections 201 (requiring service upon request and reasonable rates),⁷⁰ 202 (prohibiting unreasonable discrimination),⁷¹ 208 (granting the FCC authority to act upon complaints),⁷² 222 (protecting privacy),⁷³ 254 (universal service),⁷⁴ and 255⁷⁵ (access for disabled persons).⁷⁶ In the FCC's announcements, the General Counsel identified these provisions as potentially sufficient to "do the job" of providing enough authority to accomplish the FCC's goals.⁷⁷ However, the NOI asked for comment on other provisions that may have been necessary to assert jurisdiction as well.⁷⁸

Chairman Genachowski's December 1, 2010, Statement

In a statement made on December 1, 2010, Chairman Genachowski announced that the FCC had abandoned its proposal to reclassify broadband Internet services and that they would remain classified wholly as information services.⁷⁹ In his statement, the Chairman indicated that the FCC would anchor its authority to implement the new regulations in various sections of the Communications Act. As of this writing, the order the Chairman has circulated to the other commissioners had not been released to the public, so it is unclear how the FCC's current approach differs from its previously failed attempt to assert ancillary authority. If the FCC's new proposal is adopted, the FCC's assertion of ancillary authority to regulate in this area may, again, be subject to court challenge.

In his speech, the Chairman indicated that there would be four main components to the proposed regulations. First, the agency plans to implement a "meaningful transparency obligation," to

⁶⁷ See Genachowski Statement, *supra* note 4; Schlick Statement, *supra* note 4.

⁶⁸ NOI, at ¶ 74. The Chairman and General Counsel analogized this approach to its regulation of wireless voice communications. In 1993, Congress specified that Title II applies to wireless communications, such as cellular phone service. 47 U.S.C. § 332(c). Section 332(c) gave the FCC the discretion to determine which regulations under Title II should be inapplicable to wireless voice services; however, the FCC could not forbear from applying Sections 201, 202, or 208 to wireless voice services. *Id.* Similarly, the statement of the Chairman has pledged to apply Sections 201, 202, and 208 to broadband access services.

⁶⁹ NOI, at ¶¶ 74-85.

⁷⁰ 47 U.S.C. § 201.

⁷¹ 47 U.S.C. § 202.

⁷² 47 U.S.C. § 208.

⁷³ 47 U.S.C. § 222.

⁷⁴ 47 U.S.C. § 254.

⁷⁵ 47 U.S.C. § 255.

⁷⁶ Genachowski Statement, *supra* note 4.

⁷⁷ Schlick Statement, *supra* note 4.

⁷⁸ NOI, at ¶¶ 86-7.

⁷⁹ Federal Communications Commission, Chairman Julius Genachowski, Remarks on Preserving Internet Freedom and Openness (Dec. 1, 2010). Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-303136A1.pdf.

inform consumers regarding how networks are being managed. Second, the new regulations would endeavor to ensure consumers' rights to send and receive lawful material online. Third, unreasonable discrimination among lawful Internet traffic will be prohibited, so as to prevent Internet service providers from favoring their own content over other content providers. Lastly, reasonable network management will be permissible in order to aid service providers in blocking harmful Internet traffic and managing congestion.

Furthermore, the Chairman indicated that not all of these principles would immediately apply to wireless mobile broadband Internet services, as they would apply to wireline broadband Internet services. The agency plans to recognize that wireless mobile broadband is at an earlier stage of development than its wired counterpart. As a result, it appears that only a "basic no blocking rule" and a transparency rule will apply to mobile broadband, initially.⁸⁰ However, the FCC will reserve the right to monitor the industry and adjust its regulatory status as warranted.

The full details of this proposal have not yet been released to the public. Thus, it is difficult to analyze whether the FCC has sufficient grounds to assert ancillary authority or what the proposed principals will look like and mean for broadband service providers when codified into regulation. This report will be updated once the latest information regarding the proposed rules is released.

It is worth noting that both Republican FCC commissioners, Robert M. McDowell and Meredith Attwell Baker, have voiced their opposition to the Chairman's proposal to adopt this proposal at the December 21 FCC Open Meeting. Commissioner McDowell argued in his statement that "[s]uch rules would upend three decades of bipartisan and international consensus that the Internet is best able to thrive in the absence of regulation."⁸¹ While Commissioner Baker argued that the Commission does not have authority to act and that "whether the Internet should be regulated is a decision best left to the directly elected representatives of the American people."⁸²

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⁸⁰ *Id.*

⁸¹ Press Release, FCC, Statement of Commissioner Robert M. McDowell on Chairman Genachowski's Attempt to Adopt Internet Regulations, December 1, 2010, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-303128A1.pdf.

⁸² Press Release, FCC, Statement of Commissioner Meredith Attwell Baker on Inclusion of Net Neutrality on the Tentative Agenda for the Commission's December Open Meeting, December 1, 2010, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-303140A1.pdf.