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Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

June 12, 2008

Re: Notice of *Ex Parte* Presentation
Free Press et al. Petition 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" (RM- _____)
and
CC Docket No. 02-33, CC Docket No. 01-337, CC Docket Nos. 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52, WC Docket No. 07-52

Dear Ms. Dortch,

This letter is to advise you, in accordance with Section 1.1206(b) of the Commission's rules, that on June 11, 2008, Marvin Ammori and Ben Scott of Free Press met with Matthew Berry, General Counsel of the Federal Communications Commission, Ajit Pai, Deputy General Counsel, and Christopher Killion, Deputy Associate General Counsel at the offices of the FCC.

We discussed the attached three memoranda. We drafted the memoranda to address several issues that have been raised by Comcast and others. Every matter discussed at the meeting is included in the attached memoranda.

We attach two memoranda on the issue of jurisdictional authority. Comcast continues to question the Commission's jurisdiction to act on the Free Press et al. Complaint or the Vuze, Inc. Petition for Rulemaking. Jurisdictional question have arisen at the Harvard *en banc* hearing, the Stanford *en banc* hearing, and hearings before the Senate and House Commerce Committees, and Comcast purported to answer the question in an *ex parte* letter.

The first memorandum addresses the argument that the Commission cannot fulfill its promises to consumers made in the Policy Statement because the Commission lacks Title I authority to protect consumers' rights to an open Internet. The memorandum evaluates eight different bases of Title I authority, all of which have been previously advanced by the Commission. The memorandum concludes, in short, that the Commission can exercise Title I authority to further any of eight different statutory provisions, despite the claims of Comcast and others.

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Indeed, as the memorandum details, while Comcast is arguing to the Commission that the Commission lacks ancillary authority, at the same time, Comcast is arguing to a federal court in California that the Commission *does* have Title I authority. We are encouraged by that admission but unsure why Comcast has not informed the Commission of its about-face on jurisdiction.

The second memorandum refutes the arguments of Comcast and its defenders that the Commission cannot act to "enforce" the Internet Policy Statement. Under basic administrative law, the Commission can adjudicate complaints in line with its previous policy statements.

The third memorandum addresses certain residual issues. The memorandum urges the Commission to adopt narrow, not sweeping, decisions in complaint proceedings concerning the Policy Statement. The memorandum also urges the Commission to clarify that a standard analogous to strict scrutiny will apply in such cases. The memorandum also suggests a remedy to punish violators, and rebuts certain persistent arguments made by Comcast and its defenders.

As in every filing, we once again urge the Commission to act promptly on our Complaint and Petition. The Commission has a full record on the factual and legal issues and should immediately enjoin and fine Comcast to protect consumer's rights to all the lawful content and applications on the open Internet.

Please contact me with any questions.

Sincerely,

Marvin Ammori
mammori@freepress.net

Jurisdictional Memorandum #1:
The Commission's Ancillary Authority Under Title I to Address Unreasonable Discrimination by Network Providers

Marvin Ammori
Free Press

Summary

This memorandum concludes that the FCC has jurisdiction pursuant to Title I of the Communications Act to adopt rules or act in adjudications to address unreasonable discrimination by facilities-based Internet service providers or to ensure that networks are, in the Commission's words, "operated in a neutral manner."[1] In this proceeding, Comcast wrongly claims that the Commission lacks authority to act on the Free Press et al. Complaint and Petition for Declaratory Ruling and the Vuze Petition for Rulemaking. Comcast also claims the Commission has provided no citations underlying its authority.

Comcast is wrong. Comcast is not above the law. In fact, the Commission has asserted *eight* different bases for its authority, and every one of these asserted bases independently confers Title I authority.[2] While this list of eight is not exhaustive, we evaluate these eight asserted bases in detail and conclude the Commission can assert Title I authority under these eight independent bases.

Statutory provisions in Title I itself confer jurisdiction on the Commission. Exercise of that jurisdiction must merely be reasonably ancillary to advancing the goals or policies of the Communications Act. That is, provisions in Title I confer jurisdiction, while other provisions of

[1] Federal Communications Commission, Policy Statement, Aug. 5, 2005, at ¶4, Available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf, (emphasis added) ("Internet Policy Statement").

[2] Indeed, the Commission's online page regarding network management begins with an assertion of jurisdiction. http://www.fcc.gov/broadband_network_management/.

the Act enunciate the policies for which the Commission can exercise that jurisdiction provided for in Title I.

The Commission has asserted eight statutory goals supporting ancillary authority for ensuring nondiscriminatory broadband access:

(1) Section 706 of the 1996 Telecommunications Act

(2) Section 1 of the Act (47 U.S.C. §151)

(3) Section 230(b)(3)

(4) Section 230(b)(2)

(5) Section 230(b)(1)

(6) Section 521(4)

(7) An Analogy to *Computer Inquiries*

(8) Section 256.

The Policy Statement itself refers to five of these (1, 3, 4, 5, and 8). Although we provide more detail than any party has to date on this issue, the conclusion of this memorandum—that the FCC has ample Title I authority–agrees with statements made by: the Supreme Court,[3] the President (both in 2006[4] and today[5]), the FCC,[6] the head of the phone industry lobby,[7] Verizon,[8]

[3] *See* NCTA v. Brand X Internet Services, 545 U.S. 967, 996 (2005) ("*Brand X*").

[4] *See* Executive Office of the President, Statement of Administration Policy, June 8, 2006, Available at http://www.whitehouse.gov/omb/legislative/sap/109-2/hr5252sap-h.pdf ("The Administration believes the FCC currently has sufficient authority to address potential abuses in the marketplace").

[5] See U.S. Secretary of Commerce Carlos M. Gutierrez, Remarks to the National Cable & Telecommunications Association 2008 Cable Show, May 19, 2008, New Orleans, Louisiana ("As we said in 2006, the Administration supports the FCC's broadband policy statement, and the Administration believes the FCC currently has sufficient authority to address potential abuses in the marketplace.").

[6] *See, e.g.*, Wireline Broadband Order, 20 FCC Rcd 14853, ¶109 (2005); Broadband Industry Practices NOI, 22 FCC Rcd. 7894, ¶146 (2007); Internet Policy Statement at ¶4; *see also* Cable Modem Order, 17 FCC Rcd at 4867 (Powell statement).

[7] Walter McCormick, United States Telecommunications Association, Hearing on H.R. 5353, the Internet Freedom Preservation Act of 2008, May 6, 2008 ("I think that based on the Supreme Court's decision in *Brand X* that the FCC has the authority, ancillary authority to take action against what it would consider to be activities that would not be in conformance with its principles.").

and apparently even the cable industry's usual legal expert, Christopher Yoo,[9] numerous commenters in this proceeding,[10] every member of the Commission,[11] and even Comcast itself in other venues.[12] The FCC can act in this proceeding without additional Congressional authorization.[13]

Not only does the Commission have Title I authority here, if the Commission did not, the Commission would likely be unable to preempt state regulation regarding broadband discrimination, resulting in varying state-level network neutrality regulations that the Commission could not attempt to standardize. The Commission's Title I jurisdiction in other areas would likely also have to be curtailed.

Indeed, Comcast is *currently arguing to a federal court* that the court should not address any anti-consumer network "management" issues because the FCC has jurisdiction (indeed, primary jurisdiction) over these matters—conveniently ignoring its arguments before the FCC.

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[8] Verizon and Verizon Wireless Comments, at 17-18 ("The Commission's Broadband Policy Statement indicates the Commission's intention to address broadband providers' practices that harm consumers or competition, if concrete facts ever develop showing a market failure and the need for rules.").

[9] *See* Christopher Yoo, Professor of Law, Center for Technology, Innovation and Competition, University of Pennsylvania, House Committee on Energy and Commerce, Subcommittee on Telecommunications & the Internet, Hearing on H.R. 5353, the Internet Freedom Preservation Act of 2008, May 6, 2008 ("I believe they have the authority it is just a question of whether they properly exercise it in accordance with administrative law."); *see also id.* ("As of now, the Supreme Court has indicated that they [the FCC] have the authority,"). The head of the National Cable & Telecommunications Association, one of Comcast's most strident defenders has conceded that Title I jurisdiction is at worst "ambiguous," but that both the Supreme Court asserted the FCC has such jurisdiction. Kyle McSlarrow, National Cable & Telecommunications Association President, House Committee on Energy and Commerce, Subcommittee on Telecommunications & the Internet, Hearing on H.R. 5353, the Internet Freedom Preservation Act of 2008, May 6, 2008 ("I think it's ambiguous. I think the Supreme Court and the FCC has asserted Title 1 Ancillary Authority and it's clearly broad, although not unlimited.").

[10] National Association of Realtors Comments at 1; American Library Association Comments at 3; National Association of State Utility Consumer Advocates Comments at 6; Open Internet Coalition Comments at 7; Hands Off The Internet Comments at 3-4.

[11] Broadband Industry Practices, WC Docket No. 07-52, Notice of Inquiry, 22 FCC Rcd 7894, 7896, ¶4 (2007)

[12] *See* Part V.

[13] Even members of Congress who have not supported network neutrality legislation have offered to ensure that the Commission has the authority to enforce the Policy Statement. Should there be doubt as to the Commission's authority to adjudicate in line with the Policy Statement. *See, e.g.*, Senator Gordon Smith, Hearing on the Future of the Internet, Senate Committee on Commerce, Science and Transportation, April 22, 2008 ("I'd be happy to introduce a bill with Senator Dorgan to codify the Powell principles.").

The Commission can and should assert Title I jurisdiction to address the Complaint and Petitions.

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Jurisdictional Memorandum #1:
The Commission's Ancillary Authority Under Title I to Address Unreasonable Discrimination by Network Providers

I. Questions Raised About the Commission's Title I Authority

Since parties filed Reply Comments in this docket two months ago, jurisdictional questions have been raised repeatedly: in follow-up from the FCC's Harvard *en banc* hearing on February 25, in testimony at the FCC's second *en banc* hearing at Stanford on April 17, in Chairman Martin's testimony before the Senate Commerce Committee on April 22, and in testimony before the House Commerce Committee on May 6.

Comcast and some of its defenders have raised questions regarding the Commission's jurisdiction to act on Free Press et al.'s Complaint and Petition for Declaratory Ruling and Vuze, Inc.'s Petition for Rulemaking. In Comments[14] and Reply Comments,[15] and an *ex parte* letter,[16] Comcast claimed, "it is not at all clear that the Commission has statutory authority to adopt rules" here,[17] that the Commission "provided no citation or analysis as to its statutory authority," and that the citations the Commission did provide do not "establish mandatory duties."[18] Moreover, Comcast asserted that the Commission and commenters had only made "vague" references to Title I authority, lacking citation.[19] Comcast wrote that the "basic answer" to the question of whether the Commission has authority here is "no."[20]

Comcast is wrong. The Commission can rely on any of the eight different provisions it has already cited. *The FCC should consider resting its authority on every reasonably relevant basis*, because, on appeal, the Commission can only be upheld based on the reasoning it provides

[14] Comcast Comments at 49-51.
[15] Comcast Reply Comments at 40-44.
[16] Comcast *Ex Parte*, March 11, 2008.
[17] Comcast Comments at 52.
[18] Comcast Comments at 53.
[19] Comcast, Reply Comments at 41.
[20] Comcast *Ex Parte*, March 11, 2008.

in its decision and a remand for further explanation of jurisdiction would waste judicial and Commission resources.[21]

II. Title I Jurisdiction is Broad and the Commission's Exercise of that Jurisdiction Need Merely Further the Act's Policies

The Commission's exercise of Title I jurisdiction has been repeatedly upheld for decades in the targeted regulation of numerous important communications services, the Commission has exercised Title I authority over satellite services provided on a private carrier basis, submarine cables, for-profit microwave systems, dark fiber, and certain mobile services.[22] The Commission also exercised Title I jurisdiction over cable television—with the Supreme Court's blessing—from 1968 to 1984, adopting numerous detailed cable regulations under this Title I authority and preempting numerous state regulations of cable that interfered with the Commission's regulatory goals.[23] The Commission also exercised jurisdiction over both information services and consumer premises equipment under the *Computer Inquiries* regimes, again for decades.[24] The Commission has regulated television networks under Title I, with the Supreme Court's consent.[25] The Commission has imposed Title II disability requirements on voicemail and interactive menu services under ancillary jurisdiction[26] and imposed numerous requirements on interconnected

[21] *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43(1983) (a court may not "supply a reasoned basis for the agency's action that the agency itself has not given.")

[22] For citations and numerous additional examples of services regulated under Title I, see Verizon Comments, CS Dkt. No. 02-52, June 17, 2002, at 13 and Exhibit D (providing a list of such services).

[23] *See, e.g.*, United States v. Southwestern Cable Co., 392 U.S. 157 (1968); United States v. Midwest Video Co., 406 US 649 (1972); Capital Cities Cable, Inc. v. Crisp, 467 US 691 (1984); Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968); New York State Commission on Cable Television v. FCC, 669 F.2d 58 (2d Cir. 1982).

[24] *See, e.g.*, CCIA v. FCC, 693 F.2d 198 (1982); NCTA v. Brand X Internet Services, 545 U.S. 967 (2005); NCTA v. Gulf Power, 534 US 327 (2002).

[25] *See, e.g.*, GTE Services Corp. v. FCC, 474 F.2d 724, 731 (1973) (interpreting NBC v. United States, 219 US 190 (1943) to effectively involve Title I jurisdiction); *see also* Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (1971) (upholding prime time access rules under Title I).

[26] *See* Implementation of Sections 255 and 251(a)(2), 16 FCC Rcd. 6417, 6455-62 (1999).

VoIP (without specifying the Title I or Title II authority) including for local number porting.[27] The Commission has even regulated lease-terms for residential housing under Title I.[28]

Quite simply, Title I grants jurisdiction to promote some policy or goal provided for in the Communications Act, if that exercise does not violate an explicit statutory limitation.[29] Jurisdiction and authority derive from Title I, not from other provisions. The Commission's use that jurisdiction must be reasonably ancillary to fulfilling its statutory obligations, implies that the Commission can exercise that jurisdiction merely to advance the Communications Act's goals.

A. Title I Grants the Commission Jurisdiction Over All Communication by Wire or Radio

Title I grants jurisdiction to the Commission over all communication by wire or radio, which includes the provision of Internet access. Under §2(b) of the Communications Act, 47 U.S.C. §152(b), explicitly applies to "all interstate and foreign communication by wire or radio."[30] The definitions for "communication by wire"[31] and "communication by radio"[32] are exceedingly broad, far broader than mere "telecommunications service," "information service,"

[27] *See, e.g.*, Vonage Holdings Corp. v. FCC, 489 F.3d 1232 (2007) (E911); Telephone Number Requirements for IP-Enabled Services Providers, 22 FCC Rcd 19,531, 19539-48 (2007) (discussing the Commission imposition of requirements customer proprietary network information under authority ancillary to § 222, disability access requirements under authority ancillary to § 255 to manufacturers of specialized equipment, as well as extending Telecommunications Relay Services requirements under authority ancillary to § 255(b)(1), and number portability requirements on interconnected VoIP providers under authority ancillary to § 251(e)).

[28] *See, e.g.*, Building Owners and Managers Association International v. FCC, 254 F.3d 89 (2001) (regulating lease agreements to further the goals of the Communications Act regarding over-the-air reception devices).

[29] *See* United States v. Southwestern Cable Co., 392 U.S. 157, 181 (1968).

[30] *See* Southwestern Cable Co., 392 U.S. at 167.

[31] *See* 47 USC §153(52) ("Wire communication" or "communication by wire" means the "transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection … including all instrumentalities, facilities, apparatus, and services … incidental to such transmission.").

[32] *See* 47 USC §153(33) ("The term 'radio communication' or 'communication by radio' means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.").

or "cable service," and includes all of them. The definitions also cover broadband Internet access.[33]

To enforce the Act, Congress granted the FCC expansive authority over all "interstate and foreign commerce in communication by wire and radio," to "execute and enforce the provisions of this Act."[34]

In short, as the Supreme Court stated, Congress expected the FCC to act as the "single Government agency" with "unified jurisdiction" and "regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio."[35]

B. Title I Grants the Commission Jurisdiction, Rather than Requiring the Commission to Root its Jurisdiction in Other Provisions

Title I's provisions consist of a jurisdictional grant, particularly through §§ 2(a) and 4(i). The Supreme Court has held that Title I, specifically § 2(a), "is itself a grant of regulatory power."[36] Section 2(a) states: "The provisions of this chapter *shall apply* to all interstate and foreign communication by wire or radio."[37]

Similarly, § 4(i) states that the "Commission *may perform any and all acts*, make such rules and regulations, and *issue such orders*, not inconsistent with the Act, as may be necessary in the execution of its functions."[38] This provision is also a grant of authority to the Commission to enact "rules" in rulemakings and issue "orders" in adjudications[39] as necessary to execute its

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[33] 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 NPRM, 17 FCC Rcd. 4798 ¶75-76 (2002) ("Cable Modem Order").

[34] *See* §1 of the Act; 47 USC § 151 (referring to provisions of this "chapter," referring to Chapter 5 of the US Code's Title 47, and includes the subchapters which we usually refer to as Titles, such as Titles I to Title IV of the Communications Act).

[35] *See* 392 U.S. at 167 (quoting statutory history).

[36] United States v. Midwest Video Co., 406 US 649, 660 (1972) (citing United States v. Southwestern Cable Co., 392 U.S. 157 (1968)).

[37] 47 USC § 152(a) (emphasis added).

[38] 47 USC § 154(i) (emphasis added).

[39] *Cf.* United States v. Southwestern Cable Co., 392 U.S. 157, 179 (1968) (upholding ancillary authority in case involving prohibitory order).

functions. "Necessary," of course, means "useful."[40] The Supreme Court has recognized that the Commission's functions are remarkably broad: the Commission's "responsibilities are no more narrow" than its jurisdiction, according to the Court, considering § 1's requirement "to make available … to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service."[41]

In addition, § 201, specifies that: "The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."[42] The Chairman referred §201 as authority in this case,[43] and, despite Comcast's assertion, § 201 is evidently not "explicitly limited to common carriers."[44] Similarly, § 303(r) authorizes the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act."

The Supreme Court has not only held that Title I consists of a jurisdictional grant; it has also rejected the argument that Title I "does not independently confer regulatory authority" beyond the provisions and technologies in other parts of the Act.[45] When the Supreme Court first upheld the Commission's use of ancillary authority, one Justice concurred in upholding jurisdiction, but stated he believed that Title I meant that the Commission "must generally base

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[40] *Cf.* Prometheus Radio Project v. FCC, 373 F.3d 372 (2004) ("[W]e adopt what the Commission termed 'the plain public interest' standard under which 'necessary' means 'convenient,' 'useful,' or 'helpful,' not 'essential' or 'indispensable.'"); McCulloch v. Maryland, 4 Wheat. 316, 413 (1819) (finding that "necessary" in the Necessary and Proper Clause means "convenient" or "useful"). *See also* United States v. Southwestern Cable Co., 392 U.S. 157 (1968); United States v. Midwest Video Co., 406 US 649 (1972).

[41] *See* Southwestern Cable Co., 392 U.S. at 167 (quoting 47 USC § 151).

[42] Section 201 of the Act; 47 USC §201 (referring to "provisions of this chapter").

[43] *See, e.g.*, Chairman Martin (Question to David L. Cohen, Executive Vice President, Comcast Corporation), FCC En Banc Hearing on Broadband Network Management Practices, Cambridge, MA, Feb. 25, 2008.

[44] *See* Comcast Ex Parte, March 11, 2008 at 1.

[45] United States v. Southwestern Cable Co., 392 U.S. 157, 171-72 (1968) ("Nothing" limits the Commission's Title I authority only to "activities and forms of communication that are specifically described by the Act's other provisions.").

jurisdiction on other provisions of the Act."[46] The majority rejected precisely this notion, and held that jurisdiction derives from Title I.[47] Other provisions in the Act need not themselves grant the Commission "power for their implementation" because Title I already does so.[48] The Commission can rely on provisions outside of the Title I grants of authority "for the policies they state and not for any regulatory power they might confer" because the provision of Title I, including §§ 2(a) and 4(i), provide that regulatory authority.[49]

C. To Exercise Ancillary Jurisdiction, the Commission Need Merely Advance the Act's Goals

Possessing jurisdictional authority under the provisions of Title I, the Commission can assert that authority where its exercise is merely "reasonably ancillary to the effective performance of the Commission's various responsibilities."[50] These responsibilities include promoting policies, or "objectives,"[51] or "long-established goals"[52] set forth in the Act. As the Supreme Court has upheld, such responsibilities could include general congressional policies, such as the responsibility of "providing a widely dispersed radio and television service" with a "fair, efficient and equitable distribution."[53]

The Commission has jurisdiction to act not just to avoid "adverse effects" on its policies, but can exercise Title I regulation "affirmatively to further statutory policies."[54] For example, in *Computer II*, the FCC's regulation was merely ancillary to the goals of § 2 itself, which requires the Commission, in the reviewing Court's own words, "to assure a nationwide system of wire

[46] Southwestern Cable Co., 392 U.S. at 181.
[47] *Id.* at 171-74.
[48] United States v. Midwest Video Co., 406 US 649, 670, n.28 (1972).
[49] Midwest Video Co., 406 US at 670, n.28.
[50] Southwestern Cable Co., 392 U.S. at 178.
[51] Midwest Video Co., 406 US at 661.
[52] *See, e.g.*,. Midwest Video Co., 406 US at 667-68.
[53] Southwestern Cable Co., 392 U.S. at 173-74.
[54] Midwest Video Co., 406 US at 664.

communications services at reasonable prices."[55] According to the Supreme Court in 1972, the Commission could exercise its Title I authority to regulate cable television service, to promote the Commission's "general policy to promote the maximum television service to all people in the United States."[56]

The Supreme Court even defers to the Commission's exercise of ancillary jurisdiction, merely requiring the Commission to be "reasonable" in its conclusion that such authority is necessary.[57] The Commission's ancillary authority here is probably quite broad: "the subject matter here is technical, complex, and dynamic; and, as a general rule, agencies have authority to fill gaps where statutes are silent."[58]

Moreover, the Commission could impose obligations under Title I even before a violation, to "plan in advance of foreseeable events, instead of waiting to react to them."[59] The Commission need not "know or even pretend to know" the future of a technology to respond to predictable problems.[60]

D. Classifying Broadband Access Provision as an "Information Service" Did Not Eliminate Any of the FCC's Jurisdictional Authority and Merely Gave the Commission Flexible Authority in Dynamic Markets

The Commission could not eliminate its own expansive authority, as Comcast implies, merely by classifying a service as an information service. The Commission's jurisdiction over "communications by radio and wire" remain, and the Commission cannot abdicate its own

[55] *See* CCIA v. FCC, 693 F.2d 198, 213 (1982).
[56] Midwest Video Co., 406 US at 666-668.
[57] *See, e.g.*, United States v. Southwestern Cable Co., 392 U.S. at 173, 175 (finding the Commission "reasonably found" that ancillary jurisdiction was necessary).
[58] *See* Cable Modem Order, 17 FCC Rcd at 4819 (quoting NCTA v. Gulf Power, 534 US 327, 339 (2002) (citations omitted)).
[59] United States v. Southwestern Cable Co., 392 U.S. at 177.
[60] *See* General Telephone Co. v. United States, 449 F.2d 846, 857-58 (1971).

authority.[61] Parties regulated by the Commission have long recognized this common-sense notion. As one Bell company acknowledged: "The Commission cannot diminish or enhance its own statutory jurisdiction; it can merely determine how to *exercise* that jurisdiction."[62] Regulated parties understood that, when the Commission reclassified facilities-based broadband access as a Title I service, it maintained the Title I jurisdiction granted by Congress and affirmed repeatedly by the courts. Other parties at the time also recognized that the Commission had ample, flexible authority to address the broadband market, including Verizon,[63] and SBC Communications (now a part of AT&T). SBC provided a vigorous defense of the Commission's ancillary jurisdiction, in response to claims by cable companies,[64] and noted that Title I granted the Commission the "jurisdiction to intercede at some later point if necessary to protect consumers."[65]

The FCC relied on Title I when broadband was reclassified, and likely would have reached different results if Title I authority was too weak to ensure consumer protection and advancement of the Act's goals. In reclassifying broadband, the then-Chairman issued a statement declaring that the Commission is "not neutered by this classification"; that it was "not left powerless to protect the public interest"; that Congress had "invested the Commission with

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[61] *Cf.* Heckler v. Chaney, 470 US 821, 833 n.4 (1985) (suggesting judicial review of agency inaction is available when an agency abdicates its enforcement power: We do not have in this case a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction. Nor do we have a situation where it could justifiably be found that the agency has "consciously and expressly adopted a general policy" that is so extreme as to amount to an abdication of its statutory responsibilities. Although we express no opinion on whether such decisions would be unreviewable under § 701(a)(2), we note that in those situations the statute conferring authority on the agency might indicate that such decisions were not "committed to agency discretion.") (citation omitted); *see also id.* at 839 (Brennan, J., concurring) (concurring to emphasize this very point).

[62] *See, e.g.*, SBC Communications Reply Comments, CS Dkt. No. 02-52, Aug. 6, 2002, at 21.

[63] Verizon Comments, CS Dkt. No. 02-52, June 17, 2002, at 23 (stating that regulation under Title I provides the Commission broad authority to impose "only those discrete regulatory obligations (on telephone companies, cable companies and other providers alike) that the Commission finds necessary in the public interest.").

[64] SBC Communications Reply Comments, CS Dkt. No. 02-52, Aug. 6, 2002, at 20 (refuting the arguments of cable operators suggesting "that cable modem services are beyond the regulatory reach of the Commission.").

[65] SBC Communications Comments, CS Dkt. No. 02-52, June 17, 2002, at 25. *See also id.* at 29 (the Commission "retains jurisdiction" under Title I "to protect the public interest … at some later point.")

ample authority under Title I," an authority that had "been invoked consistently by the Commission to guard against public interest harms and anti-competitive results."[66] The Chairman noted further that the Commission had long asserted Title I authority over cable services—with Supreme Court blessing from 1968 until the Cable Act in 1984—and over information services for decades, as upheld in the *Computer Inquiries*.[67] The Order also asserted numerous grounds for Title I jurisdiction to protect consumers and advance the Act's goals.[68] If the Commission *lacked* jurisdiction over Internet access merely by reclassifying Internet access, the Commission would lack jurisdiction over the most important communications medium of our time, despite the sweeping mandates of the Communications Act. The Act simply cannot be read to reach the absurd result that the Commission can place the Internet outside its jurisdiction. As the Supreme Court has noted, "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes."[69] Indeed, the order that reclassified broadband as an information service asserted that the Commission retained Title I jurisdiction, an assertion that receives deference.[70] In *Brand X*, the Supreme Court interpreted the classification of broadband services as information services not to be an abdication of all regulatory duties, responsibilities, and authorities, but to be "*the first-step* in an effort to reshape the way the Commission *regulates* information service providers."[71]

The Commission receives deference in determining which base—Title I or Title II—it uses to regulate certain communications. In upholding the exercise of ancillary jurisdiction in

[66] Cable Modem Order, 17 FCC Rcd at 4867 (Powell statement).
[67] *Id.*
[68] *See* below, notes 89-91.
[69] Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001).
[70] Cable Modem Order, 17 FCC Rcd. 4798, ¶¶75-79.
[71] *See* NCTA v. Brand X Internet Services, 545 U.S. 967, 1002 (2005) (emphasis added).

the Commission's *Computer II* decision—"an integral part" of the challenged order's "regulatory scheme"[72]—the D.C. Circuit stated: "In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing *which* jurisdictional base and *which* regulatory tools will be most effective in advancing the Congressional objective."[73] The Court held that the Commission merely substituted the "alternative regulatory tools" of Title I for those of Title II in a "volatile" field.[74]

Rather than removing its own authority, the Commission chose Title I as its jurisdictional base to ensure regulatory parity among competing technologies and provide regulatory flexibility in a dynamic marketplace.

Regarding parity, the Commission sought a "rational framework for the regulation of competing services that that are provided via different technologies and network architectures," such as cable, phone, or wireless,[75] even though Comcast encouraged the Commission to treat cable and phone companies differently.[76]

Regarding flexibility, the Commission would be able to take steps to impose only those regulations necessary in the broadband era. Courts generally defer to the FCC's use of Title I authority where the FCC determines an evolving industry can best be regulated under the flexible

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[72] 693 F.2d at 208; 211; 212.

[73] *Id.* at 212 (quoting Philadelphia Television Broad. Co. v. FCC, 359 F.2d 282 (DC Cir 1966)). *See also* Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (1971) (upholding ancillary authority to regulate network television broadcasting through the financial interest and syndication rules).

[74] 693 F.2d at 208-09.

[75] Cable Modem Order, 17 FCC Rcd at 4802. *See also* SBC Communications Comments, CS Dkt. No. 02-52, June 17, 2002, at 29 ("A key benefit of Title I is that it provides a means of applying consistent regulations and policies across all competing broadband platforms.").

[76] *See* Comcast Reply Comments, CS Dkt. No. 02-52, Aug. 6, 2002, at 18 ("In point of fact, it is *not* the law that all services offering similar capabilities must be regulated identically. ILECs and CLECs are regulated differently (even different classes of ILECs are regulated differently), just as cable, DBS, and OVS are regulated differently. Congress created the regulatory distinctions. Only Congress, not the Commission, may change this regime.").

tools of Title I. In *CCIA v. FCC*,[77] upholding *Computer II*, the D.C. Circuit found that the Commission was confronting "rapid technological and market changes" and could rely on "newly emergent market forces and the exercise of its own ancillary jurisdiction to protect the public interest."[78] The Court emphasized the FCC's wide ranging, flexible authority under Title I, primarily by relying on what was already long-standing precedent.[79]

In 1934, Congress was acting in a field that "was demonstrably 'both new and dynamic,'" much like the Internet of today, and therefore gave the Commission "a comprehensive mandate," with "not niggardly but expansive powers."[80] Congress determined that the "administrative process possess sufficient flexibility to adjust itself to these factors."[81] Congress enacted the 1934 Communications Act "to confer upon the Commission sweeping authority to regulate in a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding."[82] The Supreme Court stated, further, that "Congress sought 'to endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications'" and "avoid the necessity of repetitive legislation."[83]

So, far from overly constraining the FCC's regulatory tools, as Comcast wrongly suggests, Title I provides the FCC with ample, and flexible, regulatory tools to protect consumers and implement the Communications Act's goals in a dynamic field across differing transmission networks. That is not to say that Title I regulation is perfect or even preferred over

[77] 693 F.2d 198, 203 (D.C. Cir. 1982).
[78] 693 F.2d at 208-09.
[79] *Id.*
[80] United States v. Southwestern Cable Co., 392 U.S. 157, 172-73 (1968) (internal quotations and citations omitted).
[81] *Id.*
[82] *See* Building Owners and Managers Association International v. FCC, 254 F.3d 89 (2001).
[83] *Id.* at 214 (quoting 5th Cir. and DC Cir cases).

Title II regulation for broadband access,[84] but Title I does provide the Commission with sufficient regulatory authority to address a dynamic field with targeted rules and adjudication.

III. In This Proceeding, the Commission Meets the Test to Assert Title I Jurisdiction

As noted, to exercise ancillary jurisdiction, the Commission needs merely to have subject-matter jurisdiction and exercising that jurisdiction must be reasonably ancillary to executing the Commission's responsibilities in furthering statutory goals.

A. The FCC Has Subject-Matter Jurisdiction

Comcast could not and does not challenge subject-matter jurisdiction, and the FCC has unquestionably has subject-matter jurisdiction. The FCC has jurisdiction over all communication by wire or radio, a broad definition that encompasses cable modem access. Indeed, the FCC has already held that cable modem service is "an interstate information service within the scope of our jurisdiction over interstate and foreign communications."[85] So the Commission has naturally already asserted it has subject matter jurisdiction over such services.[86] This subject-matter jurisdiction is not affected by classifying cable modem service as an information service.[87]

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[84] There are policy arguments for treating broadband provision as partly a Title II service and then forbearing from unnecessary regulation.

[85] Cable Modem Order, 17 FCC Rcd at 4848.

[86] *See also* Wireline Broadband Order, 20 FCC Rcd 14853, 14914.

[87] As noted, the jurisdictional definitions are not limited in any way to telecommunications service, but encompass "communication" by wire and radio, which are expansive and include all instrumentalities of communication of all kinds of content and media. *See, e.g.*, sources cited in *supra* notes 31, 32. Indeed, the Commission has observed that "sections 1 through 3 of Title I of the Act are broadly worded and not limited in scope to communications by carriers." *See id*. at 6455-62. The Commission found that information service provided by non-carriers was within its Title I jurisdiction: "These services and their related equipment are not less 'incidental' to the 'receipt, forwarding, and delivery of communications' because the services may be provided by non-carriers." *Id.* at 6457.

B. Prohibiting Unreasonable Discrimination by Network Providers is Reasonably Ancillary to Furthering Numerous Provisions of the Communications Act Already Asserted by the Commission

The Commission can assert its ancillary jurisdiction to protect consumers from unreasonable discrimination by facilities-bases broadband providers like Comcast. Indeed, the Commission has asserted eight provisions of the Communications Act—three in § 230 and five elsewhere—as bases for its jurisdiction to impose openness requirements on facilities-based providers. Although only one provision is sufficient for ancillary authority, we encourage the Commission to rest its analysis (in a Complaint or Rulemaking) on each basis it believes reasonably available because the Commission can only be upheld on bases provided in an order, not advanced later in litigation.[88]

The Commission has already advanced eight bases for its jurisdiction, and has asserted six of them more than once.

First, in its *Cable Modem Order & NPRM*, the FCC listed several provisions that could serve as bases for ancillary jurisdiction. The Commission understood that jurisdiction is granted by Title I itself and that it could exercise ancillary jurisdiction broadly to "further" Congressional "goals." As a result, the Commission sought comment on "explicit statutory provisions, including expressions of congressional goals, that would be furthered" by ancillary jurisdiction. *First*, the Commission proposed its basic purpose in § 1: "to make available, so far as possible, to all people of the United States … a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges."[89] *Second*, the Commission proposed the policies in § 230, setting forth the nation's Internet policy favoring

[88] *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43(1983).
[89] Cable Modem Order, 17 FCC Rcd at 4842 (quoting 47 USC §151).

vibrant competition and maximizing user control over received information.[90] *Third*, the Commission referenced the goal in § 521(4) of assuring that "cable communications" "provide the widest possible diversity of information." *Fourth*, the Commission referenced section 706 of the 1996 Telecommunications Act, which requires the Commission to promote universal availability of advanced telecommunications capability. *Fifth*, the Commission asked whether asserting ancillary jurisdiction would be analogous to its assertion of jurisdiction in the *Computer Inquiries*, where the Commission asserted jurisdiction to promote the § 1 goal of a rapid efficient network at reasonable charges. As the Commission noted, none of these provisions are limited to common carriers.[91]

Subsequently, in the Wireline Broadband Order, the Commission asserted that reclassifying facilities-based broadband access provision would not "deny [the Commission] the ability to oversee broadband interconnectivity" under §256.[92]

At the same time, in the Policy Statement, the FCC stated that it would interpret the provisions of section 230(b) of the Communications Act,[93] section 706 of the Telecommunications Act as Title I authority,[94] and alluded to §§251 and 256 on interconnection[95] for its "ongoing policy-making activities"[96] to ensure that "providers of telecommunications for Internet access or Internet Protocol-enabled (IP-enabled) services are operated *in a neutral manner*."[97] The Commission also stated that exercising ancillary authority under these provisions would help to "preserve and promote the open and interconnected nature

[90] *Id.* at 4842, n.299 (citing §§230(b)(1)-(2)).
[91] *Id. See also* SBC Communications Reply Comments, CS Dkt. No. 02-52, Aug. 6, 2002, at 20 (making this point).
[92] Wireline Broadband Order, 20 FCC Rcd 14853, ¶¶119-20 (2005).
[93] Internet Policy Statement at ¶4 (citing 47 USC §§230(b)(1) and (2)).
[94] *Id.* at ¶4.
[95] Id. at ¶4 (adopting the four principles to "promote the open and interconnected nature of the public Internet").
[96] *Id.* at ¶5.
[97] *Id.* at ¶4 (emphasis added).

of the public Internet,"[98] and "to preserve and promote the vibrant and open character of the Internet."[99]

Again, in 2007, in the Broadband Practices Notice of Inquiry, the FCC asserted its ancillary jurisdiction over broadband service and its ability to impose obligations in line with its Policy Statement, asserting bases it had already asserted. The FCC's bases included the Commission's general purpose in § 1, the national policies enumerated in sections 230(b)(1)-(3), and section 706 of the 1996 Telecommunications Act.[100]

The Commission also asserted Title I authority for other matters, including under § 258, to regulate slamming and truth-in-billing.[101]

(1) Section 706 of the 1996 Telecommunications Act

Under its ancillary jurisdiction, the Commission can make policy confirming with the Policy Statement to promote the goals of section 706 of the 1996 Telecommunications Act. Under section 706, the "Commission and each State commission with regulatory jurisdiction over telecommunications services *shall* encourage the deployment on a reasonable and timely basis of advanced capability to all Americans."[102] Advanced telecommunications capability refers to a "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any

[98] *Id.* at ¶4 (certain emphases removed).
[99] *Id.* at ¶5.
[100] Broadband Industry Practices NOI, 22 FCC Rcd. 7894, §§7, and 2-6.
[101] Wireline Broadband Order, 20 FCC Rcd 14853, 14914. In that Wireline Broadband Order, the Commission found that, "among other provisions of the Act," certain regulations would be "'reasonably ancillary' to the Commission's responsibilities to implement sections 222 (customer privacy), 255 (disability access), and 258 (slamming and truth-in-billing)." *Id.* The Commission also found that the Commission could impose network reliability, emergency preparedness, national security, and law enforcement requirements as reasonably ancillary to the Commission's obligation, under §151, to make available "a rapid, *efficient*, Nation-wide and world-wide wire and radio communications service." Wireline Broadband Order, 20 FCC Rcd 14853, 14914 (emphasis in original).
[102] 47 USC §157 nt. (incorporating section 706 of the Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996)) (emphasis added).

technology" and "without regard to any transmission media or technology."[103] The Commission's directive applies to cable modem service.[104] In interpreting its statutory mandates, in the *Cable Modem Order & NPRM*, the Commission stated that its "primary policy goal" is to "encourage the ubiquitous availability of broadband to all Americans."[105] The Supreme Court stated that section 706 provides "a general instruction to the FCC."[106]

This provision is not deregulatory, but provides the Commission with a range of regulatory and deregulatory means to promote universal deployment. The FCC and state commissions are to use, "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."

Applying the Policy Statement will further the Commission's obligations under section 706, while a lack of jurisdiction would frustrate the Commission's ability to fulfill these obligations.

First, if the FCC doesn't act, then the basic purpose of section 706 will be undermined for all 14.1 million users of Comcast's broadband offering. The Commission "shall" encourage timely universal deployment of capability that "enables users to *originate and receive* high-quality voice, data, graphics, and video telecommunications *using any technology*" over any transmission medium.[107] At least some Comcast users cannot originate and receive these telecommunications using particular technologies—peer-to-peer technologies. Users hoping to

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[103] *See* §706(c)(1).
[104] *See* Cable Modem Order, 17 FCC Rcd at 4823 ("Advanced telecommunications capability" includes both information services and telecommunications services, as it is defined as a type of "telecommunications."). The FCC has already determined that some cable modem services cable modem service often qualifies as "advanced telecommunications capability" based on the speeds it offers. *Id.* at 4839.
[105] *See* Cable Modem Order, 17 FCC Rcd 4798, 4801.
[106] NCTA v. Gulf Power Co., 534 US 327, 339 (2002).
[107] *See* §706(c)(1) (emphasis added).

communicate with those users are similarly unable to originate and receive such content. For example, Robb Topolski, a Comcast user, was unable to originate voice and data (19th Century barbershop quartets) by using Gnutella technology. As a result, this user, and Comcast's other consumers seeking to originate content, are all deprived of advanced telecommunications capability. To ensure that such capability is made available to "all Americans," as section 706 requires (and "in all regions of the Nation"—not just those outside of Comcast's service area and those not attempting to communicate with Comcast subscribers—as §254(b)(2) requires) the Commission must assert Title I jurisdiction to outlaw discriminatory protocol-filtering.

Second, as the Commission determined in the Policy Statement, if consumers can access all content, applications, and devices, with competition, then deployment and adoption will increase. The Policy Statement adopts each of the four principles partly "[t]o encourage broadband deployment."[108] Indeed, consumers purchase advanced telecommunications capability because of the applications and content available online. As we argued in our Reply Comments, high-definition video services will likely increase adoption.[109] The Commission has already determined that access to innovative services will increase adoption. The Commission held that, because VoIP service is "often accessed over broadband facilities, there is a nexus between the availability of VoIP services and the goals of Section 706 of the Act."[110] Under Title I and section 706, the Commission can use "measures that promote competition in the local telecommunications market," and ensuring nondiscrimination promotes competition in the local market for telecommunications—in video, voice, and data.

On the other hand, if network operators like Comcast are permitted to block or degrade innovative new applications, then adoption and deployment will decline. If network providers

[108] Internet Policy Statement, at ¶4.
[109] Free Press et al. Reply Comments, at 34.
[110] Time Warner Cable Request for Declaratory Ruling, 22 FCC Rcd 3513, 3519 (2007).

can block or degrade applications, investment and innovation in all applications will decrease, as innovators will face increased uncertainty and a likelihood of degradation.[111] Because of this, an "end to end" principle fosters more innovation in applications than centralized degradation and blocking.[112] With less application-innovation, adoption and deployment decreases.

Third, if the Commission could not act here under its ancillary jurisdiction, the Commission would be unable to remove the "barriers to infrastructure investment" inherent in Comcast's blocking. Commission can use "other regulating methods that remove barriers to infrastructure investment." Comcast has chosen to cut capital expenditures[113] and, rather than investing to keep up with the consistent and predictable demand for broadband services,[114] is investing in blocking technologies—hoping to profit from scarcity. Thus, Comcast is forcing users to receive high-definition video not from peer-to-peer supported websites like Miro and Vuze, but (as Comcast often announces)[115] from Comcast's video-on-demand, pay television, and online companies. Indeed, recently Comcast's COO declared that, "in his vision, he would

[111] Testimony of Barbara Van Schewick, FCC En Banc Hearing at Stanford University on Broadband Network Management Practices, April 17, 2008. *See also* Barbara van Schewick, "Towards an Economic Framework for Network Neutrality Regulation," 5 *J. Telecom. & High Tech. Law* 329 (2007); Brett M. Frischmann & Barbara van Schewick, "Network Neutrality and the Economics of an Information Superhighway: A Reply to Professor Yoo," 47 *Jurimetrics* 383–428 (2007); *see also* Sony Electronics Comments at 2-4; Testimony of Scott Smyers, Senior Vice President, Sony Electronics Inc, FCC En Banc Hearing on Broadband Network Management Practices, Cambridge, MA, Feb. 25, 2008, Second Panel.

[112] *See* Mark A. Lemley & Lawrence Lessig, "The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era," 48 *UCLA L. Rev.* 925 (2001).

[113] Comcast, "Comcast Reports 2007 Results and Provides Outlook for 2008," Feb. 14, 2008, Available at http://library.corporate-ir.net/library/11/118/118591/items/279702/Q407_PR.pdf.

[114] Steve Lohr, "Is the Exaflood Coming?," *NY Times BITS Blog*, Nov. 30, 2007, http://bits.blogs.nytimes.com/2007/11/30/is-the-exaflood-coming/; Steve Alexander, "A Net in Neutral?," Star Tribune, Sept. 15, 2007, http://www.startribune.com/science/11619986.html; *see also* Andrew Odlyzko's site at http://www.dtc.umn.edu/mints/home.html.

[115] Press Release, "Comcast CEO Brian L. Roberts Announces Project Infinity: Strategy to Deliver Exponentially More Content Choice On TV," Jan. 8, 2008, Comcast, http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=724.

like to have everything that the Internet has in the way of video, and deliver it to the consumers over Comcast's cable-based distribution system."[116]

Finally, Comcast makes the irrelevant argument that section 706 is not an independent grant of statutory authority.[117] As discussed above, authority derives from Title I itself. If 706 *were* an independent grant of authority here,[118] the Commission would be acting pursuant to *that provision*'s authority, not its ancillary authority, so it would be jurisdiction either way.

(2) Section 1, 47 U.S.C. § 151

As the Commission proposed in its *Cable Modem Order & NPRM* and *Broadband Practices NOI*, the Commission can prohibit unreasonable discrimination under § 151. Section 151 charges the Commission with the basic purpose "to make available, so far as possible, to all people of the United States … a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges."[119] While §151 is not necessarily the strongest source for Title I authority on which the Commission could rely, ensuring nondiscriminatory networks would in fact further §151's goals. Ensuring nondiscriminatory networks would make broadband services more available and would ensure "adequate facilities," as companies like Comcast will be more likely to upgrade their networks adequately to handle consumer demand, rather than cutting capital expenditures, hiring network-blocking services, and making 80% profits on its broadband charges (apparently its current

[116] Tim Bajarin, "The Cable Industry Might Actually Get It," *PC Magazine*, May 23, 2008, http://www.pcmag.com/article2/0,2704,2308068,00.asp.
[117] *See* Comcast Reply Comments, at 43.
[118] It may be here. In the decision cited by Comcast, the Commission found that 706(a) does not provide independent *forbearance* authority to forbear from the explicit dictates of sections 251 and 271 of the Act, and thus expand the explicit exclusions to the Commission's forbearance authority in section 10(d). In deciding that limited matter, the Commission apparently suggested, and only in dicta, that 706(a) is not an independent grant of authority. *See* Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 FCC Rcd 24012 (1998). Indeed, the Commission has listed §706 as a legal basis for its decisions in several orders, including the Cable Modem Order, 17 FCC Rcd at 4855.
[119] Cable Modem Order, 17 FCC Rcd at 4842 (quoting 47 USC §151).

business plan).[120] Ensuring nondiscriminatory networks would also ensure that consumers receive these services at "reasonable" charges, as consumers would pay far more if Comcast can maintain its video programming monopolies through blocking high-definition online content. Moreover, the costs of evading Comcast's blocking—or of bribing Comcast for carriage—would be passed onto consumers in the form of higher costs for communications services.

(3) Section 230(b)(3)

The FCC has ancillary authority to act on complaints in a manner consistent with the Policy Statement under § 230, which lays out congressional findings and policy about the Internet. Under the policies of § 230(b), first, the FCC must use its ancillary jurisdiction to ensure diverse and accessible Internet speech. Section 230(b)(3) announces a federal policy "*to encourage* the development of technologies which *maximize user control over what information is received* by individuals, families, and schools who use the Internet and other interactive computer services."

The FCC must use its ancillary jurisdiction so that this important policy is not frustrated. When Comcast or another network provider blocks or degrades particular applications used to provide particular content, then user control is not maximized. The FCC's inability to assert jurisdiction would frustrate the national policy of maximizing user control over what information is received. Users like Robb Topolski and the viewers of Miro's 3500 high-definition online channels should have the maximum control over determining what information they receive, through the channel they want to receive information on.

[120] Vishesh Kumar, "Is it Time to Tune in to Cable?," *Wall Street Journal*, April 3, 2008, Available athttp://money.aol.com/news/articles/qp/ap/_a/is-it-time-to-tune-in-to-cable/rfid88603833.

(4) Section 230(b)(2)

In addition to ensuring free speech, 230(b)(2) provides the FCC ancillary jurisdiction to ensure vibrant online competitive markets. The FCC quotes this provision in the Policy Statement as one basis for its jurisdiction.[121] Section 230(b)(2) announces 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."

The Policy Statement's principles are firmly grounded in this congressional policy. This section applies especially to the fourth principle, which ensures competition in Internet services, content, application, and devices. The Policy Statement's other principles can also be enforced straight from this statutory language—the competitive free market that "presently" existed for the Internet in 1996 consisted of consumers' unfettered access to all online services, content, applications, and devices. As we argued in our Petition, peer-to-peer services are the future of online high-definition television, and Comcast has an anticompetitive motive to stifle such content, thereby undermining competition.[122] As Verizon has stated, "The most innovative broadband applications—streaming video programming and movies on demand—compete with the core monopoly product offered by cable operators."[123] Access to all content and applications will ensure the most vibrant competitive market, as numerous commenters have noted.[124]

Nothing in the provision's six-word phrase "unfettered by Federal or State regulation" supports Comcast's argument against jurisdiction. Comcast argues that the FCC lacks jurisdiction to prohibit Comcast's anticompetitive and unreasonable discrimination by taking this

[121] Internet Policy Statement, at ¶2.
[122] *See* Free Press et al. Petition at 20-22.
[123] *See* Verizon Comments, CS Dkt. No. 02-52, June 17, 2002, at 18.
[124] In this proceeding alone, see Center for Democracy & Technology Comments at 4; National Association of State Consumer Utility Advocates Comments at 7; National Association of Realtors Comments at 2; Open Internet Coalition Comments at 4; Sony Electronics Comments at 1; Vonage Comments at 2; Computer & Communications Industry Association Reply Comments at 4. In other proceedings, see also Free Press et al. Comments at 18._

six-word phrase out of linguistic and historical context, violating basic statutory interpretation. Comcast's argument requires the Commission to believe, contrary to Supreme Court precedent, that Congress is hiding a jurisdictional "elephant" in a statutory "mousehole."[125]

First, this section is irrelevant to Comcast's provision of broadband access, as the provision refers to "the Internet," and Comcast is not the Internet. The subsection defines the "Internet" as "the international computer network of both Federal and non-Federal interoperable packet switched data networks."[126] Another statutory provision, § 231, describes the Internet as "the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide network of computer networks that employ the Transmission Control Protocol/Internet Protocol or any successor protocol to transmit information."[127] In addition, in 1997, the Supreme Court described the Internet similarly as "an international network of interconnected computers."[128]

Comcast is not "the international computer network of both Federal and non-Federal interoperable packet switched data networks." It is a company providing (albeit unreasonably discriminatory) *access to* that international computer network. MIT professor and Internet "father" David Reed made this point explicitly in his testimony at the Harvard en banc hearing, stating in his written testimony: "Internet Access Providers do not create the Internet for their customers, instead they provide access to a larger collective system, of which they are a small part."[129] One opponent of network neutrality rules has conceded: "I can find no place in which Congress or the FCC affirmatively or officially decided that cable was the Internet and,

[125] Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001).
[126] *See* 47 USC §230(f)(1).
[127] 47 USC §231(e)(3).
[128] Reno v. ACLU, 521 U.S. 844, 849 (1997).
[129] Testimony of Dr. David P. Reed, At the FCC En Banc Hearing on Broadband Network Management Practices, Cambridge, MA, Feb. 25, 2008, Second Panel, p. 1.

therefore, cable infrastructure should be 'unfettered by Federal or state regulation.'"[130] Indeed, the statute makes clear that Congress understood the difference between "the Internet" and those providing *access to* the Internet because it defined the two terms separately.[131] Comcast is not the "Internet" and so §230(b)(2) does not speak to "regulation" of Comcast.

Second, not only must "unfettered by regulation" be read in reference to what it modifies (the Internet), but also to the findings of section 230. The findings note that the Internet has flourished, to the "benefit of all Americans," with a "minimum of government regulation."[132] Congress did not refer to the "benefit of broadband access providers" or to "no regulation." Rather, a basic "minimum" level of government regulation can be expected to benefit the nation generally. As we note in our Reply Comments, § 230(b)(2) refers to the free market that "presently" existed for the Internet in 1996.[133] That free market was supported by common carriage rules imposed on phone carriers. In 1996, Congress could not have predicted that the Commission would classify cable modem services (which were not yet on the market)[134] as an information service. The Commission can go at least that far without violating the spirit of §230(b)(2). Merely enforcing nondiscrimination by facilities-based Internet access providers (while not even regulating "the Internet") is minimal regulation.

Representative Pickering made this point at a hearing before the House Subcommittee on Telecommunications and the Internet within the Committee on Energy and Commerce. He noted

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[130] Testimony of Scott Cleland, Managing Director, Legg Mason Precursor Group, Hearing before the Committee on the Judiciary, House of Representatives, 106th Congress, 1st Session, June 30, 1999.

[131] Section 231 also has a specific definition for "Internet Access Service," which likely includes ISPs like Comcast, and therefore is clearly not the "Internet." *See* 47 USC §231(e)(4))("The term 'Internet access service' means a service that enables users to access content, information, electronic mail, or other services offered over the Internet. … Such term does not include telecommunications services."). *Compare also* 47 U.S.C. § 151 note (Internet Tax Freedom Act), at (3)(C) and 3(D) (defining "Internet" and "Internet access service"); *see also* H.R. 3678, Internet Tax Freedom Act Amendment Acts of 2007, 110th Congress (Public Law 110-108)..

[132] *See* 47 U.S.C. § 230(a)(4).

[133] *See* Free Press et al. Reply Comments at 46.

[134] *See* AT&T Comments, GN Dkt. No. 00-185, Dec. 1, 2000, at 37 (providing timeline).

that the principles of the Policy Statement are minimal ground rules that were first proposed under and adopted by deregulatory Republican FCC Chairmen.[135] As Mr. Pickering also noted, the Republican-led COPE Act passed by the House in 2006 provided for enforcement of the Policy Statement on a case-by-case basis.[136]

(5) Section 230(b)(1)

An inability to enforce the principles set forth in the Policy Statement would frustrate the congressional policy stated in § 230(b)(1), a provision the Commission has quoted as one basis for jurisdiction.[137] Section § 230(b)(1) declares the national policy "to promote the continued development of the Internet and other interactive computer services and other interactive media."

As noted above, this policy of "continued development" must be read in context with the rest of the section. The Commission should develop the Internet along the lines of the section's findings: to continue the vibrant competitive marketplace, the forum for political and cultural diversity, and the interoperable international network. In § 230, Congress found that the Internet offers "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual curiosity."[138] Congress also found that "[i]ncreasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment service."[139]

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[135]. Opening statement of Rep. Pickering, House Committee on Energy and Commerce, Subcommittee on Telecommunications & the Internet, Hearing on H.R. 5353, the Internet Freedom Preservation Act of 2008, May 6, 2008 ("Chairman Powell is probably one of the most recognized free market advocates, deregulatory advocates but he saw that the purpose of having an open network so he set the principles out, this has been maintained by another Republican Chairman Kevin Martin.").

[136] *Id.* ("This Committee last year, in the last Congress, excuse me, as we laid out the COPE act, we reaffirmed in that legislation network neutrality principles. In fact we codified them and in some negotiations had agreed to do a proceeding, much further than where this bill [the Markey-Pickering bill] is.").

[137] *See* Internet Policy Statement, at ¶2.

[138] *See* §230(a)(3).

[139] *See* §230(a)(5).

The Supreme Court's description of the Internet in 1997 similarly suggests that the Commission should encourage development that ensures consumers can originate and receive any and all content and applications without unreasonable discrimination. The Court wrote:

> From the publishers' point of view, [the Internet] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can "publish" information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals. Publishers may either make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege. "No single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be blocked from the Web."[140]

Congress's policy of "continued development" should be read as development *along the lines of* these congressional findings and this Supreme Court understanding.

Indeed, Congress found that the Internet "offers users a great degree of control over the information that they receive, as well as the *potential* for even greater control in the future as technology *develops*."[141] It is in this context that national policy is to ensure "continued development" to continue Internet's openness and help it reach its full potential for user control over information.

Failure to exercise ancillary jurisdiction would thwart development along these lines. Comcast would be able to block consumers' access to the diversity of political discourse available on Miro, such as Democracy Now!, PBS, ABC, and other political and religious outlets who rely on this inexpensive distribution method. Mr. Topolski's classic barbershop quartet recordings are indeed a "unique opportunity for cultural development," as are the services

[140] Reno v. ACLU, 521 U.S. 844, 853 (1997).
[141] *See* § 230(a)(2) (emphasis added).

offered by Miro, Vuze, BitTorrent, and others. The Commission should ensure these services do and will reach all consumers.

Therefore, policy should ensure the Internet develops competitively (rather than with anticompetitive blocking or discrimination), with the widest diversity of political and cultural speech and user control over speech—supporting rather than undermining Vuze, Inc., Miro, and barbershop quartet fans. Policy should also ensure that the Internet remains, as the above findings specified, an interoperable network.

(6) Section 521(4)

If the Commission could not interpret its Congressional directives pursuant to the Policy Statement under ancillary authority, then the Congressional policy in § 521(4) would be frustrated. In the Commission's *Cable Modem Order & NPRM*, the Commission suggested that this section would serve as a basis for ancillary jurisdiction. Section 521(4) states that the one purpose of Title VI is to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public." Cable "communications" are not merely "cable services." Definitions in the act for "communications"—such as communications by wire or by radio—are far broader than definitions for services—such as information, cable, or telecommunications services.[142] Ensuring that broadband access is "neutral" and "open," as the Policy Statement states, and the forum for true diverse political and cultural speech praised by Congress in 1996, will ensure the widest diversity of information sources are available "to the public." If the FCC cannot ensure open Internet access, this important federal objective would be frustrated.

The context of this provision also supports the need to exercise ancillary jurisdiction. Section 521(6) names another purpose as "promoting competition in cable communications"

[142] *See* 47 USC § 153 for all these definitions.

while not imposing "unnecessary regulation that would impose an undue economic burden on cable systems." As "cable communications" consists broadly of all communication by cable, an open Internet would promote competition among these communications. Moreover, a case-by-case adjudicatory approach or network neutrality rule would not be "unnecessary"—as consumers must be protected and Comcast has demonstrated its willingness to discriminate unreasonably and anti-competitively. Nor would an open Internet policy impose an "undue economic burden;" Comcast makes 80% profits on its broadband product.[143] Moreover, cable operators have repeatedly pledged to provide an open Internet, claiming such an offering is in their economic interest, not that it is an undue economic burden that could reduce their profit margins anywhere near what a competitive market would support.[144]

In relying on this provision for cable modem access, the Commission could also rely on other provisions for other technologies, such as mobile and DSL services.[145]

(7) Analogy to *Computer Inquiries*

As the Commission suggested in its *Cable Modem Order & NPRM*, asserting ancillary jurisdiction here would be analogous to its assertion of jurisdiction in the *Computer Inquiries*.

First, in the *Computer Inquiries*, the Commission imposed obligations on certain information service providers, including certain of those providing a telecommunications component, not because those providers offered telecommunications service but because of the Commission's findings and predictions regarding market outcomes. As the Supreme Court noted, in *Computer II* and *Computer III*, the "differential treatment of facilities-based carriers

[143] *See* Vishesh Kumar, "Is it Time to Tune in to Cable?," Wall Street Journal, April 3, 2008, Available at http://money.aol.com/news/articles/qp/ap/_a/is-it-time-to-tune-in-to-cable/rfid88603833.
[144] *See* Free Press et al. Comments at Appendix 2.
[145] These could include §332(a)(2)-(3) for mobile services (requiring the Commission to consider spectrum efficiency, competition, and access to the largest feasible number of users for private mobile services), and numerous provisions in Title II, including 47 USC § 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.")

was therefore a function not of the definitions of 'enhanced-service' and 'basic service,' [the precursors to the information-telecommunication distinction] but instead of a choice by the Commission to regulate more stringently, in its discretion, certain entities that provided enhanced service."[146]

Here, SBC Communications made the argument in 2002 as well as we can make it now:

> [C]able operators ignore the fact that the Commission retains the legal authority to regulate the telecommunications component of cable broadband Internet access services as a telecommunications service under Title II. … The Commission clearly could have regulated the telecommunications component of cable modem services as a Title II service if it had chosen.[147]

As SBC points out, cable modem service has a telecommunications component, and the Commission can assert regulation based on that component, and can impose Title II or other requirements on cable modem service as a result.[148] As in *Computer II*, the Commission can determine that the market in broadband provision is not sufficiently competitive, nor are there other adequate consumer safeguards, to ensure that consumers receive reasonably nondiscriminatory access to the Internet.[149] Indeed, the Commission has been explicit that Title II obligations are "mandatory" on telecommunications carriers,[150] suggesting certain obligations are permissive on other carriers.

Second, in *Computer II*, the FCC's regulation was also ancillary to the goals of § 151 itself, which require the Commission, in the reviewing Court's words, "to assure a nationwide

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[146] *See, e.g.*, Brand X, 545 U.S. at 996. *See also* Free Press et al. Reply Comments at 47

[147] SBC Communications Reply Comments, CS Dkt. No. 02-52, Aug. 6, 2002, at 21.

[148] Other information services, like stand-alone VoIP or other applications, lack a telecommunications component. *See* Petition for Declaratory Ruling re Pulver.com, 19 FCC Rcd 3307, 3312 (2004).

[149] Indeed, despite arguments that the *Madison River* case pertains only to Title II, that case may serve as precedent; that case does not specify if Title II or Title I jurisdiction is being invoked and the Internet Policy Statement cites that case, apparently as precedent. *See* Madison River LLC and Affiliated Companies, File No. EB-05-IH-0110, Order, 20 FCC Rcd 4295 (Enf. Bur. 2005) (cited in Policy Statement, n.12).

[150] *See, e.g.*, Time Warner Telecom, Inc. v. FCC, 507 F.3d 205, 213 & n.13 (3d Cir. 2007) (specifying Title II is "mandatory" on telecommunications service providers).

system of wire communications services at reasonable prices."[151] Here, the Commission can assure such a network, as discussed above regarding the Commission's authority under § 151.

(8) Section 256

Section 256 supports the Commission's exercise of ancillary jurisdiction to enforce the nondiscrimination requirements in the Policy Statement for any public telecommunications network, including Comcast's, that interconnects directly or indirectly with "public telecommunications networks used to provide telecommunications service." Section 256 requires the Commission to "ensure the ability of users and information providers to seamlessly and transparently transmit and receive information between and across telecommunications networks."[152] Section 256 also requires the Commission to "establish procedures for Commission oversight of coordinated network planning by telecommunications carriers" and allows the Commission to participate in standards setting bodies to ensure the communication and exchange of information "without degeneration."[153] That provision also requires the Commission "to promote access to … *information services* by subscribers of rural telephone companies,"[154] and such subscribers include over 19 million lines.[155] Section 256 is not limited to telecommunications services. Adjudicating to enforce the principles in the Policy Statement is a means by which the Commission can accomplish the goals of Section 256.

The Commission has previously invoked section 256 authority in connection with broadband services. The Policy Statement itself adopted each of the four principles partly to ensure an "open and interconnected Internet,"[156] thus invoking the Act's interconnection

[151] *See* CCIA v. FCC, 693 F.2d 198, 213 (1982).
[152] 47 U.S.C. § 256(a)(2).
[153] 47 U.S.C. § 256(b) and (d).
[154] 47 U.S.C. §§ 256(b)(2) (emphasis added).
[155] See Reply Comments of Consumers Union et al., WC Docket No. 05-337, June 2, 2008, at 24, figure 3 (first two entries under "Supported Lines").
[156] Policy Statement, at ¶4.

provisions. In the accompanying Wireline Broadband Order, the Commission concluded that §256 "affords the Commission adequate authority to continue overseeing broadband interconnectivity," and that §256 does so "regardless of the legal classification of wireline broadband Internet access service."[157] The Commission noted that a specific "purpose of section 256 is 'to ensure the ability of users and information providers to seamlessly and transparently transmit and receive information between and across telecommunications networks.'"[158] The Commission rejected an argument that "classifying wireline broadband Internet access service as an information service would deny [the Commission] the ability to oversee broadband interconnectivity."[159] Rather, the Commission agreed with Commenters including SBC Communications that the Commission retains authority to address network interconnection and interoperability.[160] The Commission's analysis of its authority is correct. While the Commission need not require interconnection here, it can ensure that when a network provider like Comcast does interconnect with public networks used to provide telecommunications service, that interconnection will not undermine the Commission's responsibility to ensure users and information providers can transmit and receive information seamlessly and transparently on telecommunications networks.

Comcast is a "public telecommunications network" that chooses to interconnect directly or indirectly under section 251(a) with other public telecommunications networks. Many of those networks with which Comcast has voluntarily chosen to interconnect for its own benefit are public telecommunications networks that "are used to provide telecommunications service"

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[157] *See* Wireline Broadband Order, 20 FCC Rcd 14853, ¶120 (2005).
[158] Id. (citing 47 U.S.C. §256(a)(2)) (emphasis added).
[159] *Id.*
[160] *Id.* (citing Comments of SBC Communications, Inc., CC Docket No. 02-33, May 3, 2002, at 41 ("Commission action in this proceeding will not constrain its ability to address generic interconnectivity and interoperability issues.")). *See also id.* (discussing the recommendations of the Network Reliability Council)

and are thus directly covered by the plain language of section 256.[161] When users and information providers using a network like Verizon's or a rural telephone company's—a public telecommunications network used to provide telecommunications service—attempt to access p2p information services that relies on communicating with users on Comcast's system, Comcast's policy of blocking or degrading p2p transmissions interferes with the ability of those users and information providers "to seamlessly and transparently transmit and receive information" or to "access … information services."[162] The Commission will be unable to fulfill its Congressional mandate under §256 unless it acts to ensure that networks like Comcast's—public telecommunications networks *perhaps*[163] not used to provide telecommunications services that interconnect with networks that are so used—cannot discriminate to produce non-transparent, non-seamless, or degenerated exchange of information for users, providers, and networks. Indeed, the Commission may be unable to protect even telecommunications services, such as phone-to-phone VoIP; consumers must rely on a seamlessly, transparently interconnected Internet for their phone-to-phone VoIP calls to terminate.[164]

The Commission has repeatedly asserted its authority to use ancillary authority to extend Title II obligations to services that interconnect with Title II networks when necessary to effectuate the Commission's Title II goals and duties. In deciding to impose Title II accessibility

[161] "Telecommunications networks" "used to provide" telecommunications service are not synonymous with "telecommunications service." If they were, Congress would have simply referred to telecommunications services. Congress referred to telecommunications networks "used to provide telecommunications service" only in §256, three times, and nowhere else in the Act. 47 U.S.C. §§ 256(a)(1); 256(a)(1)(B)(2); 256(d). Rather, "telecommunications networks" are not telecommunications services but merely have a telecommunications component, and so include DSL and cable. *Cf.* Federal-State Joint Board On Universal Service, 13 FCC Rcd. 11,501, 11,503 (1998) ("By connecting our nation's telecommunications networks to all citizens, we expand the potential customer basis for information services.").

[162] *See also* Harold Feld, "Look! My Solution Found A Problem! Comcast Degrades BitTorrent Traffic Without Telling Users," *Wet Machine*, Oct. 21, 2007, http://www.wetmachine.com/item/912 (discussing the possibility of a Balkanized Internet).

[163] Comcast's VoIP product may be a telecommunications service.

[164] Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, 19 FCC Rcd. 7457, 7457-58; 7465 (2004).

requirements the Commission found that certain information services, such as voicemail and interactive menus, were so "integral to the use of telecommunications service" that it imposed Title II disability accessibility requirements on them.[165] The Commission also extended numerous Title II obligations on interconnected VoIP providers through its ancillary authority. In 2005, the Commission asserted jurisdiction under Title I and § 251(e) to require interconnected VoIP providers to supply 911 emergency calling capabilities. In 2006, the Commission established universal service obligations for interconnected VoIP providers subject both to its permissive authority under § 254(d) using its ancillary jurisdiction.[166] In 2007, the Commission imposed § 222's customer proprietary network information obligations on "interconnected VoIP providers using its Title I authority."[167] Also in 2007, the Commission used ancillary authority to impose disability access requirements under § 255 to manufacturers of specialized equipment, as well as extending Telecommunications Relay Services requirements under § 255(b)(1) to interconnected VoIP providers.[168] Later in 2007, the Commission invoked its ancillary jurisdiction, in the alternative and in addition to other jurisdiction, to impose number portability requirements on interconnected VoIP providers.[169]

In this proceeding, Comcast has chosen to avail itself of direct or indirect interconnection with public telecommunications networks that provide telecommunications services due to the benefits such interconnection provides to Comcast and its users. Yet Comcast refuses to interconnect "seamlessly" and without degenerating or degrading certain information services. This undermines the Commission's ability to oversee interconnection of public telecommunications networks and to ensure the ability of users and information providers on

[165] *See* Implementation of Sections 255 and 251(a)(2), 16 FCC Rcd. 6417, 6455-62 (1999).
[166] *See, e.g.*, Vonage Holdings Corp. v. FCC, 489 F.3d 1232 (2007).
[167] *See* Telephone Number Requirements for IP-Enabled Services Providers, 22 FCC Rcd 19,531, 19539-48 (2007).
[168] *See id.*
[169] *See id.*

those interconnected networks, including rural telephone companies' networks, to seamlessly and transparently send and receive information without degeneration.

IV. If the Commission Somehow Lacked Ancillary Jurisdiction, Much Existing Law and Preemption Authority Could Be Called Into Question

If Comcast is right that the FCC lacks all ancillary authority to protect consumers of broadband services, then the Commission may lack the authority to preempt similar state regulation of broadband services. The Commission can only preempt state regulation where it has jurisdiction.[170] If the Commission lacks jurisdiction to ensure reasonably nondiscriminatory broadband access, states would likely have the authority to impose network neutrality and other regulations on a state-by-state basis, with the Commission having no preemption authority.[171]

Moreover, if Comcast's limited reading of the Commission's Title I authority is accurate, then the Commission's authority over numerous Title I services may be under question, including the Commission's authority over satellite services provided on a private carrier basis, submarine cables, for-profit microwave systems, dark fiber, and certain mobile services.[172]

As it stands, no party has cited a limit relevant to this case. Comcast has cited *American Library Association v. FCC*[173] as a potential limit on the Commission's ancillary jurisdiction. In

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[170] *See, e.g.*, City of New York v. FCC, 486 U.S. 57, 63-64 (1988); New York State Commission on Cable Television v. FCC, 749 F.2d 804, 808 (D.C. Cir. 1984) (determining that the FCC could preempt state cable regulation, before the 1984 Cable Act, where its Title I authority applied); CCIA v. FCC, 693 F.2d 198, 209, 215-17 (DC Cir. 1982) (FCC preempted regulation of enhanced services through its ancillary jurisdiction); Capital Cities Cable, Inc. v. Crisp, 467 US 691, 704 (1984) (upholding the Commission's authority to preempt local cable regulations under Title I authority); Petition for Declaratory Ruling re Pulver.com, 19 FCC Rcd 3307, 3315-18 (2004) (asserting jurisdiction over stand-alone VoIP service and preempting state regulation under Title I); Brookhaven Cable TV, Inc. v. Kelly, 573 F.2d 765 (1978) (upholding preemption of state price regulation of cable television). Compare these cases with those such as Illinois Citizens Committee for Broadcasting v. FCC, 467 F.2d 1397 (1972) (upholding the FCC's refusal to preempt state zoning laws which fell outside its Title I authority); NARUC v. FCC, 880 F.2d 422 (1989) (rejecting the Commission attempt to preempt state regulation under Title I, finding preemption exceeded the Commission's Title I jurisdiction in that case).

[171] Despite arguing for limited Title I authority, Comcast somehow argues for expansive preemption authority under the very sources of statutory authority it claims too weak to support Title authority: §§230(b) and §706 of the 1996 Telecommunications Act. *See* Comcast Comments, CS Docket No. 02-52, June 17, 2002, at 33.

[172] For citations and numerous additional examples of services regulated under Title I, see Verizon Comments, CS Dkt. No. 02-52, June 17, 2002, at 13 and Exhibit D (providing a list of such services).

[173] 406 F.3d 689, 702 (2005).

that case, the FCC exceeded its ancillary jurisdiction by imposing broadcast flag requirements on television-makers. But, there, the FCC failed the *first* prong, which is whether Title I applies at all, not the second prong of whether the FCC's act was ancillary to its statutory responsibilities. That is, Title I did not apply because the broadcast flag requirement applied *after* the "communication" by radio or wire had been completed, so the Act did not extend to include the broadcast flag.[174] There is no question here that broadband service is an interstate information service, therefore an interstate communications, and therefore covered by Title I.[175]

Nor does *Motion Picture Association of America, Inc. v. FCC*,[176] limit the Commission here. That case addressed whether the Commission could mandate video description for the blind. But the Court held that Congress had forbidden the FCC from dictating content to broadcasters,[177] and no such prohibition has been cited or applies here.

V. Comcast Is Currently Arguing to a Federal Court That the Commission Has Jurisdiction Under These Provisions To Address Anti-Consumer Network "Management"

Despite its claims before the Commission, Comcast is passionately arguing—to a federal court—that the Commission has Title I jurisdiction to adjudicate complaints under the Policy Statement. Comcast currently faces several class actions for defrauding and deceiving consumers by blocking peer-to-peer applications secretly. One of those class actions is in the federal district court for the Northern District of California.[178] Comcast filed a Memorandum of Law in Support of Motion for Judgment on the Pleadings filed on March 14, 2008, Comcast completely reversed its opinion of the Commission's jurisdiction (filed three days after the letter

[174] *Id.* at 700; 703.
[175] Cable Modem Order, 17 FCC Rcd at 4848.
[176] 309 F.3d 796 (D.C. Cir. 2002)
[177] 309 F.3d at 805 ("To avoid potential First Amendment issues, the very general provisions of § 1 have not been construed to go so far as to authorize the FCC to regulate program content. Rather, Congress has been scrupulously clear when it intends to delegate authority to the FCC to address areas significantly implicating program content.").
[178] Hart v. Comcast, Case No. C-07-06350 PJH, N.D. Ca.

filed by David Cohen and Comcast attorneys with the Commission).[179] Comcast leads with the argument that all claims regarding network management are "Within the FCC's Primary Jurisdiction."[180] In urging the court to stay the case, Comcast writes that the conduct at issue in that case "falls squarely within the FCC's subject matter jurisdiction."[181] Most explicitly, Comcast cites several orders as support for its newfound belief in the Commission's jurisdiction (a belief it never communicated to the Commission following the March 11 letter):

> Any inquiry into whether Comcast's P2P management is unlawful falls squarely within the FCC's subject matter jurisdiction. *See* … In re Inquiry Concerning High-Speed Access to the Internet Over Cable, 17 F.C.C.R. 4798, ¶ 77 (2002), aff'd National Cable Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 976, 980, 996 (2005); In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 20 F.C.C.R. 14853, ¶ 109 (2005); In re Broadband Industry Practices, NOI, 22 F.C.C.R. 7894, ¶ 4 (2007); see also AT&T Corp. v. City of Portland, 216 F.3d 871, 879-80 (9th Cir. 2000).

Notably, of course, Comcast is citing paragraph 4 of the Broadband Industry Practices, NOI. That paragraph states, with unmistakable clarity: "The Commission, under Title I of the Communications Act, has the ability to adopt and enforce the net neutrality principles it announced in the Internet Policy Statement." We are encouraged by Comcast's admission.

VI. Title I Jurisdiction Over Internet Matters Has Limits

As the Commission knows, the Commission cannot contravene the Communications Act in exercising its ancillary authority. Therefore, the Commission generally cannot overly "fetter" *the Internet* (not Internet access providers), nor promote technologies permitting users only to receive and not also to originate content, nor minimize user control of the information they receive, nor undermine the interconnected nature of the Internet, etc. Certain intrusive

[179] Comcast *Ex Parte*, March 11, 2008 (claiming the "basic answer" to the question of whether the Commission has authority here is "no").
[180] Comcast Motion, at 10-13.
[181] Comcast Motion, at 12.

regulations of non-facilities-based information providers would thus likely exceed such limits. These limits, however, are implicated in the case involving Comcast's degradation and blocking of peer-to-peer protocols. In addition, the Commission would likely be unable to regulate private networks that do not interconnect with public telecommunications networks under authority ancillary to §256, though other provisions may apply.

VII. Conclusion

The Commission has Title I authority to act on Free Press's Complaint or to initiate a rulemaking. Title I's provisions grant the Commission authority to advance policies in the Communications Act. Here, at least eight different provisions—each of which has been previously asserted by the Commission—provide the Commission with ancillary authority. The Commission can and should follow through on its promises to the public, the courts, and the Congress, and should act promptly subject to these bases of Title I authority.

Jurisdictional Memorandum #2:
Policy Statement/Informal Adjudication

Marvin Ammori
Free Press

Summary

This memorandum concludes that the FCC has the authority to impose injunctions and fines based on *informal complaints* brought for violations of the *Policy Statement*'s principles.

The FCC's Internet Policy Statement provides guidance on how the Commission will interpret its statutory responsibilities, both through rule-making and adjudication. The Commission provided notice of that guidance and, in fact, policy statements are generally used for that exact purpose. In following its principles in the Policy Statement, the Commission can use adjudication to both announce a policy and apply it in that case.

Moreover, the Commission can adjudicate in line with its Policy Statement in an informal adjudication. Indeed, the Commission can deprive a network provider of property and liberty here, so long as it meets only the most minimal administrative and constitutional baselines required of an informal adjudication.

As a result, all of Comcast's assertions to the contrary—that the Commission cannot "enforce" the Policy Statement, that rulemaking is necessary before an adjudication, and that the informality of consumer complaints somehow undermines them—are all wrong.

I. The Policy Statement Provides Guidance on Adjudication and the Commission's Interpretation of the Statute

Comcast emphasizes that policy statements are not generally "enforceable," and the Chairman and others have characterized the Internet Policy Statement as not "enforceable."[1]

[1] *See* Comcast Reply Comments, at 40. *See also* Time Warner Reply Comments, at 8-9.

Comcast misunderstands the legal importance of this "unenforceability" under the Administrative Procedure Act. As a result, Comcast wrongly suggests the FCC cannot use adjudication to expound and apply the principles listed in the Policy Statement.

Rather, the very point of policy statements is to announce broad principles letting parties know how an agency intends to act in future particular adjudications. In referring to "enforcing" the Policy Statement, Free Press and others merely save words on a more detailed expression: "making policy based on announced principles set forth 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." In comments, "enforce" serves as short-hand. The Commission does not "enforce" the Policy Statement but would adjudicate a complaint and make policy in line with its announced statement of policy that interprets its Congressional directives. Under the Administrative Procedure Act, "adjudication" is an "agency process for the formulation of an order," and "order" is defined as "the whole or a part of a final disposition whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing."[2] Here, the Commission's adjudication and the adjudication's announced policy derive from the Communications Act itself, not from the Policy Statement, though the Policy Statement provides guidance on how the Commission would interpret the Act.

The Commission was explicit that the Policy Statement provided guidance on how the Commission would interpret its *statutory directives*—to require openness or "neutrality" by network providers. The Commission stated: "In this Policy Statement, the Commission offers guidance and insight into its approach to the Internet and broadband that is consistent with these

[2] 5 U.S.C. §§ 551(7), (6).

Congressional directives."[3] These "Congressional directives" refer to statutory provisions in § 230(b) of the Communications Act as well as section 706(a) of the Telecommunications Act.[4] The Commission's approach in the Policy Statement lays out four principles to ensure that "providers of telecommunications for Internet access or Internet Protocol-enabled (IP-enabled) services are operated *in a neutral manner*."[5] The Commission described the Policy Statement in a letter to the Ninth Circuit, following the *Brand X* remand to that Court, as ensuring neutrality: "[T]he Court should be aware that the FCC, in a recent policy statement, adopted principles of Internet *neutrality* 'to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers.'"[6] The FCC assured the Ninth Circuit that the Policy Statement "provides further evidence that, contrary to the claims of some consumer groups (Consumer Federation Br. 27-58), the FCC stands *ready to take additional action (if necessary)* to ensure that subscribers to broadband Internet access services have unfettered access to the lawful Internet content of their choice."[7]

The Policy Statement thus did not announce rules but provided guidance on how the Commission would interpret its enabling statute when making policy. In short, the Commission would ensure that consumers were entitled to the content, applications, services, and devices of their choice, with the benefit of competition, and that implied that telecommunications provision for Internet access would be operated in a neutral manner.

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[3] *See* Policy Statement, at ¶3.
[4] Their relevance for jurisdictional authority under Title I is discussed in the Title I Memorandum.
[5] *See* Policy Statement at ¶4.
[6] Letter from Sam Feder, General Counsel, FCC, et al. to Cathy Catterson, Clerk, Ninth Circuit, "RE: Brand X Internet Services v. FCC, No. 02-70518," Oct. 13, 2005, at 2 (emphasis added) (citing the Policy Statement at ¶4), *available at* http://www.fcc.gov/ogc/briefs/02-70518-101305.pdf.
[7] *Id.* at 3 (emphasis added).

Although some parties suggest that the Policy Statement must be followed by FCC rules,[8] the FCC has made it clear that the Policy Statement would inform future rulemaking *or* future adjudication. The FCC stated that the Statement would "incorporate the above principles into its ongoing policy-making activities."[9] As any law student learns during the first week of Administrative Law, policy-making includes both rule-making and adjudication: an agency "is not precluded from announcing new principles in an adjudicative proceeding and … the choice between rulemaking and adjudication lies in the first instance within [an agency's] discretion."[10]

There is nothing retroactive and improper about announcing *and applying* policy in adjudication, despite Comcast's misguided argument that agency adjudication is "retroactive rulemaking."[11] The Supreme Court has stated that "adjudicated [administrative] cases may and do … serve as vehicles for the formulation of agency policies, *which are applied and announced therein*."[12] The ability of agencies to do so is central to the flexibility of the administrative process. Indeed, some agencies' "policy-making activities" are made *exclusively* through adjudication, where the agencies announce and apply policy, even when the agency has rule-making authority.[13] The Supreme Court has naturally upheld the FCC when the FCC announced and applied a new policy in an adjudication.[14] So Comcast and any other party should have understood: the Commission would be informed by the Policy Statement both in rule-making

[8] *See* Time Warner Reply Comments, Feb. 28, 2008, at 10.
[9] Policy Statement at ¶ 5.
[10] *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 292 (1974).
[11] *See* Comcast Reply Comments, at 40. *See also* Time Warner Reply Comments at 11 (asserting "retroactive" penalties would violate Due Process).
[12] *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 292 (1974) (quoting NLRB v. Wyman-Gordon Co., 394 U.S. 759, 765-66 (1969)).
[13] N.L.R.B. v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 819 (1990) (Scalia, J., dissenting) ("the NLRB has explicit rulemaking authority, see § 156, it has chosen-unlike any other major agency of the Federal Government-to make almost all its policy through adjudication. It is entitled to do that.").
[14] *See, e.g.,* FCC v. Pacifica Found., 438 U.S. 726 (1978)

and adjudication, *i.e.* in the "policymaking activities" to which it referred in the Policy Statement.

The Supreme Court has held that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."[15] Agencies can announce policy in adjudications: "in an adjudicative proceeding" an agency can "apply a general standard that it had formulated for the first time in that proceeding."[16] Agencies can announce and apply new standards even where the standard will affect a large number of parties,[17] including by affecting them through its mere precedential value.[18] The Commission often uses case-by-case methods to refine and make policy, such as with indecency[19] and with renewal standards.[20]

Indeed, under some circumstances, policy-making through adjudication may be preferable to making policy through rulemaking. The Supreme Court has stated:

> Not 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. … Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is

[15] SEC v. Chenery Corp., 332 U.S. 194, 203 (1947)
[16] *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 292 (1974) (citing SEC v. Chenery Corp., 332 U.S. 194 (1947)).
[17] *See, e.g.*, Goodman v. FCC, 182 F.3d 987, 994 (D.C. Cir. 1999) ("an adjudication can affect a large number of individuals without becoming a rulemaking").
[18] *Id.* at 994.
[19] *See* Free Press et. al. Reply Comments at 49;
[20] *See* Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures), 61 Fed. Reg. 18,289 (Apr. 25, 1996) ("It is our present intent to continue to apply existing policy statements and case law, refining these as appropriate on a case-by-case basis, in interpreting the statutory terms that govern the new renewal process.")

> thus a very definite place for the case-by-case evolution of statutory standards.[21]

Here, these same Court-endorsed principles reasonably apply. When it adopted the Policy Statement three years ago, before the Comcast episode, the Commission had not yet found "sufficient evidence in the record before us that such interference by facilities-based wireline broadband Internet access service providers or others is currently occurring."[22] Rather than risk "rigidifying its tentative judgment into a hard and fast rule" for "particular, unforeseeable situations," and thereby perhaps incidentally be grossly overinclusive or underinclusive, the Commission sought to act on a case-by-case basis. It can make policy through these cases.

Indeed, courts have made clear that policy statements, while themselves "unenforceable," usually provide notice and clarification regarding future adjudications. The D.C. Circuit has stated: "By issuing a policy statement, an agency simply lets the public know its current *enforcement or adjudicatory* approach."[23] Indeed, a policy statement "represents an agency position with respect to how it will treat—*typically enforce*—the governing legal norm."[24] Simply put, policy statements announce principles that typically will guide adjudication. Here, the Policy Statement described the Commission's future adjudicatory position, merely clarifying the Commission's (and public's) understood legal norm of the Communications Act. This legal norm underlay even the deregulatory orders and mergers leading up to the 2005 Policy Statement.[25] During all these proceedings, the carriers agreed they would maintain an open Internet and the FCC assured the public that it understood the Communications Act to maintain

[21] Chenery, 332 U.S. at 202-203.
[22] *See* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14853, 14904 ¶ 96 (2005).
[23] Syncor Intern. Corp. v. Shalala 127 F.3d 90, 94 (D.C. Cir. 1997) (Silberman, J.) (emphasis added).
[24] *Id.* (emphasis added).
[25] *See* Free Press et al. Comments at 23-25.

the Internet's openness, despite deregulation of ISP access.[26] The Commission's interpretation of the statute was no secret, and was made more explicit in the Policy Statement.

As we have detailed in previous filings, the carriers clearly understood they would face adjudication if they violated the Commission's announced policy.[27] Many carriers—such as AT&T—still argue that the Commission should engage in specific adjudications to announce policy, rather than adopting rules.[28] AT&T, in fact, has consistently argued, even before revelation of Comcast's degradation, that "ex post enforcement remedies" are adequate[29] and therefore blocking and degradation of Internet content and services "would already be addressed by the Commission's existing Broadband Policy Statement."[30]

Similarly, even the Japanese Ministry of Internal Affairs and Communications understood that the Policy Statement represented the FCC's decision "going forward" to "handle each case separately in accordance with the four neutrality principles."[31] Former Chairman Reed Hundt, over two years, naturally stated that the Policy Statement implied a "case-by-case" approach, though he disagreed with that approach.[32] Even the COPE bill introduced in 2006 envisioned the FCC addressing complaints based on the Policy Statement; in fact, the bill sought to limit the Commission exclusively to a case-by-case method rather than rule-making.[33]

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[26] *Id.* at Appendix 2;Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14853, 14904 ¶ 96 (2005).

[27] Free Press et al. Reply Comments at 50-51

[28] AT&T Comments at 24 n. 61. ("For purposes of these comments, AT&T will assume arguendo, but does not concede, that the Commission has regulatory jurisdiction to convert the non-binding principles of its *Policy Statement* into enforceable requirements.")

[29] AT&T Comments, Broadband Industry Practices, WT Dkt. No. 07-52, June 15, 2007, at 53 n. 138. *See also id.* at 68 n. 182.

[30] AT&T Reply Comments, Broadband Industry Practices, WT Dkt. No. 07-52, July 16, 2007, at 28.

[31] *See* Study Group on Network Neutrality (Draft English Translation), Government of Japan, September 2007, at 11.

[32] Mr. Hundt feared case-by-case decisions would be delayed by litigation and the network providers' "deep pockets." *See* "Freedom To Connect: Panelists, Participants Strategize for Net Policy Change at F2C," *Telecommunications Reports*, April 15, 2006.

[33] *See, e.g.*, Communications Opportunity, Promotion and Enhancement (COPE) Act of 2006, H.R. 5252, 109th Cong. § 201 (2006) (affirming the FCC's the authority to "adjudicate any complaint alleging a violation of the

Indeed, the Policy Statement itself reveals why it is not a "rule." The Policy Statement is less precisely worded than a rule would be. The Statement is phrased primarily as a guide for future, more precise, policy-making, likely in adjudications.

Here, the Commission will not be interpreting and enforcing the Policy Statement itself. Rather, the Commission will be interpreting and enforcing the Communications Act. The Commission should, naturally, interpret the Act in line with the Policy Statement clarifying how the Commission interpreted the Act. In the accompanying Title I Memorandum, we evaluate several bases for Title I jurisdiction. The Commission can interpret and act pursuant to any of those provisions in acting on a complaint. If the Commission abandons the Policy Statement, rather than adjudicating in line with its principles and interpretations as the Commission announced it would in the Wireline Broadband Order,[34] the Commission would likely receive little deference, and would need to provide considerable justification for doing so.

II. The Commission Can Impose Fines and Injunctions Through Even Informal Adjudication

Comcast argues that our complaint should be considered "informal," rather than formal.[35] While Comcast's argument suggests the need for a streamlined formal complaint process, as we discuss in the Free Press Substantive Memo, our Complaint clearly meets at least the Commission's test for informal complaints.[36] Far from undermining the FCC's authority, the potentially "informal" status of an adjudication merely relieves the Commission of onerous

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broadband policy statement and the principles incorporated therein," but removing any authority to "adopt or implement rules or regulations regarding enforcement of the broadband policy statement and principles incorporated therein."). Free Press and other consumer groups opposed the bill in part because of this limitation to the FCC's authority.

[34] *See* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14853, 14904 ¶ 96 (2005) ("Should 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.").

[35] Comcast Ex Parte, March 11, 2008 (attaching Letter from David Cohen to Kevin Martin, March 7, 2008, at 3).

[36] *See* 47 C.F.R. § 141.

procedural formalities. Informal status provides the Commission with procedural flexibility, subject merely to minimal procedural baselines.

In an informal adjudication, the FCC can interpret and apply a statute, and even receive some degree of considerable deference for its decision.[37] Any limitations on that power are merely found in constitutional principles or statute. But neither limits the FCC's power here. So long as the Commission does not violate the minimal requirements of the Due Process Clause and the Administrative Procedure Act, the Commission can deprive a party of "property" (with a fine) and "liberty" (through an injunction).

That is, in this case the Commission can grant Free Press et al. the relief it seeks.

The only constitutional and basic statutory limitations on informal adjudication, according to the Supreme Court, are those inferred from the Due Process Clause and 5 U.S.C. § 555.[38] (Despite misguided arguments, no other constitutional provisions could limit the Commission here.)[39] Were the Commission to deprive Comcast of a "liberty" or "property" interest, the Due Process Clause merely requires notice and an opportunity to be heard, and does flexibly based on the relevant circumstances.[40] Even where a person is "in jeopardy of serious

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[37] *See, e.g.*, Barnhart v. Walton, 535 U.S. 212, 221-222 (2002) (and cases cited therein); Mylan Laboratories, Inc. v. Thompson, 389 F.3d 1272, 1279-80 (D.C. Cir. 2004) (and cases cited therein); U.S. v. Mead, 533 U.S. 218 (2001); NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 255, 257 (1995); FDIC v. Philadelphia Gear Corp., 476 U.S. 426, 438-439 (1986); Young v. Community Nutrition Institute, 476 U.S. 974 (1986)). *See also* Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633 (1990); Federal Election Commission v. National Rifle Association, 254 F.3d 173, 185-86 (2001).

[38] *See, e.g.*, Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633 (1990).

[39] Time Warner argues that enforcing the Policy Statement, and thereby promoting citizen speech, would violate the First Amendment. This is a silly argument. *See* Open Internet Coalition, Reply Comments, Petition for Declaratory Ruling that Text Messages and Short Codes are Title II Services or are Title I Services Subject to Section 202 Non-Discrimination Rules, WT Docket No. 08-7, filed April 14, 2008, at 9-11. Indeed, the Commission could easily as far as to impose common carriage rules on broadband providers—even if broadband were cable television service and not broadband service, which historically has not provided any editorial or other control. *See, e.g.*, Turner I, 512 U.S. 622, 684 (1994) (O'Connor, dissenting) ("[I]t stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies."). *See also* Harold Feld, "Whose Line is it Anyway? The First Amendment and Cable Open Access," 8 *CommLaw Conspectus* 23 (2000) (and citations therein).

[40] Matthews v. Eldridge, 424 U.S. 319, 348 (1976) (citation omitted).

loss" the person must be merely given "notice of the case against him."[41] Comcast cannot claim it lacks notice of the case against it, as it had received the complaint and petition in November of 2007 and has responded to the claims at length. Comcast is even well aware of the Policy Statement and has been since the Statement's day of adoption; as we detailed in the Petition and initial Comments,[42] the Commission's Policy Statement was "shouted from the rooftops,"[43] and is perhaps the most famous, debated, and discussed agency Policy Statement in history.

An opportunity to be heard in an informal adjudication requires far less than Comcast was afforded here, so the Commission can take action against Comcast in line with Due Process. Comcast merely must be given an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[44] Factors to consider regarding due process include the (1) private interest affected, the (2) risk of erroneous deprivation of the interest through the selected procedures and the probably value (if any) of additional safeguards, and (3) the government's interest, including additional financial burden.[45] The private interest affected (cost-savings and the liberty to discriminate against Comcast's innovative competitors) here is far less than the interests that usually implicate considerable due process concerns—such as an interest in welfare benefits for citizens who can barely subsist without them.[46] The probable value of additional safeguards is quite low. Comcast has been able to file in response to the Free Press et al. Complaint; it also been able to make its case more broadly in comments, reply comments, ex partes, hearings, and FCC meetings regarding the related Petition for Declaratory Ruling and Vuze Inc.'s Petition for Rulemaking. In addition, the Commission received dozens of long detailed comments and held

[41] *Id.*
[42] Free Press et al. Petition for Declaratory Ruling at 27; Free Press et al. Comments at 13-14.
[43] *See, e.g.*, New York State Commission on Cable Television v. FCC, 749 F.2d 804, 812 (DC Cir. 1984) (citations and internal quotations omitted).
[44] Matthews v. Eldridge, 424 U.S. 319, 333 (1976).
[45] *Id.* at 335.
[46] *See id.* at 333 (discussing Goldberg v. Kelly, 397 U.S. 254 (1970)) (exceptionally imposing a trial-like procedure, for denial of welfare benefits).

two en banc hearings at which numerous interested parties (including, as noted, Comcast) testified, as did the most highly respected authorities in our field, such as David Reed, Barbara Van Schewick, Lawrence Lessig, and Yochai Benkler. Many parties—including Comcast[47]—have filed documents in the Petition docket that also discuss our Complaint or the complaint process, further informing the Commission's decision. Written submissions alone would meet the due process requirement. Under clear Supreme Court precedent, a trial-like evidentiary hearing or even an "oral presentation to the decision-maker" is certainly not required here, as such presentations have only been required for welfare recipients, barely subsisting and often illiterate.[48] Indeed, Comcast was granted the opportunity to make its case orally at the Harvard *en banc* hearing, and a top executive made Comcast's case. Comcast even refused to attend the second *en banc* hearing at Stanford, despite the FCC's invitation, so Comcast can hardly claim it needed more opportunities to make its case.[49]

Finally, the government need not expend any additional funds here, considering these procedures and Comcast's unwillingness to avail itself of some of them.

Like the Due Process Clause, § 555 imposes only the most minimal requirements on informal adjudications.[50] Under § 555, agencies need merely permit a party to be accompanied by a lawyer; action must be authorized by law, and parties must be permitted to retain copies of their filings; issued subpoenas must follow certain procedures; and the decision must be served

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[47] *See all* Comments of Comcast, Reply Comments of Comcast, Comcast Ex Parte on March 11, 2008, Comcast Letter on March 27, 2008, Comcast Letter on March 28, 2008, Comcast Ex Parte on April 9, 2008 and Comcast Ex Parte on April 16, 2008.

[48] *See id.* at 344; 337-349 (laying out three factors and suggesting that an evidentiary hearing is necessary in informal adjudication only in the rarest circumstances, such as welfare recipients). *See also* Doolin Security Savings Bank v. FDIC, 53 F3d 1395, 1403-04 (1995) (finding written submissions were sufficient and oral hearing not required).

[49] Amy Schatz, "Comcast Absent, Anything But Forgotten," Wall Street Journal, Washington Wire, April 17, 2008, available at http://blogs.wsj.com/washwire/2008/04/17/comcast-absent-anything-but-forgotten/.

[50] *See, e.g.*, Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633, 655 (1990) ("the minimal requirements of [informal adjudication] are set forth in the APA, 5 U.S.C. § 555").

promptly and include a brief written statement.[51] All of these requirements have been, or easily will be (in the case of the service and written statement), met. Hearings are not required,[52] nor are "trial-type procedures" or other requirements of formal adjudication required in the APA.[53] Indeed, the Supreme Court has held that lower courts cannot require an agency to jump through additional procedural hoops if the baseline listed above is met.[54] So far from undermining the FCC's authority, informal procedures merely permit the FCC to tailor its process to the interests at hand, rather than follow any particular procedures preferred by a court or set forth in the APA for formal adjudications.

As a result, the Commission can deprive Comcast of liberty, through an immediate injunction, and of property, through significant fines. We repeat the call for fines significant enough to deter future violations by Comcast or other parties, especially as the Commission continues to evaluate practices on a case-by-case basis. Because the likelihood of catching a network provider's anti-consumer degradation is so low, and providers have demonstrated their willingness to openly mislead the public about their practices in the face of direct accusations, the fine must be proportionately increased to be an effective deterrent.[55]

Importantly, for a complaint-process to work, the Commission must impose fines. If the Commission makes policy on open Internet and network management through a complaint process but imposes no fines, network providers would have every incentive to violate consumers' rights. Network providers would push the envelope on discrimination and hope not

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[51] 5 U.S.C. § 555(a)-(e).
[52] *See* Matthews v. Eldridge, 424 U.S. 319 (1976).
[53] *See* Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633, 655 (1990).
[54] *See* Pension Ben. Guar. Corp., 496 U.S. at 654 (citing Vermont Yankee Nuclear Power Corp. v. NRDC, Inc. 435 U.S. 519, 524 (1978)).
[55] *See, e.g.*, George J. Stigler, "The Optimum Enforcement of Laws," 78 *J. Political Economy* 526-536 (1970); Gary Becker, "Crime and Punishment: An Economic Approach," 76 *J. Political Economy* 169-217 (1968); Gary Becker, "Nobel Lecture: The Economic Way of Looking at Behavior," 101 *J. Political Economy* 385-409 (1993). *See also* Free Press et al. Complaint at 24-33; Free Press et al. Residual Issues Memorandum, at 14-17.

to get caught—expecting no penalty for getting caught. Rather, the network providers should know they will be subject to significant, deterrent fines. The network providers have sufficient notice: they understand the basic principles of the Policy Statement and have debated open Internet and network management issues for years. Moreover, some consult consumer groups and the public on matters of network management, to better understand whether certain practices would be interpreted as pro-consumer or anti-consumer. Significant fines would encourage all network providers, including Comcast, to work more openly with consumers *before* adopting non-standard practices, not merely after thousands of complaints prompt an FCC investigation.

III. Conclusion

The Commission can and should act on complaints brought to vindicate the consumer entitlements enumerated in the Commission's Policy Statement and protected by a proper interpretation of the Communications Act.

Residual Issues Memorandum:
Narrow Rulings, Complaint Processes, Scrutiny Levels, Etc.

Free Press

Summary

We are filing this memorandum to provide our input on certain residual issues that have been raised in the past few weeks. Primarily, we urge the Commission to adopt narrow decisions regarding complaints that come before the Commission, and we urge the Commission to adopt an analogy to the strict scrutiny standard, as referenced by Chairman Martin before the Senate Commerce Committee. We also urge the Commission to adopt a streamlined complaint-process that involves the public, and we respond to several arguments advanced by Comcast and its allies.

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Free Press

This Memorandum urges the Commission to adopt a narrow decision in complaints before the Commission and to adopt a standard analogous to strict scrutiny that network providers would have to meet to justify network discrimination. We also urge the Commission to adopt a public complaint process, to enjoin and fine Comcast, and to reject or ignore certain arguments recently raised.

I. We Urge Limited Decisions Regarding Complaints

In addressing a complaint, the Commission should decide the issue before it, and make all conclusions necessary for that decision, rather than deciding matters not addressed in a complaint. Case-by-case adjudication need not announce sweeping rules, but should focus on the case at hand, as Chief Justice Roberts has often stated.[1] The Commission has chosen a case-by-case method so that it can address concrete problems with some specificity and should not undermine that benefit by making sweeping declaratory decisions.

For example, we highlight four areas not at issue in the Free Press et al. Complaint that focuses on discrimination against particular applications and content.

A. Here, the Commission Need Not Bless or Condemn Any Forms of Prioritization

The Commission need not include any dicta regarding which forms of discrimination *may* be permissible. Before the Senate Commerce Committee, Chairman Martin referred to the need

[1] *See, e.g.*, Hope Yen, "Roberts Seeks Greater Consensus on Court," *Associated Press,* May 21, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/05/21/AR2006052100678.html ("'If it is not necessary to decide more to a case, then in my view it is necessary not to decide more to a case,' [Chief Justice John] Roberts said.")

for priority for VoIP calls.[2] We urge the Commission to await a complaint regarding VoIP prioritization before suggesting the need for such priority. We say this partly because both Vonage and Skype have assured us that their products do not rely on prioritization by network providers.[3] Moreover, we have been told by representatives of certain network providers that they do not currently prioritize any traffic on their networks, including VoIP. So the facts remain in dispute; and nobody has complained.

Indeed, VoIP may be the poster-child for why we need not bless any particular prioritization in advance. Many years ago, some well-respected experts argued that prioritization was necessary for VoIP. Nonetheless, innovators at the edges were able to introduce VoIP products that do not rely on prioritization. Current VoIP products assume, and work on, a best-efforts Internet. So VoIP suggests we should trust edge-based innovation even when some experts claim network-based prioritization may be necessary for a new application. At any rate, the issue is not before the Commission, as Comcast is degrading particular applications, rather than selecting particular narrow classes of latency-sensitive applications for prioritization.

Beyond VoIP, another reason not to bless prioritization is the FCC and public need to better understand how prioritization functions and affects non-prioritized traffic. We understand that bits currently travel in most portions of the network at the fastest speed possible—the speed of light—in the current "best efforts" environment. So network operators cannot speed up certain bits. Instead, the operator would be forced to degrade or slow other bits. In other words if we have a string of 15 bits traveling through a wire and bit number 12 is "prioritized", the

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[2] *See* Comments of Chairman Martin, Before the United States Senate Committee on Commerce, Science and Transportation, April 22, 2008 (in Question and Answer with Sen. John Kerry, Chairman Martin stated: "There are some good techniques for example when they favor voice packets over data packets to make sure that the voice communications can occur on a real-time basis.").

[3] *See* Free Press et al. Ex Parte, May 1, 2008, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520007317.

operator would not speed up bit number 12, it would slow down bits 1 through 11 to allow bit number 12 to move to the front of the line. While this process appears likely unproblematic if milliseconds are involved and if prioritization is only used during times of congestion and if those times are rare, we need to better understand how prioritization could be accomplished in a real world environment and how and when it functions to de-prioritize other traffic.

B. Here, the Commission Need Not Address Specific Attempts to Filter Unlawful Content

While the Petitioners have consistently argued that consumers have the right to access all "lawful content," the Commission should be cautious in implying that network providers can filter unlawful content without *any* regulatory oversight. While we support and understand the importance of fighting copyright piracy and child pornography, we believe the FCC should gather more information—and await a complaint—before suggesting particular network-based solutions would be acceptable or unacceptable. At a panel in New Haven, on Computers, Freedom, and Privacy, David Reed suggested we need more information on whether network-level filtering will even work before endorsing such strategies.[4]

Regarding child pornography, through working with the National Center for Missing and Exploited Children, network providers already follow some established procedures for targeting this content.

Regarding piracy, there is ongoing research into different network-based solutions to copyright, which has not yet borne fruit. There is even less research, however, on the encryption arms race of counter-measures that will be employed by end-users and applications-providers to

[4] *See* CFP2008 Panel, http://www.cfp2008.org/wiki/index.php/Network_Neutrality:_Beyond_the_Slogans.

avoid such network-level filtering.[5] This encryption arms race could have huge effects on the Internet's evolution, consumers' rights, and the ability of law enforcement to target other online crimes (including child pornography) and threats to national security. The FCC can remain silent on the issue until a complaint is filed on the matter, which is unlikely until a network provider announces a product.

The Commission should, however, encourage disclosure of any such filtering trials so all interested parties can work together on the preferred solutions to address the problems of unlawful content.

C. Here, the Commission Need Not Issue a Full Disclosure "Checklist"

The Commission need not determine what kind of disclosure *would have* been adequate if Comcast had provided it. Nor must the Commission set out a general disclosure checklist and consumer-information bill of rights. Rather, the Commission can simply find that under any standard Comcast violated truth-in-billing principles the Commission can apply under Title I.[6] Comcast directly lied for months about its practices and continued lying, claiming that it was only "delaying" traffic.[7]

The Commission should open an important proceeding on disclosure rights in the broadband age, even if the proceeding has an expedited timeline. Importantly, consumers should

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[5] *See* Comments of Professor Jon M. Peha, April 4, 2008, p. 5. *See also* William H. Lehr, Marvin A. Sirbu, Jon M. Peha, Sharon Gillett, "Scenarios for the Network Neutrality Arms Race," 1 *International J. Communication* 607-643 (2007).

[6] The Commission suggested in its Wireline Broadband Order & NPRM that it can impose and enforce disclosure rules on broadband providers under Title I as being ancillary to the provisions requiring truth-in-billing and outlawing slamming and cramming. Wireline Broadband Order, 20 FCC Rcd 14853, 14931-33 (2005).

[7] Comcast's Comments at 28 state that "To effectuate its management practices, Comcast's network issues instructions called 'reset packets'—which involve a communication between two IP addresses (and, importantly, not between two people)—to temporarily delay the initiation of new unidirectional P2P file uploads." Moreover, Comcast's online FAQ holds that "Since it is our responsibility to protect our customers' Internet experience, we use several network management technologies that, when necessary, enable us to delay P2P traffic during periods of heavy congestion on the Internet." (Comcast FAQ, available at http://www.comcast.com/Customers/FAQ/FaqDetails.ashx?Id=4389) Also, see Chloe Albanesius, "Comcast Admits Delaying, Not Blocking, P2P Traffic," *PC Magazine*, October 22, 2007, available at

have the ability to know whether cable operators are artificially producing the congestion issues at the center of this debate, especially if adding capacity in the upstream or downstream direction could mean simply shifting a channel to use for broadband, which is "basically free," according to Time Warner Cable's CTO.[8]

D. Here, the Commission Need Not Bless Any Particular Class of Management Tools Advertised as Protocol Agnostic

The Commission need not bless all existing tools that advertise themselves as "protocol agnostic" network management solutions. While we believe protocol agnostic solutions affirm a previous assertion,[9] and that such solutions will reduce investment in the high-capacity, high-speed networks available abroad,[10] some of these technologies may even be discriminatory. For example, Sandvine is advertising a tool called FairShare[11] that not only claims to allow "service providers to defer bandwidth expansion and capital expenditure,"[12] but also to discriminate against particular uses, depending on how network providers implement the tool. As Sandvine admits, their new product "may not meet the network neutrality principles."[13] Thus, as we previously noted, "while these tools appear to have the capability of adhering to the Policy Statement, they can also enable violations of it, as evidenced by Comcast."[14] Considering many

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http://www.pcmag.com/article2/0,1759,2204751,00.asp.

[8] "If you want more throughput for your customers, the easiest and least expensive way is to add another DOCSIS carrier. It's basically free." Leslie Ellis, "How Sexy is HFC? (Answer: Plenty.)" CED Magazine, May 1, 2007, *available at* http://www.cedmagazine.com/article.aspx?id=146993.

[9] "Given the growth in this market, undoubtedly new options will be created for those unwilling to perform the necessary upgrades." Free Press et al. Reply Comments at 32.

[10] Free Press et al. Reply Comments at 9-12; See also "Allows service providers to manage network congestion and reduce or defer capital expenditures…while maintaining network profitability" Sandvine Corporation, "Admission to AIM," March 16, 2006, available at http://www.sandvine.com/general/getfile.asp?FILEID=92; "Service providers can…reduce or defer capital expenditures" Sandvine, Inc, "Annual Report 06," March 23, 2007, available at http://www.sandvine.com/about_us/inv_docs/Annual_Report_2006.pdf.

[11] Sandvine Press Release, "Sandvine Unveils Fairshare Product to Enhance Traffic Optimization," May 19, 2008, available at http://www.sandvine.com/news/pr_detail.asp?ID=169.

[12] Sandvine, Inc, "The Value of Traffic Optimization in a World with Network Neutrality," May 2008, available at http://www.sandvine.com/solutions/downloads/Traffic_Optimization_Whitepaper_May_2008.pdf.

[13] Id.

[14] Free Press et al. Reply Comments at 31.

tools can be used for network neutrality violations, and consumers cannot just trust network providers after Comcast's litany of false promises and lies, the Commission should refuse to bless solutions that simply advertise themselves as "protocol agnostic." The Commission should merely make clear that network providers should not engage in unreasonable discrimination against any application, including applications using any particular protocol, or any content.

E. Here, the Commission Need Not Bless or Prohibit the Use of Deep Packet Inspection Technology

The Commission need not bless or prohibit the use of deep packet inspection (DPI) technology. This technology empowers network providers to break their promises of conforming to the Policy Statement by peering into the traffic and affecting traffic through anti-consumer tools, or at least controversial tools.[15] Nonetheless, DPI could protect against malicious activities and therefore the Commission need not pass judgment on its merits at this time.

[15] See http://www.publicknowledge.org/node/1587.

F. Here, the Commission Need Not Determine If Metering Broadband Use Is Reasonable Network Management

The Commission need not determine now if metering broadband use is reasonable network management. Recently, Time Warner and Comcast have both proposed metering. Free Press has argued that some metering could be unreasonable and violate the Policy Statement as anticompetitive, while other metering may not.[16] The Commission need not decide the issue here and should await a complaint on a specific offering.

II. The Commission Should Impose a Standard on Network Discrimination Analogous to Strict Scrutiny

In testifying before the U.S. Senate Committee on Commerce, Science, & Transportation, Chairman Martin suggested that unreasonable discrimination is unlawful. To determine if discrimination is unlawful, the Chairman mentioned a test that is apparently modeled on the strict scrutiny standard applied under First Amendment and Equal Protection analysis.[17]

We applaud the Chairman for suggesting a strict scrutiny test, but write to clarify a few details. We applaud the Chairman because applying strict scrutiny recognizes the Internet's role as the public forum of our day. Just as the First Amendment applies strict scrutiny to effectively ban speech-discrimination on streets and in parks, the FCC should apply strict scrutiny to ban such discrimination by network operators on the Internet.[18] As Supreme Court Justices

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[16] Free Press et al. Reply Comments, at 29-31; Free Press, "Time Warner Metering Exposes America's Bigger Broadband Problems," Jan. 17, 2008, *available at* http://www.freepress.net/release/328. Saul Hansell, "Comcast's Near-Unlimited Bandwidth Limits," *New York Times*, May 7, 2008, available at http://bits.blogs.nytimes.com/2008/05/07/comcasts-near-unlimited-bandwidth-limits; Om Malik, "Why Tiered Broadband Is the Enemy of Innovation," GigaOM, June 4, 2008, available at http://gigaom.com/2008/06/04/why-tiered-broadband-is-the-enemy-of-innovation/.

[17] Comments of Chairman Martin, Before the United States Senate Committee on Commerce, Science and Transportation, April 22, 2008, pp. 7-8, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281690A1.doc.

[18] While the First Amendment generally applies to governmental entities, the government can impose speech-diversifying regulations on network providers to further citizens' speech interests. *See, e.g.*, Turner Broadcasting Sys., Inc. v. FCC, 520 U.S. 180 (1997); Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 663-64 (1994); United States v. Midwest Video Corp., 406 U.S. 649, 668, n. 27 (1972) (plurality opinion); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Associated Press v. United States, 326 U.S. 1, 20 (1945);

understand, "(m)inds are not changed in the streets and parks as they once were," but primarily through "mass and electronic media."[19] Characterizing the Internet as the nation's emerging public space, in 1997, the Court stated: with Internet chat, "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer."[20] Two Justices were willing to impose public-forum analysis on cable channels based on the First Amendment alone.[21] Here, as Congress has directed, the Commission should promote networks where Americans can *receive and originate* the information of their choice in the format of their choice, in the vein of an open public forum.[22]

The Commission should ensure that, as the Supreme Court endorsed, any person with a phone—or cable—line can be a town crier or a pamphleteer.

First and foremost, the Commission should be clear on which judicial test it is modeling its own broadband-discrimination test—strict scrutiny, not intermediate. The language of strict scrutiny is that the government must have a "compelling" social interest and the government action must be "narrowly tailored" to furthering that interest.[23] The language of intermediate scrutiny is that the government must have an "important" (or "substantial" or "significant") interest and the rule must be "narrowly tailored" to furthering that interest.[24] Importantly, "narrow tailoring" is defined differently under strict scrutiny, where it essentially requires "least

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Time Warner Entm't Co., L.P. v. FCC, 93 F.3d 957, 967-72 (D.C. Cir. 1996); Reply Comments of the Open Internet Coalition, WT Docket No. 08-7, April 14, 2008, at 9-12.

[19] Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 802-03 (1996) (Kennedy, J., concurring in part and dissenting in part).

[20] Reno v. ACLU, 521 U.S. 844, 870 (1997).

[21] Denver Area Educ. Telecomms. Consortium, 518 U.S. at 802-03 (1996) (Kennedy, J., concurring in part and dissenting in part).

[22] *See, e.g.*, 47 USC §157 nt. (incorporating section 706 of the Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996)). *See also* 47 USC §230(b).

[23] *See, e.g.*, Reno v. ACLU, 521 U.S. 844 (1997); Playboy Entm't Group, Inc., 529 U.S. 803 (2000).

[24] *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968).

restrictive means." Under intermediate scrutiny, "narrow tailoring" merely requires government's chosen option to not substantially burden more speech than necessary, even if there are less restrictive means.[25] Rational basis, the lowest form of review, requires a "legitimate" interest and a means rationally tailored to that interest. Since one of its terms is "reasonable," the Commission should clarify that any reference to "unreasonable" discrimination does not suggest rational-basis-like review, which is basically no review at all.

We cannot emphasize enough that the Commission should clarify that its standard for nondiscrimination is modeled on strict, not intermediate, scrutiny. While strict scrutiny is generally fatal, intermediate scrutiny is famously lax.[26] The Chairman's testimony somewhat imprecisely used the language of all three standards,[27] and the Commission must clarify that a test modeled on strict scrutiny will apply.

In addition to clarifying that the network management test is modeled on strict scrutiny, the FCC should clarify how the compelling interest standard would work when imposed to address a private entity's actions. In the First Amendment context, the government must have a

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[25] *See* Board Of Trustees, State Univ. Of N. Y. v. Fox, 492 U.S. 469 (1989). *Compare* Turner Broadcasting Sys., Inc. v. FCC, 520 U.S. 180 (1997) *and* Playboy Entm't Group, Inc., 529 U.S. 803 (2000).

[26] *See, e.g.*, Elena Kagan, "Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine," 63 *U. Chi. L. Rev.* 413, n.226 (1996) ("When applied to incidental restraints, intermediate scrutiny has acquired a peculiarly toothless quality."); Michael C. Dorf, "Incidental Burdens on Fundamental Rights," 109 *Harv. L. Rev.* 1175, 1203-04 (1996) (describing intermediate scrutiny as "toothless" and noting that "most challenged laws will survive" such scrutiny); Larry Alexander, "Free Speech and Speaker's Intent," 12 *Const. Comment.* 21, 26 (1995) ("I believe that [intermediate scrutiny] has been an extremely unsuccessful jurisprudential exercise, with only a few very arbitrary victories for speakers in a period of over fifty years."); Frederick Schauer, "Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications," 26 *Wm. & Mary L. Rev.* 779, 787 (1985) (noting the Court "applies [the prongs of intermediate scrutiny] in a toothless manner, producing a standard of review that in practice resembles mere rational basis scrutiny").

[27] Written Statement of the Honorable Kevin J. Martin Before the United States Senate Committee on Commerce, Science and Transportation, April 22, 2008, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281690A1.doc. The Chairman referenced intermediate scrutiny: "If so, I believe that we should evaluate the practices with heightened scrutiny, with the network operator bearing the burden of demonstrating that the particular practice furthered an important interest, and that it was narrowly tailored to serve that interest." *Id.* at 7. The Chairman also made reference all three standards in this sentence: "In a manner similar to the way in which restrictions on speech are analyzed, network management solutions would need to further a compelling or at least an important/legitimate interest and would need to be tailored to fit the exact interest." *Id.*

compelling interest—which naturally, for the government, must be a pro-social interest, such as promoting diverse and antagonistic sources (a "governmental interest of the highest order"),[28] free competition,[29] or protecting children from harmful materials.[30] An interest like protecting a favored, politically powerful industry would not be compelling. Similarly, network providers should be permitted to justify discrimination only with interests that are *socially*—not merely privately—compelling. That is, for network discrimination, least-restrictive discrimination can be justified based on a social interest, such as protecting children—not a "compelling" *private* interest for the network provider, like blocking competitors and maximizing profits at any cost to innovation.

The Commission should also ensure that network discrimination does not undermine other important social goals. Judicial strict scrutiny can defer to some extent to the government's desire to promote one social goal (such as protecting children from indecency) rather than another goal (protecting children from too much advertising), but we cannot defer to a network provider's decision to promote one social goal at the expense of another. Network providers are not institutionally responsible like Congress and markets do not always respond to consumer preferences or optimal social goals in concentrated media markets.[31] Therefore, the Commission should ensure that discrimination based on one compelling social interest does not overly jeopardize other compelling social goals, including by examining possible arms-race effects of discrimination. Moreover, specialized engineering solutions often may be less expensive than more general solutions, while general solutions, which ensure the Internet remains an open,

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[28] *Turner I*, 512 U.S. 622, 663.
[29] *Id.* at 664.
[30] Reno v. ACLU, 521 U.S. 844, 870, 875 (1997).
[31] *See* C. Edwin Baker, *Media, Markets, and Democracy* 1-96 (2002).

general purpose technology, would benefit society more than specialized solutions.[32] Network providers should be unable to argue merely that discrimination in building and upgrading their networks is cheaper for them, as there can be no compelling *social* interest for avoiding the cost of maintaining the Internet as a general purpose technology that supports wide open speech, competition, and innovation.[33]

The Commission should clarify the least-restrictive-means prong also requires disclosure. While disclosure is never sufficient alone to make discrimination reasonable or sufficient alone to consist of a least restrictive means—any means lacking full disclosure can never be "least restrictive" or "narrowly tailored." If a network provider has provided adequate consumer disclosure, the Commission then determines whether that disclosed practice is the least restrictive means to advance the compelling social interest.[34]

III. The Commission Should Set Forth an Informal Adjudication Process

The FCC should adopt an informal, streamlined, adjudication process with defined procedures for initiating and addressing complaints arising from network discrimination, blocking, degradation, or network-level "delay," especially using tools violating the standards of basic Internet protocols. The Commission could initiate a rulemaking, seeking comment on appropriate informal procedures, or it can announce certain basic principles in the Declaratory Ruling or Complaint order.

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[32] *See, e.g.*, Lawrence Lessig, *The Future of Ideas* 147-176 (2001); Barbara van Schewick, "Towards an Economic Framework for Network Neutrality Regulation," 5 *J. Telecom. & High Tech. Law* 329 (2007); Brett M. Frischmann & Barbara van Schewick, "Network Neutrality and the Economics of an Information Superhighway: A Reply to Professor Yoo," 47 *Jurimetrics* 383–428 (2007).

[33] For this reason, the Commission need not determine if discrimination is justified by "content-neutral" or content-based interests—such as congestion-control versus censorship. Network providers, unlike government, do not balance conflicting social goals under the institutional framework of our democracy, and consumers should have access to all applications and all content. In this case, for example, Comcast claims "content-neutral" congestion concerns, but effectively censored Mr. Topolski's speech.

[34] *See* Comment of Chairman Martin, Before the United States Senate Committee on Commerce, Science and Transportation, April 22, 2008.

At any rate, some basic principles should be incorporated.

First, the complaint process should assume that both applications-providers and consumers can navigate the process. Therefore the Complaint requirements should be minimal, such as those required in indecency complaints or the current FCC requirements for informal complaints.[35]

Second, the threshold of evidence to begin an investigation should not be very high. As the technical panelists at Harvard mentioned, the network providers control most of the information regarding their networks and treat it as proprietary. We also detail the difficulty for end-users of discovering discriminatory behavior. Even in this proceeding, despite the hundreds of pages of filings and two *en banc* hearings, network providers are reluctant to reveal any information about their congestion or the scope and methods of their network management tools. End-users can test their connections, but network providers can implement tools that are nearly, or completely, impossible to detect precisely. Network providers thus should not be allowed to hide behind high evidentiary standards in an early stage of a proceeding, especially since they are so secretive about all informational aspects of their networks.

Third, the process should be as public as possible. The Internet is the 21st Century's basic infrastructure for speech and commerce. The public should be involved in decisions affecting its openness. Because the public would likely seek to maximize its own control over information it receives, a public process will help the FCC implement congressional policy "to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer

[35] *See* FCC, "How to File a Complaint," http://www.fcc.gov/eb/oip/Compl.html; *and* 47 C.F.R. § 1.716.

services."[36] In addition, because the Commission has decided to regulate the Internet through a complaint process under Title I, each major complaint can help support a national dialogue about the Internet's future. Moreover, to the extent that regulated network providers attempt to "capture" the Commission through various means, such as control over information and political pressure, public scrutiny through a public process makes such capture more difficult.[37]

As a result, the Commission should require a public hearing, preferably outside of Washington, DC, whenever sufficient public interest is apparent. As a threshold, the Commission should provide a public hearing whenever it receives at least 1,000 complaints and more than one hearing when it receives at least 5,000 complaints.[38]

IV. The Commission Should Enjoin Comcast and Impose a Fine for Every Violation for Every Day Following Its Injunction

In our Complaint, we asked the Commission to enjoin Comcast and sought the maximum regulatory forfeitures under Section 503(b)(2)(D) of the Act.[39]

The Commission should enjoin Comcast and require Comcast to cease and desist all discrimination against lawful content and applications.

Because the likelihood of detecting and attributing a user's Internet experience directly to a network provider's anti-consumer measures is so low, the imposed fine must be proportionately increased to be an effective deterrent.[40] Detecting network degradation is

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[36] 47 U.S.C. § 230(b)(3).

[37] *See, e.g.*, Louis D. Brandeis, "Other People's Money" 92 (1914) ("Sunlight is the best disinfectant; electric light the best policeman.").

[38] The Commission, of course, received over 15,000 complaints about Comcast's blocking behavior.

[39] *See, e.g.*, Trans World Entertainment Corporation DBA F.Y.E., File Number EB-07-RK-009, NAL/Acct. No. 200832460002, 2007 WL 3005244, & nn. 25-26 (October 15, 2007) (citing 47 U.S.C. § 503(b)(2)(D); 47 U.S.C. § 503(b)(2)(E); 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures).

[40] *See, e.g.*, George J. Stigler, "The Optimum Enforcement of Laws," 78 *J. Political Economy* 526-536 (1970); Gary Becker, "Crime and Punishment: An Economic Approach," 76 *J. Political Economy* 169-217 (1968); Gary Becker, "Nobel Lecture: The Economic Way of Looking at Behavior," 101 *J. Political Economy* 385-409 (1993).

possible, as experts like Robb Topolski and researchers at the Max Planck Institute have shown,[41] but very difficult and uncertain. A consumer may notice that some traffic is slow or uneven, but would not know for certain whether or not the network provider—and not some other reason—is to blame.[42] Indeed, Mr. Topolski has suggested at least seven factors a researcher would have to eliminate in tracing interference to the network provider—even when researchers *can* capture measurable evidence of interference like injected reset packets.[43] Often, however, the ends have no measurable evidence of network interference.

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[41] *See* "Glasnost: Results From Tests For Bittorrent Traffic Blocking," http://broadband.mpi-sws.mpg.de/transparency/results/; Peter Svensson, "Study: Cox, Comcast Internet Subscribers Blocked," *Associated Press*, May 15, 2008, *available at* http://www.usatoday.com/tech/products/2008-05-15-1302561807_x.htm.

[42] *See, e.g.*, Declaration of Jeffrey Pearlman, Free Press et al. Complaint, Nov. 1, 2007 ("Although I performed a thorough troubleshooting of my network, I was unable to find the cause of these problems at the time.").

[43] Comcast's interference with the BitTorrent protocol left observable evidence in the data stream: additional TCP packets purportedly from the other peer with the RST flag set. Despite this fact, all three testers – the Electronic Frontier Foundation, the Associated Press, and career software tester and Comcast customer Robb Topolski – also found it necessary to monitor both ends of the peer connection and monitor transaction on different ISPs before concluding that Comcast was definitely the responsible party for the interference.

The problem of detecting ISP interference would have been exacerbated without the overt evidence of the injected packets. Instead, some other reliable behavioral differentiator would have been necessary to find, test, and profile. To bear scrutiny, plausible alternative explanations for observed behavior would need to be authoritatively eliminated.

1. One path may allow larger packet windows to form, while the other does not. This is largely a function of what equipment is between the downloader and the server and how it is configured. Ethernet local area networks (LANs) use a packet size of 1500 bytes and that's usually the size of packets seen on the Internet. Encapsulation by any link between peers would subtract from the packet size and, as a consequence, reduce observed performance.
2. One path may have more en-route congestion over others. TCP transmissions fall back when signs of congestion appear: the local host sends duplicate ACK (acknowledge) packets or the remote host appears to skip a data packet in the sequence. With either event, the data sender slows to about half of its previous rate. If the congestion is cleared, then the speed will return slowly to its former level.
3. One path may be more distant or have more hops, which reduces the maximum speed that TCP will attempt to send. Both ends of the connection will strive to keep a pace that avoids errors injected by any of the hops.
4. The endpoints themselves contribute to the equation. One server may be more or less encumbered than the other (processing load). This can add a delay or drop data that the TCP protocol can misinterpret as a sign of congestion or greater RTT (round trip time).
5. An endpoint may have less available bandwidth (less subscribed, or subscribed amount divided by many current outgoing streams of data). Conditions such as this are normal on the Internet, but in determining whether or not an operator's equipment is responding in a predictable manner, it is a condition that must be ascertained.
6. Server, In-Transit, or Local caching. Caches are among the oldest ways to improve the user's experience. In determining whether or not an operator's equipment is responding in a predictable manner, caches that would bypass the operator's equipment must be detected by the tester and disabled or they would skew the results.
7. Finally, protocols and services have innovations of their own that a tester must recognize and understand to ascertain its impacts on the results. For example, server compression would result in a higher file-data

The FCC should impose a deterring fine for Comcast's past actions.

The most logical fine against Comcast can be enormous. The FCC can assess a maximum fine of $11,000 (and perhaps more for fining a "cable television operator"[44]) for each violation or each day of a continuing violation. Each reset packet or act of degradation is a violation. Multiply that by every single user receiving a reset, as each is a violation. The violations are not limited merely to Comcast users; Comcast's actions affect the Internet experience for peer-to-peer users across the globe by limiting the number of available seeders for peer-to-peer networks. The Commission also can fine Comcast per each violation per day for as long as Comcast has been violating consumers' rights under the Policy Statement. This number is difficult to surmise given Comcast's lack of forthrightness in this proceeding.

Under these conditions, the fine against Comcast could be astronomical. Indeed, the fine likely should be astronomical. As explained in our Complaint, Comcast's actions severely threaten innovation and, by undermining the open and interconnected Internet, reduce national economic efficiency and growth. When taking into account the difficultly of discovering network-level blocking or degradation, the imposed fine thus must be sufficiently large to deter future activity by Comcast or another operator and protect our economy and democracy.

The Commission could impose a more targeted fine. The Commission could, at the very least, enjoin Comcast immediately and then—only because Comcast is the first violator—fine Comcast only for any violations committed *after* the effective date of the Order. Comcast would have no argument that it lacked notice of a fine imposed after an Order (especially as Comcast has had notice of a potential fine since Free Press et al. filed their Complaint). The Commission should fine Comcast at least for each Comcast subscriber who is being blocked from using peer-

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throughput without showing a corresponding network-layer throughput. Another example would be encryption

to-peer technology. To estimate this number, we can consider Comcast's initial filing, where Comcast claims p2p creates a situation where "80% of the bandwidth is consumed by 20% of the users."[45] This 20% does not include the users who rely on p2p less frequently. Nonetheless, if the Commission were to use this figure, about 2.8 million[46] (20% of their 14.1 million) Comcast subscribers are being blocked from using p2p.[47] This number is little more than one-tenth the number of Vuze users—on Comcast or other networks—who are harmed by having fewer or no seeders in attempting to use the application "of their choice."[48] Further, while the Commission has the power to fine Comcast at least $11,000 per violation, the Commission can choose to fine Comcast merely $11 per day per violation. As a result, with these overly generous conservative numbers, based on merely the 2.8 million Comcast subscribers, Comcast should face a fine of $30.8 million each day following the Order. We are not sure this fine is sufficiently large, and encourage the Commission to increase the fine if it appears not to have the desired deterrent effect. Comcast received broadband revenues of $6.4 billion in 2007 with a profit margin estimated to be 80 percent.[49] If the fine is not enough to stop Comcast promptly, the Commission may modify the fine.[50]

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of a type that would add overhead versus a lighter ciphering type that would not.

[44] 47 U.S.C. § 503(b)(2)(D); 47 U.S.C. § 503(b)(2)(E).

[45] Comcast Comments at 25.

[46] Considering the hundreds of p2p clients, the fact that a single one has "an installed base of 20 million, and 2.1 million new client downloads every month" and the millions affected outside of Comcast subscribers, 2.8 million is by no means excessive. See http://www.vuze.com/docs/PR20080212_Vuze_Applauds_FCC_Hearing.pdf.

[47] See "About Comcast Corporation," Comcast Press Release, May 19, 2008, available at http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=758.

[48] "With an installed base of 20 million, and 2.1 million new client downloads every month, Vuze is the world's fastest growing and most innovative online entertainment brand." Vuze Press Release, "Vuze Applauds FCC in Setting Traffic-Throttling Hearing," Feb. 12, 2008, *available at* http://www.vuze.com/docs/PR20080212_Vuze_Applauds_FCC_Hearing.pdf.

[49] Vishesh Kumar, "Is it time to tune in to cable?," *Wall Street Journal*, April 3, 2008, *available at* http://www.freepress.net/node/38199; Comcast, "Comcast Reports 2007 Results and Provides Outlook for 2008," Feb. 14, 2008, available at http://library.corporate-ir.net/library/11/118/118591/items/279702/Q407_PR.pdf.

[50] In testifying before the Senate Commerce Committee in 2003 on enforcement of the Telecommunications Act of 1996, both Chairman Martin and Commissioner Adelstein noted the difficulty in levying a fine large enough for

Otherwise, at any time, the FCC can impose the maximum fine, which is rightly steep, to deter interference with what has been one of the leading drivers of national economic growth—the free and open Internet—especially where detection is so difficult and the equipment being used for this unlawful blocking is marketed as a way to reduce network investment and upgrades.[51]

V. Responding to Other Arguments

In this section, we reject some recent arguments advanced by Comcast and its allies.[52]

A. Comcast "Deal-Making" With Particular Parties is Irrelevant and Demonstrates the Need for Enforcing the Policy Statement

We have already explained that Comcast's agreements to talk with BitTorrent, Inc. and with Pando do not negate Comcast's conduct.[53] Indeed, Comcast continues to engage in its

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the company to be deterred from similar conduct in the future with Commissioner Adelstein noting, "given the vast size of some of the companies that we are overseeing, it is very hard to really get their attention with a small pin-prick of the size of the forfeiture and fine authority that we currently have." The following year Senator Hollings noted in a hearing that the Bell companies had been fined "to the tune of $2.6 billion". The Commission must ensure Comcast is adequately deterred. See Hearing on Competition in the Telecommunications Industry, Senate Commerce Committee, 108th Congress, 1st Session, January 14, 2003, Transcript, p. 62; quotation of Senator Hollings, Hearing on Telecommunications Policy Review: Lessons Learned From the Telecommunications Act of 1996, Senate Commerce Committee, 108th Congress, 2nd Session, April 27, 2004, Transcript, p. 3.

[51] "Sandvine's Intelligent Traffic Management solution offers the widest range of policy management options available to help service providers significantly reduce transit bandwidth costs and to avoid unnecessary capex spending for their access networks." Sandvine, Inc, "Sandvine DPI-Based Policy Solutions," July 5, 2007, available at http://www.sandvine.com/general/getfile.asp?FILEID=17; See also Free Press et al. Reply Comments at 9-12.

[52] We ask that the Commission note that many opposing commenters are funded by phone and cable companies. For example: Progress & Freedom Foundation (Comments filed Feb. 13, 2008, Reply Comments filed Feb. 27, 2008), see http://www.pff.org/about/supporters.html; Phoenix Center for Advanced Legal & Economic Public Policy Studies (Testified at FCC En Banc Hearing at Stanford, April 17, 2008), The cable industry itself have questioned their motivations, see National Cable & Telecommunications Association, "Phone Companies and the Truth: A Bad Connection," March 14, 2006, available at http://www.ncta.com/DocumentBinary.aspx?id=299; Hands Off the Internet (Comments filed Feb. 13, 2008, Reply Comments Feb. 28, 2008), see http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=2007803; National Black Chamber of Commerce (Comments filed Feb. 13, 2008, Reply Comments filed Feb. 28, 2008), see http://web.archive.org/web/20070812152224/http://www.nationalbcc.org/index.php?option=com_content&task=view&id=135&Itemid=101. Free Press, of course, accepts no money from corporations, political parties, or the government.

[53] *See* Free Press, "Comcast-BitTorrent Talks No Substitute for Net Neutrality," March 27, 2008, available at http://www.freepress.net/node/37939; Deborah Yao, "Comcast will treat BitTorrent traffic equally," *Associated*

unreasonable and anti-consumer discrimination despite these talks (and its talks with Pando have apparently been restructured, due to criticism from the wider Internet community).[54] Moreover, these talks do nothing to protect consumers from future harms. The worst scenario for consumers would be one where small companies like Pando and BitTorrent, Inc. have to cut special deals with every network provider to reach audiences. Such a scenario would transform the Internet into the cable model, where the network provider can determine which "channels" will have an audience, and programmers will vie for preferential access from the network provider.

Comcast's involvement in the P4P discussions does nothing to obviate the need for FCC action.[55] As we state in our reply comments, collaboration can of course be beneficial for consumers.[56] However, certain aspects of the P4P project are concerning, as one of its leading members has reportedly sought to cut a special deal, at the expense of the public, to receive preferential treatment.[57] Furthermore, we remain skeptical of a few qualities of the P4P working group, given the non-public nature of the data and the closed manner in which it has proceeded. We urge the core group participants to move away from this closed model and become a truly

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Press, March 27, 2008, *available at* http://www.usatoday.com/tech/products/services/2008-03-27-comcast-bittorrent-traffic_N.htm; SavetheInternet.com Blog, "Comcast's 'Bill of Rights,' Wrong for an Open Internet," April 18, 2008, available at http://www.savetheinternet.com/blog/2008/04/18/comcasts-bill-of-rights-wrong-for-an-open-internet/; Free Press, "Comcast-Pando Pact Won't Protect Consumers," April 15, 2008, available at http://www.freepress.net/node/38480; Brad Stone, "Comcast Adjusts Way It Manages Internet Traffic," New York Times, March 28, 2008, *available at* http://www.nytimes.com/2008/03/28/technology/28comcast.html. *See also* Statement by FCC Chairman Martin on Announcement by Comcast and BitTorrent, March 27, 2008, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281165A1.pdf.

[54] Janko Roettgers, "Comcast Abandons P2P Bill of Rights," NewTeeVee, May 6, 2008, *available at* http://newteevee.com/2008/05/06/comcast-abandons-p2p-bill-of-rights/.

[55] *See, e.g.*, Matthew Lasar, "Big ISPs push P4P as substitute for net neutrality," *Ars Technica*, April 10, 2008, *available at* http://arstechnica.com/news.ars/post/20080410-big-isps-push-p4p-as-substitute-for-fcc-regulation.html.

[56] Free Press et al. Reply Comments at 28.

[57] "Robert Levitan, the chief executive of Pando, had told me that he hoped Comcast might program its network to give preference to applications like the one his company makes." Saul Hansell, "Comcast's Concession to Net Neutrality," New York Times Bits Blog, April 17, 2008, *available at* http://bits.blogs.nytimes.com/2008/04/17/comcasts-concession-to-net-neutrality/?hp.

open-source project that allows the wider Internet community to participate in the formation of the framework and the ability to publicly vet the details and provide suggested improvements. This model would be much more consistent with the type of testing routinely done for Internet applications and technology.[58] With business collaborations, we must ensure the collaborations do not foist proprietary technologies and closed systems on a public and an applications industry that would benefit from the openness, competition, innovation and choice of open technologies.

Moreover, Comcast's involvement in P4P is somewhat puzzling, as the underlying technology could increase congestion on Comcast's network. This might imply that Comcast was blocking off-network uploads to reduce transit costs or maintain peering ratios, rather than reduce congestion. Comcast has repeatedly claimed the central issue in this proceeding is managing congestion in the last mile.[59] But P4P provides geographic awareness for peers looking to communicate with local peers, allowing network operators to keep traffic on their local networks. This can reduce costs such as those associated with peering and transit arrangements to interconnect with backbone providers. But this does not appear to reduce congestion; rather it increases traffic on the last mile network.[60] In a recent presentation, submitted as an ex parte in this proceeding, Comcast acknowledged this fact stating that the

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[58] For example, uTorrent began testing a new version of its software with a forum announcement, making weekly updates to the underlying code, while bugs are reported through the forum. See http://forum.utorrent.com/viewtopic.php?id=31998; A similar situation exists with Shareaza. See http://www.shareazasecurity.be/forum/viewforum.php?f=15.

[59] Chloe Albanesius, "Comcast Admits Delaying, Not Blocking, P2P Traffic," *PC Magazine*, October 22, 2007, *available at* http://www.pcmag.com/article2/0,1759,2204751,00.asp; Comcast Comments, Feb. 12, 2008, at 27; Comcast Ex Parte, May 16, 2008, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520010123; Comcast FAQ, "How does Comcast manage its network?" http://help.comcast.net/content/faq/Frequently-Asked-Questions-about-Network-Management#how.

[60] "Levitan believes P4P can significantly ameliorate heavy P2P traffic burdens for ISPs by shifting traffic patterns. While "normal" P2P comprises approximately 98 percent inter-ISP and 2 percent intra-ISP traffic, P4P shifts the intra-ISP figure to 50. "That has real cost implications for real physical network and operating investment to expand connections with other ISPs," he says. "The second step, making that internal data movement even more local translates to fewer routers the ISP needs to deploy. The implications are potentially billions of dollars in

benefits of P4P include "increased traffic localization within ISP metro regions."[61] Comcast also states, "These newly released test results demonstrate the applicability of P4P to cable ISP infrastructures."[62] The CEO of Pando, the p2p company leading these efforts goes further:

> If you and I are on Comcast, and we want to download a TV show, P4P will connect us to nodes within the same Comcast cable network, instead of connecting randomly to users and nodes across multiple ISPs and regions…Local is most efficient. If content is on your block, it can travel the fewest links or hops. That's the whole point of this: let's try to have data move internally and, as much as we can, locally.[63]

We are puzzled why Comcast is seeking to implement a solution that will further exacerbate the supposed congestion problem that caused them to secretly violate their consumers' right to access all applications and content of their choice. Of course, regardless of the technical reasoning, the fact remains that Comcast is disadvantaging an emerging competitor to their core video business.

We also have uncertainty as to Comcast's actual participation (beyond providing a quote for the press release) in the P4P working group. At the P2P Media Summit on May 5, 2008, nearly a month after their inclusion in a P4P press release (filed with the Commission as an ex parte[64]), Comcast states that it would "like to initiate conversations with engineers in the P4P working group."[65]

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infrastructure cost savings." ScreenPlays, "Pando Field Test Results Attract Cable and Telco Ops to P2P 'Good Guys'," April 9, 2008, *available at* http://www.openp4p.net/front/fullnews/21.

[61] Comcast Ex Parte, May 16, 2008, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520010123.

[62] ScreenPlays, "Pando Field Test Results Attract Cable and Telco Ops to P2P 'Good Guys'," April 9, 2008, *available at* http://www.openp4p.net/front/fullnews/21.

[63] Id.

[64] Comcast Ex Parte, April 9, 2008, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519872850.

[65] Comcast Ex Parte, May 16, 2008, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520010123.

In addition, Comcast has recently invested in a peer-to-peer company delivering high-definition television.[66] With this investment, Comcast has even more incentive to degrade and block competing peer-to-peer services.

B. The Only Way for the Commission to Act Consistently With Its Existing Policy is to Apply the Policy Statement's Principles

Comcast has argued, somehow, that if the Commission follows its own Policy Statement issued three years ago, as well as its consistent declarations that it would protect consumers from blocking and degradation, then the Commission will have made an "abrupt departure" from a policy of ensuring broadband services remain in a "minimal regulatory environment."[67] This argument is frivolous. Rather, the Commission would have to justify any abrupt departure from its repeated assurances that the Commission would act on complaints in conformity with its Policy Statement.[68]

First, the Commission has been consistent that consumers have the right to access all lawful content and run all applications online, and that, should a broadband provider violate that right, the Commission would act. The Commission has long stated it would remain vigilant in monitoring developments in the broadband marketplace to impose diverse regulations ranging from disability access to open Internet principles.[69] Even before any allegation that a cable operator had denied "access to unaffiliated content" or attempted to "relegate unaffiliated content to the 'slow lane' of its service", by delaying the service, the Commission asked if the mere "threat that subscriber access to Internet content" was "sufficient to justify regulatory

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[66] *Associated Press*, "Comcast invests in peer-to-peer video-delivery startup GridNetworks," May 19, 2008, *available at* http://www.startribune.com/science/19072479.html?location_refer=Science%20+%20Technology.
[67] Comcast Comments at 54.
[68] *See* Free Press et al. Petition for Declaratory Ruling, at 14-16.
[69] *See, e.g.*, Wireline Broadband Order, at 14913-33; Notice of Inquiry, Broadband Industry Practices, March 22, 2007; see also Free Press et al. Petition at 14-16.

intervention at this time."[70] Everyone understood that if a network provider began engaging in these practices the Commission would act, likely through the complaint process.[71] The FCC's Internet Policy Statement is probably the most famous policy statement in the history of administrative law; it is the first entry in a Google search of "policy statement"; the Statement was incorporated into several large telecommunications mergers. This policy "has been shouted from the rooftops" and there has been "no reversal of policy."[72]

Second, even had the Commission not repeatedly declared it would enforce the Policy Statement, a rule against unreasonable discrimination remains a "minimal regulatory environment." Indeed, while seeking other regulatory benefits, Comcast and other providers repeatedly promised Congress and the FCC that they did not intend to engage in online discrimination. Comcast claimed, in 2002, that "consumers can access whatever Internet content they wish, without constraint."[73] In 2000, AT&T, then a cable operator, claimed that cable operators provide subscribers with "unrestricted access to the public Internet (and all of the networks that comprise and are connected to it)."[74] Comcast and other cable providers were not then claiming a nondiscrimination rule was onerous regulation. Some providers suggested a "minimal regulatory environment" would include even more regulation, such as mandatory ISP access.[75] As Commissioner McDowell told Congress: "There are circumstances, however, when

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[70] *See* 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 NPRM, 17 FCC Rcd. 4798 ¶87 (2002).

[71] *See, e.g.*, Free Press et al. Reply Comments at 49-51; *see also* Free Press et al. Petition at 15-16; Free Press et al. Policy Statement Memo at 5-7.

[72] *See, e.g.*, New York State Commission on Cable Television v. FCC, 749 F.2d 804, 812 (D.C. Cir. 1984) (citations and internal quotations omitted).

[73] Comcast Comments, CS Dkt. No. 02-52, June 17, 2002, at 4, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513198081.

[74] AT&T Comments, GN Dkt. No. 00-185, Dec. 1, 2000, at 29, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512159408.

[75] SBC Communications Reply Comments, CS Dkt. No. 02-52, Aug. 6, 2002, at 23-25, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513285364.

the government should address market failure to further the public interest so new entrepreneurial ideas have a chance to compete in the marketplace."[76] Nondiscrimination is a minimal and targeted action to ensure entrepreneurial innovation and competition.

Therefore, if the Commission deviates from its Policy Statement and from the repeated orders and statements promising the public to protect open (or neutral) networks, the Commission would need to justify *that* departure.[77]

C. Enforcing the Policy Statement Will Increase, Not Reduce, Investment and Deployment in Broadband

We have demonstrated that network providers who are free to block and degrade content or applications will seek to maximize economic rents by profiting from scarcity. Because they would be able to profit from scarcity, they would have little to no incentive to upgrade their networks and relieve that scarcity.[78] Both investment and deployment would decrease.[79]

By contrast, network providers have argued that non-discriminatory network management rules would lead to less deployment and slower upgrades, as the providers would have less financial incentive to deploy network infrastructure.[80] This contention is simply wrong.

First, as the Commission has stated, an open and interconnected Internet ensures greater deployment, not less,[81] precisely because content and applications are what drive consumer adoption of broadband technology..[82] Consumers place value on the applications and content

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[76] Statement of Commissioner Robert M. McDowell, FCC, Before the H. Subcommittee on Telecommunications and the Internet, H. Comm. on Energy and Commerce, p. 3, Mar. 14, 2007, http://energycommerce.house.gov/cmte_mtgs/110-ti-hrg.031407.McDowell-Testimony.pdf..

[77] *See, e.g.*, Fox Television Stations v. FCC, 489 F.3d 444, 450-51, 456 (2007) (evaluating the Commission's shift in indecency enforcement from a previous policy statement and course of decisions).

[78] Free Press et al. Petition at 27.

[79] *See* Free Press et al. Title I Memo at 18-22.

[80] Comcast Comments at 54; AT&T Comments at 18.

[81] *See, e.g.*, Policy Statement at ¶4 (adopting all four principles "To encourage broadband deployment").

[82] *See* Free Press et al. Reply Comments at 33-34.

that the network offers, not the network itself. As the available pool of content and applications increases, so does consumer utility. At the same time, as the available pool of applications and content increases, so does the need for the network operator to make investments and upgrades in the network. These investments are justified from an economic standpoint because they allow the network operator to maintain the value of their network.

Second, the *Policy Statement* has been in effect for nearly three years, and during this time network operators utilizing various technologies have spent billions deploying broadband knowing full well their obligation to adhere to the principles outlined by the Commission in 2005. Indeed, several commenters in this proceeding have highlighted the investments made in "third-pipe" technologies[83], and Comcast themselves has recently highlighted its *current* and future investment plans.[84] The Commission should take special notice of the fact that Comcast recently *doubled* upload speeds for all its customers, despite the fact that their central reason behind blocking p2p was upload network congestion.[85] The fact that Comcast has taken steps to implement network upgrades while the Commission is headed towards a decision on enforcement of the Policy Statement plainly illustrates that the argument that enforcing the principles of the statement will deter investment is nothing but a distraction.

Third, as we have extensively detailed, network operators have repeatedly pledged to abide by the principles contained within the Policy Statement -- even prior to its adoption.[86] If we take these pledges as genuine, then we must assume that the companies vowing to abide by

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[83] *See, e.g.,* Comcast Reply Comments at 2; Time Warner Cable Comments at 5; Verizon Comments at 12.
[84] Comcast Corporation Press Release, "Comcast Unleashes New 50/5 Mbps Extreme High-Speed Internet Service Using DOCSIS 3.0 Technology in the Twin Cities," April 3, 2008, available at http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=741; Written Statement of the Honorable Kevin J. Martin Before the United States Senate Committee on Commerce, Science and Transportation, April 22, 2008, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281690A1.doc.
[85] "Comcast Increases Upstream Speeds for Its High-Speed Internet Customers for No Additional Charge", *Press Release*, June 12 2008. Available at http://biz.yahoo.com/bw/080612/20080612005162.html?.v=1.
[86] *See* Free Press et al. Comments at 29, Appendix 2.

the Policy Statement have already accounted for this in their long-term business plans -- plans that are centered around future network investment and upgrades.

Fourth, the cable industry in the recent past dismissed the argument that openness diminishes investment. AT&T Corp., a cable company acquired by Comcast in 2002, scoffed at the argument that *open access conditions* (which are arguably a much larger regulatory intervention than non-discrimination principles), would undermine an incumbent phone company's incentive to invest in its network stating, "[t]hese arguments amount to nothing more in the present context than misplaced drama."[87] We believe this characterization holds true today.

Fifth, cable operators like Comcast claim the costs of network upgrades are inexpensive. If this is true then basic non-discriminatory ground rules will have no impact on investment decisions, which will be driven by other market fundamentals like consumer demand. The major cable operators have all emphasized in press statements how easy and inexpensive network upgrades are.[88] Comcast's CTO recently stated that upgrades are "usage driven."[89] If they are, consumers should not be facing periods of congestion (especially considering the consistent growth rates of Internet usage[90]).

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[87] Affidavit of R. Glenn Hubbard, William H. Lehr, Janusz A. Ordover & Robert D. Willig on behalf of AT&T Corp, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996. Federal Communications, CC Dkt. No. 96-98, p. 31, June 10, 1999, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6007645334.

[88] CTO of Charter Communications Marwan Fawaz: "There are two types of node splits…Both are success driven. As the number of DOCSIS devices in that particular service area grow to a certain level, it triggers capacity requests to split a node. Either way, it's not significant, from a total capital spend viewpoint, today."
CTO of Time Warner Cable, Mike LaJoie: "you want more throughput for your customers, the easiest and least expensive way is to add another DOCSIS carrier. It's basically free." *See* Leslie Ellis, "How Sexy is HFC? (Answer: Plenty.)" *CED Magazine*, May 1, 2007, *available at* http://www.cedmagazine.com/article.aspx?id=146993.

[89] *Id.*

[90] Free Press et al. Reply Comments at 16-17.

Indeed, it is widely recognized that the primary factor influencing investment in infrastructure upgrades is competition, not regulation or a lack thereof.[91] Cable operators in overseas markets with much more competitive markets are making substantial investment in network upgrades. The consumers in these foreign countries are also not subjected to the draconian network management principles used by U.S. companies like Comcast. However, in the U.S. where there is very little meaningful direct competition amongst network providers, we see only incremental investment from cable operators. The success in overseas markets makes in quite clear that the choice offered to consumers by certain U.S. companies between open networks or upgraded networks is a false choice. While American consumers are subjected to high prices and application blocking consumers in other nations in the OECD continue to enjoy the real-world economic benefits of meaningful competition.[92]

This comparative lack of competition and its direct impact on investment is illustrated by the cable industry. Currently, only one U.S. cable operator, Comcast, is offering next generation cable-broadband (DOCSIS 3.0), at a price of $150 a month to a single market, months (in some cases years) after many other international cable operators have taken the step. The OECD recently reported that ten of the thirty countries studied have a cable operator offering a higher maximum download speed than the U.S. (with six more at the same speed).[93] As the Chief Architect for Cisco's cable business unit in reference to DOCSIS 3.0 remarked in October 2006,

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[91] Written Statement of Blair Levin, Managing Director and Telecommunications, Technology and Media Regulatory Analyst, Stifel Nicolaus & Company, Before the United States Senate Committee on the Judiciary, June 14, 2006.

[92] Free Press, "U.S. Continues to Trail in World Broadband Rankings," May 20, 2008, *available at*http://www.freepress.net/node/40052. In its most recent assessment of broadband policies worldwide, the OECD underscores the economic importance of progressive broadband deployment (see OECD, Broadband Growth and Policies in OECD Countries: Ministerial Background Report, 2008, 7).

[93] OECD "5f. Fastest Advertised Connection Offered by Surveyed Cable Operators", *OECD Broadband Statistics*, May 2008, available at http://www.oecd.org/sti/ict/broadband.

"The Asia community was screaming for this stuff probably a couple of years ago."[94] All the while, major U.S. cable operators have casually taken a wait and see approach, affirmed by public statements to that effect.[95]

The consequences of this lack of competition are those predicted by classic microeconomic theory: reduced output (e.g. artificial congestion) and supra-competitive profits. Even as Comcast continues it blocking they and others enjoy 80% profit margins on broadband.[96] When U.S. cable operators talk to investors, upgrades are cheap; when they talk to the FCC, however, they claim any baseline consumer protections will deter investment in infrastructure upgrades. We urge the Commission to reject the red herring argument that baseline consumer protections deter investment and focus on policies that will foster the competitive environment and investment occurring overseas.[97]

The Commission should reject the false-choice between openness and investment -- a false choice that would lead to a closed one-way Internet, undermining the goals of Section 706 of the 1996 Telecommunications Act.[98] We do not have to abandon the Internet—as an open network of networks—to increase deployment of it; to do so would simply reduce deployment of the Internet to "no deployment."

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[94] Jeff Baumgartner, "Inside DOCSIS 3.0," CEDMagazine.com, Oct. 1, 2006, *available at* http://www.cedmagazine.com/inside-docsis-3-0.aspx.

[95] CTO of Charter Communications Marwan Fawaz: "we haven't completely taken advantage of a lot of the capabilities already present in DOCSIS 2.0. From a competitive response perspective, 2.0 will be sufficient in some areas."
CTO of Cox Communications, Chris Bowick: "There's lots of room to grow before we need 3.0."
CTO of Time Warner Cable, Mike LaJoie: "We're waiting for DOCSIS 4.0 (laughs). We're in the same boat…. DOCSIS 2.0 serves us just fine, through '09 and '10."
Leslie Ellis, "How Sexy is HFC? (Answer: Plenty.)" CED Magazine, May 1, 2007, *available at* http://www.cedmagazine.com/article.aspx?id=146993.

[96] Vishesh Kumar, "Is it time to tune in to cable?," *Wall Street Journal*, April 3, 2008, *available at* http://www.freepress.net/node/38199.

[97] S. Derek Turner, "Broadband Reality Check I," Free Press, August 2005; S. Derek Turner, "Broadband Reality Check II," Free Press, August 2006; Free Press et al. Comments, GN Dkt. No. 07-45, May 16, 2007; Free Press et al. Reply Comments, GN Dkt. No. 07-45, May 31, 2007; S. Derek Turner, "Shooting the Messenger," Free Press, July 2007.

D. Dynamic Markets Need Baseline Rules

In this proceeding, industry commenters have asserted that the current broadband marketplace and its associated technology are "dynamic"[99] and any government-imposed rules would therefore be inappropriate. For example, Comcast has claimed "imposing requirements through government regulation will prevent marketplace experimentation and evolution and innovation."[100] Such claims ignore the reality that the best time to mandate basic consumer safeguards are during a market's *emergence* rather than after the market has settled on anticompetitive market structures and anti-consumer practices. This notion is well established. In a 2001 Commission proceeding on interactive television, broadcasters were concerned that cable providers would discriminate in the emerging interactive television industry. The National Association of Broadcasters wrote:

> Numerous commenters in other Commission proceedings - and the Commission itself - have recognized the inefficiencies and greater costs associated with such "ex post" regulation. Indeed, the old adage "an ounce of prevention is worth a pound of cure" seems remarkably apt in this situation, as industry observers have noted the dangers of regulators adopting a "wait-and-see attitude" while individual companies are "establishing the architecture of the broadband world right now." Establishing clear nondiscrimination standards now would also allow broadband providers to construct or upgrade their systems to be consistent with the Commission's "rules of the road."[101]

A coalition of programming networks, including The Walt Disney Company and Viacom, made the same point:

> It is not too early in the evolution of the ITV [interactive television] market for such safeguards, but precisely the right time. Nondiscrimination safeguards will create a virtuous circle: lowered entry barriers will allow more firms to compete to provide ITV services and content, resulting in innovative services and lowered

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[98] Free Press et al. Comments at 19-21.
[99] Comcast Comments at 7; Verizon Comments at 4; Time Warner Cable at 22.
[100] Comcast Reply Comments at 36.
[101] Comments of the National Association of Broadcasters, In the Matter of Nondiscrimination in the Distribution of Interactive Television Services Over Cable, CS Docket No. 01-7, March 19, 2001, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512562817

> prices, in turn spurring consumer demand for ITV services and the broadband capacity to enjoy those services.[102]

Similarly, in detailing the discrimination of cable operators and asking for open access conditions in the AT&T/Comcast merger, SBC recognized that:

> The broadband market is nascent and crucial new products and technologies are being developed quickly. Accordingly, as the Commission has previously recognized, any harm to this market at this critical stage will have long-lasting effects on consumer welfare.[103]

GTE (now Verizon) also recognized the need for establishing pro-consumer baseline rules as an industry develops, rather than attempt do so after the problem occurs. In the AT&T/MediaOne merger, GTE wrote:

> Ultimately, the Commission faces the choice of regulating a little now or a lot later. History is replete with examples underscoring the difficulty of undoing network monopolies once they have become entrenched.[104]

Arguments by Comcast and others in this proceeding, are motivated by the desire to create an incumbent-dominated marketplace free of ground rules, where incumbents can control competitive threats (like peer-to-peer video delivery). The Commission should recognize that enforcing the ground rules established in the 2005 Policy Statement will ensure the continued

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[102] Comments of the Non-MVPD Owned Programming Networks, In the Matter of Nondiscrimination in the Distribution of Interactive Television Services Over Cable, CS Docket No. 01-7, March 19, 2001, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512562853; Also see "Moreover, trying to remedy entrenched discriminatory practices down the road will be far more costly than creating safeguards to stem those practices at the outset as the Non-MVPD Owned Programming Networks explain in their Comments" Reply Comments of the Non-MVPD Owned Programming Networks, In the Matter of Nondiscrimination in the Distribution of Interactive Television Services Over Cable, CS Docket No. 01-7, March 19, 2001, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512567373.

[103] Comments of SBC Communications, Inc, In the Matter of Applications for Consent to the Transfer of Control of Licenses From Comcast Corporation and AT&T Corp., to AT&T Comcast Corporation, MB Docket 02-70, April 29, 2002, at 16, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513189221.

[104] Petition of GTE Service Corporation, GTE Internetworking, and GTE Media Ventures, Inc. To Deny Application, or in the Alternative, to Condition the Merger on Open Access Requirements, In the Matter of Applications for Consent to the Transfer of Control of Licenses MediaOne Group, Inc., Transferor, To AT&T Corp., Transferee., CS Docket No. 99-251, July 29, 2000, p. 67, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512357996.

development of a broadband market where providers have incentives to invest in upgrades and employ consumer-friendly network management practices. Ignoring the Policy Statement will only lead to further deployment of blocking technologies that reward reduced investment, forever sinking the Internet's future promise.

E. The BitTorrent Protocol is Not Overly Aggressive

We addressed several technical inaccuracies in our Reply Comments.[105] We attach a memorandum by Robb Topolski refuting the argument that BitTorrent "unfairly" cheats TCP congestion mechanisms by opening too many TCP sessions. Moreover, the OECD's most recent policy report on broadband deployment explicitly addresses the innovative value of BitTorrent as a peer-to-peer based service.[106]

VI. Conclusion

In short, we urge the Commission to issue a decision on complaints limited to the issues in the complaint and urge it not to set forth broader dicta on prioritization or filtering until there is more information and a relevant complaint. To evaluate broadband discrimination, the Commission should impose standards analogous to strict scrutiny and should set forth an adjudication process.

The Commission should immediately enjoin Comcast and fine Comcast for every day Comcast delays in complying with the injunction. This filing also rejects certain flawed arguments raised by Comcast: its "deal-making" with particular parties is irrelevant; enforcing network neutrality is not a departure from existing FCC policy; enforcing network neutrality will spur broadband deployment, not hinder it; as a developing market, broadband would benefit from baseline rules; and BitTorrent technology is not overtly aggressive.

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[105] *See* Free Press et al. Reply Comments at 17-19.
[106] OECD, *Broadband Growth and Policies in OECD Countries: Ministerial Background Report,* 2008, 98

Appendix 1

Testimony of

Ben Scott
Policy Director
Free Press

before the

U.S. House of Representatives
Subcommittee on Telecommunications and the Internet of the
Committee on Energy and Commerce

on behalf of

Free Press
Consumers Union
Consumer Federation of America
Public Knowledge

Regarding

A Legislative Hearing on H.R. 5353, The Internet Freedom Preservation Act of 2008

May 6, 2008

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Summary – Testimony of Ben Scott, Policy Director, Free Press, May 6, 2008

The Internet's open marketplace for speech and commerce is the hallmark of the most transformative communications technology since the printing press. Determining how to ensure an open Internet for consumers is the most important communications policy decision of the decade. It represents a pivotal moment for the future of the Internet -- a technology that is rapidly becoming the dominant communications infrastructure of our information society.

Two competing visions for the Internet stand before policymakers. The first is an open Internet with baseline rules to protect consumers' right to access the content and services of their choice. The second is a closed network that would permit experiments with content control and discriminatory service provisions that have been the hallmark of the old media world. It is a virtual clash of civilizations. Congress should choose the path of open markets for speech and commerce -- a path championed by virtually every consumer and innovator using the Internet.

The stakes of the debate have long been known. But the consequences of a closed Internet are sharpening in clarity. Comcast is currently under investigation by the Federal Communications Commission for allegations that it has secretly blocked consumers from using a popular Internet application. This case shows unequivocally that -- contrary to what telephone and cable companies said in 2006 -- consumer protection rules online are not a "solution in search of a problem." There is a very clear problem -- Comcast was just the first to cross the line and get caught. That case also demonstrates that the threat requires congressional action: Comcast disputes the FCC's legal authority to protect consumers.

The recent debate has been punctuated with misdirected concern about issues that are important in their own right but unrelated to this bill. To be clear, Network Neutrality is not mutually exclusive -- or even in tension -- with protecting copyright, network security or children. None of the proposed consumer protections safeguard illegal activity from prosecution. Further, this debate is not about file-sharing or peer-to-peer (P2P) programs. Far from being bad actors on the Internet, these technologies indicate a growing sector of innovation.

Reviewing the short history of debate over this issue demonstrates that everyone favors some kind of consumer protection principles or rules that guarantee an open Internet. It is not a question of *whether* consumers will have laws guarding against Internet gatekeepers, but *how* those laws will be crafted.

The last three years of legislative proposals and regulatory activity on the issue of Network Neutrality show remarkable unanimity of purpose and desired outcome. Republicans and Democrats in the legislature and at the FCC have all agreed that consumers are entitled to access the lawful content, applications and devices of their choice without interference from network owners. There is substantial precedent for establishing principles of nondiscrimination in the law and granting FCC authority to redress complaints brought by Internet users.

The Internet Freedom Preservation Act is a reasonable bill that includes elements of the legislative proposals and regulatory efforts that have preceded it. It draws from this consensus to establish consumer protections at the base of the Communications Act. It also directly clarifies the authority of the FCC to act in defense of consumers, an authority which is challenged by the cable industry in the Comcast case. Finally, this bill recognizes that we do not yet have all the answers. It calls for a broad public inquiry into the future of Internet policymaking on the backdrop of these baseline principles of consumer choice and open markets.

It is time for Congress to act. This is the right bill at the right time. The future of the Internet for everyone depends on it.

Background and Overview

For the last three years, the preservation of "Network Neutrality" has been a priority issue for nearly every major consumer organization in the country that works on communications policy. The reason is simple. We stand at a paradigm-shifting moment in the history of Internet policymaking.

The Internet is rapidly emerging as the dominant means of mass communication -- transforming traditional broadcasting and cable with new business models and decentralizing the tools of speech and commerce in the information society to all citizens. This critical moment is a singular opportunity to learn from the past. The Committee has spent years working to redress the problems in the current media system created by concentrated market power, gatekeepers and anti-competitive practices that reduce diversity, limit access and control the flow of content. Sitting on this Committee for a decade should make anyone an expert on what has gone wrong with traditional media.

Unfortunately, once the pie is baked; it is hard to un-bake it. The concentration of power in the broadcasting and cable industries is well-established -- and fiercely defended by legions of industry lobbyists. Policy decisions made at key points in the development of these technologies have played a central role in strengthening rather than weakening this consolidation. Now, this Committee spends a great deal of its time crafting reforms to create competition, lower consumer rates and foster more diverse content. But it is an uphill battle trying to undo outcomes in the communications market that were set in motion decades ago.

The Internet represents a new chapter in this history. What Congress and the Federal Communications Commission decide in the next few years of major technological change will determine how communication in the information society evolves. This is the time to learn from the mistakes of the past -- the time to undo cartels, promote free markets and guarantee consumer rights. Armed with the knowledge of what went wrong with the policies governing old media, we can make good policy decisions that protect the future of the Internet.

There are two competing schools of thought on how Internet policy should be made. One school suggests that Congress should permit the dominant financial interests in today's broadband networks -- generally a local duopoly of phone and cable companies -- to control the Internet market of the future. The opposing school of thought suggests that Congress should strive to keep the Internet open as a free marketplace of ideas and commerce -- the first media form in history without centralized gatekeepers.

This is a veritable "clash of civilizations" that has been stalemated for three years. The correct choice should be clear. Congress should opt for competition and free markets, resisting the logic of deregulation that would hand over new media to the titans of old media. Deregulation is not a free market policy in this context -- it is the handmaiden of a 21st century media cartel. Will we embrace the openness that has shaped the Internet to the present day? Or will we permit network owners to move to the closed systems of content control we have had with cable television and broadcasting?

From a consumer perspective, the clash over the future of the Internet is about user control. Put simply, consumers want to preserve their freedom to use the Internet as they wish -- without interference from gatekeepers. This user experience depends on establishing minimum baseline consumer protections that guarantee openness on the Internet. The Internet Freedom Preservation Act would do just that.

Let me say a few words about openness on the Internet -- probably a more apt term than "Network Neutrality." Openness does not mean an end to all network management. It does not mean every bit should be treated exactly alike on the Internet. Openness does not reject protecting children or copyright or security on the Internet. Openness simply means that Internet policy should promote free speech and

commerce in the online marketplace. Openness means faithfully guarding against interference from the cable and telephone companies who have the technical and market power to become bottlenecks between consumers and producers of Internet content. Openness means deliberately refusing to accept marketplace behaviors that seek to discriminate.

These are the stakes of this debate, this bill and this legislative hearing. History will record these years as the pivotal juncture when the policies that shaped the future of the Internet were made. It is the time for Congress and the FCC to send the correct signals to the market that openness on the Internet will be the future of the technology -- not a closed system of content control and gatekeepers. Passing the Markey-Pickering bill would be a timely and appropriate method to accomplish this worthy goal.

The Internet Freedom Preservation Act - A Reasonable Proposal to Protect Consumers

Urgency to Act – FCC and the Comcast Case

The Internet Freedom Preservation Act is the right bill at the right time. Moreover, the urgency to move on this bill is rising. It is now unequivocal that passing a bill to protect consumer access to lawful content on the Internet is not a "solution in search of a problem." This was the mantra of the cable and phone companies throughout the congressional debate over Network Neutrality in 2006. In hearing after hearing, executives and trade association presidents promised Congress that network operators would never interfere with consumers' access to content on the Internet. Here is one example from National Cable & Telecommunications Association President and CEO Kyle McSlarrow's testimony before the Senate Commerce Committee:

> "I think we can all agree that consumers should have reasonable expectations from the companies that deliver high-speed Internet service to them. So let me be clear. NCTA's members have not and will not block the ability of their high-speed Internet service customers to access any lawful content, application or services available over the public Internet."[1]

Despite the warnings of Net Neutrality supporters at the time, the 110th Congress ended without a resolution on legislation guarding openness on the Internet.

Network operators promised they would not block consumer access to Internet content in 2006. But they did exactly that in 2007. A bellwether case now sits before the FCC -- a case involving Comcast and allegations that it is using network technologies to block and degrade consumer access to content on the Internet. The facts of the case are straightforward. Not only was Comcast blocking consumer access to Internet content -- they were doing so secretly, using technologies that "spoof" the computers of its customers and disguise the practice of blocking.

Millions of dollars have already been spent litigating this case and prosecuting its arguments in the media. The FCC has conducted to *en banc* field hearings in which **Massachusetts Institute of Technology** (**MIT**) engineers and the nation's leading Internet law professors from Harvard, Columbia and Stanford universities confirmed that Comcast has been blocking consumer access to Internet content. It is a precedent-setting case.

[1] National Cable and Telecommunications Association, President and CEO Kyle McSlarrow, Before the United States Senate Committee on Commerce, Science, and Transportation, Hearing on Net Neutrality, February 7, 2006, Available at http://commerce.senate.gov/pdf/mcslarrow-020706.pdf.

How was this momentous case kick-started? Was it Silicon Valley organizing its corporate might to challenge the telephone and cable companies in a battle of the titans? No. It was a barbershop quartet fan in Oregon. A network engineer named Robb Topolski began the network testing that ultimately triggered the FCC's Comcast case because he couldn't share his favorite non-copyrighted, 19th century barbershop tunes with his friends. Comcast first denied its interference. Months later, when the Associated Press confirmed Topolski's tests, Comcast acknowledged it but directly challenged the legitimacy of the FCC's authority to intervene. Finally, Comcast promised to stop at some undisclosed future time subject to an undefined agreement -- hoping the government would walk away.

Robb Topolski has proven what has always been obvious to those of us in the consumer groups working on this issue. This debate isn't about AT&T, Comcast, or Google or EBay. It's about every consumer wanting to seek or share information on the Internet. Even though very few of us can test networks like Topolski, and fewer still will see their attempt to share music become first-tier business for a federal agency, this is a singular case with historic implications for all consumers.

The Comcast case at the FCC demonstrates exactly why Congress should pass this bill. This bill establishes an important baseline protection for consumers -- one that is long overdue and much-needed given the behavior of network operators in the marketplace. This bill is also highly appropriate and timely given the debate over the FCC's authority to adjudicate this proceeding. In its filings and testimony before the agency, Comcast is directly challenging FCC authority to act on the complaint against them. "The Commission cannot lawfully issue an injunction against Comcast," the company wrote in its filing, "…even were it to conclude…that Comcast's behavior is inconsistent with the Internet Policy Statement."[2]

Notice how this statement is completely the opposite of what network owners claimed in 2006 -- that the FCC would act in the unlikely event of a consumer complaint. FCC Chairman Kevin Martin has been consistently firm in his belief that he does have authority. In April, he testified before the Senate Commerce Committee, reiterating what he has said for three years: "I also believe that the Commission has a responsibility to enforce the principles that it has already adopted. Indeed, on several occasions, the entire Commission has reiterated that it has the authority and will enforce these current principles."[3]

In light of this controversy and the likelihood of a judicial appeal of any FCC action drawing on Title I ancillary authority, it is perfectly reasonable for Congress to legislate -- reaffirming the FCC's authority and giving further guidance to the agency as to the character of the marketplace and the consumer rights the Congress intends to promote. In short, this bill would reaffirm the FCC's authority to act on behalf of consumers like Robb Topolski.

Copyright and Peer-to-Peer

The Comcast case highlights what this debate is all about. But it is important to clarify what this open-Internet debate over is *NOT* about. Too often, this question of open vs. closed Internet policy gets caught up in rhetorical sparring over issues that, while legitimate in their own right, have little or nothing to do with Network Neutrality or the legislation at hand.

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[2] Ex Parte Letter of Comcast Corporation, In the Matter of Broadband Industry Practices, WC Docket No. 07-52, March 11, 2008, Available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519866175.

[3] Written Statement of Federal Communication Chairman Kevin Martin, Before the United States Senate Committee on Commerce, Science and Transportation, April 22, 2008, p. 4, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281690A1.pdf.

First, Network Neutrality has nothing to do with excusing violators of intellectual property on the Internet. Online piracy is a huge and important issue of law enforcement. But the goals of Net Neutrality and copyright are not mutually exclusive in any way. The rights of consumers online that are protected by the Markey-Pickering bill apply exclusively to *lawful* content. Neither this bill nor any other Net Neutrality bill or regulation implemented or proposed in the history of this debate would in any way apply protections to illegal activity online.

Second, Net Neutrality is not strictly about peer-to-peer (P2P) applications. These technologies get a bad reputation because unfortunately some people use them for piracy. Those users can and should be prosecuted under existing copyright laws. But we shouldn't throw the baby out with the bathwater -- Congress should recognize that P2P is a flourishing field of application development on the Internet. It is a category of computer programs that is extending far and wide on the Internet -- becoming pervasive in many of the most popular things consumers do online.

The best example may be Skype. Skype is a P2P program than enables Internet users to have voice conversations online for free. The service can also do high definition video conferencing. Today, it has 308 million users worldwide that have had over 100 billion minutes of conversations in 28 languages. P2P services are also used by NASA to share images of the Earth from outer space; it's used by software developers to collaborate on new innovations. P2P is the standard used by ABC.com and, soon, NBC's online offering. Other than email, few programs are more ubiquitous.

Third, this debate is not about protecting the network from "bandwidth hogs." When Comcast was caught blocking P2P applications, the company tried to vilify P2P users as bad actors. Never have I heard of an industry complaining so loudly about people so eager to consume and buy their products. Can you imagine the oil companies scolding SUV drivers for using so much gas?

And it is important to point out that P2P services do *not* use more bandwidth than consumers have already paid for under the terms of their contracts. According to the *Wall Street Journal*, Comcast makes 80 percent profit margins on its broadband service, so consumers are paying a pretty penny for that bandwidth that Comcast doesn't want to deliver.[4] On top of that, many P2P applications hardly use any bandwidth at all. Skype, for example, uses just 8-20 kilobytes per second. That means you can use Skype on a dial-up connection just as easily as you can on a WiFi hotspot, a mobile device, a cable modem or a fiber line.

The bottom line is that guaranteeing an open Internet is not just about protecting these 308 million users of a P2P service -- it's about protecting the kind of innovation that creates a new medium of global communication.[5]

History and Context

Look at the legislative and regulatory efforts in the last three years on the question of Network Neutrality, and it is clear that we are no longer arguing about *whether* to have open Internet rules, but rather *how* to craft them. As this Committee attempts to build consensus around the right solution, it is critical to note that we all appear to be headed to the same outcome -- guaranteeing consumers access to the lawful Internet content of their choice without interference from network owners.

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[4] Vishesh Kumar, "Is it time to tune in to cable?," Wall Street Journal, April 3, 2008, Available at http://money.aol.com/news/articles/qp/ap/_a/is-it-time-to-tune-in-to-cable/rfid88603833.

[5] All facts about Skype taken from, "Q1 2008 Skype Fast Facts," http://news.ebay.com/fastfacts_skype.cfm

In this context, I submit that the Markey-Pickering bill (HR 5353) is a reasonable proposal that accomplishes this goal. I have included in this testimony an appendix of the relevant sections of existing law, major legislative proposals (in the House), and regulatory actions at the FCC. I will analyze them all here in order to demonstrate the point that Republicans and Democrats -- in two Congresses and at the FCC -- have shared the fundamental goals of Network Neutrality policy, differing only in degree and approach.

A review of recent history illustrates how Congress has moved toward agreement on policy that protects the free market on the Internet. In the wake of the *Brand X* case in the summer of 2005, the FCC shifted broadband Internet services from Title II jurisdiction to Title I in its Wireline Broadband Order[6], released in September of 2005. That action distanced these broadband networks from a wide variety of common carrier regulations, including the important provisions in Sections 201, 202 and 230 that had long carried the banner of open communications systems as the policy of the United States.

Right now, broadband over cable lines, phone lines, powerlines, and wireless spectrum are subject to Title I -- not mandatory Title II -- jurisdiction. The policy guidance and regulatory authority vested in these sections, however, is still available to the FCC for application through its ancillary authority under Title I. This authority was upheld by the *Brand X* case, which affirmed the FCC's option "to impose additional regulatory obligations under its Title I ancillary authority jurisdiction to regulate interstate and foreign communications."[7] That assertion is now strongly challenged by the cable industry[8] in the matter of the consumer complaint against Comcast even as it is defended by consumer groups.[9]

Simultaneous with the September 2005 order, the commission issued its *Internet Policy Statement*, outlining its "four principles" of Network Neutrality to clarify how it would enforce consumer protection under Title I.[10] That policy statement is printed in full in the appendix. The four principles are straightforward statements of consumer rights on the Internet. The first three protect consumers' right to access the lawful content, applications and devices of their choice. The fourth principle entitles consumers to competition among networks, applications, services and content online.

Policy statements are meant to guide market participants on how an agency will interpret and enforce the agency's statutory authority and obligations. The policy statement roots its ancillary authority at least partly in Section 230 of the statute, in which Congress stated that the policy of the United States is "to preserve the vibrant and competitive free market that presently exists for the Internet" and "to encourage the development of technologies that maximize user control over what information is received by individuals."[11] Further, the commission's policy statement specifically reaffirms the FCC's ancillary authority under Title I (citing *Brand X*) to take action to protect consumer rights on the Internet.

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[6] Federal Communications Commission, Report and Order, In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33, August 5, 2005, Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-150A1.pdf.

[7] *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S. Ct. 2688, slip op. at 3-4 (2005).

[8] Ex Parte Letter of Comcast Corporation, In the Matter of Broadband Industry Practices, WC Docket No. 07-52, March 11, 2008, Available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519866175; Comments of Time Warner, In the Matter of Broadband Industry Practices, WC Docket No. 07-52, February 13, 2008, p. 26, Available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519841176.

[9] Reply Comments of Free Press et al., In the Matter of Broadband Industry Practices, WC Docket No. 07-52, February 28, 2008, Available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519856406.

[10] Cite to Internet Policy Statement - http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf

[11] 47 U.S.C. § 230(b)(2) and (3).

When the policy statement was issued, many consumer advocates -- myself included -- feared that handing over the legacy of an open communications systems to such an untested guardian as a policy statement was a dangerous business. Today, we are watching the FCC test the mettle of that guardian in the Comcast case. Ironically, some of the network operators that once assured Congress that no laws were necessary because the FCC's policy statement was an adequate safeguard against content discrimination are now arguing that it is a paper tiger with no teeth to stop them from behaving however they wish.

In recent testimony before the Senate Commerce Committee, NCTA's McSlarrow presented the contradictory position that the cable industry fully supports the FCC's policy statement, but it does not support its enforcement to protect consumers. When questioned by senators about whether the FCC could bring an enforcement action guided by its four principles, McSlarrow replied: "It's not even a close call, the answer is no."[12] We do believe he is wrong, but the FCC's policy statement represents the absolute floor of basic consumer protection on the Internet. In my view, it is not enough, but it appears to be the last defense available to consumers absent congressional action.

What does the policy statement do in essence? It seeks to modernize the openness principles once at the core of a larger set of common carrier regulations in Title II and then deploy them in Title I. No final resolution has been reached about whether this endeavor will succeed. Throughout the last three years of debate, the network owners have asserted their right to create a closed system for the Internet. In fact, it was network owners' comments in late 2005 and early 2006 that triggered the Net Neutrality debate in Congress in 2006.[13] Because the carriers claimed the right to discriminate amongst content on the Internet, many in Congress began to believe that the FCC's policy statement would not stick.

As a result, we got two main legislative responses -- both of which are excerpted in the appendix. The first was the Network Neutrality Act of 2006, introduced by Mr. Markey. The second was the Net Neutrality section of the Communications Opportunity, Promotion, and Enhancement (COPE) Act of 2006 Act, introduced by Mr. Barton. The 2006 Markey bill proposed to expand on the FCC's policy statement and direct the commission to establish enforceable rules to protect consumer rights on the Internet.

The bill captures all of the four principles and adds a so-called "fifth principle," which combines a nondiscrimination principle with a rule that bars the sale of services by network operators that privilege or degrade Internet content in a discriminatory manner. This is the specific provision that would prohibit pay-for-play "fast lanes" and "slow lanes" on the Internet. The Barton bill, by contrast, simply codifies the four principles in the FCC's policy statement. Beyond that, it gives the FCC explicit authority to enforce those principles through adjudication and fines. However, it strictly denies the FCC authority to adopt or implement rules based on the four principles. Neither bill became law; neither was reintroduced in the 110th Congress.

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[12] See Anne Broache, "Net Neutrality Battle Returns to US Senate," 22 April 2008, *CNet*, http://www.news.com/8301-10784_3-9925517-7.html

[13] "William L. Smith, chief technology officer for Atlanta-based BellSouth Corp., told reporters and analysts that an Internet service provider such as his firm should be able, for example, to charge Yahoo Inc. for the opportunity to have its search site load faster than that of Google Inc." Jonathan Krim, Executive Wants to Charge for Web Speed, Washington Post, Dec 1, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/11/30/AR2005113002109.html; SBC CEO Edward Whitacre: "Now what they would like to do is use my pipes free, but I ain't going to let them do that because we have spent this capital and we have to have a return on it. So there's going to have to be some mechanism for these people who use these pipes to pay for the portion they're using. Why should they be allowed to use my pipes?" At SBC, It's All About "Scale and Scope," BusinessWeek, Nov 7, 2005, http://www.businessweek.com/magazine/content/05_45/b3958092.htm.

The next action on Net Neutrality came at the end of 2006 when AT&T acquired BellSouth. As a condition of that acquisition, the new company agreed to abide by enforceable Net Neutrality rules. These rules included all of the FCC's four principles from the policy statement -- verbatim -- plus a fifth principle of nondiscrimination that also barred the sale of services that would allow the network owner to create fast lanes and slow lanes for Internet content. The details of the fifth principle differed slightly from the Markey Network Neutrality Act of 2006 -- but its impact was the same, except of course, that it only applied to the new, expanded AT&T. That condition expires at the end of 2008.

While there was no new legislative or regulatory activity in 2007, there were several incidents in the marketplace that demonstrated how the network operators can and do interfere with content on the Internet. It now appears that Comcast was secretly blocking consumer use of peer-to-peer technologies throughout 2007. In August, AT&T censored the political speech of a musician during a concert webcast.[14] In September, Verizon Wireless refused to send text messages carrying the political communication of NARAL Pro-Choice America to its membership.[15] Though both AT&T and Verizon hastened to reverse themselves under heavy media scrutiny, the specter of Internet gatekeepers was raised in the minds of consumers. And, of course, the Comcast case presents a paradigmatic Network Neutrality violation -- a company secretly blocking its innovative new competitors. The company has not backed down from this stance -- which is why it stands as a bellwether case at the FCC.

Finally, we move to 2008, when Mr. Markey and Mr. Pickering introduced HR 5353, the bill under discussion here today. This bill fits squarely in between the COPE Act and the AT&T/BellSouth merger condition. And it addresses directly the question of Title I authority for the FCC's four principles currently under dispute at the agency. It clarifies exactly what policies the Congress desires to guide the Commission to produce the desired outcome for protecting consumers online. It establishes a revised version of the four principles directly into Title I of the Communications Act. It captures the intent of all of the FCC's existing four principles -- protecting consumer access to content, applications, devices and competition. Beyond that it adds policy principles that seek to protect consumers against unreasonable discrimination and interference by network operators. These form a fifth principle similar to those that appeared in the Network Neutrality Act of 2006 and in the AT&T/BellSouth merger condition. However, unlike either of these, HR 5353 does not require enforcement of these principles.

The principles in HR 5353 establish a baseline consumer protection on the Internet as one of the basic congressional intentions of the Communications Act. Adoption and implementation of rules are left to the agency. As an immediate practical matter, it simply strengthens the hand of the FCC's principles and clarifies its authority in the adjudication of complaints based on the statute. Its purpose, in that sense, is similar to that of the COPE Act, though it does not go nearly as far in dictating an enforcement process or setting a penalty. Instead, it instructs the commission to conduct studies and public hearings to evaluate the core issues that will inform a national broadband policy in the future. It injects extremely valuable transparency and a public process into a complex debate over policymaking in the information society. This element of the bill should not be underappreciated. It is of signal importance.

Make no mistake, this is a compromise bill. It is such a compromise, to be honest, that some of our old allies were alarmed. While I would prefer something stronger -- I believe that this bill represents a very significant step in the right direction. What amazes and disappoints me is that it has not yet become the

[14] K.C. Jones, "Pearl Jam Blasts AT&T for Cut Lyrics in Lollapalooza Webcast," InformationWeek, August 9, 2007, Available at http://www.informationweek.com/news/internet/showArticle.jhtml?articleID=201310731.
[15] Adam Liptak, "Verizon Blocks Messages of Abortion Rights Group," New York Times, September 27, 2007, Available at http://www.nytimes.com/2007/09/27/us/27verizon.html.

vehicle of general compromise that it deserves to be. The middle ground that opponents of Net Neutrality once called for is now available -- but they appear no longer willing to stand on it.

So what do we learn from this walk down memory lane? We have to evaluate what each of the preceding Net Neutrality bills and regulations tell us about the Internet Freedom Preservation Act. Is it moderate or extreme? Are we debating *whether* to have Net Neutrality protections consumers or *how* to have Net Neutrality protections? Here are the three take-home analytical points:

- All of the actions taken by FCC and Congress to protect consumer rights on the Internet contain some version of the FCC's "four principles" -- consumers are entitled to the lawful Internet content, applications and devices of their choice as well as to competitive markets.

- Some of the Net Neutrality actions contain a "fifth principle" of nondiscrimination in one form or another. In the case of the Markey bill from 2006 and the AT&T/BellSouth merger condition, that fifth principle of nondiscrimination is enforced as a rule and prohibits the sale of discriminatory quality of service. The Barton bill and the FCC's policy statement have no fifth principle at all. The Markey-Pickering bill has a fifth principle that authorizes the commission to guard broadly against unreasonable discrimination -- but it is does not establish a specific rule that the FCC must follow.

- Some of the Net Neutrality actions specify enforcement as rules or through adjudicatory proceedings. The FCC's policy statement draws broadly on its ancillary authority from Title I to make policy -- through rules or through adjudicating complaints -- but it does not specify a precise rule based on the exact language of the principles. The Barton bill codifies the FCC's authority to enforce the specific language of the four principles and specifies an adjudicatory process and penalties. The 2006 Markey bill specifies a precise rule and enforcement process. The AT&T merger condition functions as an enforceable rule, though it is temporary. The Markey-Pickering bill does not specify an enforceable rule, nor does it specify an adjudicatory process. It simply clarifies the intent of Congress and the authority of the commission to act to protect consumers' rights under Title I.

The Internet Freedom Preservation Act captures the intent of all of the Net Neutrality actions taken or proposed by Congress or the FCC in the last three years. It takes a substantially different approach to the issue than the Network Neutrality Act of 2006, hewing closer to the strategy of the COPE Act, in some ways going further (with a fifth principle) and in some ways not as far (it does not have specific enforcement provisions or penalties). Although recent developments in the marketplace bear out the concerns voiced by Net Neutrality advocates in 2006, this bill represents a substantial compromise -- meant to ensure consumer protection, free speech and free competition, while not overly specifying the actions of the FCC.

Conclusion

This debate is a clash between two competing visions for the Internet -- open or closed networks. Congress and the FCC have begun to turn the corner toward acting to ensure an open Internet -- in part because the network providers have begun blocking and discriminating. The recent history of Internet policymaking was premised on this idea: we will remove some regulations from the network operators, but we will draw a line on ensuring consumers' access to an open Internet and all of the content and applications on it. Deregulation has led us to the bright red line of basic consumer protection. We should not stray beyond it.

Now is the time to firmly establish that precedent. It is the moment to recognize that action for an open Internet is the best path toward redressing the problems of concentrated power in the old media marketplace. It is the path to protecting consumers' rights to access all lawful content of their choice online. It is the path to guaranteeing innovation and entrepreneurship in our information economy. It is a path to expanding public input in the process as we work toward shaping the broadband policies that will guide the nation in the coming decades.

At the end of the day, consumers are relying on Congress and the FCC to set a baseline standard to protect openness on the Internet. A duopoly market of access providers will not discipline itself. Nor can we expect that fans of barber shop quartets will always be the white knights that ride to the rescue. This is a clear moment for the Congress to act and pass the Internet Freedom and Preservation Act. The future of the Internet for everyone depends on it.

Appendix

Communications Act of 1934 as Amended

SEC. 201. [47 U.S.C. 201]

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities regulations for operating such through routes.
(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful…

SEC. 202. [47 U.S.C. 202] DISCRIMINATION AND PREFERENCES.

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.
(b) Charges or services, whenever referred to in this Act, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.
(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each such offense and $300 for each and every day of the continuance of such offense.

SEC. 230. [47 U.S.C. 230]

(a) FINDINGS.--The Congress finds the following:

> (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
> (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) POLICY.--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 Internet 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.

FCC Internet Policy Statement (September 23, 2005)

To 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 service providers, and content providers.[16]

Network Neutrality Act of 2006 - HR 5273 (May 2, 2006)

SEC. 3. POLICY.

It is the policy of the United States--

(1) to maintain the freedom to use broadband telecommunications networks, including the Internet , without interference from network operators, as has been the policy for Internet commerce and the basis for user expectations since its inception;
(2) to ensure that the Internet , and its successors, remain a vital force in the United States economy, thereby enabling the country to preserve its global leadership in online commerce and technological innovation;
(3) to preserve and promote the open and interconnected nature of broadband networks that enable consumers to reach, and service providers to offer, lawful content, applications, and services of their choosing, using their selection of devices that do not harm the network;

[16] FCC Internet Policy Statement, September 23, 2005, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf

(4) to encourage escalating broadband transmission speeds and capabilities that reflect the evolving nature of the broadband networks, including the Internet , and improvements in access technology, which enables consumers to use and enjoy, and service providers to offer, a growing array of content, applications, and services;
(5) to provide for disclosure by broadband network operators of prices, terms, and conditions, and other relevant information, including information about the technical capabilities of broadband access provided to users, to inform their choices about services they rely on to communicate and to detect problems; and
(6) to ensure vigorous and prompt enforcement of this Act's requirements to safeguard and promote competition, innovation, market certainty, and consumer empowerment.

SEC. 4. NET NEUTRALITY SAFEGUARDS.
(a) In General- Each broadband network provider has the duty to--

(1) enable users to utilize their broadband service to access all lawful content, applications, and services available over broadband networks, including the Internet ;

(2) not block, impair, degrade, discriminate against, or interfere with the ability of any person to utilize their broadband service to--

(A) access, use, send, receive, or offer lawful content, applications, or services over broadband networks, including the Internet ; or

(B) attach any device to the provider's network and utilize such device in connection with broadband service, provided that any such device does not physically damage, or materially degrade other subscribers' use of, the network;

(3) clearly and conspicuously disclose to users, in plain language, accurate information about the speed, nature, and limitations of their broadband service;
(4) offer, upon reasonable request to any person, a broadband service for use by such person to offer or access unaffiliated content, applications, and services;
(5) not discriminate in favor of itself in the allocation, use, or quality of broadband services or interconnection with other broadband networks;
(6) offer a service such that content, applications, or service providers can offer unaffiliated content, applications, or services in a manner that is at least equal to the speed and quality of service that the operator's content, applications, or service is accessed and offered, and without interference or surcharges on the basis of such content, applications, or services;
(7) if the broadband network provider prioritizes or offers enhanced quality of service to data of a particular type, prioritize or offer enhanced quality of service to all data of that type (regardless of the origin of such data) without imposing a surcharge or other consideration for such prioritization or quality of service; and
(8) not install network features, functions, or capabilities that thwart or frustrate compliance with the requirements or objectives of this section.

…

(c) Implementation- Within 180 days after the date of enactment of this Act, the Commission shall adopt rules that--

(1) permit any person to complain to the Commission of anything done or omitted to be done in violation of any duty, obligation, or requirement under this section;

(2) provide that any complaint filed at the Commission that alleges a violation of this section shall be deemed granted unless acted upon by the Commission within 90 days after its filing;

(3) require the Commission, upon prima facie showing by a complainant of a violation of this section, to issue within 48 hours of the filing of any such complaint, a cease-and-desist or other appropriate order against the violator until the complaint is fully resolved, and, if in the public interest, such order may affect classes of persons similarly situated to the complainant or the violator, and any such order shall be in effect until the Commission resolves the complaint with an order dismissing the complaint or imposing appropriate remedies to resolve such complaint; and

(4) enable the Commission to use mediation or arbitration or other means to resolve the dispute.

(d) Enforcement- This section shall be enforced under titles IV and V of the Communications Act of 1934 (47 U.S.C. 401, 501 et seq.). A violation of any provision of this section shall be treated as a violation of the Communications Act of 1934, except that the warning requirements of section 503(b) shall not apply. In addition to imposing fines under its title V authority, the Commission also is authorized to issue any order, including an order directing a broadband network operator to pay damages to a complaining party.

Communications Opportunity, Promotion, and Enhancement Act of 2006 - HR 5252 (passed by the House, June 8, 2006)

TITLE II—ENFORCEMENT OF BROADBAND POLICY STATEMENT

…

‘‘SEC. 715. ENFORCEMENT OF BROADBAND POLICY STATEMENT.

‘‘(a) AUTHORITY.—The Commission shall have the authority to enforce the Commission’s broadband policy statement and the principles incorporated therein.

‘‘(b) ENFORCEMENT.—

‘(1) IN GENERAL.—This section shall be enforced by the Commission under titles IV and V. A violation of the Commission’s broadband policy statement or the principles incorporated therein shall be treated as a violation of this Act.

‘‘(2) MAXIMUM FORFEITURE PENALTY.—For purposes of section 503, the maximum forfeiture penalty applicable to a violation described in paragraph (1) of this subsection shall be $500,000 for each violation.

‘‘(3) ADJUDICATORY AUTHORITY.—The Commission shall have exclusive authority to adjudicate any complaint alleging a violation of the broadband policy statement and the principles incorporated therein. The Commission shall complete an adjudicatory proceeding under this subsection not later than 90 days after receipt of the complaint. If, upon completion of an adjudicatory proceeding pursuant to this section, the Commission determines that such a violation has occurred, the Commission shall have authority to adopt an order to require the entity subject to the complaint to comply with the broadband policy statement and the principles incorporated therein. Such authority shall be in addition to the authority specified in paragraph (1) to enforce this section under titles IV and V. In addition, the Commission shall have authority to adopt procedures for the adjudication of complaints alleging a violation of the broadband policy statement or principles incorporated therein.

‘‘(4) LIMITATION.—Notwithstanding paragraph (1), the Commission’s authority to enforce the broadband policy statement and the principles incorporated therein does not include authorization for the Commission to adopt or implement rules or regulations regarding enforcement of the broadband policy statement and the principles incorporated therein, with the sole exception of the authority to adopt procedures for the adjudication of complaints, as provided in paragraph (3).[17]

AT&T/BellSouth Merger Commitments (December 28, 2006)

Net Neutrality

1. Effective on the Merger Closing Date, and continuing for 30 months thereafter, AT&T/BellSouth will conduct business in a manner that comports with the principles set forth in the Commission's Policy Statement, issued September 23, 2005 (FCC 05-151).

2. AT&T/BellSouth also commits that it will maintain a neutral network and neutral routing in its wireline broadband Internet access service. This commitment shall be satisfied by AT&T/BellSouth's agreement not to provide or to sell to Internet content, application, or service providers, including those affiliated with

[17] Communications Opportunity, Promotion, and Enhancement Act of 2006, HR 5252, 109th Congress.

AT&T/BellSouth, any service that privileges, degrades or prioritizes any packet transmitted over AT&T/BellSouth's wireline broadband Internet access service based on its source, ownership or destination. This commitment shall apply to AT&T/BellSouth's wireline broadband Internet access service from the network side of the customer premise equipment up to and including the Internet Exchange Point closest to the customer's premise, defined as the point of interconnection that is logically, temporally or physically closest to the customer's premise where public or private Internet backbone networks freely exchange Internet packets.

This commitment does not apply to AT&T/BellSouth's enterprise managed IP services, defined as services available only to enterprise customers 16 that are separate services from, and can be purchased without, AT&T/BellSouth's wireline broadband Internet access service, including, but not limited to, virtual private network (VPN) services provided to enterprise customers. This commitment also does not apply to AT&T/BellSouth's Internet Protocol television (IPTV) service. These exclusions shall not result in the privileging, degradation, or prioritization of packets transmitted or received by AT&T/BellSouth's non-enterprise customers' wireline broadband Internet access service from the network side of the customer premise equipment up to and including the Internet Exchange Point closest to the customer's premise, as defined above.

This commitment shall sunset on the earlier of (1) two years from the Merger Closing Date, or (2) the effective date of any legislation enacted by Congress subsequent to the Merger Closing Date that substantially addresses "network neutrality" obligations of broadband Internet access providers, including, but not limited to, any legislation that substantially addresses the privileging, degradation, or prioritization of broadband Internet access traffic.[18]

Internet Freedom Preservation Act of 2008 - HR 5353 (introduced February 12, 2008)

SEC. 3. BROADBAND POLICY.

Title I of the Communications Act of 1934 (47 U.S.C. 151 et seq.) is amended by adding at the end the following new section:

`SEC. 12. BROADBAND POLICY.
`It is the policy of the United States--

`(1) to maintain the freedom to use for lawful purposes broadband telecommunications networks, including the Internet, without unreasonable interference from or discrimination by network operators, as has been the policy and history of the Internet and the basis of user expectations since its inception;

`(2) to ensure that the Internet remains a vital force in the United States economy, thereby enabling the Nation to preserve its global leadership in online commerce and technological innovation;

`(3) to preserve and promote the open and interconnected nature of broadband networks that enable consumers to reach, and service providers to offer, lawful content, applications, and services of their choosing, using their selection of devices, as long as such devices do not harm the network; and

`(4) to safeguard the open marketplace of ideas on the Internet by adopting and enforcing baseline protections to guard against unreasonable discriminatory favoritism for, or degradation of, content by network operators based upon its source, ownership, or destination on the Internet.'.[19]

[18] Letter of Commitment, AT&T, December 28, 2006, WC Docket No. 06-74.
[19] Internet Freedom Preservation Act of 2008, HR 5353, 110th Congress.

Appendix 2

FRAMING PEER TO PEER FILE SHARING by Robb Topolski

A Fact: A BitTorrent uploader transfers to only 3-4 peers at a time.

Peer-to-peer (P2P) file-sharing applications are widely believed to strain access providers' upload links by uploading over hundreds of TCP connections. It is the basis incorporated in problem statements supporting extreme management methods. It is also a basis that escaped testing. The fact is that BitTorrent simultaneously uploads data over only 3 to 4 TCP connections.

1. DEFLECTING ACCOUNTABILITY BY DEFLECTING RESPONSIBILITY TO OTHERS

While the growing demand for upstream bandwidth among Internet users is nothing new, today's operators are claiming difficulty in dealing with the phenomena. I choose the word 'claiming' because technical conclusions require data and analysis, and insufficient data has been presented to be openly analyzed. I also ask the readers to read the word 'claiming' as neutral in tone, as no strong evidence is available to rebut providers' claims.

Without providing data about this congestion, operators avoid the possibility that they themselves have issues bearing scrutiny. As a result, the latest debates skip analyzing congestion and advance to how and when to "throttle" the "bandwidth hogs," how to correct a congestion-control fairness imbalance between users, under what conditions network operators may inspect the payload of IP packets prior to forwarding them, and how to further assure routine availability for real-time applications.

This puts technologists in a position of playing "Bring Me a Rock"; a game that never ends because someone is unhappy with the particular rock that is returned and requests a different rock be returned instead, meanwhile never adding any useful information to help the player choose the correct rock.

Without data, we cannot tell if the problem of congestion is due to the failure of existing congestion-control algorithms, the addition of "smart" devices installed mid-network that are changing the normal behavior of packets, a sudden insurgence of aggressive or incorrect network decorum among applications, a QoS technique problem, or mismanaging the division of a shared resource among users. Data is also necessary to understand the size of a problem and under what conditions it occurs in order to accurately predict whether a proposed solution is likely to solve the problem.

Today's problem has been framed as a P2P file-sharing problem. However, without congestion, applications do not contend for bandwidth and any of the technical solutions to efficiently share congested bandwidth become moot. Therefore, congestion itself must be a causal factor to include in theories about the problem. Data about causes must be gathered. In the past, the Internet community coped with congestion by dealing with congestion along with its external additives such as protocol efficiency. We should not allow today's congestion to escape a studied examination.

Specifically, the Working Group should first gather data before reaching its problem statement. It should then test the problem statement to ensure it is accurate so that any solutions to be brought are accurate. If the data cannot or will not be made available, doing nothing at all would be better than continuing to hear "No, not that one. Bring me a different rock.

2. ASSIGNING ACCOUNTABILITY AND RESPONSIBILITY WITHOUT CORRECT EVIDENCE

A recent description of this problem, said: "[the] traditional management of fairness at the transport level has largely been circumvented by [P2P] applications designed to achieve the best end-user transfer rates"

A renowned researcher explained the problem, saying: "Even though file-sharing generally uses TCP, it uses the well-known trick of opening multiple connections--currently around 100 actively transferring over different paths is not uncommon."

It's tribal knowledge that P2P file-sharing applications open hundreds of connections, all active. This is a notion that has been repeated in technical blogs and shown as evidence to Members of Congress and the U.S. Federal Communication Commission as to the cause of the congestion bringing about the Network Neutrality debate. In as much as P2P file-sharing behavior is represented by its most-used protocols, namely BitTorrent, Gnutella, and ED2K, it is also false (or greatly misjudged).

The unsubstantiated blaming of P2P for today's problems is only the first problem with the first line. The phrase, "traditional management of fairness," prejudges whether any "fairness" that congestion control algorithms accomplish are intended, or are they merely a side-effect of robust network-availability watchdog functions? The word "management" implies intent, and it is unlikely that extended terms of fairness were intended for a algorithm designed to keep congestion from bringing the Internet to a halt.

Finally, the phrase, "designed to achieve the best end-user transfer rates", ignores the fact that the vast minority of Internet applications impose bandwidth limitations upon themselves. The normal behavior of network transports is to use any bandwidth that is available. Applications using these transports are generally blind to network conditions and cannot "speed up" or "slow down" based on signals that are not there. Instead, this is a function of symptoms and signals analyzed at the lower levels of the network stack.

All of the top P2P file-sharing protocols that I have described, access socket services through the same limited API set used by every other TCP application. In other words, P2P doesn't speak "in TCP," it only knows how to speak the O/S specific API commands - a limited command set that provides network services to all applications on the platform. Finally, such nefariousness on the part of a background application would defeat the use of other applications on a person's computer.

The statements refer to BitTorrent (the #1 P2P file-sharing protocol on the Internet). They do not resemble behavior by ED2K (#2) or Gnutella (#3), both of which use a queuing system instead of a swarming method. A queuing system holds incoming requests for files while filling those requests only a very few at a time. In some parts of the world, a source-obfuscating generation of encrypted and overlaid P2P file-sharing applications is emerging including Freenet, Share, and others. I have not profiled the network behavior of these applications, but I believe that the authors of the above quotes were not focused on these applications, either. The chief suspect of these particular allegations is BitTorrent.

3. FOCUSING SOLELY ON THE BEHAVIOR OF BITTORRENT

Is the Problem Uploading? Downloading? Both?

To perform a BitTorrent transfer of a file or set of files, the BitTorrent client connects to peers focused on the same file (called a 'swarm.'). The maximum number of connections to open is recommended to be somewhere in the neighborhood of 50-55 and nearly all BitTorrent clients install with a default maximum number of TCP connections that falls near this range. Within a few minutes of joining a typical swarm, many of these connections may be downloading.

BitTorrent's first incarnations were realized in applications that transferred a single file (or a grouping of files behaving as one). For comparison purposes, this is analogous to transferring a single large file via FTP or HTTP. This is important, because many problem statements involving BitTorrent are made between BitTorrent involved in a file transfer versus a web browser fetching a web page, a VOIP app handling a call, and other dissimilar activities.

One question to refine for the problem statement is whether multiple connections that are downloading are substantially contributing to any congestion problem today - or is any problem confined to how BitTorrent uploads? Indeed, some of the operator solutions proposed and imposed, attempt to focus on the upload side, alone. While some solutions also focus on the downloading side as well, it is also an unanswered question as to whether their concern for doing so has more to do with congestion than it does controlling consumption and transit costs.

When considering whether BitTorrent interferes with normal congestion control, it seems relevant that the uploading host is responsible for responding to the signs of network congestion. The downloading host has a lack of insight and control. Being that the signal of congestion is a dropped packet (one that is not delivered) or a duplicated ACK, the downloading host receives no early indication of a problem.

If downloading is found to contribute to the problem, it should be analyzed in the context that often none of these BitTorrent connections are downloading. After a node has collected all of the pieces in a swarm, it only uploads.

Without data, I am not concluding that BitTorrent downloading activity has no bearing on this or any problem. However, it is quite possible that downloading via BitTorrent has a positive effect owing to its ability to route around congested paths while single-stream transfers have no such ability and must "power-through" a congested route until a transfer is completed.

The Surprising Reason BitTorrent Uploads on Only 3-4 Connections

Most indicators are that the congestion pressure on last-mile operators exists primarily in the uploading direction. These networks were designed several years ago, at a time when graphical interfaces and World-wide web browsers began to replace shell sessions and text-based networking tools. Indeed, the ratio of upload-to-download dial-up and fledgling high-speed bandwidth usage back then became the basis for planning the networks we are using today.

Focusing on the upload side of the equation, the fact that BitTorrent clients are only uploading to 3-4 other peers per swarm - not hundreds - is probably the most relevant contradiction to the present analysis. This fact casts into doubt any conclusions made on the assumption that BitTorrent uploads across hundreds of connections.

The primary reason that BitTorrent uses only 3-4 upload slots is to be a good network neighbor. As recorded in one instance of the specification, the Slot-and-Choking algorithm was a design decision to facilitate Congestion Control, among other things. This is the algorithm used by nearly all of the BitTorrent applications. While concluding that it does so is beyond the scope of this paper, any analysis that BitTorrent does not facilitate congestion control deserves an explanation of how and why it fails - not an accusation that the protocol was somehow designed to trick the system out of bandwidth belonging to other network applications.

As the popularity of the BitTorrent protocol increased, clients appeared that could handle multiple BitTorrent streams simultaneously. The popular examples of these clients contain similar per-task configurations (including uploading slot limitations) as their single-task predecessors: 3-4 slots per swarm. A user running up to 3-4 simultaneous tasks is not unusual or inefficient, given today's last-mile upload speed allocations. This would mean that 12 to 16 upload slots may be simultaneously running at the most - and its HTTP analog is 3-4 individual uploads in different clients native to those protocols.

4. FOCUSING ON THE PROBLEM

In summary, I offer that an examination about how to deal with P2P file-sharing on a congested network should begin with examining the congested network and understanding the parameters and causes for that problem. In systems, problems are fixed as close to the source as possible. These are the least expensive solutions. We strive to fix root causes because, if fixed, this solves its effects.

There are plenty of anecdotal reasons to blame BitTorrent for poor performance on a congested network, and there are plenty of anecdotal reasons to blame other causes -- none of which bearing repeating here. They, too, first require an analysis as to the root cause of the congestion.