

THE FCC TACKLES NET NEUTRALITY: AGENCY JURISDICTION AND THE COMCAST ORDER

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The Internet¹ has rapidly become an important source of communication, productivity, and entertainment for many Americans. Nearly seventy-five percent of Americans have access to the Internet in their homes,² most utilizing a high-speed broadband connection.³ A connection to the Internet typically requires a subscription with an Internet Service Provider (ISP), which becomes the customer's sole gateway to the online world.⁴ A lively debate has arisen regarding the extent to which consumers' access to the Internet should be manipulated by ISPs.⁵ These arguments have raged for several years now, housed under the "net neutrality" debate. The Federal Communication Commission (FCC) recently entered the fray, exercising its authority in direct furtherance of net neutrality-related goals

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1. The Internet is statutorily conceived 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." 47 U.S.C. § 231(e)(3) (2006). More simply, the Supreme Court has described the Internet as a "network of interconnected computers . . ." Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 974 (2005).

2. Press Release, Nielsen/NetRatings, Three out of Four Americans have Access to the Internet, According to Nielsen/NetRatings (Mar. 18, 2004), http://www.nielsen-netratings.com/pr/pr_040318.pdf.

3. JOHN B. HERRIGAN, PEW INTERNET & AM. LIFE PROJECT, HOME BROADBAND ADOPTION 2008: ADOPTION STALLS FOR LOW-INCOME AMERICANS EVEN AS MANY BROADBAND USERS OPT FOR PREMIUM SERVICES THAT GIVE THEM MORE SPEED (2008), http://www.pewinternet.org/~media/Files/Reports/2008/PIP_Broadband_2008.pdf.

4. An Internet Service Provider is simply a "company which provides end-users with a data connection allowing access to the internet and the associated services . . ." Organisation for Economic Co-Operation and Development, Glossary of Statistical Terms—Internet Service Provider (ISP), <http://stats.oecd.org/glossary/detail.asp?ID=6740> (last visited Feb. 3, 2009).

5. See *infra* Part II.

for the first time. The move has been characterized as a landmark decision for both the FCC and internet policy.⁶

In August of 2008, the FCC considered whether Comcast, a popular broadband ISP, could lawfully manipulate consumer internet access by selectively interfering with peer-to-peer (P2P) protocols⁷ commonly used to share files online.⁸ The Commission found that Comcast's practice of selectively interfering with internet traffic was "discriminatory and arbitrary" and did not constitute reasonable network management.⁹ As a result, the FCC ordered Comcast to disclose the details of its network management practices within thirty days, submit a compliance plan for ending the offending practices by the end of the year, and disclose to the public the details of intended future practices.¹⁰ The FCC's Order (Comcast Order), accompanied by a Memorandum Opinion (Comcast Opinion), was the first Internet network management decision of its kind.¹¹

This Note addresses the FCC's authority to issue the Comcast Order.¹² Part I of this Note summarizes some relevant background information, briefly reviewing the net neutrality debate, necessary technical concepts, and important aspects of FCC's regulatory power. Part II outlines the factual and procedural details of the Comcast Order and Comcast's subsequent appeal. Part III emphasizes the unclear nature of impending judicial review and enumerates important questions pertaining to the FCC's juris-

6. *In re Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 F.C.C.R. 13028, 13078 (2008) ("This is a landmark decision for the FCC—a meaningful stride forward on the road to guaranteed openness of the Internet. It's taken a while for us to get here, but that doesn't detract from the historic importance of what the Commission does today.").

7. Peer to peer networks are "an approach to computer networking where all computers share equivalent responsibility for processing data. Peer-to-peer networking (also known simply as *peer networking*) differs from client-server networking, where certain devices have responsibility for providing or 'serving' data and other devices consume or otherwise act as 'clients' of those servers." Bradley Mitchell, *Introduction to Peer to Peer Networks*, About.com, <http://compnetworking.about.com/od/basicnetworkingfaqs/a/peer-to-peer.htm> (last visited Feb. 3, 2009); see also What Is BitTorrent?, <http://www.bittorrent.com/btusers/what-is-bittorrent> (last visited Feb 3, 2009).

8. See *In re Formal Complaint of Free Press*, 23 F.C.C.R. at 13028.

9. *Id.* at para. 1.

10. *Id.*

11. The decision has already garnered significant attention and commentary. See Nate Anderson, *Hammer drops at last: FCC opposes Comcast P2P throttling*, ARS TECHNICA, July 25, 2008, <http://arstechnica.com/old/content/2008/07/hammer-drops-at-last-fcc-opposes-comcast-p2p-throttling.ars>; Declan McCullagh, *FCC formally rules Comcast's throttling of BitTorrent was illegal*, CNET NEWS.COM, Aug. 1, 2008, http://news.cnet.com/8301-13578_3-10004508-38.html.

12. See *infra* Parts II and III.

diction in this instance. Part IV concludes that, no matter the outcome, we likely have not seen the last of the FCC on issues of internet policy.

I. BACKGROUND

A. The Net Neutrality Debate: A Brief Summary

“Net neutrality” generally refers to a paradigm where internet traffic is not prioritized based on its type, source, destination, or volume.¹³ Academics have lamented the difficulty in precisely defining the term and generally agree that the concept has become distorted by political and ideological polarization.¹⁴ At the most basic level, however, is the ideal that internet traffic should flow freely from source to source without delay or interruption from individual networks along the way.¹⁵ Net neutrality advocates routinely make reference to a core value: the Internet should be a democratic medium that fosters innovation and free speech.¹⁶

1. History and Perspectives

The debate surrounding net neutrality has grown in both recognition and intensity over the past several years. In April 2006, a grassroots organization called SavetheInternet.com collected over a million signatures lobbying Congress in support of net neutrality principles.¹⁷ Only a few months later, five separate bills addressing net neutrality were introduced in Congress.¹⁸ None of the bills were made into law, and the likelihood of imminent congressional action has since dimmed.¹⁹ Most recently, the

13. Kai Zhu, Note, *Bringing Neutrality to Network Neutrality*, 22 BERKELEY TECH. L.J. 615, 615 (2007).

14. *Id.*; see also Philip J. Weiser, *The Next Frontier for Network Neutrality*, 60 ADMIN L. REV. 273, 276 (2008) (“One casualty of the network neutrality debate on Capitol Hill is that the issue became more politicized and polarized than traditional technology policy debates, which often stay below the radar and are initially discussed and considered by a more select group of policymakers.”).

15. Save the Internet, *Frequently Asked Questions*, <http://www.savetheinternet.com/=faq#what> (last visited Feb. 3, 2009) (“Put simply, Net Neutrality means no discrimination. Net Neutrality prevents Internet providers from blocking, speeding up or slowing down Web content based on its source, ownership or destination.”).

16. *Id.* (“Net Neutrality is the reason why the Internet has driven economic innovation, democratic participation, and free speech online.”).

17. See Declan McCullagh, *House plans vote on Net neutrality*, CNET NEWS.COM, June 7, 2006, http://news.com.com/2100-1028_3-6080983.html.

18. *Id.*

19. Weiser, *supra* note 14, at 274.

FCC has asserted its authority to regulate the players in the net neutrality debate, thus gaining some of the spotlight.²⁰

Concerns on both sides of the net neutrality debate have remained fairly consistent throughout the years. On the one hand, support for net neutrality stems from a deep commitment to openness harbored by many in the internet community. There is fear that ISPs will impinge upon the democratic nature of the Internet by redirecting or blocking certain kinds of content.²¹ If wealthy content providers are permitted to pay for prioritized delivery of their content to the end-user, so the argument goes, then consumers' ability to access and share information of their choosing may be diminished.²² On the other hand, those in opposition to net neutrality laws are concerned that regulating or legislating net neutrality will stifle innovation.²³ For example, cutting-edge applications, such as videoconferencing, would benefit from prioritized delivery of data, while other applications like email might be reasonably delayed for several seconds.²⁴ In this fashion, net neutrality skeptics usually emphasize the unforeseen consequences of strict neutrality rules. Both arguments clearly have merit, and thus the debate is unlikely to be resolved in the near future.

2. *Technical Underpinnings*

Understanding the net neutrality debate requires a basic understanding of the technology behind the Internet. The first network utilizing the basic protocols undergirding today's Internet launched January 1, 1983 on ARPANET—a government-sponsored research network.²⁵ The basics of internet architecture remain largely the same today, relying almost exclu-

20. *See infra* Parts II and III.

21. Posting of Susan Crawford to Susan Crawford Blog, FAQ on Net Neutrality, http://scrawford.blogware.com/blog/_archives/2006/5/31/1998151.html (May 31, 2006) (“The whole point of price discrimination (the goal of the cablecos and telcos) is that you get to choose who pays more to travel your network. Network providers will have every incentive to favor their own services and make exclusive deals . . .”).

22. *Id.*

23. *See* Public Broadcasting Station, Two Views on Net Rules, <http://www.pbs.org/now/shows/222/net-rules.html> (June 2, 2006) (“The move away from net neutrality may thus represent nothing more than Internet's attempt to meet the increasingly varied and intense demands that consumers are placing on the Internet. Maintaining an attachment to the architecture of the past may stifle these new innovations.”).

24. *Id.* (“[T]he proposed net neutrality legislation poses risks to innovation that are often overlooked. It could foreclose the emergence of new services that depend on a different type of network. It also risks subjecting changes in the network to the delay and political pressure inherent in the regulatory process.”).

25. *See* JAMES F. KUROSE & KEITH W. ROSS, COMPUTER NETWORKING 61 (2001).

sively on the Transport Control Protocol (TCP).²⁶ Before data is sent over the Internet, it is separated into a number of smaller pieces called “packets.”²⁷ Each packet contains layers of identifying information and a payload of data.²⁸ When data is transferred, a parade of packets leaves the source computer and is propelled through various networks toward a final destination.²⁹ If all goes well, the packets are reunited at the destination computer, where it is often accessed by an application like an email client or web browser. This entire process typically takes place in a matter of milliseconds, and is invisible to the typical Internet user.

The net neutrality debate is concerned with the vast number of routers that facilitate the packets’ journey over the Internet—particularly those controlled by ISPs. A router is a device that determines the next point in a packet’s journey as it moves towards its final destination.³⁰ Each router has one or more “routing tables” that function as a map for the purposes of delivering packets.³¹ If, as is most often the case, a router cannot deliver a packet directly to its destination, the routing table provides the intermediary hops necessary to get it there.³² However, if a router is particularly busy, it may need to queue a packet before sending it along, as each router-to-router connection can only carry a limited amount of data.³³ The net neutrality debate asks this technical question: should routers be permitted to *selectively* delay some packets for the benefit of others?

Since the beginning of its commercial use in the 1990s, the Internet has become increasingly complex and heterogeneous. Today’s Internet is vast in scale—joining potentially infinitely deep sub-networks—and connects together a greater number of applications than ever before. Accordingly, the Internet today is defined heavily by its interconnections and routing policies, as opposed to a central structure or storage location. These routing policies, which individual ISPs in part control in the trust of their customers, are the principle focus of the net neutrality debate.

26. See generally RFC793 - Transmission Control Protocol, <http://www.faqs.org/rfcs/rfc793.html> (last visited Feb 3, 2009).

27. *Id.*

28. See KUROSE & ROSS, *supra* note 25, at 18.

29. *Id.*

30. *Id.* at 301-04.

31. *Id.*

32. *Id.*

33. *Id.*

3. *Is the Internet Really “Neutral”?*

When evaluating the net neutrality debate, it is critical to separate aspirations for what the Internet can be and what the Internet already is.³⁴ Many imagine or idealize the Internet as a “dumb pipe” that simply sends packets along, “fairly,” in the order that they are received.³⁵ However, this conception is technically inaccurate and misleading.³⁶ Packet prioritization is commonplace today, and mostly uncontroversial, in several instances. First, the TCP architecture underlying the Internet is *itself* designed to regulate data flow based on the degree of congestion in a network.³⁷ Second, content providers are able to buy priority through service level agreements (SLAs) with Internet backbone providers (powerful commercial or government networks that form the “trunk” of the Internet).³⁸ SLAs typically provide assurances against network congestion, thus guaranteeing timely delivery of relevant data.³⁹ Content providers also strategically employ use of “content delivery networks” which provide data locally by caching their data.⁴⁰ Moreover, popular internet content providers, like Google, sometimes “colocate” caching servers within broadband ISPs’ own facilities, reducing bandwidth costs.⁴¹ In sum, the Internet is designed to prioritize traffic when necessary, and Internet backbone providers and caching services already afford some kinds prioritization to those who are able to pay for it. Thus, realistically conceived, the

34. Weiser, *supra* note 14, at 279.

35. See Adam Thierer, *Are “Dumb Pipe” Mandates Smart Public Policy? Vertical Integration, Network Neutrality, and the Network Layer Model*, 3 J. TELECOMM. & HIGH TECH. L. 275, 276, 287-91 (2005).

36. Weiser, *supra* note 14, at 279 (“Stated simply, the Internet is not, and will never again be, a purely best-efforts-based network.”).

37. See KUROSE & ROSS, *supra* note 25, at 241-48.

38. Weiser, *supra* note 14, at 281 (“Firms with major content hosted on websites (like ESPN.com) limit the opportunities for congestion by contracting with both Internet backbone providers and ‘content delivery networks’ . . . that have built servers across the country to store (or ‘cache’) content locally, which limits the likelihood of congestion along the way.”).

39. *Id.*

40. See Editorial, *The Eden Illusion*, WASH. POST, Mar. 13, 2006, at A14 (“[B]ig e-tailers have accelerated their service by paying to ‘cache’ their Web pages on computers close to customers.”).

41. Posting of Richard Whitt to Google Public Policy Blog, Net neutrality and the benefits of caching, <http://googlepublicpolicy.blogspot.com/2008/12/net-neutrality-and-benefits-of-caching.html> (December 15, 2008) (“Google has offered to ‘colocate’ caching servers within broadband providers’ own facilities; this reduces the provider’s bandwidth costs since the same video wouldn’t have to be transmitted multiple times. We’ve always said that broadband providers can engage in activities like colocation and caching, so long as they do so on a non-discriminatory basis.”).

net neutrality debate is one of degree, not absolutes. However, further “prioritization” of packets at the behest of ISPs—usually the last point of contact data traverses before reaching the end-user—is a relatively new kind of interference with internet traffic.

B. The FCC’s Jurisdiction to Regulate the Internet

A significant portion of the Comcast Opinion addresses the Commission’s authority to issue the Comcast Order. The FCC’s jurisdiction over the Internet generally is not well settled. This Section outlines the principle jurisdictional issues contested in the Comcast Order. First, the Communications Act⁴² provides an ample, but largely untested and uncertain source of authority. Second, the FCC’s decision to proceed with informal adjudication, as opposed to more formalized rulemaking procedures, is a matter of some contention. Third, questions exist pertaining to the authoritative weight of the Commission’s previously issued Internet Policy Statement. Finally, and most importantly, the FCC asserts its Title I ancillary jurisdiction—an arguably tentative theory of jurisdiction—as a basis for its authority to issue the Comcast Order.⁴³ Each of these issues will be summarized and their merits discussed in turn.

1. The Communications Act of 1934

The Communications Act of 1934⁴⁴ established the FCC for the purpose of “regulating interstate and foreign commerce in communication by wire and radio so as to make available . . . rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges by securing a more effective execution of this policy by centralizing authority.”⁴⁵

The authority flowing from the Communications Act appears expansive. The broad scope of the FCC’s organic statute is best illustrated by three provisions of the Communications Act.⁴⁶ First, statutory definitions state that the FCC’s jurisdiction covers “all interstate and foreign communication by wire or radio.”⁴⁷ Second, the FCC’s authority includes all “instrumentalities, facilities, apparatus, and services” used for receipt, delivery, and forwarding the aforementioned transmissions.⁴⁸ Third, a sort of

42. 47 U.S.C. § 151 (2006).

43. *See infra* Part III.

44. Pub. L. No. 416, 48 Stat. 1064 (codified as amended 47 U.S.C. § 151 et seq.).

45. Communications Act of 1934, § 1, 47 U.S.C. § 151.

46. *See* Kevin Werbach, *The Federal Computer Commission*, 84 N.C. L. REV. 1, 70 (2005). In this paragraph, I closely follow Professor Werbach’s presentation.

47. 47 U.S.C. § 152(a) (2006).

48. 47 U.S.C. § 153(33) (2006).

catch-all provision permits the FCC to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”⁴⁹ Taken together, these provisions have striking implications for the FCC’s involvement in the computer and networks industry.⁵⁰

The FCC has applied its sweeping statutory authority in numerous and diverse circumstances. For example, in the now infamous *Carterphone* decision, the FCC exercised its authority to regulate a rubber cup sold as an attachment for telephones to improve sound quality.⁵¹ The FCC has also effected social policy, mandating that all television sets over thirteen inches include technology to allow parental control of content (so-called “V-Chips”).⁵² In yet another area of communications policymaking, the FCC has directly regulated instant messaging (IM) protocols, requiring AOL to interoperate with other IM providers before approving a merger between AOL and Time Warner.⁵³ Thus, the Communications Act provides substantial flexibility in jurisdiction.

2. *Choice of Administrative Activity: Adjudication and Rulemaking*

The Administrative Procedure Act⁵⁴ grants administrative agencies broad discretion in choosing how to make law, subject to authority granted in the relevant organic statute.⁵⁵ Agencies might promulgate future-looking rules⁵⁶ through specified rulemaking procedures.⁵⁷ Alternatively,

49. 47 U.S.C. § 154(i) (2006).

50. See Werbach, *supra* note 46, at 70.

51. See Use of the Carterphone Device in Message Toll Tel. Serv., 13 F.C.C.2d 420 (1968).

52. See Technical Requirements to Enable Blocking of Video Programming based on Program Ratings, ET Docket No. 97-206 (Fed. Commc'ns Comm'n, Mar. 13, 1998).

53. See generally Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. & Am. Online, Inc., Transferors, to AOL Time Warner, Transferee, 16 F.C.C.R. 6547 (2001).

54. The Administrative Procedures Act (APA) is a federal law that broadly governs administrative agencies. Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.).

55. See generally *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194 (1947). An organic statute, or organic law, is a “law or system of laws or principles which defines and establishes the organization of its government.” BLACK’S LAW DICTIONARY 991 (5th Ed. 1981). Organic statutes can define administrative agencies’ organization, powers, and legal methodologies.

56. A rule is “an agency statement of general or particular applicability and future effect . . .” 5 U.S.C. § 551(4) (2006).

agencies might issue retrospective orders through adjudication pertaining to a specific set of facts.⁵⁸ Rulemaking is often considered to be a favored method of establishing new policy because of its prospective nature and more rigorous procedural requirements.⁵⁹ However, the Supreme Court has expressly recognized agency discretion in choosing between rulemaking and adjudication, indicating that “[n]ot every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations.”⁶⁰ Thus, agencies are typically allowed broad discretion to act either by legislative rules via rulemaking or by individual orders via adjudication.⁶¹ The FCC is expressly permitted to engage in both rulemaking and adjudicatory procedures in the Communications Act.⁶²

3. *The Internet Policy Statement*

Agency-issued policy statements typically serve to inform regulated entities and the public how an agency will carry out its administrative mandate or proceed under certain factual circumstances. Policy statements generally do not carry procedural requirements for their promulgation and are not legally binding.⁶³ Agencies may not decide adjudicatory procedures based on a policy statement, but a policy statement can influence an agency decision within the scope of that agency’s discretion. Accordingly, policy statements are among the most informal of an agency’s official regulatory tools.

The FCC released its Internet Policy Statement in September of 2005.⁶⁴ The Internet Policy Statement recognized the FCC’s authority to oversee and enforce the national internet policy Congress established un-

57. Rulemaking procedures may be “formal” or “informal” in nature, each carrying varying levels of procedural rigor, depending on the requirements of statute pertaining to the subject matter of the rulemaking. 5 U.S.C. § 553 (2006).

58. An order is a “final disposition . . . of an agency in a matter other than rule making, but including licensing[.]” 5 U.S.C. § 551(6) (2006).

59. *See, e.g., Chenery II*, 332 U.S. at 202 (“[U]nlike a court, [an agency] does have the ability to make new law prospectively through the exercise of its rule-making powers, [and thus] it has less reason to rely upon ad hoc adjudication to formulate new standards of conduct . . .”).

60. *Id.*

61. *Id.*

62. *See* 47 U.S.C. § 154(i) (2006).

63. *See* *Gen. Elec. Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995).

64. *In re* *Appropriate Framework for Broadband Access to the Internet Over Wire-line Facilities*, 20 F.C.C.R. 14986 (2005) [hereinafter *Internet Policy Statement*].

der section 230 of the Communications Act.⁶⁵ The FCC announced its intention to incorporate Congress' policy guidelines into its policymaking and rulemaking activities.⁶⁶ Specifically, the FCC recognized its "duty to preserve and promote the vibrant and open character of the Internet as the telecommunications marketplace enters the broadband age."⁶⁷ The document also offered "guidance and insight" into the Commission's approach to internet policy and broadband access.⁶⁸ This preliminary document ends up framing the concerns addressed in the Comcast Opinion, but is not itself a source of direct authority.

4. *Title I Ancillary Jurisdiction*

Title I of the Communications Act created the FCC, described its mission, and detailed its general operations.⁶⁹ Title I includes a broad grant of rulemaking authority: "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."⁷⁰ This authority is often called the FCC's "ancillary jurisdiction" because it is used with reference to a statutory provision within the Communications Act.⁷¹ Some scholars have argued this grant of authority is not a "full" grant of legislative authority, but rather something less—for example, the power to make and maintain internal procedures.⁷² Nonetheless, the FCC has successfully invoked this authority in the past.⁷³

Title I ancillary jurisdiction has become the most viable route to regulate the Internet since ISPs were reclassified under the governance of Title I. Prior to 2005, the Communications Act regulated Digital Subscriber Lines (DSL), Internet service carried over telephone wire ("dial-up" Inter-

65. Section 230(b) states general Internet policies of the United States including "promot[ing] the continued development of the Internet" and "maximiz[ing] user control over what information is received by individuals, families, and schools." 47 U.S.C. § 230(b) (2006).

66. *Internet Policy Statement*, 20 F.C.C.R. 14988.

67. *Id.*

68. *Id.* at 14988. The FCC's list of principles includes the statement, "consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement." *Id.*

69. See 47 U.S.C. § 151 (2006) ("For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . .").

70. 47 U.S.C. § 154(i) (2006).

71. See *United States v. Sw. Cable Co.*, 392 U.S. 157, 181 (1968).

72. See, e.g., James B. Speta, *FCC Authority to Regulate the Internet: Creating It and Limiting It*, 35 LOY. U. CHI. L.J. 15, 23 (2003).

73. See, e.g., *Sw. Cable Co.*, 392 U.S. 157.

net access), and cable Internet services differently, even though all provided functionally similar offerings.⁷⁴ Telephone networks were governed by Title II of the Communications Act, and thus ISPs relying on telephone networks were subject to more direct regulation and other obligations⁷⁵ from which cable services were largely exempt due to their classification as “information-service providers.”⁷⁶ Recognizing this discrepancy, the FCC created a new regulatory framework for broadband connections, casting both DSL and cable modem services as unregulated “information services.”⁷⁷ After a legal battle challenging the new classifications, the Supreme Court affirmed the FCC’s new classifications in *National Cable & Telecommunications Association v. Brand X Internet Services*.⁷⁸ Internet services were thus consolidated in a comparatively “less regulated” statutory category under Title I. As a result, the FCC cannot rely on its Title II authority to promulgate legislative rules⁷⁹ or to adjudicate disputes⁸⁰ when dealing with ISPs. With ISPs classified as information service providers, the FCC has had to turn away from Title II as a basis for its authority and rely upon a new source—namely the grant of authority under Title I discussed in the previous paragraph.

The Supreme Court has approved the FCC’s use of Title I ancillary jurisdiction under certain factual circumstances. In *United States v. Southwestern Cable Co.*,⁸¹ a high watermark for ancillary jurisdiction, the Supreme Court relied upon Title I ancillary jurisdiction to affirm FCC regulation of cable television, even though cable television was neither a common carrier nor a broadcast service (the two relevant enumerated areas of FCC jurisdiction).⁸² The Court exhibited a willingness to give the FCC broad authority, reasoning that “nothing . . . in the Act’s history or purposes limits the Commission’s authority to those activities and forms

74. See *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 974 (2005).

75. For example, telecommunications carriers must charge just and reasonable, non-discriminatory rates to their customers, 47 U.S.C. §§ 201-209 (2006), design systems so that other carriers can interconnect, 47 U.S.C. § 251(a)(1) (2006), and contribute to various federal funds, 47 U.S.C. § 254(d) (2006).

76. See *Brand X*, 545 U.S. at 967-68.

77. See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17 F.C.C.R. 3019 (2002).

78. *Brand X*, 545 U.S. 967.

79. The Supreme Court found 47 U.S.C. § 201 gave the FCC authority to make legislative rules as to any matter in Title II. See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-78 (1999).

80. See 47 U.S.C. §§ 207-208 (2006).

81. *United States v. Sw. Cable Co.*, 392 U.S. 157 (1968).

82. *Id.* at 172.

of communication that are specifically described by the Act's other provisions."⁸³ The Court was wary of binding the FCC's hands with regard to its "ultimate purpose" without compelling evidence that Congress intended such a restriction.⁸⁴ Thus, in the wake of *Southwestern Cable*, the FCC seemed to wield a potent tool in its ancillary authority.

However, the trend since *Southwestern Cable* has been a narrowing one with regard to the FCC's ancillary authority.⁸⁵ In *FCC v. Midwest Video*, the Court struck down a variety of regulations the FCC sought to apply to cable companies, on the grounds that those companies were not within the Communication Act's substantive jurisdiction.⁸⁶ The court reasoned that while "lack of congressional guidance has in the past led us to defer—albeit cautiously—to the Commission's judgment regarding the scope of its authority," Congress' "hesitancy" on issues pertinent to the case cut strongly against approving the FCC's actions.⁸⁷ The Court clarified that ancillary authority must be invoked only when "necessary to ensure the achievement of the Commission's *statutory* responsibilities."⁸⁸ Some have perceived the Court's language as a significant narrowing of ancillary authority.⁸⁹

Even so, Title I ancillary jurisdiction may still authorize FCC regulation of ISPs. In *Brand X*, the Court recognized in dicta the FCC's authority to regulate ISPs.⁹⁰ Specifically, the Court noted that "[ISPs] are not subject to mandatory common-carrier regulation under Title II, *though the Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications,*"⁹¹ and "the Commission remains free to impose *special*

83. *Id.*

84. *Id.* at 177.

85. *See* Speta, *supra* note 72, at 24-25.

86. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 696—707 (1979). At issue were "rules requiring certain cable television systems to develop, at a minimum, 20-channel capacity by 1986, to make available certain channels for access by third parties, and to furnish equipment and facilities for access purposes." *Id.* at 689.

87. *Id.* at 708 ("[W]e are unable to ignore Congress' stern disapproval Though the lack of congressional guidance has in the past led us to defer—albeit cautiously—to the Commission's judgment regarding the scope of its authority, here there are strong indications that agency flexibility was to be sharply delimited.").

88. *Id.* at 706 (emphasis added).

89. *See, e.g.*, Speta, *supra* note 72, at 24-25 ("Nevertheless, more recent Supreme Court authority construes the FCC's Title I authority much more narrowly, certainly overruling the broadest language of *Southwestern Cable*.").

90. *See supra* Section I.B.4.

91. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 974 (2005) (emphasis added).

regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction.”⁹² This recent language seems to breathe some new life into the authoritative doctrine.

II. THE COMCAST OPINION AND ORDER

This Part summarizes the history, procedure, and reasoning of the Comcast Opinion and Order. Section II.A outlines relevant facts and procedural history. Section II.B details the FCC’s reasoning. Section II.C briefly touches upon Comcast’s pending appeal.

A. Facts and Procedural History

In 2007, Comcast customers began to notice problems when using BitTorrent and other peer-to-peer applications.⁹³ When complaints reached the media, Comcast denied responsibility, claiming, “We’re not blocking any access to any application, and we don’t throttle any traffic.”⁹⁴ However, after conducting nationwide tests, the Associated Press (AP) concluded that Comcast was aggressively interfering with peer-to-peer applications.⁹⁵ The AP’s report concluded that Comcast’s method of throttling peer-to-peer traffic involved falsifying network traffic—that is, adding information to customers’ data transfers.⁹⁶ By forging “reset packets” Comcast disrupted customers’ data transfers until overall bandwidth usage fell below a predetermined level.⁹⁷ Although Comcast claimed that this practice was only employed during times of peak network congestion, evidence again contradicted Comcast’s claim, showing slowdowns at all times of day.⁹⁸ The interference was severe, perpetrated on only one segment of internet traffic and, in some instances, blocked the traffic instead of merely slowing it down.⁹⁹

92. *Id.* at 996 (emphasis added). Justice Scalia bemoaned the extension of ancillary authority in his dissent, writing that “[t]his is a wonderful illustration of how an experienced agency can (with some assistance from credulous courts) turn statutory constraints into bureaucratic discretions.” *Id.* at 996 (Scalia, J., dissenting).

93. *See In re Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 F.C.C.R. 13028 (2008).

94. *Id.*

95. *Id.* at para. 7; Peter Svensson, *Comcast Blocks Some Internet Traffic, AP Testing Shows*, ASSOCIATED PRESS, Oct. 19, 2007.

96. *In re Formal Complaint of Free Press*, 23 F.C.C.R. at 13028, para. 8.

97. *Id.* at para. 9.

98. *Id.*

99. *Id.*

Free Press¹⁰⁰ filed a complaint with the FCC against Comcast on November 1, 2007, asking the Commission to declare that Comcast had violated the FCC's Internet Policy Statement by degrading peer-to-peer traffic.¹⁰¹ More than twenty thousand Americans submitted complaints to the FCC shortly after.¹⁰² Free Press also requested a declaratory ruling to "clarify that an Internet service provider violates the FCC's Internet Policy Statement when it intentionally degrades a targeted Internet application."¹⁰³

B. The FCC's Decision

The FCC responded to the Free Press complaint through adjudication, justified its jurisdiction upon Title I ancillary authority, and deemed Comcast's network management practices unreasonable.

1. Choice of Adjudication

The Commission chose to respond to the complaints against Comcast through adjudication, rather than by promulgating regulation through rulemaking.¹⁰⁴ The Commission offered three reasons for its choice of procedure. First, the Commission characterized the matter of Comcast's conduct as a novel issue and deserving of extra caution.¹⁰⁵ Second, the Commission maintained that broadband internet access services are "specialized and varying in nature [so] as to be impossible to capture within the boundaries of a general rule."¹⁰⁶ Third, the Commission reasoned that a narrow adjudicatory approach was in accord with its stated policy of proceeding with restraint.¹⁰⁷

Comcast challenged the use of adjudication as inappropriate, contending that "[m]aking 'policy through adjudication' would be particularly problematic here, because the Commission currently has at least four open proceedings asking whether it should, or even has the authority to, adopt

100. The Free Press is "the largest media reform organization in the United States, with nearly half-a-million activists and members..." Free Press, About Us, http://www.freepress.net/about_us (last visited Feb. 3, 2009).

101. In re *Formal Complaint of Free Press*, 23 F.C.C.R. at para. 10.

102. *Id.*

103. *Id.* at para. 11.

104. *Id.* at para. 29.

105. *Id.* at para. 30 ("[T]he Internet is a new medium, and traffic management questions like the one presented here are relatively novel.").

106. *Id.* at para. 31.

107. *Id.* at para. 32.

[such] regulations.”¹⁰⁸ Comcast also argued its due process rights were implicated by lack of fair notice and the retroactive effects of the rule.¹⁰⁹ The Commission, however, maintained that Comcast had proper notice of a potential adjudication from past proceedings,¹¹⁰ and stated that its decision to adjudicate did not comprise a radical departure from previous FCC interpretations of the law.

2. *Jurisdictional Grounds*

The Commission invoked Title I ancillary authority as its primary source of jurisdiction to decide the Comcast dispute.¹¹¹ The Commission reasoned that since the issue of network management implicated “communications by wire,”¹¹² the Commission’s Title I jurisdiction applied.¹¹³ The Commission was then required to identify specific “statutory responsibilities” to support its invocation of Title I ancillary authority.¹¹⁴ The Commission cited the broad congressional internet policy mandates of section 230, arguing that since the policy goals were inscribed into “the very same Act that established this Commission as [a] federal agency,”¹¹⁵ they were the FCC’s to carry out and enforce.¹¹⁶ Moreover, the Commission cited six separate additional statutory provisions to support its Title I ancillary authority: section 1 of the Communications Act,¹¹⁷ section 201 of the Communications Act,¹¹⁸ section 706 of the Telecommunications

108. Comments of Comcast Corp., *In re Broadband Industry Practices*, WC Docket No. 07-52, at 44 (Fed. Commc’ns Comm’n 2008) [hereinafter Comcast Comments].

109. *Id.* at 54 (“[S]uch action would violate Comcast’s due process rights.”).

110. Specifically, in a prior proceeding involving acquisition of Adelphia’s cable systems, the Commission warned that “[i]f in the future evidence arises that any company is willfully blocking or degrading Internet content, affected parties may file a complaint with the Commission.” *In re Formal Complaint of Free Press*, 23 F.C.C.R. at para. 35.

111. *Id.* at para. 15 (“[W]e think our ancillary authority to enforce federal policy is quite clear.”).

112. 47 U.S.C. § 152(a) (2006).

113. *In re Formal Complaint of Free Press*, 23 F.C.C.R. at para. 15.

114. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979).

115. *In re Formal Complaint of Free Press*, 23 F.C.C.R. at para. 15.

116. *Id.*

117. 47 U.S.C. § 151 (2006) (directing the Commission to “make available, so far as possible, to all people . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities and reasonable charges”).

118. 47 U.S.C. § 201(b) (2006) (providing that “[a]ll charges, practices, classifications, and regulations for and in connection with [common carrier] service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful”).

Act of 1996,¹¹⁹ section 256 of the Telecommunications Act,¹²⁰ section 257 of the Telecommunications Act,¹²¹ and section 601(4) of the Telecommunications Act.¹²²

In his dissent, Commissioner Robert M. McDowell critiqued the FCC's invocation of ancillary authority.¹²³ Commissioner McDowell agreed that the FCC had jurisdiction over the "general areas" involved in the adjudication.¹²⁴ However, he maintained that the majority's theory of adjudicating solely based on ancillary authority was legally deficient, arguing that "in the absence of rules, neither the general policy goals set forth in sections 230 [or the other cited provisions] provide enough of a legal basis for us to act."¹²⁵ Commissioner McDowell also expressed concern that Congressional attempts at legislation suggested the FCC did not have immediate authority.¹²⁶

119. 47 U.S.C. § 157 (2006) (providing that the "Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans").

120. 47 U.S.C. § 256 (2006) (providing that the Commission should "promote non-discriminatory accessibility by the broadest numbers of users . . . [and] ensure the ability of users and information providers to seamlessly and transparently transmit and receive information").

121. 47 U.S.C. § 257 (2006) (mandating that the Commission eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services").

122. 47 U.S.C. § 601 (2006) (advancing the policy of "assur[ing] that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public"). For summaries of the individual arguments, see *In re Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 F.C.C.R. 13028 (2008), 23 F.C.C.R. 13028 (2008).

123. See *In re Formal Complaint of Free Press*, 23 F.C.C.R. at 13090 (McDowell, Comm'r, dissenting).

124. *Id.*

125. *Id.*

126. *Id.* Commissioner McDowell argued that:

If Congress had wanted us to regulate Internet network management, it would have said so explicitly in the statute, thus obviating any perceived need to introduce legislation as has occurred during this Congress. In other words, if the FCC already possessed the authority to do this, why have bills been introduced giving us the authority we ostensibly already had?

Id.

3. *The Merits*

The Commission determined that Comcast's practices were "invasive and outright discriminatory."¹²⁷ Noting numerous customer complaints, the Commission concluded that the "conduct significantly impeded consumers' ability to access the content and use the applications of their choice."¹²⁸ The Commission expressed concern that such practices violated the expectations of internet developers and would prompt confusion as to why certain programs were underperforming.¹²⁹ The Commission also cited numerous experts and academics that had condemned the practice.¹³⁰ Finally, the Commission expressed concern that Comcast's practices could lead to anticompetitive behavior.¹³¹

The Commission concluded that Comcast's practices were unreasonable and not carefully tailored to the legitimate interest of easing network congestion.¹³² First, customers could be affected based solely on their use of a particular application, regardless of bandwidth usage.¹³³ Second, the interference appeared to apply at all times of the day and not just at times of increased traffic.¹³⁴ Third, all Internet access, not just that present in particularly congested neighborhoods, was affected by the traffic shap-

127. In re *Formal Complaint of Free Press*, 23 F.C.C.R. at para. 42.

128. *Id.* at para. 44.

129. *Id.* at para. 45.

130. *Id.* at para. 46. The Commission summarized some academic testimony as follows:

For example, Professor Jon Peha of Carnegie Mellon termed Comcast's practices a "possible case of consumer fraud" and stated that he was "unaware of any technical literature that has proposed that ISPs adopt this particular practice as a way of dealing with congestion, or to use this practice to address any other issue that might be important in the context of network management." Indeed, he questioned whether Comcast's practices fell "within the realm of network management at all, much less reasonable network management." Professor David Reed of the Massachusetts Institute of Technology said that "[n]either Deep Packet Inspection nor RST Injection"—Comcast uses both to manage its network—"are acceptable behavior." Professor David Clark of the Massachusetts Institute of Technology testified that Comcast was in essence "imposing a value judgment on the consumer, and that is, in the end, looking at your customer and saying 'enemy.'"

Id. (internal citations omitted).

131. *Id.* at para. 47 ("Comcast's practice selectively blocks and impedes the use of particular applications, and we believe that such disparate treatment poses significant risks of anticompetitive abuse.").

132. *Id.* at para. 48.

133. *Id.*

134. *Id.*

ing.¹³⁵ Reinforcing its finding, the Commission pointed out a variety of other options at Comcast's disposal for managing traffic, including bandwidth caps.¹³⁶ The Commission also admonished Comcast for its failure to disclose its practices to its customers.¹³⁷

Accordingly, the Commission ordered that Comcast must, within thirty days, (1) disclose the precise contours of its network management practices, (2) submit a compliance plan to the Commission, and (3) disclose to the Commission and the public details of the network management practices that it intended to deploy in the future.¹³⁸

C. Comcast's Appeal

Comcast appealed the Commission's order on September 4, 2008 to the Court of Appeals for the D.C. Circuit.¹³⁹ Comcast's basis for appeal was the question of the FCC's jurisdiction to adjudicate the dispute.¹⁴⁰ David Cohen, a Comcast vice president, stated that Comcast would comply with the order, but maintained that the Commission went too far.¹⁴¹ Cohen stated: "We filed this appeal in order to protect our legal rights and to challenge *the basis* on which the commission found that Comcast violated federal policy in the absence of pre-existing legally enforceable standards or rules."¹⁴²

III. ANALYSIS

This section provides an analysis of the FCC's jurisdiction to issue the Comcast Order. Section III.A discusses the unclear standard of review,

135. *Id.*

136. *Id.* at para. 49. Comcast has since imposed such a bandwidth cap. See Jacqui Cheng, *It's official: Comcast starts 250GB bandwidth caps October 1*, ARS TECHNICA, August 28, 2008, <http://arstechnica.com/old/content/2008/08/its-official-comcast-starts-250gb-bandwidth-caps-october-1.ars>.

137. In re *Formal Complaint of Free Press*, 23 F.C.C.R. at para. 52 ("[D]isclosure of network management practices to consumers in a manner that customers of ordinary intelligence would reasonably understand would enhance the 'vibrant and competitive free market . . . for the Internet and interactive computer services' by allowing consumers to compare and contrast competing providers' practices.") (internal citations omitted).

138. *Id.* at paras. 57-60.

139. See Saul Hansell, *Comcast Appeals F.C.C. Sanction*, BITS BLOG, Sept. 4, 2008, <http://bits.blogs.nytimes.com/2008/09/04/comcast-appeals-fcc-sanction/>.

140. David Kravets, *Comcast Appeals FCC Throttling Order*, WIRED, Sept. 04, 2008, (Threat Level blog), <http://blog.wired.com/27bstroke6/2008/09/comcast-appeali.html>.

141. *Id.*

142. *Id.* (emphasis added).

highlighting a circuit split where agency interpretations raise jurisdictional questions. Section III.B briefly weighs potential challenges to the FCC's use of adjudicatory proceedings. Section III.C reflects upon the fact that Title I ancillary authority is currently the FCC's only viable route to address Internet regulation and predicts the question will extend beyond the instant case.

A. The Standard of Judicial Review is Unclear

The standard of judicial review relevant to the Comcast Order is not clear. Ordinarily, courts have a duty to defer to reasonable agency interpretations of statutes that the agency is charged with administering.¹⁴³ However, there is a vexing and unresolved question as to whether strong deference should be given to agency interpretations that implicate the scope of the agency's jurisdiction.¹⁴⁴ Fearing aggrandizement of agency power, courts have applied various standards of review but "generally failed to enunciate clear and consistent rationales for such a result."¹⁴⁵ The consequence is a deep circuit split on deferential standards¹⁴⁶ that remains unresolved by the Supreme Court.¹⁴⁷ The D.C. Circuit, which will decide Comcast's appeal, has gone both ways on the issue. Ultimately, the amount of deference given will likely turn on the court's interpretation of

143. See *Chevron U.S.A. Inc. v. Natural Res. Defense Counsel, Inc.*, 467 U.S. 837 (1984); see also Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 833. Merrill and Hickman explain that:

Chevron expanded the sphere of mandatory deference through one simple shift in doctrine: It posited that courts have a duty to defer to reasonable agency interpretations not only when Congress expressly delegates interpretative authority to an agency, but also when Congress is silent or leaves ambiguity in a statute that an agency is charged with administering.

Id.

144. See Merrill, *supra* note 143, at 909.

145. Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB POL'Y 203, 205 (2004).

146. The Second, Third, Fourth, and Ninth Circuits have given full *Chevron* deference to jurisdictional interpretations. See *Connecticut v. United States Dep't. of the Interior*, 228 F.3d 82, 93 (2d Cir. 2000); *Air Courier Conference of Am. v. U.S. Postal Serv.*, 959 F.2d 1213, 1223-25 (3d Cir. 1992); *Bd. of Governors of the Univ. of N.C. v. U.S. Dep't. of Labor*, 917 F.2d 812, 816 (4th Cir. 1990); *Transpacific Westbound Rate Agreement v. Fed. Mar. Comm'n*, 951 F.2d 950, 952 (9th Cir. 1991). The Seventh Circuit has declined to do so. See *N. Ill. Steel Supply Co. v. Sec'y of Labor*, 294 F.3d 844, 846-47 (7th Cir. 2002); *United Transp. Union v. Surface Transp. Bd.*, 169 F.3d 474, 477 (7th Cir. 1999).

147. See Merrill, *supra* note 143, at 909.

congressional intent.¹⁴⁸ Further muddying the waters is the difficult threshold question of *when* jurisdictional questions are actually implicated. Justice Scalia persuasively argued that “there is no discernable line between an agency’s exceeding its authority and an agency’s exceeding authorized application of its authority.”¹⁴⁹ The D.C. Circuit may be swayed by an argument from Comcast that the Comcast Order constitutes a “jurisdictional question” of substantial scope and character in hopes of shaking traditionally strong deference.

*Midwest Video*¹⁵⁰ might provide analytic guidance regarding important issues likely to be raised on review. The *Midwest Video* court asked two central questions when analyzing the validity of an invocation of Title I ancillary authority: First, is there any indication that Congress reserved such power for itself?¹⁵¹ Second, was the Commission’s exercise of authority “necessary to ensure the achievement of the Commission’s statutory responsibilities”?¹⁵² Thus, when the Comcast Order undergoes judicial review, the court is likely to ask if current and past attempts at congressional net neutrality legislation are an indication that Congress “reserved authority” to regulate network management;¹⁵³ if the broad policy goals of section 230 of the Communications Act are bona fide “statutory responsibilities”;¹⁵⁴ and if the Supreme Court’s recent willingness to allow the Commission to regulate information service providers¹⁵⁵ carries sufficient weight to support the invocation of authority in the Comcast Order.

B. The FCC’s Choice of Adjudication is Likely Valid in and of Itself, but Might Affect Judicial Review

The Commission’s decision to proceed by adjudication is likely valid in and of itself. The Supreme Court has clearly affirmed agencies’ broad discretion in choosing a decision-making forum.¹⁵⁶ It is very rare that this choice would amount to an abuse of discretion.¹⁵⁷ Thus, absent a compel-

148. *See Id.* at 913 (The amount of deference given to jurisdictional questions will likely “turn on an effort to uncover Congress’s intent regarding the most appropriate interpreter.”).

149. *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in the judgment).

150. *See supra* notes 86-89 and accompanying text.

151. *See FCC v. Midwest Video Corp.*, 440 U.S. 689, 907 (1979).

152. *Id.* at 706.

153. *See supra* note 87 and accompanying text.

154. *See supra* note 88 and accompanying text.

155. *See supra* note 91 and accompanying text.

156. *See generally SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194 (1947).

157. *Pfaff v. HUD*, 88 F.3d 739, 748 (9th Cir. 1996).

ling argument that adjudication is inappropriate in this instance,¹⁵⁸ proceeding by adjudication was likely a valid decision on the part of the Commission.

Nevertheless, Comcast has argued and Commissioner McDowell has agreed that rulemaking procedures would have been a more acceptable route in this instance.¹⁵⁹ Comcast argued that ancillary authority is only properly invoked in rulemaking processes.¹⁶⁰ Commissioner McDowell suggested that rulemaking would have been a stronger vehicle for policy, writing in his dissent that “[t]his matter would have had a better chance on appeal if we had put the horse before the cart and conducted a rulemaking, issued rules and *then* enforced them.”¹⁶¹ The idea that the FCC should act through a more deliberative rulemaking procedure when at the fringe of its jurisdiction possesses some common sense appeal, but lacks apparent doctrinal support.¹⁶² Commissioners in support of the Comcast Order were careful to reinforce the lengthy and deliberative nature of the adjudication in their written opinions.¹⁶³ Accordingly, it is possible that the decision to adjudicate in this instance might be viewed as cutting against the FCC.

C. Jurisdiction by Ancillary Authority is the FCC’s Best and Only Option

Ancillary authority is a relatively untested theory of jurisdiction that has received mixed treatment and limited attention from the courts.¹⁶⁴

158. For example, the Ninth Circuit explained that:

Such a situation may present itself where the new standard, adopted by adjudication, departs radically from the agency’s previous interpretation of the law, where the public has relied substantially and in good faith on the previous interpretation, where fines or damages are involved, and where the new standard is very broad and general in scope and prospective in application.

Id.

159. See Comcast Comments, *supra* note 108, at 49-50.

160. See *id.* (“The Commission’s ancillary authority relates solely to its statutory authority to adopt rules and regulations . . . it is not a general grant of enforcement authority to punish entities for engaging in conduct that would violate a rule . . . that the Commission has consciously *not* adopted.”).

161. *In re* Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, 23 F.C.C.R. 13028, 13090 (2008).

162. Neither Comcast nor Commissioner McDowell cite authority to this point.

163. See, e.g., *id.* at 13079 (“Let me emphasize again the cautious and well-considered approach the majority takes in this proceeding about the future of the Internet.”).

164. See *supra* Section I.B.4.

Scholars have characterized it as “at best, uncertain”¹⁶⁵ and “contain[ing] few, if any, limits.”¹⁶⁶ Further compounding uncertainty is the fact that the statutory provisions offered in support of the FCC’s invocation are vague themselves. However, as the Communications Act is written today, ancillary authority is probably the only theory upon which the FCC can meaningfully impact internet policy. Professor Werbach poetically described the FCC as “a grand old hotel built many yards inland from a beach. Over time, as the beach erodes, the water creeps closer to the hotel until it reaches the edge of the property. The hotel has not grown or moved at all; the water has come to it.”¹⁶⁷ There are no clear standards to guide the FCC in regulating the rapidly-changing world of the Internet. Accordingly, to justify many of its recent farther-reaching decisions, the Commission has been required to call upon its most capacious statutory authority.¹⁶⁸ Simply by virtue of a quickly-evolving technological society, the Commission’s authority is bound to appear somewhat reaching in nature.

IV. CONCLUSION

The validity of the Commission’s exercise of authority in the Comcast Order is difficult to predict. The authoritative doctrine applied by the FCC is relatively untested and potentially expansive.¹⁶⁹ The proper standard of judicial review remains shrouded in mystery.¹⁷⁰ The issue of net neutrality remains ideologically charged.¹⁷¹ “Regulation” of the Internet is a brave new frontier.¹⁷² Thus, there are no easy answers to be found at this stage in the game.

The D.C. Circuit, in deciding Comcast’s appeal of the FCC’s order, has sufficient grounds to find for Comcast. Congress’ recent debates about net neutrality issues could be interpreted by the D.C. Circuit as indicating that Congress intends for itself to have authority over regulating (or not regulating) ISP network management.¹⁷³ The “statutory responsibilities” cited by the FCC might be deemed too vague, or the congressional policy

165. *Id.* at 22.

166. *Id.* at 58.

167. Werbach, *supra* note 46, at 51.

168. *See id.* at 60.

169. *See supra* Section I.B.4.

170. *See supra* Section III.A.

171. *See supra* note 14 and accompanying text.

172. *In re* Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, 23 F.C.C.R. 13028, para. 30 (2008).

173. *See supra* note 87 and accompanying text.

goals of section 230 too flimsy, to support an invocation of ancillary authority practices.¹⁷⁴ Finally, the court might take issue with the procedural method chosen by the FCC—adjudication—and somehow cabinet the exercise of ancillary authority to the generally slower realm of rulemaking.¹⁷⁵

Nevertheless, the D.C. Circuit also has sufficient grounds to affirm the FCC. Agencies traditionally enjoy strong deference when interpreting their own statutes.¹⁷⁶ The Supreme Court's dicta in *Brand X* indicates that the FCC has substantive authority over Title I information service providers—a category that includes ISPs—and serves as evidence that the agency has a role to play.¹⁷⁷ Furthermore, a plain reading of the Communication Act suggests that the FCC has substantive authority to *some* extent.¹⁷⁸ To what extent remains an open question.

The uncertain character of the FCC's first venture into ISP regulation does not itself suggest that the FCC is an inadequate agent for shaping internet policy. Notably, even Comcast concedes that the FCC has the power to regulate ISPs through rulemaking processes.¹⁷⁹ Thus, even if the Comcast Order is overturned, the FCC will likely be left to explore other authoritative and procedural methodologies to effect internet policy. The fact-finding abilities and expertise of administrative agencies will surely be needed to effectively address issues as new and complicated as net neutrality. What is almost certain is that we have not seen the last of the FCC in matters of internet policy. In the words of Commissioner McDowell, at this point two things are clear: “this debate will continue, and the FCC has generated more questions than it has answered.”¹⁸⁰

174. *See supra* note 88 and accompanying text.

175. *See supra* Section III.B.

176. *See supra* Section I.B.2.

177. *See supra* note 91 and accompanying text.

178. *See supra* Section I.B.1.

179. *See, e.g., In re* Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, 23 F.C.C.R. 13028, para. 30 (“Indeed, Comcast *itself* admitted Commission jurisdiction over its network management practices in litigation before the U.S. District Court for the Northern District of California.”).

180. *Id.* at 13095 (McDowell, Comm’r, dissenting).