



**Written Testimony of
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“Ensuring Competition on the Internet: Net Neutrality & Antitrust”

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Executive Summary

This paper offers a critical reading of the Federal Communications Commission’s December 23rd Report and Order on “Preserving the Open Internet.”² This year-long proceeding, concluded just as the 2010 lame duck Congress was about to adjourn, resulted in significant new regulations for some broadband Internet access providers.

The new rules, aimed at ensuring a “level playing field” for application and other service providers in gaining access to markets, consumers, and devices, entomb into law a version of what is sometimes referred to as the “net neutrality” principle. Proponents of net neutrality regulation argue that the Internet’s defining feature—and the key to its unarguable success—is the content-neutral routing and transport of individual packets through the network by Internet service providers, Internet backbones, and other individual networks that make up the Internet.³

As evidenced in all of my writings on the digital revolution, I share the enthusiasm of all five Commissioners—and not just the three who voted to approve the new regulations—for the Open Internet. I just don’t believe there is any evidence of a need for regulatory intervention to “save” this robust ecosystem, or that the FCC had the authority from Congress to do so.

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² Federal Communications Commission, *In the Matter of Preserving the Open Internet*, FCC 10-201, Dec. 23, 2010, http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db1223/FCC-10-201A1.pdf (hereinafter “Report & Order”).

³ See Tim Wu, *Net Neutrality FAQ*, http://timwu.org/network_neutrality.html. Wu is generally regarded as having coined the term “net neutrality,” which does not, however, appear in the text of the Report & Order.

As with any lawmaking involving disruptive technologies, moreover, the risk of unintended consequences is high. In its haste to pass something before the new Congress convened, the majority has interfered with the continued evolution of this vital technology, preserving the Open Internet in the same way that amber preserves prehistoric insects.

This paper dissects several key aspects of the Report and Order, including:

- The basis on which the agency issued what it calls “prophylactic” rules (Section II);
- The final rules and how they evolved over the course of a byzantine and often hostile debate (Section III);
- The largely unexamined costs of enforcing the rules (Section IV);
- A long list of approved exceptions, caveats, and exemptions, which reveal a fundamental misunderstanding by the agency of what “the Open Internet” actually is (Section V); and
- A discussion of some of the most significant holes in the agency’s legal justification for issuing the rules (Section VI).

In summary, the Report and Order is deeply flawed and potentially dangerous to the Internet ecosystem the FCC is trying to “preserve.” The premise of looming threats to the Open Internet that inspired these proceedings proved chimerical, and the rulemaking process was unduly political and disappointingly obtuse.⁴ The new rules rest on a legal foundation the agency cannot seriously expect will hold up in court or in Congress. The result was an Order that no one other than FCC Chairman Julius Genachowski publicly supported.⁵

Key Findings

- **There was no need for new regulation** - Despite thousands of pages of comments from parties on all sides of the issue, in the end the majority could only identify four incidents in the last ten years of what it believed to be non-neutral behavior. All four were quickly resolved outside the agency’s adjudication processes. Yet these four incidents provide the sole evidence of a need to regulate. With no hint of market failure, the

⁴ As Commissioner Robert McDowell noted in his dissent, the final Report & Order was not made available to Commissioners for review until midnight the night before an early morning vote. The Commission also added over 3,000 pages of documents into the record at the last minute, precluding any opportunity for public review or comment. Report & Order, *supra* note 2, at 145-46 (McDowell, Comm., dissenting).

⁵ The final vote was 3 to 2, a bare majority and an atypical lack of consensus for the agency. Commissioners McDowell and Baker dissented from the Report & Order. Commissioner Copps concurred. Commissioner Clyburn approved in part and concurred in part. Each of the Commissioners issued separate statements critical of the final product. Advocacy groups who supported the rulemaking were deeply disappointed with the Report & Order, and opponents of any new federal Internet regulations have already initiated legal challenges. Several Members of Congress, disturbed as much by the process as the end-product, have introduced legislation and begun hearings to nullify the rules before they have even been published in the Federal Register. See Larry Downes, *Net Neutrality Fight Far from Over*, CNET News.com, Jan. 7, 2011, http://news.cnet.com/8301-1035_3-20027724-94.html.

majority instead has issued what it calls “prophylactic rules”⁶ it hopes will deter any actual problems in the future. But it is worth noting that the rules as adopted would only apply to at most one of the four incidents, which involved a small local ISP alleged in 2005 to have blocked its customers’ access to Voice over Internet Protocol (VoIP) telephone service.⁷

- **The final rules reflected little change from the original draft** - In contrast to heated claims that the FCC sold out the net neutrality principle over the course of its year-long proceedings, the final rules differed very little from those first proposed in October, 2009. The most significant change was to scale back regulation of mobile broadband based on overwhelming evidence of the fragility of this emerging platform. But even the Notice of Proposed Rulemaking (NPRM)⁸ issued in October 2009 expressed doubts about the wisdom of subjecting wireless to the new regime.
- **Enforcement mechanisms are complex and expensive** - The enforcement provisions, longer than the rules themselves, create a dangerously unbalanced private right of action for individuals to initiate complaints based on little or no evidence of violations. The costs of investigation and enforcement are outsourced to the defendants and to the agency, creating perverse incentives that will likely generate numerous frivolous adjudications. The Report and Order includes little to no discussion of these costs, yet proudly concludes that the rules will impose few new burdens on broadband Internet access providers.⁹
- **Exceptions reveal a profound misunderstanding of “the Open Internet”** - The Report and Order detail over a dozen significant exceptions, caveats and exemptions for non-neutral network management practices, services, and outright exclusion for some classes of broadband Internet access providers. In some cases, the services are new; in most, the non-neutral techniques have become entrenched and vital features of the online experience for consumers.

While the agency was correct to limit its new rules, the list is by no means complete nor is the evolution of network practices mature. The “these and no more” exceptions, arbitrarily dated to the point of issuing the rules in late 2010, means that future developments will be subject to FCC approval. This will unintentionally skew, slow, or stunt the next generation Internet ecosystem in ways that will threaten U.S. competitiveness in the most global of all markets. The majority have promised to

⁶ The phrase “prophylactic rules” appears eleven times in the Report & Order.

⁷ *Madison River Communications*, File No. EB-05-IH-0110, Order, 20 FCC Rcd 4295 (EB 2005). *Madison River* was resolved via consent decree that the FCC agreed “does not constitute either an adjudication on the merits or a factual or legal finding regarding any compliance or noncompliance...”

⁸ Federal Communications Commission, *In the Matter of Preserving the Open Internet*, FCC 09-93, Oct. 22, 2009, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-93A1.pdf (hereinafter “NPRM”).

⁹ See Report & Order, *supra* note 2, ¶ 4 (“We expect the costs of compliance with our prophylactic rules to be small, as they incorporate longstanding openness principles that are generally in line with current practices and with norms endorsed by many broadband providers.”).

review the rules no later than two years from now. But in Silicon Valley, two years may as well be forever.

- **The FCC lacked authority to issue the rules—and likely knew it** - Despite promises that the agency’s “very smart lawyers” had found jurisdictional support for the new rules beyond arguments rejected by the D.C. Circuit in its *Comcast* decision,¹⁰ the Report and Order largely repeated those arguments, offering only a slightly modified and unpersuasive reading of Section 706 of the Communications Act. The half-hearted effort suggests the agency has little expectation the rules will survive court challenges that have already begun,¹¹ and issued the rules solely to get the messy proceedings off its docket.

¹⁰ *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

¹¹ Larry Downes, *Verizon Loses Early Skirmish in Net Neutrality Litigation*, CNET News.com, Feb. 3, 2011, http://news.cnet.com/8301-13578_3-20030479-38.html.

I. Introduction

At the last possible moment before the 2010 Christmas holiday, the FCC published its Report and Order on “Preserving the Open Internet,” capping off years of largely content-free “debate” on the subject of whether or not the agency needed to step in to save the Internet.¹²

In the end, only FCC Chairman Julius Genachowski fully supported the Frankenstein’s monster that emerged from this process. His two Democratic colleagues concurred in the vote (one approved in part and concurred in part), and issued separate opinions indicating their belief that stronger measures and a sounder legal foundation were required to withstand likely court challenges. The two Republican Commissioners vigorously dissented in strident terms unusual in this kind of regulatory action. Independent regulatory agencies, like many of the U.S. Courts of Appeal, strive for and generally achieve consensus in their decisions.¹³

So for now we have a set of “net neutrality” rules that a bi-partisan majority of the last Congress, along with industry groups and academics, strongly urged the agency *not* to adopt, and which were deemed unsatisfactory by four of the five Commissioners. It’s hardly a moment of pride for the agency, which has been distracted by the noise around these proceedings since Genachowski was first confirmed by the Senate. Important work freeing up radio spectrum for wireless Internet, reforming the corrupt Universal Service Fund, and promoting the moribund National Broadband Plan have all been sidelined.

How did we get here? In October, 2009, the agency first proposed new rules, but their efforts were sidetracked by an April 2010 court decision that held the agency lacked authority to regulate broadband Internet.¹⁴ After flirting with the dangerous (and likely illegal) idea of “reclassifying” broadband to bring it under the old telephone rules (“Title II”), sanity seemed to return. Speaking to state regulators in mid-November, the Chairman made no mention of net neutrality or reclassification, saying instead that “At the FCC, our primary focus is simple: the economy and jobs.”¹⁵

Just a few days later, at a Silicon Valley event, the Chairman abruptly reversed course, promising that net neutrality rules would be finalized. He also complimented the “very smart lawyers” in his employ who had figured out a way to do it without the authorization of Congress, which has consistently failed to pass enabling legislation since the idea first surfaced

¹² See, e.g., Declan McCullagh, *Ten Things that Finally Killed Net Neutrality*, CNET News.com, Sept. 6, 2007, http://news.cnet.com/8301-13578_3-9773538-38.html.

¹³ See Report & Order *supra* note 2, at 145 (McDowell, Comm., dissenting) (“For those who might be tuning in to the FCC for the first time, please know that over 90% percent of our actions are not only bipartisan, but unanimous. I challenge anyone to find another policy making body in Washington with a more consistent record of consensus.”)

¹⁴ *Comcast*, 600 F3d at 642.

¹⁵ Federal Communications Commission Chairman Julius Genachowski, *Our Information Infrastructure: Opportunities and Challenges*, Prepared Remarks at NARUC Annual Meeting (Nov. 15, 2010), http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db1115/DOC-302802A1.pdf.

in 2003.¹⁶ (Most recently, Democratic Congressman Henry Waxman floated a targeted net neutrality bill days before the mid-term elections, but never introduced it.¹⁷)

From then until the Commission's final meeting before the new Congress came to town in January 2011, Commissioners and agency watchers lobbied hard and feigned outrage with the most recent version of the rules, which the agency did not make public until after the final vote was taken on Dec. 21.¹⁸ In oral comments delivered at the December meeting, two commissioners complained that they hadn't seen the version they were to vote on until midnight the night before the vote. Journalists covering the event didn't have the document all five Commissioners referenced repeatedly in their spoken comments, and had to wait two more days for all the separate opinions to be collated and published.

Why the Midnight Order? FCC Commissioners do not serve at the whim of Congress or the President, so the mid-term election results technically had no effect on the chances of agency action. Chairman Genachowski has had the votes to approve pretty much anything he wanted all along, and will for the remainder of his term.

Even with a Republican House, successful legislation to block or overturn FCC actions is unlikely. The Republicans would have to get Democratic support in the Senate, and perhaps overcome a Presidential veto.¹⁹ But Republicans could use net neutrality as a bargaining chip in future negotiations, and Congress can make life difficult for the agency by holding up its budget or by increasing its oversight of the agency, forcing the Chairman to testify and respond to so many written requests that it ties the agency in knots.

So doing *something* just as Congress was nearly adjourned and was too busy to do much but bluster, was perhaps the best chance the Chairman had for getting something—anything—in the Federal Register.

More likely, the agency was simply punting the problem. Tired of the rancor and distraction of net neutrality, the new rules—incomplete, awkward, and without a solid legal foundation—

¹⁶ Sara Jerome, *FCC Chairman Knocks Google, Verizon for Slowing Net Neutrality Efforts*, THE HILL, Nov. 17, 2010, <http://thehill.com/blogs/hillicon-valley/technology/129745-genachowski-knocks-google-verizon-for-slowing-net-neutrality-efforts>.

¹⁷ Cecelia Kang, *Waxman Says Net Neutrality Bill Dead, FCC Should Assert Regulatory Authority*, THE WASHINGTON POST, Sept. 29, 2010, http://voices.washingtonpost.com/posttech/2010/09/rep_waxman_says_net_neutrality.html.

¹⁸ Ryan Singel, *FCC Net Neutrality Rules Slammed from All Sides*, WIRED, Dec. 20, 2010, <http://www.wired.com/epicenter/2010/12/fcc-rule/>; Joel Rose, *Critics: 'Net Neutrality' Rules Full of Loopholes*, NPR Morning Edition, Dec. 22, 2010, <http://www.npr.org/2010/12/22/132250803/Critics-Net-Neutrality-Rules-Full-Of-Loopholes>.

¹⁹ Congress is already pursuing two avenues for overturning the rules and limiting the FCC's ability to enact future Internet regulations. Under the Congressional Review Act, Congress can undo agency action with a Resolution of Disapproval, a filibuster-proof measure. At the same time, Rep. Marsha Blackburn (R-TN), introduced legislation in the opening days of Congress to prohibit the agency from regulating the Internet in any way. See Larry Downes, *Tech Priorities for New Congress: From Old to New*, CNET News.com, Jan. 19, 2011, http://news.cnet.com/8301-13578_3-20028935-38.html.

move the issue from the offices of the FCC to the courts²⁰ and Congress. That will still tie up agency resources and waste even more taxpayer money on protracted litigation, of course, but now the pressure of industry and “consumer advocate” groups will shift its direction away from FCC headquarters. Perhaps this was the only chance the Chairman had of getting any real work done.

II. Why Now? The Need for “Prophylactic” Rules

Too much ink has already been spilled on both the substance and the process of this order, but there are a few tidbits from the documents that are worth calling out. This section examines the basis for issuing what the agency itself calls “prophylactic rules.” Section III considers the final text of the rules themselves and compares them to the initial draft, as well as to alternatives offered by Verizon and Google and by Congressman Waxman. Section IV discusses the likely costs of enforcing the rules, while section V looks at the exceptions and other carve-outs for existing “non-neutral” practices and what they reveal about the FCC’s misunderstanding of fundamental Internet engineering. Finally, section VI reviews the legal basis on which the rules were issued, and outlines likely jurisdictional challenges to the agency’s authority.

Even the FCC acknowledges that the “problem” these new regulations solve doesn’t actually exist—yet. The rules are characterized as “prophylactic”—a phrase that appears eleven times in the 87-page Report. Rather, the majority fears that the lack of robust broadband competition in much of the U.S. *could* lead to ISPs using their market influence to squeeze content providers, consumers, or both.²¹

This hasn’t happened in the ten years broadband Internet has been growing in both capability and adoption, of course. But still, there’s a chance. As the Report puts it in challenged grammar, “broadband providers potentially face at least three types of incentives to reduce the current openness of the Internet.”²²

²⁰ Even before the rules had been published in the Federal Register, Verizon and MetroPCS filed appeals in the U.S. Court of Appeals for the D.C. Circuit, challenging their validity. See Marguerite Reardon, *Verizon files Legal Shot Against Net Neutrality Rules*, CNET News.com, Jan. 20, 2011, http://news.cnet.com/8301-30686_3-20029105-266.html?tag=mncol;txt; Marguerite Reardon, *FCC Moves to Dismiss Net Neutrality Lawsuits*, CNET News.com, Jan. 31, 2011, http://news.cnet.com/8301-30686_3-20030087-266.html.

²¹ Outside the scope of this paper is the question of how much competition in consumer broadband Internet access advocates of FCC intervention would consider adequate for the market to police itself. The combination in the most populous regions of cable, DSL, satellite and cellular providers doesn’t appear to be enough. Many advocates are nostalgic for the days of multiple dial-up ISPs created by the unbundling requirements of the 1996 Communications Act. But as all competitors were using the same infrastructure, it was a strange kind of competition, one that resulted in the destruction, not the awakening, of the communications industry. See Adam D. Thierer, *UNE-P and the Future of Telecom ‘Competition,’* CATO Institute, Feb. 1, 2003, http://www.cato.org/pub_display.php?pub_Id=11525.

²² Report & Order, *supra* note 2, ¶ 21. These “potential” “incentives” include economic incentives, such as the temptation to disadvantage VoIP phone service providers who compete with similar services offered by the ISP or a parent company; incentives to increase revenues by charging “edge” application providers for access

We'll leave to the side for now the undiscussed potential that these new rules will themselves cause unintended negative consequences for the future development or deployment of technologies built on top of the Open Internet. Instead, let's look at the sum total of the FCC's evidence, collected over the course of more than a year with the help of advocates who believe the "Internet as we know it" is at death's door,²³ that broadband providers are lined up to destroy the technology that, ironically, is the source of their revenue.

A. Four Incidents

To prove that these "potential" incentives are neither "speculative or merely theoretical," the FCC cites four and only four incidents between 2005 and 2010 in which the agency believes broadband providers may have responded to these potential incentives in ways that threatened the Open Internet.²⁴ These are:

1. A local ISP (Madison River) that was "a subsidiary of a telephone company" settled claims it had interfered with Voice over Internet Telephony (VoIP) applications used by its customers.
2. Comcast agreed to change its network management techniques when the company was caught slowing or blocking packets using the BitTorrent protocol (the subject of the 2010 court decision holding that the agency lacked jurisdiction over broadband).
3. After a mobile wireless provider contracted with an online payment service, the provider "allegedly" blocked customers' attempts to use competing services to pay for purchases made with mobile devices.
4. AT&T initially restricted the types of applications—including VoIP and Slingbox—that customers could use on their Apple iPhones.

In the world of regulatory efficiency, this much attention being focused on just four incidents of potential or "alleged" market failures is a remarkable achievement indeed. (Imagine if the EPA, FDA, or OSHA reacted with such energy to the same level of consumer harm.)

But in legal parlance, regulating on such a microscopically thin basis goes well beyond mere "pretense"—it's downright embarrassing the agency couldn't come up with more to justify its actions. Of the incidents, (1) was resolved with a consent decree that explicitly avoided any factual determinations. (2) was resolved quickly long before the agency completed its adjudication, (3) was merely alleged and apparently did not even lead to a complaint being filed with the FCC (the FCC's footnote for this case is to comments filed by the ACLU, so it's unclear

to the ISP's customers, and incentives to degrade the performance of edge providers who do not pay for priority. *Id.* ¶¶ 21-34. As the verb tense implies, all the supporting citations for these paragraphs are to hypotheticals, largely posed by legal academics with little or no training in business.

²³ See, e.g., Megan Tady, *The End of the Internet as we Know it?*, In These Times, Dec. 20, 2010, http://www.inthesetimes.com/article/6790/the_end_of_the_internet_as_we_know_it/; Timothy Karr, *Obama FCC Caves on Net Neutrality—Tuesday Betrayal Assured*, The Huffington Post, Dec. 20, 2010, http://www.huffingtonpost.com/timothy-karr/obama-fcc-caves-on-net-ne_b_799435.html.

²⁴ Report & Order, *supra* note 2, ¶ 35.

who is being referenced) and (4) was resolved—as the FCC acknowledges—when customers put pressure on Apple to allow AT&T as the (then) sole iPhone network provider to allow the applications.

Even under the rules adopted, (2) would almost surely still be allowed. That’s because the Comcast incident involved use of the BitTorrent protocol. Even as the company that developed the protocol has worked to expand its use since 2008 to non-infringing file transfers, academic studies performed since the *Comcast* case was decided **find that 90-99% of BitTorrent traffic still involves unlicensed copyright infringement.**²⁵ Thus the vast majority of BitTorrent traffic is not “lawful” traffic and, therefore, is not subject to the FCC’s new rules. The no-blocking rule only prohibits blocking of “**lawful** content, applications, services or non-harmful devices.”²⁶

Indeed, even as the Report and Order repeatedly cites the BitTorrent incident as the leading case justifying the rules,²⁷ the majority repeatedly **encourages** network providers to move more aggressively to stop customers who use the Internet to violate intellectual property law. The Report makes crystal clear that the new rules “do not prohibit broadband providers from making reasonable efforts to address the transfer of unlawful content or unlawful transfers of content” and that the “open Internet rules should not be invoked to protect copyright infringement”²⁸ (Perhaps the FCC, which continues to refer to BitTorrent as an “application” or believes it to be a website, simply doesn’t understand how the BitTorrent protocol actually works.²⁹)

So what is a broadband Internet access provider to do? The vast majority of BitTorrent traffic, even after the adoption of new rules motivated to protect that traffic, can and indeed should—according to the Order—be blocked. Worse, in order to determine the small percentage of lawful BitTorrent packets that cannot and should not be blocked, a broadband access provider would presumably need to develop sophisticated and invasive techniques that would of necessity involve deep packet inspection of a great number of BitTorrent-related packets.

²⁵ See Ed Felten, *Census of Files Available via BitTorrent*, Princeton Center for Information Technology Policy, Jan. 29, 2010, <http://www.freedom-to-tinker.com/blog/felten/census-files-available-bittorrent>; Mike Masnick, *Of Course Most Content Shared on BitTorrent Infringes, but that’s Meaningless*, *Techdirt*, Feb. 2, 2010, <http://www.techdirt.com/articles/20100201/1720597993.shtml>; Renai LeMay, *89% of BitTorrent is Illegal: Study*, PC WORLD, July 23, 2010, http://www.pcworld.idg.com.au/article/354282/89_bittorrent_illegal_study/.

²⁶ Report & Order, *supra* note 2, §§8.5, 8.9 (emphasis added). See also Cindy Cohn, *A Review of the Verizon and Google Net Neutrality Proposal*, The Electronic Frontier Foundation, Aug. 10, 2010, <http://www.eff.org/deeplinks/2010/08/google-verizon-netneutrality>. The nominal complainants in the *Comcast* case were using the protocol for legal file transfers, so the question of infringement and the meaning of “lawful” content under the FCC’s earlier Open Internet policy statements was not raised in either the adjudication or in the appeal. Federal Communications Commission, *In the Matters of Formal Complaints of Free Press and Public Knowledge*, 28 F.C.C.R. 13028 (2008) ¶ 42.

²⁷ Report & Order, *supra* note 2, ¶¶ 35, 36 n. 111, 63 n. 168, 75 n. 227, 78 n. 245.

²⁸ *Id.* ¶¶ 107, 111. See also § 8.9 (“Nothing in this part prohibits reasonable efforts by a provider of broadband Internet access service to address copyright infringement or other unlawful activity.”)

²⁹ *Id.* ¶ 36 n. 11; ¶ 78 n. 245.

But no. The majority also discourages that approach, preferring instead that providers operate at a higher level in efforts to control infringement over their networks. The majority, after all, maintains that:

[O]pen Internet rules applicable to fixed broadband providers should protect all types of Internet traffic, not just voice or video Internet traffic. This reflects, among other things, our view that it is **generally preferable to neither require nor encourage broadband providers to examine Internet traffic in order to discern which traffic is subject to the rules.**³⁰

So if a broadband Internet access provider wanted—or felt compelled—to take more aggressive steps to discourage copyright infringement, the majority would prefer something less invasive. Such as, perhaps, identifying a protocol that is almost exclusively used for illegal file sharing and, without investigating individual packets, block its use on the network. Which, of course, is exactly what Comcast did in the first place. Under the Order, that practice would need to be disclosed under the transparency rule. But otherwise the very activity the rules were most eager to outlaw remains not only legal but encouraged.

Under the more limited wireless rules adopted, (3) and (4) would probably not violate the regulations. We don't know enough about (3) to really understand what is "alleged" to have happened, but the no-blocking rule says only that mobile broadband Internet providers "shall not block consumers from accessing lawful websites, subject to reasonable network management; nor shall [providers] block applications that compete with the provider's voice or video telephony service, subject to reasonable network management."³¹

A mobile payment application is neither a website nor a competing voice or video service, leaving incident (3) outside the new rules. In the case of the iPhone (incident (4)), it was Apple, not AT&T, that wanted to limit VoIP, arguing that it "alter[ed] the iPhone's distinctive user experience by replacing the iPhone's core mobile telephone functionality and Apple user interface with its own user interface".³² Apple is not a provider of broadband Internet access.

Even if a VoIP app was considered "competing," the Report makes clear that the wireless rule doesn't apply in any case to app stores: "The prohibition on blocking applications that compete with a broadband provider's voice or video telephony services does not apply to a broadband provider's operation of application stores or their functional equivalent."³³ So if the software

³⁰ *Id.* ¶ 48 (emphasis added). Prior to the FCC's adjudication of Comcast, the company voluntarily modified its practice to focus on high-bandwidth users rather than particular protocols. See Arun Radhakrishnan, *Comcast and BitTorrent Collaborate on Network Traffic Management*, [TechRepublic](http://www.techrepublic.com/blog/tech-news/comcast-and-bit-torrent-collaborate-on-network-traffic-management/2132), Mar. 28, 2008, <http://www.techrepublic.com/blog/tech-news/comcast-and-bit-torrent-collaborate-on-network-traffic-management/2132>. The majority approves of the new approach, See Report & Order, *supra* note 2, ¶ 56 n. 177.

³¹ Report & Order, *supra* note 2, § 8.5.

³² Apple Answers the FCC's Questions, <http://www.apple.com/hotnews/apple-answers-fcc-questions/>.

³³ Report & Order, *supra* note 2, ¶ 102.

involved in incidents (3) and (4) involved rejection of proposed apps for the respective mobile devices, there would be no violation under the new rules regardless of whether the device manufacturer or the broadband Internet access provider made the decision.

And the caveat for “reasonable network management” says only that a practice is “reasonable if it is appropriate and tailored to achieving a legitimate network purpose, taking into account the particular network architecture of the broadband Internet access service.”³⁴ Voice and video apps, depending on how they have been implemented, can put particular strain on a wireless broadband network. In other words, blocking particular VoIP services or apps like Slingbox might be allowed anyway as reasonable network management.

So that’s it. Only four or fewer actual examples of non-open behavior by ISPs in ten years. And the rules adopted to curb such behavior would probably only apply, at best, to first instance, a case involving a local telephone carrier with six hundred employees that the FCC agreed to drop without a formal finding of any kind nearly six years ago. The FCC has made a regulatory mountain out of Madison River’s molehill.

B. Is the Real Problem a Lack of Competition?

But maybe these four incidents are not what’s really driving the push for FCC regulation of Internet access. Maybe the real problem is, as many regulatory advocates argue vaguely, the lack of “competition” for broadband.³⁵ According to the National Broadband Plan, 5% of the U.S. population still doesn’t have access to any wireline broadband provider, while 2% do not have access to a wireless provider. In many parts of the country, only two providers are available and in others, the offered speeds of alternatives vary greatly, leaving users without high-speed alternatives.³⁶

If lack of competition is the problem, though, why not solve that problem? Well, perhaps the FCC would rather sidestep the issue, since it has consistently demonstrated it is the wrong agency to encourage more competition. Since the first deployment of high-speed Internet, multiple technologies have been used to deliver broadband access to consumers, including DSL (copper), coaxial cable (cable), satellite, cellular (3G and now 4G), wireless (WiFi and WiMax), and broadband over power lines (BPL), the latter of which is a particularly promising technology for rural users, a group that is more likely than others to have no or limited broadband options today.³⁷

But rather than promote multiple technologies, the FCC has done just the opposite. For example, the agency has sided with some state governments, who argued successfully that they can prohibit municipalities from offering telecommunications service to maintain lucrative local

³⁴ *Id.* § 8.11(d).

³⁵ *Id.* ¶¶ 32-34.

³⁶ Federal Communications Commission, *Connecting America: The National Broadband Plan*, Chapter 4, Exhibits 4A and 4E, March, 2010, <http://download.broadband.gov/plan/national-broadband-plan.pdf> (hereinafter “National Broadband Plan”)

³⁷ *Id.* at 37.

franchising monopolies.³⁸ And the Commission has dragged its feet on approving trials for BPL, contributing to continued setbacks in deploying the technology.³⁹

Indeed, if there are anti-competitive behaviors now or in the future, existing antitrust law, enforceable by either the Department of Justice or the Federal Trade Commission, provide much more powerful tools both to prosecute and remedy activities that genuinely harm consumers. (Both agencies continue to describe the broadband Internet market as competitive.⁴⁰)

The legal response to problems of so-called “vertical exclusion,” in which a dominant provider abuses its power over access to a key input to an upstream or downstream business, has undergone a sea change in recent decades, with the Supreme Court moving from a rule of *per se* illegality to one requiring proof of “demonstrable economic effect.”⁴¹ Mere market dominance is not enough to trigger antitrust remedies, nor should it be.

And even if limited competition in some areas of the country does lead to genuine consumer harm, as may have been the case in *Madison River*, there is no reason to believe any version of net neutrality rules would correct it. As Christopher S. Yoo has long argued, even if antitrust issues do arise in broadband Internet access, net neutrality regulation is not the solution:

The imposition of network neutrality would not increase the number of last-mile options one iota and thus would not change the bargaining power between last-mile providers and end users. Given that network neutrality would, however, leave last-mile providers bargaining power vis-à-vis end users unaffected, one would not expect network neutrality to lead to any reduction in the prices charged to end users. Network neutrality would have a dramatic effect on the other side of the two-sided market by affecting how last-mile providers and content/applications providers divide up those rents. From this perspective, network neutrality has less to do with benefiting consumers and more to do with adjusting the bargaining power between the Verizons and the Googles of the world.⁴²

Perhaps this is why the majority veers dangerously away from anti-competitive justifications for its new anti-discrimination rule. “The broad purposes of this rule,” according to the majority, “cannot be achieved by preventing only those practices that are demonstrably anticompetitive or harmful to consumers.” Instead, “the rule rests on the general proposition that broadband

³⁸ *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004).

³⁹ See *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227 (D.C. Cir. 2008); Karl Bode, *Nation’s First Major Broadband over Power Line Deployment Shuts Down*, *Techdirt*, Apr. 13, 2010, <http://www.techdirt.com/articles/20100409/0826178949.shtml>.

⁴⁰ See Report & Order, *supra* note 2, at 148, 152 (McDowell, Comm., dissenting).

⁴¹ *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724, 726 (1988).

⁴² Christopher S. Yoo, *What can Antitrust Contribute to the Network Neutrality Debate?*, 1 INTERNATIONAL JOURNAL OF COMMUNICATIONS 493-530 (2007).

providers should not pick winners and losers on the Internet—even for reasons that may be independent of providers’ competitive interests or that may not immediately or demonstrably cause substantial consumer harm.”⁴³

This is a novel theory of protecting the “public interest” indeed—one that requires a showing of neither anti-competitive behavior nor harm to consumers before imposing sanctions on a broadband Internet access provider for “unreasonable discrimination.” All one can say charitably is that the majority recognizes there are no threats it can credibly point to today, and is reserving to its future discretion the determination of practices it finds violate the spirit of the “Open Internet.”⁴⁴

That fuzziness underlines the folly of past efforts by the FCC to police technologies and markets that are evolving rapidly—or, in any case, much faster than the agency’s traditional milieu of mature technologies and regulated industries. Even if the Open Internet were indeed under genuine threat, in other words, it’s hard to find many examples in the long history of the FCC where the agency has used its sometimes vast authority to solve genuine problems.

The *Carterfone* decision, which Commissioner Copps cites enthusiastically in his concurrence, and (finally) the opening of long distance telephony to competition, certainly helped consumers.⁴⁵ But both (and other examples) could also be seen as undoing harm caused by the agency in the first place. And both dealt with technologies and applications that were mature. Why does anyone believe the FCC can “prophylactically” solve a problem dealing with an emerging, rapidly-evolving new technology that has thrived in the last decade in part because it was unregulated?

The new rules, which are aimed at ensuring “edge” providers do not need to get “permission to innovate” from ISPs, may have the unintended effect of requiring ISPs—and edge providers—to get “permission to innovate” from the FCC. That hardly seems like a risk worth taking for a problem that hasn’t presented itself.

⁴³ Report & Order, *supra* note 2, ¶ 78. See also *id.* ¶ 42 n. 141. See also Randolph May, *Infamous No. 78 (of the Net Neutrality Order)*, Free State Foundation, Jan. 5, 2011, <http://freestatefoundation.blogspot.com/2011/01/infamous-no-78-of-net-neutrality-order.html>.

⁴⁴ Channeling Justice Stewart’s confidence if not his candor in confessing that whatever obscenity means, “I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (Stewart, J., concurring).

⁴⁵ Report & Order, *supra* note 2, at 141 (Copps, Comm., concurring).

III. “Not Neutrality” or Government Takeover? The Rules Revealed

In the end, the FCC voted to approve three new rules that apply to broadband Internet providers. One requires broadband access providers to disclose their network management practices to consumers.⁴⁶ The second prohibits blocking of content, applications, services, and non-harmful devices.⁴⁷ The third forbids fixed broadband providers (*e.g.*, cable and telephone) from “unreasonable” discrimination in transmitting lawful network traffic to a consumer.⁴⁸

There has been a great deal of criticism of the final rules, much of it reaching a fevered pitch even before the text was made public. At one extreme, advocates for stronger rules have rejected the new rules as meaningless, as “fake net neutrality,” “not neutrality,” or the latest evidence that the FCC has been captured by the industries it regulates.⁴⁹ On the other end, critics decry the new rules as a government takeover of the Internet, censorship, and a dangerous and unnecessary interference with a healthy digital economy.⁵⁰ (I agree with that last one.)

One thing that has not been seriously discussed, however, is just how little the final text differs from the rules originally proposed by the FCC in October, 2009. Indeed, many of those critical of the weakness of the final rules seem to forget their enthusiasm for the initial draft, which in key respects did not change at all in the intervening year of comments, conferences, hearings, and litigation.

The differences—significant and trivial—that have been made can largely be traced to comments the FCC received on the original draft, as well as interim proposals made by industry and Congress, particularly the framework offered by Verizon and Google in August and a bill circulated (but never introduced) by Rep. Henry Waxman just before the mid-term elections.⁵¹ In that sense, reviewing the not only the final rules but the editing that led to them illuminates a great deal about the politics behind the Report and Order.

⁴⁶ *Id.* § 8.3.

⁴⁷ *Id.* § 8.4.

⁴⁸ *Id.* § 8.5.

⁴⁹ See, *e.g.*, Brian Montopoli, *Liberals Lash out at ‘Fake Net Neutrality,’* CBS News, Dec. 21, 2010, http://www.cbsnews.com/8301-503544_162-20026286-503544.html; Nate Anderson, *Why Everyone Hates New Net Neutrality Rules—Even NN Supporters,* Ars Technica, Dec. 21, 2010, <http://arstechnica.com/tech-policy/news/2010/12/why-everyone-hates-new-net-neutrality-rules-even-nn-supporters.ars>.

⁵⁰ See, *e.g.*, Gene Rodgers, *Reaction to FCC’s ‘Net Neutrality’ Coup,* Richmond Tea Party, Dec. 22, 2010, <http://www.richmondteaparty.com/2010/12/reaction-to-fccs-net-neutrality-coup/>; Sara Jerome, *Cato: Glenn Beck ‘Mistaken’ About Net Neutrality,* The Hill, Dec. 9, 2010, <http://thehill.com/blogs/hillicon-valley/technology/132967-cato-glenn-beck-mistaken-about-net-neutrality>.

⁵¹ Ars Technica’s Nate Anderson has done a great service in laying out the text of the final rules side-by-side with the proposed legislative framework offered by Verizon and Google. See Nate Anderson, *Why is Verizon Suing over Rules it once Supported?*, Ars Technica, Jan. 15, 2011, <http://arstechnica.com/tech-policy/news/2011/01/verizon-sues-over-net-neutrality-rules-it-once-supported.ars>.

A. Transparency

Compare, for example, the final text of the transparency rule with the version first proposed by the FCC:

Proposed: Subject to reasonable network management, a provider of broadband Internet access service must disclose such information as is reasonably required for users and content, application and service providers to enjoy the protections specified in this part.⁵²

Final: A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance and commercial terms of its broadband Internet access service sufficient for consumers to make informed choices regarding use of such services and for content, application, service and device providers to develop, market and maintain Internet offerings.⁵³

The final rule is much stronger, and makes clearer what it is that must be disclosed. It is also not subject to the limits of reasonable network management. Rather than the vague requirement of the draft for disclosures sufficient to “enjoy the protections” of the Open Internet rules, the final rule requires disclosures sufficient for consumers to make “informed choices” about the services they pay for, a standard more easily enforced.

By comparison, the final rule comes close to the version that appeared in draft legislation circulated but never introduced by Rep. Henry Waxman in October of 2010.⁵⁴ It likewise reflects the key concepts in the Verizon-Google Legislative Framework Proposal from earlier in the year.⁵⁵

As the Report makes clear, the transparency rule has teeth.⁵⁶ Though the agency declines for now from making specific decisions about the contents of the disclosure and how it must be posted, the Report lays out a non-exhaustive list of nine major categories of disclosures, including network practices, performance characteristics, and commercial terms, that must be included. It’s hard to imagine a complying document or posting that will not run to several pages of very small text.

⁵² NPRM, *supra* note 8, § 8.15.

⁵³ Report & Order, *supra* note 2, § 8.3.

⁵⁴ The bill was widely leaked to THE HILL and others, *See* http://thehill.com/images/stories/whitepapers/pdf/proposed_net_neutrality_legislative_framework-1.pdf (hereinafter “Waxman Bill”)

⁵⁵ Verizon-Google Legislative Framework Proposal, Aug. 9, 2010, <http://www.scribd.com/doc/35599242/Verizon-Google-Legislative-Framework-Proposal> (hereinafter “V-G Proposal”); Alan Davidson, *A Joint Policy Proposal for an Open Internet*, Google Public Policy Blog, Aug. 9, 2010, <http://googlepublicpolicy.blogspot.com/2010/08/joint-policy-proposal-for-open-internet.html>.

⁵⁶ Report & Order, *supra* note 2, ¶¶ 53-61.

That generosity, unfortunately, may be the rule's undoing. As anyone who has ever thrown away a required disclosure that accompanies a complex product or service (*e.g.*, mortgage, credit card, pharmaceutical, electronic device, public financial statement, medical insurance, privacy notice, etc.) knows full well, information "sufficient" to make an informed choice is far more information than any non-expert consumer could possibly absorb and evaluate, even if they wanted to. The more information consumers are given, the less likely they'll pay attention to any of it, including what may be important.⁵⁷

The FCC recognizes that risk, however, but believes it has an answer. "A key purpose of the transparency rule," the Commission notes, "is to enable third-party experts such as independent engineers and consumer watchdogs to monitor and evaluate network management practices, in order to surface concerns regarding potential open Internet violations."⁵⁸

Perhaps the agency has in mind here organizations like the Broadband Internet Technical Advisory Group (BITAG), which has been established by a wide coalition of participants in the Internet ecosystem to develop "consensus on broadband network management practices or other related technical issues."⁵⁹ Or perhaps the agency imagines that some of the public interest groups who have most strenuously rallied for the rules will become responsible stewards of their implementation, trading the acid pens of political rhetoric for responsible analysis and advocacy to their members and other consumers.

We'll see. I wish I shared the Commission's confidence that, "for a number of reasons" (none cited), "the costs of the disclosure rule we adopt today are outweighed by the benefits of empowering end users and edge providers to make informed choices..."⁶⁰—but I don't.

B. Blocking

The final version of the blocking rule consolidated the "Content, Applications and Services and Devices" rule of the original draft. The final rule states:

A person engaged in the provision of fixed broadband Internet access services, insofar as such person is so engaged, shall not block lawful content, applications, services or non-harmful devices, subject to reasonable network management.⁶¹

A more limited rule applies to mobile broadband providers, who:

[S]hall not block consumers from accessing lawful websites, subject to reasonable network management, nor shall such person block applications that

⁵⁷ Florencia Marotta-Wurgler, *Does Disclosure Matter?* NYU Law and Economics Research Paper No. 10-54, Nov. 23, 2010, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1713860.

⁵⁸ Report & Order, *supra* note 2, ¶ 60.

⁵⁹ Broadband Internet Technical Advisory Group, <http://members.bitag.org/kwspub/home/>.

⁶⁰ Report & Order, *supra* note 2, ¶ 59.

⁶¹ *Id.* § 8.5.

compete with the providers' voice or video telephony services, subject to reasonable network management.⁶²

Much of the anguish over the final rules expressed thus far relates to a few of the limitations added to the blocking rule. First, many copyright "reform" activists object to the word "lawful" appearing in the rule.⁶³ "Lawful" content, applications, and services do not include activities that constitute copyright and trademark infringement. Therefore, the rule allows broadband providers to use whatever mechanisms they want (or may be required to use) to reduce or eliminate traffic that involves illegal file-sharing, spam, viruses and other malware.⁶⁴

A provider who blocks access to a site selling unlicensed products, in other words, is not violating the rules. And as the agency finds it is "generally preferable to neither require nor encourage broadband providers to examine Internet traffic in order to discern which traffic is subject to the rules,"⁶⁵ there will be a considerable margin of error given to providers who block sites, services, or applications which may include some legal components.

A second concern is the repeated caveat for "reasonable network management," which gives access providers leeway to balance traffic during peak times, limit users whose activity may be harming other users (*e.g.*, continuous and very large file transfers), and other "legitimate network management" purposes.

Finally, some disappointed regulatory advocates object to the special treatment for mobile broadband providers, which may block applications, services or devices without violating the rule. There is an exception to the exception for applications, such as VoIP and video, which compete with the provider's own offerings, but that special treatment doesn't keep mobile providers from using "app stores" to exclude services of which they don't approve.⁶⁶

Of course even the original draft of the rules included the limitation for "reasonable network management," and refused to apply any of the rules to unlawful activities. The definition of "reasonable network management" in the original draft is different, but functionally equivalent, to the final version.⁶⁷

⁶² *Id.*

⁶³ Cindy Cohn, *A Review of the Verizon and Google Net Neutrality Proposal*, The Electronic Frontier Foundation, Aug. 10, 2010, <http://www.eff.org/deeplinks/2010/08/google-verizon-netneutrality>.

⁶⁴ Report & Order, *supra* note 2, ¶¶ 107, 111. *See also Id.* § 8.9 ("Nothing in this part prohibits reasonable efforts by a provider of broadband Internet access service to address copyright infringement or other unlawful activity.")

⁶⁵ *Id.* ¶ 48.

⁶⁶ *Id.* ¶ 102.

⁶⁷ Compare NPRM, *supra* note 8, § 8.3 ("Reasonable network management consists of: (a) reasonable practices employed by a provider of broadband Internet access service to: (i) reduce or mitigate the effects of congestion on its network or to address quality-of-service concerns; (ii) address traffic that is unwanted by users or harmful; (iii) prevent the transfer of unlawful content; or (iv) prevent the unlawful transfer of content; and (b) other reasonable network management practices.") with Report & Order, *supra* note 2, § 8.11(d) ("A

The carve-out for mobile broadband is a significant departure from the original rules. Though the Oct. 2009 NPRM expressed concern about applying the same rule to fixed and mobile broadband,⁶⁸ the draft blocking rule did not distinguish between fixed and mobile Internet access. The FCC did note, however, that different technologies “may require differences in how, to what extent, and when the principles apply.”⁶⁹ The agency sought comment on these differences (and asked for further comment in a later Notice of Inquiry⁷⁰).

Needless to say, the agency heard plenty.

Wireless broadband is, of course, a newer technology, and one still very much in development. On the one hand, competition, for the most part, is robust.⁷¹ Spectrum, on the other hand, is limited, and capacity cannot easily be added. Those are not so much market failures as they are regulatory failures. The FCC is itself responsible for managing the limited radio spectrum, and has struggled by its own admission to allocate spectrum for its most efficient and productive uses—indeed, even to develop a complete inventory of who has which frequencies of licensed spectrum today.⁷²

Adding additional capacity is another regulatory obstacle. Though mobile users rail against their providers for inadequate or unreliable coverage, no one, it seems, wants to have cellular towers and other equipment near where they live. Local regulators, who must approve new infrastructure investments, take such concerns very much to heart.⁷³ (There is also rampant corruption and waste in the application, franchising, and oversight processes at the state and local levels; a not-very-secret secret.)

The FCC, it seems, has taken these concerns into account in the final rule. Its original Open Internet policy statements—from which the rules derive—applied only to fixed broadband access,⁷⁴ and the October, 2009 draft’s inclusion of mobile broadband came as a surprise to many.

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

⁶⁸ NRPM, *supra* note 8, ¶¶ 13, 154-174.

⁶⁹ *Id.* ¶ 13.

⁷⁰ FCC, *Further Inquiry into Two Underdeveloped Issues in the Open Internet Proceeding*, DA 10-1667, Sept. 1, 2010, http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db0901/DA-10-1667A1.pdf.

⁷¹ National Broadband Plan, *supra* note 36, at 40. 77% of American consumers have a choice of three or more providers. See Exhibit 4E.

⁷² Larry Downes, *Spectrum Crisis Amnesia: What Happened in Vegas Stayed in Vegas, Unfortunately*, Jan. 10, 2011, <http://larrydownes.com/spectrum-crisis-amnesia-what-happened-in-vegas-stayed-in-vegas-unfortunately/>; Larry Downes, *Tech Priorities for New Congress*, *supra* note 19.

⁷³ See, e.g., Tracey Taylor, *Opponents of New Cellphone Towers Try a New Tack*, THE NEW YORK TIMES, May 7, 2010, <http://www.nytimes.com/2010/05/07/us/07sfc.html>.

⁷⁴ Federal Communications Commission, *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, FCC 05-151, Sept. 23, 2005.

The first indication that the agency was considering a return to the original policy came with the Verizon-Google proposal (V-G), where the former net neutrality adversaries jointly released a legislative framework—that is, something they hoped Congress, not the FCC, would take seriously—that specified different treatment for mobile. As the V-G proposal noted, “Because of the unique technical and operational characteristics of wireless networks, and the competitive and still-developing nature of wireless broadband services, only the transparency principle would apply to wireless at this time.”⁷⁵

The Waxman proposal didn’t go as far as V-G, however, adding a provision that closely tracks what the FCC adopted as the final rule. Under the Waxman bill, mobile providers would have been prohibited from blocking “lawful Internet websites”, and applications “that compete with the providers’ voice or video communications services.”⁷⁶

So the trajectory of the specialized treatment for mobile broadband is at least clear and, for those following the drama, entirely predictable. Yet the strongest objections to the final rule and the loudest cries of betrayal from neutrality advocates came from the decision to burden mobile providers less than their fixed counterparts. (Many providers offer both, of course, so will be subject to different rules for different parts of their service.)

At the very least, the advocates should have seen it coming. Many did. A number of “consumer advocacy” groups demonized Google for its cooperation with Verizon,⁷⁷ and refused to support Rep. Waxman’s bill.⁷⁸ (It should also be noted that none of the groups objecting to the final rules or any interim version ever actually proposed their own version—that is, what they actually wanted as opposed to what they didn’t want.)

C. Unreasonable Discrimination

The final rule, applicable only to fixed broadband providers, demands that a provider not “unreasonably discriminate in transmitting lawful network traffic over a consumer’s broadband Internet access service.”⁷⁹

Though subtle, the difference in language between the NPRM and the final rule is significant, as the FCC acknowledges. The NPRM draft rule noted plainly that “a provider of broadband

⁷⁵ V-G Proposal, *supra* note 55, at 1.

⁷⁶ Waxman bill, *supra* note 54, at 1-2.

⁷⁷ Michael Scherer, *Is the Google-Verizon Plan Bad for Net Neutrality?*, TIME, Aug. 10, 2010, <http://www.time.com/time/business/article/0,8599,2009541,00.html>; Marguerite Reardon, *Net Neutrality Crusaders Slam Verizon, Google*, CNET News.com, Aug. 9, 2010, http://news.cnet.com/8301-30686_3-20013118-266.html.

⁷⁸ Sara Jerome, *Sources: OIC Not Supporting Waxman Net-Neutrality Bill*, THE HILL, Sept. 28, 2010, <http://thehill.com/blogs/hillicon-valley/technology/121493-sources-oic-will-not-support-waxman-net-neutrality-bill>.

⁷⁹ Report & Order, *supra* note 2, § 8.7, ¶¶ 68-79.

Internet access service must treat lawful content, applications, and services in a nondiscriminatory manner.”⁸⁰

The difference here is between “nondiscrimination,” which prohibits all forms of differential network treatment, and “unreasonable discrimination,” which allows discrimination so long as it is reasonable.

The migration from a strict nondiscrimination rule (subject, however, to reasonable network management) to a rule against “unreasonable” discrimination can be traced through the interim documents. The V-G proposal, which called for a “Non-Discrimination Requirement,” nonetheless worded the requirement to ban only “undue discrimination against any lawful Internet content, application, or service *in a manner that causes meaningful harm to competition or to users.*”⁸¹

Rep. Waxman’s draft bill, likewise, would have applied a somewhat different standard for wireline providers, who “shall not unjustly or unreasonably discriminate in transmitting lawful traffic over a consumer’s wireline broadband Internet access service,” also subject to reasonable network management.⁸²

Over time, the FCC recognized the error of its original draft and now agrees “with the diverse group of commenters who argue that any nondiscrimination rule should prohibit only unreasonable discrimination.”⁸³

As between the proposed limiting terms “undue,” “unjust” and “unreasonable,” the FCC chose the latter for the final rule. Though many have complained that “unreasonable” is a nebulous, subjective term, it should be noted that of the three it is the only one with understood (if not entirely clear) legal meaning, particularly in the context of the FCC’s long history of rulemaking and adjudication.

For example, the earliest railroad regulations, which also provided the beginning of the FCC’s eventual creation and authority over communications industries, required reasonable rates of carriage, and empowered the Interstate Commerce Commission to intervene and eventually set the rates itself, much as the FCC later did with telephony.⁸⁴

One lesson of the railroad and telephone histories, however, is the danger of turning over to regulators decisions about which behaviors are reasonable. (Briefly, regulatory capture often

⁸⁰ NPRM, *supra* note 8, ¶ 16.

⁸¹ V-G Proposal, *supra* note 55, at 1 (emphasis added).

⁸² Waxman Bill, *supra* note 54, at 1.

⁸³ Report & Order, *supra* note 2, ¶ 77.

⁸⁴ The Hepburn Act, 59th Congress, Sess. 1, ch. 3591, 34 Stat. 584, (1906); The Mann–Elkins Act, 61st Congress, ch. 309, 36 Stat. 539 (1910);

ends up leaving the industry unable to respond to new forms of competition from disruptive technologies, with disastrous consequences.⁸⁵)

The V-G proposal gets to the heart of the problem by regulating only discrimination that “causes meaningful harm to competition or to users.” This is essentially the consumer welfare standard at the heart of antitrust law, one that has long been proposed as the basis for meaningful regulation of the Open Internet.⁸⁶ Despite the negative connotations of the word in common use, “discrimination” isn’t inherently bad. As the Report makes clear, in managing Internet access and network traffic there are many forms of discrimination—which means, after all, affording different treatment to different things—that are entirely beneficial to overall network behavior and to the consumer’s experience with the Internet. (More on this in section V.)

The draft rule, as the FCC now acknowledges,⁸⁷ was dangerously rigid. For one thing, users may *want* some kinds of traffic—*e.g.*, voice and video—to receive a higher priority over text and graphics, which do not suffer from latency problems. Companies operating Virtual Private Networks for their employees may likewise want to limit Web access to selected sites and activities for workers while on the job.

A strict nondiscrimination rule would have also discouraged or perhaps banned tiered pricing, harming consumers who do not need the fastest speeds and the highest volume of downloads to accomplish what they want to do online. Without tiered pricing, such consumers effectively subsidize power-users who, not surprisingly, are the most vociferous objectors to pricing based on usage.

Discrimination may also be necessary to manage congestion during peak usage periods or when failing nodes put pressure on the backbone. Discrimination against spam, viruses and other malware, much of which is not “lawful,” is also permitted and indeed encouraged.⁸⁸

The Report notes three types of provider discrimination that are of particular concern:

1. Discrimination that harms competitors (*e.g.*, VoIP providers of over-the-top telephone service, such as Skype or Vonage, that competes with the provider’s own telephone service);
2. “Inhibiting” end users from accessing content, services, and applications of their choice (but see the no-blocking rule, above, which already covers this); and

⁸⁵ See LARRY DOWNES, UNLEASHING THE KILLER APP, *supra* note 1; LARRY DOWNES, THE LAWS OF DISRUPTION, *supra* note 1. See also Timothy B. Lee, *The Durable Internet: Preserving Network Neutrality Without Regulation*, Cato Policy Analysis 625 (Nov. 12, 2008), http://www.cato.org/pub_display.php?pub_id=9775.

⁸⁶ Randolph J. May et. al, *Digital Age Communications Act - Proposal of the Regulatory Framework Working Group*, Release 1.0, The Progress & Freedom Foundation, June 2005, <http://www.pff.org/issues-pubs/other/050617regframework.pdf>. But see Yoo, *What can Antitrust Contribute to the Network Neutrality Debate?* *supra* note 42.

⁸⁷ Report & Order, *supra* note 2, ¶ 77.

⁸⁸ *Id.* ¶ 90-92.

3. Discrimination that “impairs free expression,” including slowing or blocking access to a blog whose message the broadband provider does not approve.⁸⁹

On that last point, it’s important to note that the FCC’s ability to police restrictions on “free expression” is greatly limited. Fifteen years ago, Congress wisely gave broadband Internet access providers (and others) broad leeway to filter and otherwise curate content they do not approve of or which they believe their customers don’t want to see. Under Section 230 of the 1996 Communications Act,

No provider or user of an interactive computer service shall be held liable on account of ... any action voluntarily taken in good faith to restrict access to or availability of material that **the provider or user** considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.⁹⁰

The goal of Section 230 was to immunize early Internet providers like CompuServe and Prodigy from efforts to exercise editorial control over message boards whose content was provided by customers themselves. But the law gives providers broad discretion in determining what kind of content it believes its customers don’t want to see. So long as the filtering is undertaken in “good faith” (*e.g.*, not with the intent of harming a competitor), there is no liability for the provider, who does not, for example, become a “publisher” for purposes of defamation law.⁹¹

The FCC acknowledges the limit that Section 230 puts on the discrimination rule: Simply put, the majority notes that “Our rule will not impose liability on a broadband provider where such liability is prohibited by section 230(c)(2) of the Act.”⁹²

Here too there is a likely First Amendment concern lurking in the background: The Constitution forbids the FCC, and not private parties, from regulating in ways that violate basic free speech principles. A decision by a broadband Internet access provider to block specific content, so long as it is not motivated by anticompetitive objectives, is likely to be a form of protected speech for the provider. (Local cable companies, which may be owned by individuals with strong religious or other moral convictions, can likewise refuse to carry programming and channels the owner finds objectionable.)⁹³

On the harm-to-competitors prong, the FCC waffles on whether “pay for priority”—the bugaboo that launched the neutrality offensive in the first place—actually constitutes a

⁸⁹ *Id.* ¶ 75.

⁹⁰ 47 U.S.C. 230(c)(2)(A) (1996) (emphasis added).

⁹¹ *Id.* at (c)(1).

⁹² Report & Order, *supra* note 2, ¶ 89.

⁹³ *Id.* But see *Id.* ¶141 (“Unlike cable television operators, broadband providers typically are best described not as ‘speakers,’ but rather as conduits for speech”). Compare *Id.* ¶ 143 (“Broadband providers are also free under this Order to offer a wide range of ‘edited’ services. If, for example, a broadband provider wanted to offer a service limited to ‘family friendly’ materials to end users who desire only such content, it could do so under the rules we promulgate today.”)

violation of the rules.⁹⁴ While a broadband provider's offering to prioritize the traffic of a particular source for a premium fee "would raise significant cause for concern," the majority acknowledges that such behavior has occurred and thrived for years, especially in the form of third party Content Delivery Networks (CDN). Briefly, CDNs replicate popular content on servers placed in strategic proximity to key hubs in the Internet, making it possible to speed such content to users when they request it. The Report and Order makes clear that CDNs, despite being "inconsistent" by design with the theory of an Open Internet, are allowed.⁹⁵ (More on CDNs in section V.)

So in the end, the discrimination rule doesn't appear to add much to the blocking rule or to existing antitrust law. Discrimination against competing over-the-top voice and video providers would violate antitrust law. Blocking or slowing access to disfavored content is already subject to the blocking rule. And broadband Internet access providers have significant leeway in interfering with "free expression" rights of users both through Section 230 of the Communications Act and as an expression of their own First Amendment rights.

What's left? Perhaps everything. As noted earlier, the majority rejects a view of discrimination cabined by antitrust law and its economic foundations, but neither does it offer any alternative foundation for its future enforcement of the rule. "The rule rests on the general proposition," the majority concludes, "that broadband providers should not pick winners and losers on the Internet," even when doing so is independent of competitive interests. What exactly this means—and how "reasonable" discrimination will be judged in the course of enforcing the rules—remains to be seen.⁹⁶

IV. Hidden Costs: Coase & the Problems of Enforcement Error

Nobel prize-winning economist Ronald Coase, a remarkable man I have had the great fortune to know personally, recently celebrated his 100th birthday. Among his many contributions to the field, Coase has always advocated for more empirical research and other data collection to help lead the field out of its theoretical quagmire. To that end, Coase co-founded the International Society for New Institutional Economics, and served as its first President in 1996.

Unfortunately, the FCC, which owes a great debt to Coase for his early championing of auctions for radio spectrum,⁹⁷ does not seem to have learned much else from his work. In a section optimistically captioned, "The Benefits of Protecting the Internet's Openness Exceed the Costs,"

⁹⁴ *Id.* ¶ 76.

⁹⁵ *Id.* ¶ 76 n. 235. ("We reject arguments that our approach to pay-for-priority arrangements is inconsistent with allowing content-delivery networks (CDNs).")

⁹⁶ *Id.* ¶ 78; Randolph May, *Infamous No. 78 (of the Net Neutrality Order)*, *supra* note 43 ("Paragraph No. 78 is so important because, by disclaiming reliance only on anticompetitive injury and consumer harm (generally present only when an Internet provider possesses market power), the Commission leaves itself largely at sea in enforcing its rules.").

⁹⁷ L. Gordon Crovitz, *Better Broadband is No 'Joke'*, THE WALL STREET JOURNAL, Mar. 22, 2010, <http://online.wsj.com/article/SB10001424052748704550004575133802210396886.html>.

the Commission makes no effort to calculate either with any hint of rigor.⁹⁸ Wishing away serious economic analysis, the Report simply states that “By comparison to the benefits of these prophylactic measures, the costs associated with the open Internet rules adopted here are likely small.”⁹⁹

The sole source of authority cited for this remarkable claim is to comments filed by Free Press, “a national, nonpartisan, nonprofit organization working to reform the media.”¹⁰⁰ This is one of fifty citations to Free Press in the Report and Order. So far as I know, Free Press does not keep economists on staff, nor did they perform any economic analysis of the benefits or costs of rules that, of course, weren’t in any case finalized until months after its comments were filed.

So the belief that the costs are likely small, let alone that the value of the benefits not of the Open Internet but of the rules adopted to salvage it, is simply that—a belief, or, more likely, a mere hope. Hope may well “spring eternal in the human breast,”¹⁰¹ but it is hardly the basis for “reality-based” policymaking.

The Report goes on to note that openness and no-blocking are already the “norm” and the “status quo” for broadband Internet providers. (So, again, why are new rules so urgently required?) Therefore, the only significant compliance cost the FCC envisions is for the new transparency rule, which will require disclosure of network management practices that consumers could, the FCC imagines, use in deciding which broadband provider to choose.¹⁰²

Assuming that the transparency rule represents the only significant change required by the new rules, it probably won’t add enormous new costs. On the other hand, this is also the rule least likely to deliver much in the way of benefits.

A. The Nature of Enforcement

Unfortunately, the transparency rule is not the only source of new costs associated with the rules. What about the costs to the FCC of enforcing the new regulations, or the costs to broadband Internet access providers to defend against claims that they have violated those regulations? The Report here is eerily silent.

As an initial matter, it’s worth noting that the Procedural Rules for enforcing the Order are longer than the rules themselves.¹⁰³ They describe three types of actions that may be taken to enforce the rules, and a set of procedures for complaints, discovery, hearings and appeals that in some sense incorporate much of the same protocols that govern actions and appeals in federal district courts and in the courts of appeal.

⁹⁸ Report & Order, *supra* note 2, ¶¶ 38-42.

⁹⁹ *Id.* ¶ 39.

¹⁰⁰ http://www.freepress.net/about_us.

¹⁰¹ Alexander Pope, *An Essay on Man, Epistle I*, 1733.

¹⁰² Report & Order, *supra* note 2, ¶¶ 39, 43, 53-61.

¹⁰³ *Id.* at Appendix B, §§ 8.12-8.17.

First, any individual or organization may file an informal complaint through the FCC website without paying any fee.¹⁰⁴ Though such complaints will not automatically lead to agency action, “the Enforcement Bureau will examine trends or patterns in complaints to identify potential targets for investigation and enforcement action.”¹⁰⁵

Second, the agency itself may initiate actions, perhaps based on trends or patterns it notes in the informal complaints.¹⁰⁶

The third avenue for enforcement, the filing of a formal complaint, is the most worrisome. Under § 8.12 of the Order, “**Any person** may file a formal complaint alleging a violation of the rules....”¹⁰⁷ A modest filing fee is required.

In his greatest single work, “The Nature of the Firm,”¹⁰⁸ Coase laid out a simple but inescapable theory of why organizations exist in the first place. For Coase, the market in reality is not a magic font of perfect efficiency that theoretical economists assume in their models. Each transaction between a buyer and a seller has inefficiencies or costs associated with it, costs Coase referred to as “transaction costs.”

Firms are formed and reach their optimal size solely to avoid or reduce these transaction costs. Businesses exist, in other words, only to the extent that their internal costs are less than the costs of using the market to perform every activity associated with the production and marketing of the firm’s products and services.

I have written in all of my books about the importance of transaction costs in understanding how the Internet—which reduces transaction costs—is putting unique pressures on the structure of firms, and there’s no need to repeat that discussion here.¹⁰⁹

But of the six categories of transaction costs Coase described in 1937, the one that seems not to have penetrated the FCC’s analysis is what he called “enforcement costs.” In the event the terms of a transaction are not met to the satisfaction of buyer or seller or both, various mechanisms—including arbitration, negotiation, regulators and/or the courts—must be invoked to ensure the bargain made is the bargain received.

In many cases these costs can be exorbitant; indeed, far greater than the value of the underlying transaction. To take a trivial example, a rational consumer won’t sue the maker of a rubber band that breaks the first time she uses it. The costs—time, effort, and out-of-pocket

¹⁰⁴ *Id.* ¶ 153.

¹⁰⁵ *Id.* ¶153.

¹⁰⁶ *Id.* ¶ 160.

¹⁰⁷ *Id.* § 8.12 (emphasis added). See also ¶¶ 154-159.

¹⁰⁸ R. H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 16 (New Series), pp. 386-405 (Nov., 1937).

¹⁰⁹ LARRY DOWNES, *UNLEASHING THE KILLER APP*, *supra* note 1, Chapter 2; LARRY DOWNES, *THE STRATEGY MACHINE: BUILDING YOUR BUSINESS ONE IDEA AT A TIME* (HarperBusiness 2002), Chapter 3; LARRY DOWNES, *THE LAWS OF DISRUPTION*, *supra* note 1, Chapter 2.

expenses for lawyers, filing fees, and the like—so obviously exceed the value of the best possible outcome (replacement of the broken item) that no one would bother.

The loss of value from the broken rubber band is a fraction of a penny. The cost of initiating—let alone prosecuting—a lawsuit would exceed that price by several orders of magnitude. And, in most situations, the most the consumer could hope to win would be the fraction of a cent. The cost of enforcing the implied promise of a working rubber band—and the seller’s cost of defending itself—are lost. They are inefficiencies of the market, or “transaction costs.” Even without knowing exactly how much they are, no consumer would undertake them.

At least, that is, not when the consumer has to bear those costs herself.

But what if the consumer can offload nearly all of the enforcement costs on someone else—on the FCC, perhaps, or their broadband Internet access provider? If “any person” who believes something is amiss can file a network neutrality complaint and pay only a small filing fee to start the machinery of enforcement, why not bring a complaint for any perceived infraction, no matter how small or, indeed, illusory?

And that, unfortunately, is exactly the kind of incentive system created by the Order.

The existence of the new Open Internet rules, of course, might operate as a deterrent against the behaviors they prohibit. But it is also likely that the agency will be called upon to enforce the rules against broadband access providers who are accused of violating them. The enforcement costs can be significant—including the costs to the agency itself (that is, to the taxpayers), as well as to the companies accused, rightly or wrongly, of violations.

Bizarrely, the Report makes no mention of the costs of enforcement or their potential impact on the cost-benefit analysis that is dispensed with so quickly. Yet the rules as written are likely to introduce substantial enforcement costs, as evident by looking at the mechanisms for making and resolving complaints.¹¹⁰

B. The Danger of a Private Right of Action

In legal terms, the ability of any individual to initiate an enforcement action is known as a private right of action. Federal law grants very few such broadly-written rights. There are, of course, hundreds of millions of American consumers, and giving all of them the right to initiate a formal proceeding that the government and the complained-of party must address can generate enormous costs.

You believe a medication advertised on television has a side-effect on some patient. You suspect the actions of a far-off manufacturer create environmental hazards in another state. Your car pulls to the left when you drive on certain roads. While there are avenues both private and public to bring such concerns to the attention of the potentially-responsible regulators and private parties, there is no private right of action that allows you to file a formal complaint with the federal government—a complaint that must be answered line by line.

¹¹⁰ Report & Order, *supra* note 2, ¶¶ 151-160.

But that is precisely what the new rules allow. Regardless of the merits or specifics of a complaint, “the defendant must submit an answer.” In cases where the “facts” are disputed, “a thorough analysis of the challenged conduct might require further factual development and briefing.”¹¹¹ Moreover, “the broadband provider must answer each claim with particularity and furnish facts, supported by documentation or affidavit, demonstrating reasonableness of the challenged practice.”¹¹²

In resolving formal complaints, “the Commission will draw on resources from across the agency—including engineering, economic, and legal experts—to resolve open Internet complaints in a timely manner.”¹¹³

These are the general comments in the Report. Specific “pleading requirements” laid out in the Order provide the procedures for filing complaints, answers and replies, conducting discovery, developing and supporting legal arguments, verifying facts and documents submitted, and more.¹¹⁴

For example, any broadband provider served with a complaint must respond within 20 days, and must respond to each and every fact referenced in the complaint, supported with documentation including affidavits, legal authority, and other evidence. The Commission “may specify other procedures,” including hearings and oral arguments, and “may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceedings, including copies of all contracts and documents reflecting arrangements and understandings alleged to violate” the rules.¹¹⁵

Again, a party filing a formal complaint can be any person or organization so long as they have a good faith belief that the broadband provider has violated the rules. They need not themselves even be a customer of the broadband provider.

Since the kind of blocking and traffic discrimination the rules prohibit can only be distinguished from “reasonable network management” practices (or indeed, behavior that may appear to involve ISP activity but which may simply be a function of overall network conditions at any given time) by detailed discovery, we can expect a great many complaints to be filed in good faith that will nonetheless turn out not to reveal violations of the rules.

Since consumers aren’t likely to know with any certainty that the behaviors they observe are in fact violations of the rules without extensive and technically complicated discovery, in other words, any slow-down, hiccup, temporary outage or other network artifact that appears to suggest interference will constitute a good faith belief that a violation has occurred, and therefore put the broadband provider (and the FCC) to the cost of demonstrating otherwise.

¹¹¹ *Id.* ¶ 156.

¹¹² *Id.* ¶ 157.

¹¹³ *Id.* ¶ 159.

¹¹⁴ *Id.* §§ 8.13-8.17.

¹¹⁵ *Id.*

Is your Internet connection acting up today? Did it take a long time to watch the latest YouTube video? Did you have trouble finding the website you were looking for? Could be that your ISP is blocking or otherwise discriminating against particular content, so perhaps you should submit a formal complaint to the FCC—just in case.

And why *not* do so? All the costs will be borne by others—the provider for the most part and the FCC to a lesser, but still substantial, degree.

C. It's Not Just Money that's Being Wasted

Such an open-ended grant of standing to “any person,” whether for good or for evil, cannot be squared with the belief that “the costs associated with the open Internet rules adopted here are likely small.”¹¹⁶ Even if no violation of the rules is ever found—even if no broadband provider ever interferes illegally with the Open Internet in the future—providers and the agency will find themselves buried under mountains of complaints, all of which must be investigated and responded to within 20 days of the filing, no less.

It isn't just money that will be wasted. The process of enforcement could undermine basic Constitutional protections as well. If a complaint alleges that a broadband provider is interfering with traffic—perhaps on an on-going basis—in ways that violate the rules, the FCC will, of necessity, need to analyze large volumes of traffic to determine if a service is being blocked or unreasonably discriminated against. And that means not just looking at traffic patterns but at the contents of the packets themselves.¹¹⁷

The FCC, in other words, in the name of enforcement, will be looking at the Internet behavior not only of the person making the complaint but perhaps of many other customers of the same provider or of other providers for comparison.

Economists were clearly absent from discussions about the cost of the rules. But one would have thought at least that civil libertarians, privacy advocates, and others concerned about the expansion of federal law enforcement powers with regard to online content would pause at new rules that, in the name of an open and transparent Internet, give the FCC the ability to observe traffic—to perform deep packet inspection—that in any other context would require a search warrant based on probable cause of a crime.

But no. So far, not a peep.

If not enforcement through the FCC and litigation-like procedures, how else can consumers ensure the Open Internet remains the engine of economic, social and political change that has made it one of the most profound inventions of the last few decades?

Though a detailed answer is outside the scope of this paper, I believe that regulatory supporters and detractors alike both greatly undervalue the ability of online consumers and

¹¹⁶ *Id.* ¶ 39.

¹¹⁷ This is a concern I first raised before the NPRM was even issued. See LARRY DOWNES, *THE LAWS OF DISRUPTION*, *supra* note 1, at Chapter 6.

citizens to take collective action without the need for regulatory proxies in the form of government agencies or self-styled “consumer advocates.”

In many cases, consumers can police practices they do not approve of by voting with their wallets. As in other markets, consumers can change to providers whose practices they prefer. Switching costs for broadband Internet access providers are low, and in much of the country there are multiple choices for providers using different technologies. Competition in the mobile broadband market, as the National Broadband Plan indicated, is particularly robust.

Beyond switching providers, consumers in their increasingly active digital lives have other ways of influencing corporate behavior. The Internet’s power, as noted earlier, is its ability to reduce transaction costs across the board, making possible new kinds of ad hoc organizations and governance structures that require little in the way of formal constitutions and adjudicatory bodies.

One need only look at how users of social networking products including Facebook, Yelp, Groupon, Twitter, Google Buzz, Second Life and others have used the very tools provided by those services to express their opinions and often exact modifications to terms of service historically dictated by the service provider. Indeed, in many if not all of the examples cited by the majority as cases of dangerous non-neutral behavior, it was consumer objections that usually led to changes to the practices in question long before the FCC’s deliberative processes had creaked into gear.

The methods adopted by consumers in these examples may sometimes be crude, but they are effective, and evolving quickly. Self-enforcement by consumers is also much more efficient and cost-effective. If nothing else, the agency should have, but did not, give serious consideration to the likelihood that consumers can solve any future Open Internet problems without the need for federal enforcement, limited by definition to issues within U.S. jurisdiction even when most Internet services are inherently global.¹¹⁸

V. “Nostalgia for the Future”—Which Internet is Being Preserved?

The idea of the “Open Internet” is relatively simple: consumers of broadband Internet access should have the ability to surf the web as they please and enjoy the content of their choice, without interference by access providers who may have financial or other anti-competitive reasons to shape or limit that access.

In the act of trying to translate that idea into enforceable rules—enforceable, inexplicably, by a federal regulatory agency with no legislative authority over any substantial feature of the Internet economy and no real justification for creating rules of any kind for a system that is working nearly flawlessly so far—the FCC has found itself tied in unholy knots.

¹¹⁸ See David G. Post & David R. Johnson, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996).

The rules as enacted carved out exceptions and caveats that, taken together, render the final regulations not meaningless but certainly incoherent.

In exempting from the rules a host of important innovations in network management and infrastructure optimization developed over the last decade, the FCC has stepped back from the brink of its original plan, which would have returned the Internet to the days of unreliable dial-up access and static websites.

But carving out so many exceptions has also revealed the danger of trying to regulate a rapidly-evolving life form, and risked the unintended consequence of denying it future forms of nutrition and good health. If these rules stand and are vigorously enforced, the Internet's further growth and development will surely be stunted.

A. The Mythical Neutrality Principle

Back in the stone age of 1998, I wrote in *UNLEASHING THE KILLER APP* that one of the fundamental bases on which the Internet became an engine of innovation and even social change was that its basic protocols are non-proprietary.¹¹⁹ Anyone can make use of them, any device can support them, and every node is a peer—without paying royalties or other tribute to anyone. As the “lowest common denominator” standard, TCP/IP benefited from network effects to overtake several popular proprietary standards, including IBM's SNA and DEC's DECnet.¹²⁰

The technical and legal openness of TCP/IP has been romanticized over the years, particularly by legal scholars and journalists who know less about technology than they think they do, into a view of the Internet as a Platonic ideal, a vehicle for true collaboration and consciousness-raising. The web, on this view, was nothing less than the fruition, as Web 2.0 Summit's Tim O'Reilly put it, “of “what we were talking about at [New Age HQ] Esalen in the '70s—except we didn't know it would be technology-mediated.”¹²¹ (The Esalen Institute, situated on California's Big Sur coast, offers visitors or “seminarians” the “intellectual freedom to consider systems of thought and feeling that lie beyond the current constraints of mainstream academia ... ancient wisdom in the motion of the body, poetry in the pulsing of the blood ... [and] the miracle of self-aware consciousness.”¹²²)

The ideal of neutrality—of a level playing field in which every website, application, and device is no more prominent than any other—is a persistent and compelling myth. It evokes the heroism of the entrepreneur in the garage, developing the next Yahoo or Google or YouTube or Facebook or Twitter or Groupon, with little more than a great idea, technical skills, and the willingness to sacrifice sleep and social life for the promise of a future liquidity event—

¹¹⁹ Larry Downes, *UNLEASHING THE KILLER APP*, *supra* note 1.

¹²⁰ *Id.*, at Chapter 1.

¹²¹ Steven Levy, *The Trend Spotter*, *WIRED* 13.10, Oct. 2005, <http://www.wired.com/wired/archive/13.10/oreilly.html>

¹²² Esalen Institute, <http://www.esalen.org/> (last accessed Feb. 13, 2011).

optimally, a fortune-making Initial Public Offering—or to change the world and make it a better place by connecting people and information in new and unexpected ways (*e.g.*, Wikipedia.)

Whatever the motivation, after a grueling race against the clock, the app is released. If all goes well, it reaps the benefit of network effects, goes viral, and becomes the next Big Thing—all in the span of time between one South by Southwest conference and the next Web 2.0 Summit.

No large corporation can stop the plucky inventor, or ransom a part of her invention. No access provider can hold its invaluable user base hostage. No competing content provider, no matter how giant, can buy up all the available market channels and freeze out the upstart start-up. No government regulator need approve or license the invention before human testing and general use can begin.

B. When Worlds Collide

A considerably more mundane version of that ideal world *did* exist in the last half of the 1990's. It still exists today. But it has become much more complex and nuanced in the last decade.

The Internet, the Web, the Cloud and the app-based economy of wireless computing devices, TVs and increasingly other things (including cars and other non-traditional computing platforms such as consumer electronics and home appliances—ultimately a trillion items of all shapes and sizes) have evolved in interesting and productive ways, often under the covers of the network infrastructure.

Few consumers know—or would care to know—about the existence, let alone the details, of network optimization algorithms, content delivery networks, complex peering arrangements, caching and edge servers, file torrenting, mirror sites, specialized services, virtual private networks, packet prioritization based on media type, spam and other malware filters, dynamic IP addresses or domain name redirection.

All of these (and more) are mechanisms for speeding up the delivery of the most popular or the most bandwidth intensive content. Many have been developed by entrepreneurs or by the large access and hosting services, often working in concert with the voluntary protocol and technical committees of the Internet Engineering Task Force (IETF), the principle body that maintains the technical standards that are, in fact, the true meaning of “Internet.”

The IETF keeps the standards alive, flexible, and responsive to new opportunities for expansion and reinvention made possible through the agency of Moore's Law, which continues to drive the basic technological components of digital life into the uncharted realm of the faster, cheaper, and smaller.

Strictly speaking, of course, all of these innovations violate the neutrality principle. They recognize that some packets, either because of file size or popularity or media characteristics or importance to the recipient, requires special treatment in the transport from host to client via an unknown and unpredictable number of intermediate computers following the Internet protocols.

Video (e.g., YouTube, Hulu, Netflix), for example, can consist of very large files, and the component packets must arrive at their destination with relatively short delays in order to maintain the integrity of high-quality display.

Hosted services, such as medical monitoring, use parts of the same infrastructure as the public Internet, but cannot safely be left to the normal ebb and flow of Internet traffic patterns. Limitations of the 3G wireless infrastructure—in large part a result of regulatory restrictions on cell siting and spectrum mismanagement—make it difficult to satisfy exploding customer demand for ever-more of the most bandwidth-intensive apps.

When all is said and done, the core problem with the FCC's Open Internet Report and Order comes down to a clash of the idealized view of the neutral Internet with the reality of an always-evolving, always-improving technology infrastructure.

Chairman Genachowski, himself a former venture capitalist, is clinging to the myth of the Internet as virtual frontier, an understandable but highly dangerous indulgence in nostalgia, a remembrance of Internets past.¹²³ He's not alone. The romance of the American west has persisted more than a hundred years since historian Frederick Jackson Turner famously declared the frontier closed.¹²⁴

As Chairman Genachowski said in introducing the Open Internet proceeding in September, 2009, shortly after taking office:

The Internet's creators didn't want the network architecture—or any single entity—to pick winners and losers. Because it might pick the wrong ones. Instead, the Internet's open architecture pushes decision-making and intelligence to the edge of the network—to end users, to the cloud, to businesses of every size and in every sector of the economy, to creators and speakers across the country and around the globe. In the words of Tim Berners-Lee, the Internet is a 'blank canvas'—allowing anyone to contribute and to innovate without permission.¹²⁵

Many of us fortunate enough to have been there at the moment the Internet reached its tipping point and became an unstoppable force—a kind of network magnetism—share this nostalgia. It was a moment that changed the trajectory of computing, upended giants, and unleashed tremendous creativity. For me, it utterly transformed my career, much as my first FORTRAN course as an undergraduate had unintentionally started it.

¹²³ Larry Downes, *FCC's Net Neutrality Ruling: Misplaced Nostalgia*, CNET News.com, Dec. 21, 2010, http://news.cnet.com/8301-1035_3-20026326-94.html.

¹²⁴ Frederick Jackson Turner, *The Significance of the Frontier in American History*, address before the American Historical Association, Chicago, 1893.

¹²⁵ Federal Communications Commission Chairman Julius Genachowski, *Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity*, Prepared Remarks at Brookings Institution (Sept. 21, 2009), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293568A1.pdf.

But the majority's passion for alchemizing nostalgia into federal law—assuming, but only for the moment, that the FCC is the appropriate agency to preserve an Internet that has long since passed even if it was ever the way we old-timers remember it—has produced no gold, only more lead. What the agency learned along the way gave the majority every opportunity to see the fool's errand they were on, but that knowledge was heroically explained away. The result are regulations filled with exceptions, exemptions, and exclusions that leave the final Report and Order sadly reminiscent of late efforts to explain the geocentric view of the solar system in the face of unassailable evidence that the Earth actually did revolve around the Sun and not the other way around.

C. The Exceptions that Expose the Rules

The process of explaining away Internet reality began long before the final vote. Even the original Notice of Proposed Rulemaking and draft order released for comment in October, 2009 included many (necessary) exceptions from strict adherence to the neutrality principle.

The proposed rules, most important, limited all six neutrality regulations to an exception for “reasonable network management.”¹²⁶ Reasonable network management was defined as all “reasonable practices” broadband Internet access providers undertook to, among other things, “reduce or mitigate the effects of congestion on the network or to address quality-of-service concerns.”¹²⁷ And bowing to legal limits imposed by existing criminal and intellectual property law, reasonable network management did not apply to efforts by broadband access providers to “address unlawful conduct on the Internet,” including unlicensed sharing of copyrighted content.¹²⁸

In explaining “reasonable network management,”¹²⁹ the FCC acknowledged that the technology by which a user accessed the Internet could play a significant role in determining when a provider could act “inconsistently” with the neutrality principle but still not violate the rules. Access over coaxial cable follows a different architecture—with different constraints—than fiber, copper, satellite, or cellular access. Moreover, for purposes of “quality of service,” the agency acknowledged that it might be appropriate for an access provider to implement a “network management practice of prioritizing classes of latency-sensitive traffic,” such as VoIP, gaming, and streaming media traffic.¹³⁰

Since the FCC has up until now had little role to play in the regulation of the Internet, it's not surprising that the agency began this process with a highly outdated view of how the Internet “worked.” So the NPRM here **and in eighty other sections**, sought comment on the current state of the Internet ecosystem, the technologies of broadband access, network management

¹²⁶ NPRM, *supra* note 7, §§ 8.5-8.15.

¹²⁷ *Id.* § 8.3.

¹²⁸ *Id.* ¶ 139.

¹²⁹ *Id.* ¶¶ 135-141.

¹³⁰ *Id.* ¶137.

principles in place, and the nature of the broadband access market throughout the U.S.—the latter a subject the agency took up again in the National Broadband Plan.

Not surprisingly, the FCC heard plenty. The final Report lists over 450 sources of comments and replies to the NPRM, many of which addressed themselves to educating the FCC on the technologies it had undertaken to regulate.

As a result of this formal (and no doubt a great deal of informal) feedback, the final rules added numerous additional exceptions, authorizing a wide range of practices that allow providers of broadband Internet access to act “inconsistently”¹³¹ with the neutrality principle but still not be judged to have violated them. I have compiled the following list of exceptions. Taken together, they offer a window into the majority’s education on how the Internet has evolved since 1996 and their struggle to rationalize that reality with the pre-determined decision to regulate in the name of “neutrality” no matter what they learned along the way:

1. Exemption from many of the rules for providers of mobile broadband Internet access, including the “no unreasonable discrimination” rule and some of the “no blocking” rule.¹³²
2. Explicit exemption from the “no blocking” rule for app stores and other control mechanisms used by mobile broadband providers.¹³³
3. A change from a strict “nondiscrimination” rule for wireline providers to a rule prohibiting only “unreasonable discrimination.”¹³⁴ (See section III for a discussion of the difference between those two formulations.)
4. A limited definition of “broadband Internet access service” that constrains the rules only to providers of “mass market retail service” providing “the capability to transmit data to and receive data from all or substantially all Internet endpoints.”¹³⁵ That change leaves out a range of relatively new Internet devices and services—including the Amazon Kindle, game consoles, cars, TVs and home appliances—that offer some form of web access incidental to their main purpose in connecting to the network.¹³⁶
5. A broader definition of “reasonable network management,” that includes any practice that is “appropriate and tailored to achieving a legitimate network management purpose.”¹³⁷

¹³¹ The term “inconsistently” was used in the NPRM, *id.* ¶ 136. (“There appear to be several types of situations that could justify a broadband Internet access service provider’s acting inconsistently with the six open Internet principles described above.”)

¹³² Report & Order, *supra* note 2, § 8.5, 8.7.

¹³³ *Id.* ¶ 102.

¹³⁴ *Id.* § 8.7.

¹³⁵ *Id.* § 8.11(a).

¹³⁶ *Id.* ¶ 47.

¹³⁷ *Id.* § 8.11(d) and ¶ 82.

6. Exemption for virtual private networks, which use much of the same infrastructure as the public Internet.¹³⁸
7. Exemption for Content Delivery Networks and co-located servers that put particular content in closer proximity to important network nodes and therefore speed its transmission to requesting users.¹³⁹
8. Exemption for multichannel video programming services (*e.g.*, AT&T's U-verse) that use TCP/IP protocols and existing Internet infrastructure to deliver television programming to customers.¹⁴⁰
9. Exemption for Internet backbone services.¹⁴¹
10. Exemption for hosting or data storage services.¹⁴²
11. Exemptions for "coffee shops, bookstores, airlines and other entities when they acquire Internet service from a broadband provider to enable their patrons to access the Internet from their establishments."¹⁴³
12. Exemption from the discrimination rule for "existing arrangements for network interconnection, including existing peering arrangements."¹⁴⁴
13. Exemption (for now) for "specialized services," including multichannel video programming (see above) or facilities-based VoIP (*e.g.*, Comcast Digital Voice), that "share capacity with broadband Internet access services over providers' last-mile facilities."¹⁴⁵
14. A hedge on whether "paid priority" of some content, either that of the access provider or a third party, would necessarily violate the "unreasonable discrimination" rule and an explicit rejection of the argument that CDNs constitute illegal "pay for priority" though they have the same effect on consumer experience as prohibited prioritization schemes.¹⁴⁶
15. Recognition that end-users may elect to subscribe to Internet access that limits their choice of content, including services that support parental controls or which "allow end users to choose a service that provides access to the Internet but not to pornographic websites."¹⁴⁷ Further, "[b]roadband providers are also free under this Order to offer a

¹³⁸ *Id.* ¶ 47.

¹³⁹ *Id.* ¶ 47 and ¶76 n. 235.

¹⁴⁰ *Id.* ¶ 47.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* ¶ 52.

¹⁴⁴ *Id.* ¶ 67 n. 209. Note that this exception probably means the public fight between Comcast and Level 3 over their secret peering agreements probably does not violate the rules. See Marguerite Reardon and Elinor Mills, *Level 3 Takes Spat with Comcast Public*, CNET News.com, Nov. 29, 2010, http://news.cnet.com/8301-1023_3-20024070-93.html.

¹⁴⁵ Report & Order, *supra* note 2, ¶¶ 112-114.

¹⁴⁶ *Id.* ¶¶ 76-77.

¹⁴⁷ *Id.* ¶ 89.

wide range of ‘edited’ services,” including a “service limited to ‘family friendly’ materials.”¹⁴⁸

16. Recognition that existing federal law allows all Internet Service Providers to “restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.”¹⁴⁹

D. Finding the Forest Amid the Exemptions

These exceptions, particularly the measured approach to mobile broadband access and the provisional reprieve for specialized services, generated howls of indignation from advocacy groups hoping for “pure” neutrality, and led many of the Chairman’s initial supporters to abandon him over the course of the year the NPRM was publicly and privately debated.¹⁵⁰

My concern is quite different. I think each of these exceptions makes good sense, and will keep the new rules, at least in the short-term, from causing life-threatening damage to the Internet ecosystem. Rather, what the laundry list of exceptions demonstrates is that the majority just isn’t seeing the forest for the trees: ***What the exceptions have in common is that each of them represents a change to the Internet’s architecture and service models that have evolved over the last decade and a half.*** They are new services, technologies, or service providers who, in these and other ways, act “inconsistently” with the neutrality principle but who nonetheless are providing crucial and valuable benefits to consumers.

These innovations have been developed for beneficial and not evil purposes. The network today is better in every sense imaginable largely because of these innovations. It will continue to improve in speed, efficiency, and usability so long as future innovations don’t run afoul of the rules and their enforcement. The Internet is not “open” in the way it may have been in 1996 (and it was never as open as the idealists imagine). But in order for the Internet we have today—faster, cheaper, better—to exist, each of these changes had to be made.

The genius of a virtual infrastructure is that it can absorb redesign without any interruption in service. One generally positive but here unfortunate side-effect of that ease of transformation is that users don’t see the construction cones and highway workers. Consumers—and the FCC—don’t realize that we’re now traveling on a multi-lane highway rather than the old dirt road. The technology is utterly changed, and the rules of the road have changed with it. For better or worse, but largely for the better.

The final rules, with all their exceptions, suggest a majority clinging to the idealized past, and a stubborn refusal in the end to admit that the Internet has evolved and continues to evolve—that it needs to change.

¹⁴⁸ *Id.* ¶ 143, but cf. ¶ 141.

¹⁴⁹ *Id.* ¶ 89 n. 279.

¹⁵⁰ Sara Jerome, *FCC Chairman Told to Put on ‘Man Pants’*, THE HILL, Oct. 27, 2010, <http://thehill.com/blogs/hillicon-valley/technology/126133-fcc-chairman-told-to-put-on-man-pants>; Timothy Karr, *Obama FCC Caves on Net Neutrality—Tuesday Betrayal Assured*, The Huffington Post, Dec. 20, 2010, <http://www.huffingtonpost.com/timothy-karr/obama-fcc-caves-on-net-neutrality>.

The exceptions, for example, for the “inconsistent” and non-neutral effects of CDNs, specialized services, peering arrangements, e-readers and game consoles, and app stores have no logical rationale, other than that the FCC has now learned that they are part of the current status quo. They are being exempted simply because they are in place, and they work.

For example, paying a CDN to replicate your content and co-locate servers at key network access points is surely “paying for priority.” The cached content will arrive faster when requested by a consumer than similar or even competing content that does not subscribe to a CDN. It puts a start-up without the funds for similar services at a competitive disadvantage. But for consumers, that feature is a good thing—an improvement—even though it is not “neutral.”¹⁵¹ It ensures the most popular and therefore most frequently accessed content is not slowed down by its popularity.

Likewise, the mobile Internet is given special treatment because it is “evolving rapidly.”¹⁵² But the fixed Internet is evolving rapidly as well, as many of these exemptions implicitly recognize.

The majority is fixated on maintaining an Open Internet even though it now understands that neutrality is a virtue more honored in the breach. The final report uses the word “traditionally” 25 times, the word “historically” nine times, and the word “typically” 21 times. These are the only justifications for the exceptions, and they undermine the purpose of the rules that remain. There is no neutral Internet to preserve. There’s only one that works.

The reality is that we’re moving away from websites to the mobile, app-based economy, specialized services and high-bandwidth applications such as video that shouldn’t be treated the same. A “level playing field” doesn’t mean everyone gets a trophy.

The good news is that the final rules grandfather-in many existing technologies that are “inconsistent” with the neutrality principle. That’s essential, even if each of the exceptions is granted in isolation and begrudgingly at that.

But the bad news is that the Open Internet regulations as approved allow little flexibility for future innovations in network optimization. The FCC sees ominous clouds of non-neutral and therefore prohibited behavior on the network horizon, ignoring that tomorrow’s violations are only as dangerous as the “traditions” that have been established up until this random moment in Internet time. The vote comes at a politically significant moment, but not a time that has any particular meaning for network engineering. The new rules, in the worst case, may arbitrarily freeze today’s particular status quo, for no good (and lots of bad) reasons.

¹⁵¹ Report & Order, *supra* note 2, ¶ 76 n. 235. The majority justifies the exemption for CDNs on the basis that “Unlike broadband providers, third-party CDN providers do not control the last-mile connection to the end user.” So are non-neutral network management practices allowed only if they are offered by third parties? Does that mean that a broadband Internet access provider cannot develop or acquire a CDN company without violating the new rules?

¹⁵² *Id.* ¶ 8.

Nostalgia can be fun. I enjoy sitting around with my fellow veterans of the pre-bubble dot com boom talking about the good old days, toasting to our irrational exuberance. But translating that wistfulness into federal law, even as here with rules pockmarked by the blemishes of a reality that looks far different than our idealized view of the past, is a dangerous way to celebrate it.

VI. “Badges? We Don’t Need No Stinking Badges!”¹⁵³

The FCC has built its new broadband Internet access regulations on a legal foundation of jurisdictional quicksand. I discuss that problem only briefly here because the extended legal analysis already been admirably detailed by FCC Commissioner Robert McDowell. His dissent calmly, systematically and completely dismantles the legal case made by the majority.¹⁵⁴

This is no theoretical discussion of statutory interpretation. Even before the rules have been published in the Federal Register, two broadband providers—Verizon and then MetroPCS—filed lawsuits in the D.C. Circuit Court of Appeals challenging the FCC’s authority to regulate.¹⁵⁵ The arguments sketched out in Commissioner McDowell’s dissent are likely to mirror the complainants’ briefs in these and likely other Petitions for Review of the Order.

A. The Need for Authorization

Nate Anderson of Ars Technica asks the key question, “Why is Verizon suing over net neutrality rules it once supported?”¹⁵⁶

I wouldn’t and didn’t go as far as Anderson, who concludes that Verizon, “on substance ... got exactly what it wanted.” As I noted above, both the final rules and the Verizon-Google proposal closely tracked, with important differences, the original order the FCC proposed in October, 2009. But there are material differences between what Verizon-Google proposed and what the FCC ultimately voted on, notably in the treatment of mobile broadband—a subject of particular concern to Verizon.

Those details aside, there is one crucial difference that Anderson acknowledges. As he writes, “the Verizon/Google proposal did make one other suggestion: it should be passed by Congress, not the FCC”¹⁵⁷

That might seem like a small enough difference. Rules are rules, what difference if the FCC passed them under its rulemaking authority or if Congress had put them into a new statute,

¹⁵³ The Treasure of the Sierra Madre (Warner Brothers 1948). See http://en.wikipedia.org/wiki/Stinking_badges.

¹⁵⁴ Report & Order, *supra* note 2, ¶¶ 115-150.

¹⁵⁵ On Verizon’s effort to secure exclusive jurisdiction for the D.C. Circuit, See James DeLong, *Which Court Gets to Hear the Net Neutrality Appeal?*, Digital Society, Jan. 21, 2011, <http://www.digitalsociety.org/2011/01/which-court-gets-to-hear-the-net-neutrality-appeal/>; Larry Downes, *Verizon Loses Early Skirmish in Net Neutrality Litigation*, CNET News.com, Feb. 3, 2011, http://news.cnet.com/8301-13578_3-20030479-38.html.

¹⁵⁶ Anderson, *Why is Verizon Suing over Rules it once Supported?*, *supra* note 51.

¹⁵⁷ *Id.*

such as the Internet Freedom Preservation Act, which would have given the FCC authority to enforce them anyway?¹⁵⁸

But in fact, that procedural difference embodies the principal and most principled objection not only to the Report and Order but to the process by which it was completed. Put simply: Congress alone has the power to regulate; the FCC can only act on authority delegated to it by Congress. Any rulemaking undertaken without authority is not only dangerous, also it is unconstitutional.

And Congress, it's clear, has not delegated authority to the FCC to regulate broadband Internet access. What most worries Verizon and others—including net neutrality-sympathizers like the Electronic Frontier Foundation¹⁵⁹—is that if the FCC gets away with passing new rules anyway, the agency will have established a dangerous precedent. Any time in the future that the FCC or any other federal regulatory agency wants to extend its power, it need only deputize itself.

That is the feature of the Open Internet Report and Order that has most alarmed the communications industry, members of Congress, and advocates of limited government. And that is principally why several leading members of Congress have promised to reverse the ruling, even as Verizon and others challenge it in court.¹⁶⁰ In short, the substance of the rules aside, it very much matters that the FCC, and not Congress, took up elements of the framework proposed by Verizon and Google.

B. Regulatory Overreach Is Not a New Problem

The problem of regulatory overreach goes far beyond net neutrality. Under a novel and somewhat fragile arrangement that was worked out during the New Deal, independent federal regulatory agencies can exercise considerable authority that the Constitution, on its face, reserves to the Legislative and Judicial branches. Indeed, the early New Deal Supreme Court overturned much of FDR's regulatory agenda under the so-called "nondelegation doctrine."

After FDR threatened to "pack the court" with more sympathetic Justices, a key swing Justice changed sides,¹⁶¹ saving the Court and the New Deal. (The so-called "switch in time that saved nine," which few people realize is a pun on the sewing parable of a "stitch in time saves nine.")

But even so, federal regulators operate under strict controls that ensure they stay close to their implementing statutes, lest their authority become untethered. FCC Commissioners are appointed by the President and confirmed by the Senate, and can only be removed from office

¹⁵⁸ Internet Freedom Preservation Act of 2009, H.R. 3458, July 31, 2009.

¹⁵⁹ See, e.g., Fred von Lohmann, *Net Neutrality: FCC Trojan Horse Redux*, EFF Deeplinks Blog, May 3, 2010, <http://www.eff.org/deeplinks/2010/05/net-neutrality-fcc-trojan-horse-redux>; and Corynne McSherry, *Is Net Neutrality a FCC Trojan Horse?*, EFF Deeplinks Blog, Oct. 21, 2009, <http://www.eff.org/deeplinks/2009/09/net-neutrality-fcc-perils-and-promise>.

¹⁶⁰ Larry Downes, *Tech Priorities for New Congress: From Old to New*, *supra* note 19.

¹⁶¹ *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

by impeachment. At least two of the five Commissioners must be members of a party different from the President's.¹⁶²

Both the rulemaking (legislative) and adjudicatory (judicial) powers of the agency are strictly limited by implementing statutes passed by Congress. If the agency isn't given explicit powers to regulate, regardless of the appearance or reality of significant market failures, only Congress can delegate additional powers. And the courts, in the checks-and-balance system, are the final determinants of what powers have and have not been granted to an agency.

So the FCC has a problem. It wants to regulate broadband Internet providers to ensure the "level playing field" it believes essential to the success of the Internet. But Congress has never given them authority to do so, and has failed since 2004 to pass new legislation that would grant additional authority.

The FCC actually lost ground during the rulemaking process. The rulemaking was, in some sense, an effort to formalize earlier policy statements, whose authority had not been challenged. But an effort to enforce the 2005 Open Internet policy statement through adjudication against Comcast was reversed by the D.C. Circuit in April, 2010, on the grounds that Congress had not authorized the FCC to regulate broadband Internet access.¹⁶³ As the NPRM had based its authority on the identical legal theory used in the *Comcast* case, the agency found itself with little wiggle room to complete the rulemaking it began in October 2009.

What's the problem? Briefly: Under the Communications Act of 1996, and consistent with earlier versions of the FCC's implementing statute, the agency was given broad authority over common carrier telephone service (Title II of the Act) but almost no authority over information services or what used to be known as "enhanced" or "ancillary services" (pre-Internet access, these included call waiting and other supplements to telephone service) (Title I of the Act). The one exception was Internet access provided by dial-up modems, which is no longer a significant source of access.

The *Comcast* case, in line with several earlier D.C. Circuit and Supreme Court cases, made clear that Congress did not delegate authority over broadband access under Title I.

There was nothing new in that. The FCC has made numerous efforts to attach otherwise unauthorized regulations to Title I's so-called "ancillary jurisdiction," but the courts frequently reject these efforts as overreaching.

For example, in 2005 the D.C. Circuit rejected regulations the FCC approved that would have required consumer products manufacturers to include "broadcast flag" technology in any device capable of receiving a television signal.¹⁶⁴ The new regulations were grounded in the

¹⁶² FCC, About the FCC, <http://www.fcc.gov/aboutus.html> (last accessed Feb. 13, 2011).

¹⁶³ *Comcast v. FCC*, 600 F.3d 642.

¹⁶⁴ *American Library Association v. FCC*, 406 F.3d 689 (D.C. Cir. 2005).

agency's ancillary jurisdiction over television broadcasters. But while the agency had unquestioned authority over broadcasters, they could not require non-broadcasters to comply with rules aimed at helping the broadcasters control unauthorized home taping.

At oral argument, the judges nearly laughed the FCC out of court. "You're out there in the whole world, regulating. Are washing machines next?" asked Judge Harry Edwards. Judge David Sentelle added, "You can't regulate washing machines. You can't rule the world."¹⁶⁵

The result in the *Comcast* case was much the same. And the October, 2009 NPRM had grounded its authority to proceed solely with Title I. With that avenue all but foreclosed to the agency by *Comcast*, the Chairman found himself in one of several lonely corners he inhabited for much of 2010. Congress was unlikely to move on any of the net neutrality bills floating around committees (and indeed, did not do so), but Chairman Genachowski was committed to the rulemaking.

C. The FCC's "Very Smart Lawyers" Try Again

What to do? One option was to undertake a "reclassification" of broadband Internet to categorize it as a telephone service subject to Title II, a section of the law that comes with fifty-plus years of baggage from the regulation of the former telephone monopoly. The Commission has (for now) wisely avoided taking that step, which itself would have been subject to substantial legal challenges.¹⁶⁶

The authority stalemate seemed to doom the net neutrality proceeding. But then, in late fall, FCC Chairman Julius Genachowski told the audience at the Web 2.0 Summit that the FCC's "very smart lawyers" had figured out a way to get around the Title I/Title II problem. The net neutrality faithful and faithless waited, holding their collective breath.

In the final Report and Order, however, all we really get is a rerun of the argument that had failed in the *Comcast* case, with only minor tweaking. Again, Commissioner McDowell's detailed dissent explains the weakness of the argument without the need for much added commentary.

The courts have consistently told the FCC that to invoke ancillary jurisdiction, a rulemaking must be reasonably related to a specific delegated power elsewhere in the Communications Act. It has to be "ancillary" to some other authority the Commission already has, in other words. Title I gives no powers on its own over "information services." In the *Comcast* case, the FCC listed off several provisions in hopes that at least one of them would stick, but the court rejected all of them.

¹⁶⁵ Declan McCullagh, *Court Questions FCC's Broadcast Flag Rules*, CNET News.com, Feb. 22, 2005, http://news.cnet.com/Court-questions-FCCs-broadcast-flag-rules/2100-1030_3-5585533.html.

¹⁶⁶ The majority refused requests to close the Title II docket, however. See Report & Order, *supra* note 2, at 182 n. 7 (Baker, Comm., dissenting).

In the Order, the FCC tries several new provisions.¹⁶⁷ Obviously the best bets were already exhausted in the *Comcast* case; the majority here poses even more attenuated provisions for ancillary authority over broadband Internet than the laundry list rejected in *Comcast*. Most get only perfunctory explanation. The FCC knows it is on thin ice.

Instead, the Order relies principally on a new and unconvincing reading of Section 706 of the Communications Act.¹⁶⁸ Section 706 had formed the leading argument in *Comcast* as well, but there the agency argued that Section 706 was the provision that gave it ancillary authority over a Title I Information Service such as broadband Internet access. The court rejected that argument.¹⁶⁹

The revised Section 706 argument argues that that provision in and of itself provides independent authority for the FCC to implement the Open Internet rules. In relevant part, Section 706 reads:

SEC. 706. ADVANCED TELECOMMUNICATIONS INCENTIVES.

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

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

(c) DEFINITIONS- For purposes of this subsection:

¹⁶⁷ *Id.* ¶¶ 124-137.

¹⁶⁸ *See Id.* ¶¶ 117-123.

¹⁶⁹ *Comcast*, 600 F.3d at 658-59.

(1) ADVANCED TELECOMMUNICATIONS CAPABILITY- The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.¹⁷⁰

On its face, neither 706(a) nor 706(b) appears to give the FCC power to put regulatory constraints of any kind on how broadband Internet access providers operate. Indeed, the goal of this section is to encourage the FCC to promote broadband adoption by “regulating methods that remove barriers to infrastructure investment,” including forbearance from use of its existing powers. The history of this provision, as Commissioner McDowell explains, was aimed at **removing regulations** of Title II telephone carriers that hindered their ability to provide advanced telecommunications capability.¹⁷¹

The reliance on Section 706(b) is even stranger, and deeply cynical. It requires the FCC to issue a regular report on broadband deployment and, if it finds such deployment is not taking place in a “reasonable and timely manner,” to take “immediate action to accelerate deployment” by “removing barriers” to investment.

Again, as Commissioner McDowell notes, the 706(b) Reports have consistently found broadband deployment to be proceeding at a rapid pace, confirming what everyone already knows. Americans are signing on to the Internet faster than any previous information technology, whether through wireline or, increasingly, wireless broadband.¹⁷²

That is, until July, 2010, a few short months after the *Comcast* decision. For the first time ever, the 706(b) Report found that “broadband deployment to *all* Americans is not reasonable and timely.”¹⁷³ (The Report, along with the Open Internet Order, was approved on a party-line 3-2 vote of the Commission.) This despite the fact that broadband availability grew from 15% of Americans in 2003 to 95% in 2010.¹⁷⁴

The negative 706(b) Report was clearly a pretext to give the agency the ability to trigger the “immediate action” language of the 706(b), but even then, the action the FCC is supposed to take is in the nature of deregulating broadband, not adding additional regulations. How will rules that limit the operational flexibility of broadband providers “accelerate deployment”?

¹⁷⁰ 47 U.S.C. § 706 (1996).

¹⁷¹ Report & Order, *supra* note 2, at pp. 189-192 (McDowell, Comm., dissenting).

¹⁷² *Id.*

¹⁷³ Federal Communications Commission, *Sixth Broadband Deployment Report*, FCC 10-129, ¶12, July 16, 2010, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-129A1.pdf.

¹⁷⁴ *Id.* fn. 81. National Broadband Plan, *supra* note 36 at 20. See also Report & Order, *supra* note 2 at p. 147 (McDowell, Comm., dissenting).

The majority argues simply that “Section 706(b) provides express authority for the pro-investment, pro-competition rules we adopt today.”¹⁷⁵ Hardly!

The effort to tether the Open Internet rules to Section 706 is, charitably, flimsy at best. But there’s yet another problem. The FCC itself has already foreclosed that interpretation. The agency has long rejected the view it now adopts that Section 706 provides any explicit authority for rulemaking, whether on its own (the new argument) or as a hook for ancillary jurisdiction under Title I.

As the D.C. Circuit noted in the *Comcast* case, “In an earlier, still-binding order, the Commission ruled that section 706 ‘does not constitute an independent grant of authority.’ Instead, the Commission explained, section 706 ‘directs the Commission to use the authority granted in other provisions ... to encourage the deployment of advanced services.’”¹⁷⁶ So Section 706 doesn’t give the agency any regulatory authority, just guidance on how to apply (or not) other provisions in the Act. That, at least, has long been the FCC’s own view of the law, a view courts will give considerable deference.

In dispensing with the Section 706 argument in *Comcast*, the court concluded that “Because the Commission has never questioned, let alone overruled, that understanding of section 706, and because agencies ‘may not ... depart from a prior policy *sub silentio*,’ the Commission remains bound by its earlier conclusion that section 706 grants no regulatory authority.”¹⁷⁷

That last sentence seemed to leave the door open just a crack for the FCC to “depart from its prior policy” in an explicit way. And, it’s possible to read the Report and Order as doing just that.¹⁷⁸

But not so fast. While agencies have broad discretion to overrule earlier decisions, there must be some rational basis for doing so. There must be some changed circumstances, some evidence, some explanation that passes the sniff test. A reviewing court will at least look to see if there is some external data that justifies the majority’s reversal of the agency’s prior interpretation of Section 706.

And there’s nothing here that meets even that minimal standard. Again, to quote Commissioner McDowell, “This move is arbitrary and capricious and is not supported by the evidence in the record or a change of law.”¹⁷⁹ The only thing that changed, in fact, is that the agency lost the *Comcast* case. That’s not reason enough, but that seems to be all that justifies this surprising new understanding of a 15 year-old provision in the FCC’s implementing statute.

¹⁷⁵ Report & Order, *supra* note 2, ¶ 123.

¹⁷⁶ *Comcast*, 600 F.3d at 658.

¹⁷⁷ *Id.* (citations omitted)

¹⁷⁸ See Report & Order, *supra* note 2, ¶ 122 for an unintentionally hilarious explanation for why the agency had never before noticed that Section 706 granted explicit authority.

¹⁷⁹ *Id.* at 148 (McDowell, Comm., dissenting).

D. Preserving *Which* Internet, Again?

The rest of the FCC's "Authority" section, as noted, throws in what's left of the kitchen sink, largely provisions of Title II that *Comcast* didn't already dispose of. The connection between the Open Internet rules and the Commission's regulatory powers over telephone service, television and radio broadcasting, cable TV and spectrum management are just too tenuous to be convincing to a reviewing court. If that authority is close enough to support net neutrality, it's close enough to support anything, including, for example, the broadcast flag rules already overturned.

The majority's straining to find authority exposes more than just the clear intent of Congress not to provide any. Trying the net neutrality rules to problems of VoIP, IP-based television broadcasting, IP radio, and other video and audio services proves too much. It actually undermines the FCC's position by bringing into sharp focus the reality behind the agency's fundamental problem here.

Since Congress last updated the agency's authority in 1996, a revolution has utterly transformed the industries the FCC deals with. The Internet's packet-switching protocols have quickly and unexpectedly taken over as the super-dominant technology for all forms of communications, traditional and new. The world of television, radio, and computing have changed and converged, leaving little left of the world the 1996 Act authorized the FCC to regulate. Even the "Internet" as we knew it in 1996 looks nothing like the thriving ecosystem of digital life that we enjoy today.

Which brings us squarely back to the problem of "nostalgia." The FCC is operating under a statute that has its origins in the 1930s, and which was last updated (fitfully) fifteen years ago. Congress then had telephone regulations very much on their minds, not the nascent consumer Internet. In 1996, the communications, computing and entertainment industries operated in silos with little overlap. Each had its own established leaders and long histories of regulatory intervention.

These and other related industries have undergone nearly complete transformation in the intervening years, largely outside the notice of the FCC or its authority to intervene. Device and content convergence is a reality. Consumers now use far more computing resources than do businesses. Telephone providers offer television and Internet, cable companies offer voice. The Internet giants of 1996 are nearly all gone.

Those aspects of the industry still under strict FCC control—including Plain Old Telephone Service (POTS) and over-the-air television and radio—have gone into deep decline. They've become a legacy business that owners can't even exit from, because there's no one interested in the dwindling assets.¹⁸⁰

¹⁸⁰ Larry Downes, *Spectrum Worries at CES: Déjà vu all Over Again*, CNET News.com, Jan 8, 2011, http://news.cnet.com/8301-1035_3-20027902-94.html.

That's no coincidence. Those businesses (in some cases parts of companies whose unregulated operations are thriving), thanks to the regulatory environment in which they operate, are simply unable to respond quickly to rapidly emerging new technologies, applications, and consumer demands. They suffer from a regulatory disease closely related to what Harvard's Clayton Christensen famously termed the Innovator's Dilemma: They can't adapt, even if they had the will to do so.¹⁸¹

Continued efforts, including this one, to fit square regulations into round statutory pegs underscores not only the lack of FCC authority over what has evolved to be our new and magical communications platform but also the agency's continued and unintentional effort to demonstrate its own obsolescence.¹⁸²

At the same time, the majority's incantations of outmoded, obsolete, and inapplicable provisions of the old communications law reminds the rest of us just how much progress has been made during the period when the FCC has been unable or unwilling to interfere in the evolution of the Internet platform.

That's probably not the conclusion the FCC was hoping to have drawn from a year of genuinely hard labor and a nearly 200-page Report. But there you have it.

¹⁸¹ CLAYTON M. CHRISTENSEN, *THE INNOVATOR'S DILEMMA*, (Harvard Business School Press 1997).

¹⁸² *See, e.g., FCC v. Fox Television Stations*, 129 S.Ct. 1800 (2009).