

Net Neutrality: The Federal Communications Commission's Authority to Enforce Its Network Management Principles

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Summary

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

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

Comcast argues that the FCC does not have the authority to enforce its Network Management Principles and the Commission's order was invalid for that reason. The Commission argues that it has ancillary authority under Title I of the Communications Act to implement the broad statutory goals for an open, user-controlled Internet laid out by Congress. If the court finds that the FCC does not have the authority to adjudicate based on its Internet Policy Statement, Congress may face the question whether to act to give the FCC such authority in order to prevent anticompetitive conduct by broadband access providers. If the court finds that the FCC acted properly, the agency may continue to enforce these broad principles on a case-by-case basis.

Recently, FCC Chairman Julius Genachowski proposed the initiation of a notice-and-comment rulemaking procedure to codify the four Network Management Principles into regulations. Furthermore, he proposed the addition of two more principles to be included in the rulemaking procedure. The fifth principle will be one of non-discrimination and the sixth principle would be one of transparency. This proposal is discussed in more detail below.

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Introduction

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

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

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

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

Proceedings at the FCC

FCC's Network Management Principles

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

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

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

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

[1] 47 U.S.C. § 230(b)(2).

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

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

[4] *Id.* at 14988.

[5] *Id.*

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

The Ruling Against Comcast

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

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

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

[6] *Id.* at n. 15.

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

[8] *Id.*

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

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

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

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

[13] *Id.* at para. 52.

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

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

Comcast filed the requested documents with the FCC on September 19, 2008.[20] Comcast also filed a certification with the FCC on January 5, 2009, affirming that the company had fulfilled its promise to move to protocol-agnostic network management practices.[21] The Commission sent a letter to Comcast on January 18, 2009 asking the company to clarify its treatment of VoIP services.[22] The Commission expressed concern that Comcast made no distinction between VoIP services in its filing, but, apparently, treats its own VoIP service offering differently than it treats

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[14] *Id.* at para. 53.

[15] *Id.*

[16] *Id.* at para. 49.

[17] *Id.* at para. 54.

[18] *Id.*

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

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

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

[22] Letter from Dana R. Shaffer, Chief, Wireline Competition Bureau, and Matthew Berry, General Counsel, FCC, to Katherine A. Zachem, Vice President, Regulatory Affairs, Comcast Corporation, Re: In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices: Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management," File No. EB-08-IH-1518, WC Docket No. 07-52 (January 19, 2009).

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

Comcast filed its answer with the Commission on January 30, 2009.[23] The company argued that Comcast's voice service is a separate service from its broadband offering. It, therefore, was not part of the ongoing discussions about Comcast's broadband network management practices and is not affected by the newly implemented management regime, in the company's opinion. Comcast also argued that the question of whether Comcast's voice service should be treated as a telecommunications service is irrelevant to the current proceedings, but, nonetheless, asserted that Comcast's voice offering is not a telecommunications service. The Commission has yet to take any action in response to Comcast's letter.

The FCC's Authority to Enforce its Network Management Principles

Though Comcast voluntarily ceased the network management practices that the Commission found objectionable, Comcast appealed the decision of the Commission to the D.C. Circuit.[24] Comcast argues that the FCC did not have the authority to enforce its Internet Policy Statement under the Communications Act and, even if it did, could not use its adjudicatory authority to do so. The Commission, in its order, disagreed. Citing the rapid development of technology in this area and the resulting need for regulatory flexibility, the Commission declined to develop set regulations for network management. Instead, the Commission has decided to proceed with enforcement of its Internet Policy Statement on an ad-hoc basis. Two issues seem to be of concern for the court: (1) whether the Commission has the authority to regulate broadband network management practices and (2) if the agency does have that authority, whether the Commission used it appropriately against Comcast.

Title I Ancillary Authority to Regulate Reasonable Network Management

The Commission has asserted its so-called ancillary authority under Title I of the Communications Act to impose standards for reasonable network management on broadband Internet access providers. The FCC classifies broadband Internet access as an "information

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

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

service," which is regulated under Title I of the Communications Act.[25] As a result, broadband Internet access providers are exempt from many of the requirements imposed upon providers of telecommunications services that are regulated under Title II of the Communications Act (i.e., traditional telephone service). The Commission does, however, have the power to impose additional regulations on "information services" under its Title I ancillary authority to regulate interstate and foreign communications.[26] A reviewing court would likely analyze whether the Commission's Title I ancillary authority to regulate information services extends to broadband providers' chosen methods of network management.

Title I of the Communications Act instructs the Commission "to make available . . to all the people of the United States ... a rapid, efficient, Nation-wide and world-wide wire and radio communications service ..."[27] The Act applies "to all interstate and foreign communication by wire or radio."[28] Section 1 of the Communications Act requires the Commission to "execute and enforce" the provisions of the Act and section 4(i) grants the Commission the authority to do so by issuing "such orders ... as may be necessary in the execution of its functions."[29] The Supreme Court has held that the Commission has jurisdiction to issue rules and orders pursuant to these provisions that are "reasonably ancillary to the effective performance of the Commission's various responsibilities" set forth in the Act.[30] In order for rules enforced pursuant to this authority to be valid, the "rules must be reasonably ancillary to something."[31] In other words, rules enforced pursuant to the Commission's Title I ancillary authority must aid in the Commission's effective performance of at least one of its more specific statutorily designated responsibilities.

In an early ruling outlining the Commission's ancillary authority, the Supreme Court noted that "[n]othing in the language of Section 152(a) ... or in the Act's history or purpose limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions."[32] Congress anticipated that the communications industry would evolve rapidly and that technology would outstrip Congress' ability to legislate expediently.[33] Accordingly, Congress granted the Commission expansive powers to regulate all communications by wire or radio.[34] The Internet is considered to be communications by "wire or radio." Therefore, if the Commission can show that regulation of broadband network management practices would aid the Commission in accomplishing one of its broader statutory responsibilities, it is likely that its authority to regulate such practices would be upheld.

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[25] 47 U.S.C. § 153(20); In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd 4798 (2002).

[26] *See* 47 U.S.C. §§ 151-161; National Cable and Telecommunications Association v. Brand X Internet Services, 545 U.S. 967, 977 (2005).

[27] 47 U.S.C. § 151.

[28] 47 U.S.C. § 152(a).

[29] Midwest Video Corp., v. Federal Communications Commission, 571 F.2d 1025, 1040 (8th Cir. 1978).

[30] United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

[31] *Midwest Video Corp*., 571 F.2d at 1040.

[32] *Southwestern Cable*, 392 U.S. at 172.

[33] *See* Computer and Communications Industry Assoc. v. FCC, 693 F.2d 198, 213 (D.C. Cir. 1982) (quoting General Telephone Co. of the Southwest v. U.S., 449 F.2d 846, 853 (5th Cir. 1971) (Congress sought "to endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications.")) [hereinafter *CCIA*].

[34] *Id.*

The Commission purports to find its authority to regulate broadband network management to be ancillary to its responsibilities, primarily, under Section 230 of the Communications Act. Section 230(b) of the Communications Act sets forth the policy of the United States in relation to the Internet. Some of the major objectives outlined by the provision are to promote the development of the Internet, to preserve the vibrant and competitive free market in which the Internet exists, and to encourage the development of technologies that maximize user control over what information is received.[35] This section does not, however, expressly grant the Commission the authority to promulgate regulations to ensure these goals are met. The Commission has stated that it is nonetheless obligated, as the agency entrusted with regulating interstate communication by wire or radio, to advance the policies set forth in this section.[36] In the Commission's estimation, preventing the blocking or degrading of applications such as P2P programs by network managers is reasonably ancillary to the statutory goal of encouraging a user-driven Internet, as well as the other goals mentioned in Section 230(b).

Section 706 of the Telecommunications Act of 1996 instructs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans by utilizing ... price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[37] This provision seems to grant the Commission some regulatory authority in order to encourage broadband deployment. Like Section 230(b), however, it does not grant the Commission express authority to regulate management of a broadband network once it has been deployed. The Commission believes that fostering reasonable and transparent network management will increase demand for broadband, thereby increasing demand for broadband deployment. For instance, the Commission stated that prohibiting network operators from blocking or degrading access to content will result in increased consumer demand for high speed Internet which will spur the deployment required by Section 706.[38] Such an intended effect makes enforcing its Internet Policy Statement reasonably ancillary to the Commission's responsibility to encourage broadband deployment.[39]

Courts have upheld regulations derived from similar statutory authority as the order at issue here. In *U.S. v. Midwest Video Corp.*, the Supreme Court upheld the FCC's regulations requiring cable systems to make facilities available for local production and program presentation as a valid exercise of the Commission's ancillary authority.[40] The Court agreed that the FCC had reasonably determined, consistent with its grants of authority under Sections 152(a) and 303(r), that the new rule would "further the achievement of long-established goals in the field of television broadcasting by increasing the number of outlets for community self-expression."[41] Likewise, the D.C. Circuit Court of Appeals upheld the FCC's use of its ancillary authority to regulate

[35] 47 U.S.C. § 230(b).

[36] Comcast Decision, 23 FCC Rcd 13028, at para. 17.

[37] 47 U.S.C. § 157 nt.

[38] Comcast Decision, 23 FCC Rcd 13028, at para. 18.

[39] The Commission also cites sections 1, 201, 256, 257, and 601 to support its ancillary authority to regulate network management practices. At bottom, the Commission argues that Comcast's management practices may overburden telecommunications networks with which Comcast's network interconnects. The Commission therefore believes that its authority to regulate Comcast's management practices is ancillary to the Commission's express statutory authority to ensure that telecommunications networks run smoothly. *Id.* at para. 16 - 21.

[40] 406 U.S. 649 (1972).

[41] *Id.* at 662.

"enhanced services" and customer-premises' equipment (CPE) in the so-called *Computer II* proceedings (which were an early attempt by the FCC to address the communications methods that eventually developed into the Internet).[42] Here, the Court upheld the Commission's assertion of authority to regulate wire communications that fall outside of Title II "solely in order to further the Title I goal of 'assur[ing] a nationwide system of wire communications services at reasonable prices.'"[43]

These cases appear to demonstrate that the Commission has broad power to choose regulatory tools within its Title I ancillary authority as long as they are in furtherance of broad statutory goals. In seeking to enforce its Internet Policy Statement, the Commission has asserted its ancillary authority to achieve the broad statutory goals of ensuring an open and user controlled Internet, as well as other, more specific, goals. Accordingly, it is possible that a court would find that the Commission has the authority under Title I to impose standards defining reasonable network management.

Propriety of Proceeding by Adjudication

Even if the Commission has the authority to regulate in this area, that does not necessarily mean that the Commission did so properly in this case. The next question a reviewing court would need to address is whether the FCC may proceed by enforcing its Internet policies through *ad hoc* adjudication rather than through the regulatory process, as it has chosen to do. Though the "function of filling in the interstices of the Act should be performed, as much as possible, through th[e] quasi-legislative promulgation of rules," the Supreme Court has held that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency."[44] Furthermore, agency interpretations of the statute that it has been charged with enforcing are entitled to deference from reviewing courts.[45] It seems, therefore, that the Commission will have the authority to proceed by adjudication, so long as regulation of broadband network management practices does not fit within the narrow class of exceptions wherein proceeding by adjudication would amount to an abuse of discretion.

The Supreme Court has described the ideal scenario for the use of an agency's adjudicatory authority in the absence of promulgating general rules as follows:

> [P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a

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

[43] *CCIA*, 683 F.2d at 213; *Comcast Order*, at para. 22.

[44] SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) [hereinafter *Chenery II*].

[45] Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837 (1984); *see Chenery II*., 332 U.S. at 207 (noting that the wisdom of the principle's adoption is none of the court's concern and that the court's review comes to an end once it is evident that the agency's action is based upon substantial evidence and upon authority granted by Congress).

> case-by-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards.[46]

The Commission set forth three reasons that proceeding by adjudication in this context fits within the Court's description:

1. Because the Internet is a new medium and traffic management questions are novel, adjudication will allow the Commission flexibility to course correct as technology develops;[47]
2. Because Internet access networks are complex and variegated, all possible permutations would be impossible to capture within the bounds of a general rule;[48] and
3. Case-by-case adjudication comports with congressional directives and agency precedent.[49]

For these three reasons, the Commission believes that its enforcement of its Internet Policy Statement is better suited for an *ad hoc* approach, rather than notice and comment rulemaking.

Courts have previously upheld the Commission's ability to enforce policy via adjudication rather than rulemaking,[50] but the agency's discretion to proceed via adjudication is not without limitations. The Supreme Court has acknowledged that there may be situations where an agency's choice to proceed by adjudication would amount to an abuse of discretion in violation of the Administrative Procedure Act.[51] The Ninth Circuit Court of Appeals has held that "such a situation may present itself where the new standard, adopted by adjudication, departs radically from the agency's previous interpretation of the law, where the public has relied substantially and in good faith on the previous interpretation, where fines or damages are involved, and where the new standard is very broad and general in scope and prospective in application."[52]

Comcast argues that the Commission action to enforce its Internet Policy Statement falls within this class of cases because the Commission has departed radically from prior Commission policy to restrain from regulating the Internet upon which Comcast and other industry participants had relied.[53] The Commission argues that, though it has always taken a deregulatory approach to the Internet, it consistently has made clear its intent to take action to ensure compliance with its Internet Policy Statement and to protect consumers and the marketplace from abusive or anticompetitive conduct.[54] Therefore, the Commission asserts that its decision in this case is not a

[46] *Id.*

[47] *Comcast Decision*, at para. 30.

[48] *Id.* at para. 31.

[49] *Id.* at 32.

[50] *See* Allied Broadcasting, Inc. v. FCC, 435 F.2d 68 (D.C. Cir. 1970).

[51] *Chenery II*, 332 U.S. at 203.

[52] Pfaff v. U.S. Dep't of Hous. & Urban Dev., 88 F.3d 739, 748 (9th Cir. 1996).

[53] *Comcast Decision* at para. 33-36 (quoting Comcast *Ex Parte* at 13).

[54] *See* In the Matter of Broadband Industry Practices, Notice, 22 FCC Rcd at 7894, 7896, para. 4 (2007) ("The Commission, under Title I of the Communications Act, has the ability to adopt and enforce the net neutrality principles it announced in its Internet Policy statement); In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand (continued...)

departure from prior policy and does not fall into the narrow exception articulated by the Ninth Circuit.[55] If the D.C. Circuit Court of Appeals agrees with Comcast, the FCC may be forced to create regulations in order to standardize network management practices.

Conclusion

Though the Supreme Court has intimated that the Commission has the authority to regulate broadband Internet services,[56] no court has had the opportunity to address the question presented by this case specifically. If the D.C. Circuit Court of Appeals upholds the agency's authority to regulate broadband network management by *ad hoc* adjudication, the Commission may proceed on a case-by-case basis without further action from Congress. If, however, the court overturns the agency's order against Comcast, Congress may face the question of whether to grant the Commission the authority to regulate broadband network management practices.

Recent Developments

On September 21, 2009, in a speech before the Brookings Institution, FCC Chairman Julius Genachowski announced his goals for the preservation of a free and open Internet by the FCC.[57] Chairman Genachowski proposed the initiation of a notice-and-comment rulemaking procedure to codify the four Network Management Principles into regulations. Furthermore, he proposed the addition of two more principles to be included in the rulemaking procedure. The fifth principle will be one of non-discrimination, preventing broadband providers from discriminating against lawful content or applications. The sixth principle would be one of transparency, requiring broadband providers to inform their customers about their network and traffic management policies. Chairman Genachowski estimated that a draft of the proposed rules would be circulated in the coming weeks.

If the policy statement is codified into regulations via notice-and-comment rulemaking, as the chairman has proposed, the question posed in the Comcast case involving whether the FCC may enforce the terms of the policy statement via adjudication will be resolved in the FCC's favor. The more fundamental question regarding whether the FCC has the authority to promulgate rules for the management of broadband networks in the first place would remain unanswered by the new rulemaking. Absent Congressional action granting the FCC clear authority to regulate in the area, it appears that the court in the Comcast case will address the issue.

(...continued)

Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era, 20 FCC Rcd 14853, 14907, para. 96 (2005) ("Should we see evidence that providers of telecommunications for Internet access or IP-enabled services are violating these principles, we will not hesitate to take action to address that conduct.").

[55] *Comcast Order* at para. 33-36.

[56] *Brand X Internet Services*, 545 U.S. at 977.

[57] Julius Genachowski, Chairman, Federal Comm. Comm'n, Address at the Brookings Institution, Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity (Sept. 21, 2009).

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