

# The FCC's Role in Regulating Network Neutrality: Protection of Online Innovation & Business

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*"Regulation' of the Internet is a Brave New Frontier"<sup>1</sup>*

## INTRODUCTION

The Smith family loads their dishes into their Whirlpool dishwasher every night. It does not matter which brand or material their dishes are made from, they all go into the dishwasher. In other words, the Whirlpool dishwasher does not discriminate. Currently, the Internet operates in a similar way. If Mr. Smith types a web address into his internet browser, his Internet Service Provider ("ISP") will connect him to that website at a high speed, even if the website is a competitor of the ISP.

What if Whirlpool made dishes and their dishwashers only accepted its own brand? Similarly, imagine if the websites that consumers were allowed to connect to depended on which ISP they had. For example, users with Verizon as their ISP would not be able to access competitors' websites (such as AT&T) at the same speed, thereby making harder-to-access websites less desirable to Internet users. This would result in Verizon's content gaining preferential treatment over that of AT&T's. This

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<sup>1</sup> Aaron K. Brauer-Rieke, *The FCC Tackles Net Neutrality: Agency Jurisdiction and the Comcast Order*, 24 BERKELEY TECH. L.J. 593, 614 (2009).

resulting discrimination is an important concern of the network neutrality debate.<sup>2</sup>

A fundamental goal of today's communications landscape is to maintain a free and non-discriminatory Internet.<sup>3</sup> Today, there exists more than 100 million websites<sup>4</sup> and the demand for increased network capacity is growing.<sup>5</sup> With an increased demand for network capacity, comes the tension between allowing ISPs to prioritize content in order to manage bandwidth levels and the desire to maintain a neutral Internet, one without prioritization. This tension is a crucial aspect of the network neutrality issue.

The concept of network neutrality can be difficult to define and understand. California Public Utilities Commissioner Rachelle Chong noted that there are "31 flavors of [n]et [n]eutrality."<sup>6</sup> Despite its complexity, the basic principle of network neutrality is that "all Internet content should be treated equally, and that ISPs should not be allowed to deliver Internet content at different speeds or with selective access to their users."<sup>7</sup> The purpose of a "neutral" Internet is to protect against degradation, prioritization and blockage of content, price discrimination, and the vertical integration of ISPs with content providers.<sup>8</sup>

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<sup>2</sup> The idea for this analogy came from Christopher E. Roberts, Comment, *Can I Still Google My Yahoo? Reframing the Net Neutrality Debate—Why Legislation Actually Means Deregulation*, 77 UMKC L. REV. 765, 766–67 (2009).

<sup>3</sup> See Julius Genachowski, Chairman, Brookings Inst., Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity (Sept. 21, 2009), available at <http://www.openinternet.gov/read-speech.html> [hereinafter Preserving a Free and Open Internet] ("[Chairman Genachowski is] convinced that there are few goals more essential in the communications landscape than preserving and maintaining an open and robust Internet.").

<sup>4</sup> See Marsha Walton, *Web Reaches New Milestone: 100 Million Sites*, CNN (Nov. 1, 2006, 7:32 PM), <http://edition.cnn.com/2006/TECH/internet/11/01/100millionwebsites/> (noting that these numbers reflect the data available as of 2006, and bloggers and small businesses are in part responsible for the high increase of websites). See also Preserving a Free and Open Internet, *supra* note 3 ("Internet traffic is roughly doubling every two years.").

<sup>5</sup> See FED. TRADE COMM'N, BROADBAND CONNECTIVITY COMPETITION POLICY 86 (2007), available at <http://www.ftc.gov/reports/broadband/v0700000report.pdf> (noting, as an example, that if YouTube becomes a high-definition video player then it, by itself, "would double the capacity needs of the entire Internet").

<sup>6</sup> Rachelle B. Chong, *The 31 Flavors of Net Neutrality: A Policymaker's View*, 12 INTELL. PROP. L. BULL. 147, 147 (2008) ("Net Neutrality is like the Baskin-Robbins ice cream store. There are several flavors that appeal to various tastes. Whatever you want, we can serve it up in a Net Neutrality cone.").

<sup>7</sup> George S. Benjamin, *Internet Content Discrimination: The Need for Specific Net Neutrality Legislation by Congress or the FCC in Light of the Recent Anti-Net Neutrality Actions by Comcast Corporation*, 39 SW. L. REV. 155, 155–56 (2009).

<sup>8</sup> See Cody Vitello, Comment, *Network Neutrality Generates a Contentious Debate Among Experts: Should Consumers be Worried?*, 22 LOY. CONSUMER L. REV. 513, 525

At the core of the network neutrality debate are the network-management tools and data prioritization methods ISPs use to control traffic on their infrastructure.<sup>9</sup> Under the principles of network neutrality, ISPs would be prohibited from creating a preferred or tier-leveled system<sup>10</sup> controlling the order and speed that information passes over the Internet.<sup>11</sup> Tier-leveled systems would pose a number of problems for e-commerce.<sup>12</sup> ISPs which are allowed to discriminate among different types of content and information could provide some categories of Internet traffic with high priority delivery, while other traffic would be relegated to the “slow lane” on the Internet.<sup>13</sup>

Network neutrality is the status quo.<sup>14</sup> The Internet currently operates under a system “where users pay a fee to an [ISP] and have nearly unrestricted access to all online content.”<sup>15</sup> The fear is that with the obliteration of network neutrality and

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(2010) (noting that if ISPs were to vertically integrate—where a company merges or expands operations into its supply markets—they would then have the incentive to prioritize their own data at the expense of others, which could result in monopoly prices for consumers). See also Preserving a Free and Open Internet, *supra* note 3 (explaining that the FCC also expresses concern relating to ISP’s bottom-line interests because those interests “may diverge from the broad interests of consumers in competition and choice”).

<sup>9</sup> Vitello, *supra* note 8, at 514.

<sup>10</sup> See *Two-tiered Internet*, SEARCHNETWORKING.COM (last updated July 2006), <http://searchnetworking.techtarget.com/definition/two-tiered-Internet> (“Two-tiered Internet refers to proposed changes in Internet architecture that would give priority to the traffic of those who have paid for premium service.”).

<sup>11</sup> See Daniel Helling, *Net Neutrality and Preserving Freedoms of the Internet*, 6 L. & SOC’Y J. U. CAL. SANTA BARBARA 51, 53–54 (2007). See also Brauer-Rieke, *supra* note 1, at 598–99 (noting that the Internet is designed to prioritize traffic when necessary, and that some prioritization services are already available. Therefore, the network neutrality debate is one of *degree*, not absolutes. The further prioritization sought by ISPs is a relatively new kind of interference with Internet traffic which is why it is the subject of much controversy.).

<sup>12</sup> Large companies “will be able to out-buy small companies, rendering faster connections to their websites” and “small companies that cannot pay for Internet bandwidth will be forced to operate at a loss, with compromised customer satisfaction, or be required to shut down.” Helling, *supra* note 11, at 54.

<sup>13</sup> Hercules K., *How Internet Neutrality Affects Online Innovation and Business*, BUSINESS 2.0 PRESS (Sept. 16, 2010, 8:58 AM), <http://business2press.com/2010/09/16/how-internet-neutrality-affects-online-innovation-and-business/>.

<sup>14</sup> See Julius Genachowski, *The Third Way: A Narrowly Tailored Broadband Framework*, BROADBAND.GOV (May 6, 2010), <http://www.broadband.gov/the-third-way-narrowly-tailored-broadband-framework-chairman-julius-genachowski.html> [hereinafter *Third Way*].

<sup>15</sup> Hercules K., *supra* note 13. See also, Roberts, *supra* note 2, at 768–69 (posing a hypothetical in which a user accesses the Internet through SBC Yahoo!, and where “SBC Yahoo! makes its competitors’ websites load slowly so that SBC Yahoo!’s users are more inclined to use its services.” The Internet user wants to use Google to run a search, however, upon entering the web address into the toolbar the user experiences longer than normal wait times. As a result, he goes to Yahoo! to run a search, thereby depriving the Internet user of his choice in Internet search engines. Without net neutrality protections in place (and if Google does not pay SBC Yahoo! a fee) there is discrimination against Google’s content.).

the ability of ISPs to implement tiered services, the Internet will resemble cable television, where users must pay additionally to access premium content.<sup>16</sup> Although the Internet is currently neutral, there exists no formal legislation or authoritative government policy to ensure that it remains so.<sup>17</sup> Recent proposals by powerful ISPs and content providers working together to obliterate a neutral Internet,<sup>18</sup> and a recent decision in the United States Court of Appeals, D.C. Circuit,<sup>19</sup> prove that proactive, rather than retroactive, legislation is a necessity to protect the Internet as we currently know it.

Maintaining the Internet's current open structure is essential for businesses that operate solely or partially online.<sup>20</sup> The Internet is the perfect medium for businesses because, as an open platform, it fosters innovation and investment in new business opportunities.<sup>21</sup> Currently, online innovators are able to reach Internet users simply with an Internet connection of their own, providing for relatively low market entry barriers.<sup>22</sup> Preserving the openness of the Internet means ensuring that all content offered over the Internet continues to enjoy a level playing field. A lack of network neutrality could spell trouble for startup Internet businesses and related innovation.<sup>23</sup>

ISPs currently seek to sell prioritized access of bandwidth use, which would affect the functionality of the Internet.<sup>24</sup> These paid plans would reduce competition and free trade, limit freedom of speech, and could result in diminished use of the

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<sup>16</sup> See FTC STAFF REPORT, *supra* note 5, at 52. Imagine an Internet where websites such as Facebook and YouTube are deemed "premium content," resulting in additional fees for Internet users who wish to access these sites. *Id.* See also Chong, *supra* note 6, at 151 ("[W]ithout Net Neutrality, network providers may charge a fee for specific content that comes from certain sources.").

<sup>17</sup> See Benjamin, *supra* note 7, at 157.

<sup>18</sup> See *infra* "Why Legislation is Needed," Part III.

<sup>19</sup> See *infra* "History and Background of the FCC's Regulatory Power," Part I(B)(ii).

<sup>20</sup> See Benjamin, *supra* note 7, at 174.

<sup>21</sup> See Kevin Werbach, *Why Network Neutrality is Good for Business*, HARV. BUS. REV. (Aug. 18, 2010, 9:08 AM), [http://blogs.hbr.org/cs/2010/08/why\\_network\\_neutrality\\_is\\_good.html](http://blogs.hbr.org/cs/2010/08/why_network_neutrality_is_good.html).

<sup>22</sup> See Hercules K., *supra* note 13.

<sup>23</sup> See Benjamin, *supra* note 7, at 160 ("For startup Internet businesses, 'the Internet could become a place where wealthy companies get faster and easier access to the Web than less affluent ones.'" (quoting Vishesh Kumar & Christopher Rhoads, *Google Wants its Own Fast Track on the Web*, WALL ST. J., Dec. 15, 2008, at A1.)).

<sup>24</sup> See ANGELE A. GILROY, CONG. RESEARCH SERV., RS 22444, NET NEUTRALITY: BACKGROUND AND ISSUES 3 (2009), *available at* [http://assets.opencrs.com/rpts/RS22444\\_20090319.pdf](http://assets.opencrs.com/rpts/RS22444_20090319.pdf). If allowed to sell prioritization, there is a risk that ISPs will essentially become "gatekeepers and use their market power to the disadvantage of Internet users and competing content and application providers." *Id.*

Internet.<sup>25</sup> Small companies would suffer greatly from prioritized bandwidth use.<sup>26</sup> Large companies that can afford to pay more for faster data transmission could endanger smaller companies that otherwise would constitute competition.<sup>27</sup> Customers would begin to frequent large online businesses that could afford to purchase prioritized access, and would keep away from smaller companies with slow servers and the associated hassles of slow connection speed.<sup>28</sup>

These price-tier arrangements would negatively impact online business through consumers' obstructed online access as well.<sup>29</sup> If ISPs invoke price tiering arrangements for bandwidth use this will create fast lanes for wealthy consumers and slow lanes for those who cannot afford superior access.<sup>30</sup> As a result, the common consumer with limited bandwidth will be prevented from accessing and utilizing bandwidth-intensive content, which will in turn negatively impact the companies that supply said content. This would affect online companies' incentives to innovate.<sup>31</sup>

The Federal Communications Commission ("FCC") is charged with regulating communications in the United States.<sup>32</sup> The FCC's regulatory jurisdiction over the Internet is primarily derived from the Communications Act of 1934 which gives the FCC the power to regulate interstate and foreign commerce in communication by wire and radio.<sup>33</sup> The FCC has classified Internet companies as "information services."<sup>34</sup> Consequent to this classification, ISPs began implementing tiered pricing models to require heavy bandwidth users to pay more for their

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<sup>25</sup> See generally Helling, *supra* note 11.

<sup>26</sup> *Id.* at 56.

<sup>27</sup> Benjamin, *supra* note 7, at 161 ("Not only will users have potentially less content to choose from due to the effect of competition, but the 'Web sites by companies not able to strike fast lane deals will respond more slowly than those companies able to pay,' making the whole experience of web surfing less free and more restrictive." (quoting Kumar & Rhoads, *supra* note 23, at A1)).

<sup>28</sup> Helling, *supra* note 11, at 54 ("[S]mall companies that cannot pay for Internet bandwidth will be forced to operate at a loss, with compromised customer satisfaction, or be required to shut down.").

<sup>29</sup> *Id.* at 56.

<sup>30</sup> Chong, *supra* note 6, at 154.

<sup>31</sup> Vitello, *supra* note 8, at 526.

<sup>32</sup> See *About the Federal Communications Commission*, FED. COMM. COMMISSION (last updated Mar. 17, 2011), <http://www.fcc.gov/aboutus.html>.

<sup>33</sup> See 47 U.S.C. § 151 (2000).

<sup>34</sup> Chong, *supra* note 6, at 149. See also Vitello, *supra* note 8, at 524 ("Network neutrality advocates first began to aggressively advance their call for national neutral-Internet legislation when, in February and March of 2002, the FCC classified Digital Subscriber Lines ("DSL") and cable modem systems as 'information systems.'" (quoting Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO. L.J. 1847, 1856 (2006)).

network connection, and limited speed to those who used too much bandwidth.<sup>35</sup>

“Currently, the FCC’s Internet Policy Statement (“Statement”) is the most direct authority that exists to regulate [network neutrality].”<sup>36</sup> “[P]olicy statements are among the most informal of an agency’s official regulatory tools.”<sup>37</sup> The Statement was released in September 2005,<sup>38</sup> and it recognized the FCC’s authority over the national Internet policy established in section 230 of the Communications Act.<sup>39</sup> In the Statement, the FCC recognized its “duty to preserve and promote the vibrant and open character of the Internet as the telecommunications marketplace enters the broadband age.”<sup>40</sup> But in light of the recent decision in *Comcast v. FCC*, 600 F.3d 642 (2010),<sup>41</sup> it is clear that a mere statement of policy is not enough.<sup>42</sup> The risks associated with the discriminatory practices posed by network providers and ISPs are not being adequately addressed by the Statement due to its various shortcomings,<sup>43</sup> such as the lack of legal authority associated with the Statement<sup>44</sup> and the generality of its terms.<sup>45</sup>

Part I provides insight into the FCC’s role in regulating the Internet by detailing its initial creation and authority under the

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<sup>35</sup> See Yoo, *supra* note 34, at 1856.

<sup>36</sup> Benjamin, *supra* note 7, at 170.

<sup>37</sup> Brauer-Rieke, *supra* note 1, at 601 (emphasis added) (“Agency-issued policy statements typically serve to inform regulated entities and the public how an agency will carry out its administrative mandate or proceed under certain factual circumstances. Policy statements generally do not carry procedural requirements for their promulgation and are not legally binding. Agencies may not decide adjudicatory procedures based on a policy statement, but a policy statement can influence an agency decision within the scope of that agency’s discretion.”).

<sup>38</sup> See FED. COMM’NS COMM’N, 20 F.C.C.R. 14986, IN THE MATTERS OF APPROPRIATE FRAMEWORK FOR BROADBAND ACCESS TO THE INTERNET OVER WIRELINE FACILITIES (2005) [hereinafter INTERNET POLICY STATEMENT].

<sup>39</sup> Section 230(b) includes general Internet policies including the promotion of continued development of the Internet and maximizing user control over information received. See 47 U.S.C. § 230(b) (2006).

<sup>40</sup> INTERNET POLICY STATEMENT, *supra* note 38, at 14988.

<sup>41</sup> See *infra* “Why Legislation is Needed,” Part III(A).

<sup>42</sup> See Vuze, Inc., WC Docket No. 07-52, at 4 (Fed. Comm’ns Comm’n Nov. 14, 2007), available at <http://www.openinternetcoalition.com/files/Vuze%20Petition%2011-14-07%20FINAL.pdf>.

<sup>43</sup> The FCC’s Policy Statement lacks specifics regarding penalties that will be imposed on violators, as well as any remedies available to victims of anti-net neutrality actions. The Policy also fails to mention that ISPs cannot discriminate against content. See INTERNET POLICY STATEMENT, *supra* note 38, at 14988.

<sup>44</sup> *Id.* The Policy Statement is not a rule of law that has the force of inherent legal authority, rather it is simply a policy. See *id.* at 14988 n.15. (“Accordingly, we are not adopting rules in this policy statement. The principles we adopt are subject to reasonable network management.”).

<sup>45</sup> *Id.* at 14988.

Communications Act of 1934. It discusses how the FCC has tried to regulate ISPs under its ancillary jurisdiction under Title I of the Act, how the decision in *Comcast* has threatened this jurisdiction, and the FCC's response to the *Comcast* decision through its "third way" approach. Part II explores the importance of allowing the FCC to regulate network neutrality by looking at the impact on the economic aspects and free speech of online business in the current open Internet marketplace. It also discusses the potential adverse consequences to these businesses should the FCC not be given the power to regulate ISPs. Part III examines (1) the importance of legislation ensuring network neutrality by looking at what ISPs are planning to do, and will be able to do, should legislation not be implemented, (2) multiple (failed) attempts by Congress to implement network neutrality legislation, and (3) what *should* be implemented to protect the Internet. Part IV concludes by reiterating the current inadequate regulatory power of the FCC and the resulting importance of implementing legislation to protect network neutrality.

## I. HISTORY AND BACKGROUND OF THE FCC'S REGULATORY POWER

### A. Communications Act of 1934

The Federal Communications Commission was established by the Communications Act of 1934<sup>46</sup> ("the Act") because a "body with expertise" was needed for the United States' complex, fast-changing communications industry; specifically to resolve any contentious issues likely to arise.<sup>47</sup> Further, the Act empowers the FCC with the ability to regulate "interstate and foreign commerce in communication"<sup>48</sup> giving it the authority to "perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions."<sup>49</sup> Opponents of network neutrality regulation by the FCC argue that the FCC's power under the Act should be sufficient to regulate neutrality principals on the Internet without additional legislation;<sup>50</sup> however, as is portrayed in cases such as *Comcast vs. FCC*,<sup>51</sup> the FCC's power is simply not expansive enough.

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<sup>46</sup> See 47 U.S.C. § 151 (2006).

<sup>47</sup> Werbach, *supra* note 21.

<sup>48</sup> 47 U.S.C. § 151.

<sup>49</sup> 47 U.S.C. § 154(i).

<sup>50</sup> Benjamin, *supra* note 7, at 161.

<sup>51</sup> See *infra* "Why Legislation is Needed," Part III.

## B. FCC Ancillary Jurisdiction

### i. Title I Ancillary Jurisdiction

Currently, “[t]here are no clear standards to guide the FCC in regulating the rapidly changing” Internet landscape.<sup>52</sup> The FCC has typically relied on its “ancillary jurisdiction” under Title I of the Act to regulate the Internet.<sup>53</sup> This “ancillary jurisdiction” refers to Title I’s “necessary and proper” clause: Section 4(i) of the Communications Act of 1934 authorizes the FCC to “perform *any and all acts*, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”<sup>54</sup> The FCC may exercise this “ancillary” authority *only* if it demonstrates that its action is “reasonably ancillary to the effective performance of the Commission’s various responsibilities.”<sup>55</sup> The Supreme Court, in *National Cable & Telecommunication Ass’n v. Brand X Services*, 545 U.S. 967 (2005), held that Internet providers are classified as “information service providers, which the FCC has authority to regulate under Title I.”<sup>56</sup> However, the FCC “cannot rely on *Brand X* as an affirmation of Title I authority, because the Court in that case simply deferred to the Commission’s regulatory classification of cable modem services.”<sup>57</sup> In other words, the distinction between telecommunication services and information services was vague, and the Court gave the FCC the authority to make the decision about which category cable companies fell into.<sup>58</sup>

Under its Title I ancillary jurisdiction, the FCC seeks to ensure that “broadband networks are widely deployed, open, affordable, and accessible to all consumers.”<sup>59</sup> ISPs (who provide “customers with connection to the Internet”)<sup>60</sup> do not constitute carriers subject to regulation in the Act.<sup>61</sup> This is why the FCC is limited in available avenues with which it can regulate ISPs, and

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<sup>52</sup> Brauer-Rieke, *supra* note 1, at 614.

<sup>53</sup> *Id.* at 602.

<sup>54</sup> 47 U.S.C. § 154(i) (emphasis added).

<sup>55</sup> Am. Library Ass’n v. FCC, 406 F.3d 689, 693 (D.C. Cir. 2005) (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968)).

<sup>56</sup> Benjamin, *supra* note 7, at 163 (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1001 (2005)).

<sup>57</sup> Susan Crawford, *Comcast v. FCC—“Ancillary Jurisdiction” Has to be Ancillary to Something*, CIRCLEID (Apr. 6, 2010, 8:49 AM), [http://www.circleid.com/posts/20100406\\_fcc\\_comcast\\_ancillary\\_jurisdiction\\_ancillary\\_to\\_something/](http://www.circleid.com/posts/20100406_fcc_comcast_ancillary_jurisdiction_ancillary_to_something/).

<sup>58</sup> *Id.*

<sup>59</sup> Vitello, *supra* note 8, at 521.

<sup>60</sup> ISP, THE FREE DICTIONARY (last visited Nov. 8, 2010), <http://www.thefreedictionary.com/isp>.

<sup>61</sup> INTERNET POLICY STATEMENT, *supra* note 38, at 14987–88.



why Title I ancillary jurisdiction seems to be the only means, absent legislation, available for ISP regulation.<sup>62</sup> Acting under ancillary jurisdiction, the FCC established four principles in a Policy Statement “[t]o encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet.”<sup>63</sup> These principles encompass the right of consumers to (1) access lawful Internet content, (2) run applications and services of their choice, (3) “connect their choice of legal devices that do not harm the network,” and (4) to compete among network, application, service and content providers.<sup>64</sup> Noticeably absent from the Policy Statement is any mention of ISPs and related potential discriminatory practices that could harm network neutrality, which is why the FCC recently added a “fifth principle,” which states that broadband providers cannot discriminate against particular Internet content or applications.<sup>65</sup> However, as is made so patently clear in *Comcast*, the FCC cannot rely on Title I ancillary jurisdiction to adequately regulate network neutrality,<sup>66</sup> which is why the Policy Statement, even with the addition of the “fifth principle,” is insufficient.

ii. *Comcast v. FCC*

The Court of Appeals, D.C. Circuit in *Comcast v. FCC*<sup>67</sup> held that the FCC overreached its authority in trying to prohibit Comcast from slowing peer-to-peer traffic.<sup>68</sup> The holding in this case is another reason why formal network neutrality rules are vital if the FCC is to exercise regulatory power over ISPs.<sup>69</sup>

“In 2007, several subscribers to Comcast’s high-speed Internet service discovered that the company was interfering

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 14988.

<sup>64</sup> *Id.*

<sup>65</sup> Preserving a Free and Open Internet, *supra* note 3. Chairman Genachowski specifically mentions that ISPs cannot “block or degrade lawful traffic over their networks, or pick winners by favoring some content or applications over others in the connection to subscribers’ homes. Nor can they disfavor an Internet service just because it competes with a similar service offered by that broadband provider. The Internet must continue to allow users to decide what content and applications succeed.” *Id.* He also notes that “open Internet principles apply only to lawful content, services, and applications” and that advanced services should *supplement*, not supplant open access, to ensure enough bandwidth for all users. *Id.*

<sup>66</sup> Vitello, *supra* note 8, at 527 (stating that this is a primary argument proponents make when arguing for federal legislation to maintain the neutrality of the Internet).

<sup>67</sup> *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

<sup>68</sup> *Id.* at 661.

<sup>69</sup> See Grant Gross, *Survey Says US Public Doesn’t Support Internet Regulation*, PCWORLD (Sept. 23, 2010, 3:50 PM), [http://www.pcworld.com/businesscenter/article/206101/survey\\_says\\_us\\_public\\_doesnt\\_support\\_internet\\_regulation.html](http://www.pcworld.com/businesscenter/article/206101/survey_says_us_public_doesnt_support_internet_regulation.html).

with their use of peer-to-peer networking applications.”<sup>70</sup> A complaint was filed by two non-profit organizations, Free Press and Public Knowledge, accusing Comcast of discrimination against subscribers who used peer-to-peer applications.<sup>71</sup> The complaints alleged that Comcast violated the FCC’s Internet Policy Statement.<sup>72</sup> As a result, the FCC issued an order in which it found that Comcast’s selective interference with Internet traffic was both discriminatory and arbitrary, did not facilitate an open Internet, and was not an example of “reasonable network management.”<sup>73</sup> The FCC also noted that Comcast had impeded consumers’ content access in a notable way and that its method of bandwidth<sup>74</sup> management went against federal policy.<sup>75</sup> Comcast initially complied with the FCC order, but then challenged the Commission’s jurisdictional right to regulate its network management practices in *Comcast*.<sup>76</sup>

The court held that the FCC did not have the authority to regulate an ISP’s network management practices because the Commission’s attempted regulation was not reasonably ancillary to the effective performance of its statutorily mandated responsibilities.<sup>77</sup> The court rejected the FCC’s arguments as to why it has the authority to enforce Internet neutrality principles, stating that even though Congress gave the FCC broad jurisdiction for the purpose of keeping “pace with rapidly evolving communications technologies,”<sup>78</sup> the allowance of a wide latitude is “not the equivalent of untrammelled freedom to

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<sup>70</sup> *Comcast*, 600 F.3d at 644. See also *id.* (“Peer-to-peer programs allow users to share large files directly with one another . . . . Such programs also consume significant amounts of bandwidth.”).

<sup>71</sup> *Id.* “Comcast was jamming peer-to-peer traffic in a way that made it inconvenient—and extremely slow—for users.” Complaint at 7, Free Press and Public Knowledge v. Comcast Corp. (Nov. 1, 2007), available at [http://www.publicknowledge.org/pdf/fp\\_pk\\_comcast\\_complaint.pdf](http://www.publicknowledge.org/pdf/fp_pk_comcast_complaint.pdf) [hereinafter Formal Complaint]. Comcast’s tactics were also kept deliberately secret from users. *Id.* at 9–11.

<sup>72</sup> *Comcast*, 600 F.3d at 644.

<sup>73</sup> Formal Complaint, *supra* note 71, at 25.

<sup>74</sup> Bandwidth is the amount of data users can send “through a network or modem connection.” *Bandwidth Definition*, TECHTERMS.COM (last visited Dec. 28, 2010), <http://www.techterms.com/definition/bandwidth>.

<sup>75</sup> *Comcast*, 600 F.3d at 645.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 660–61. The two-part test the court used to determine the FCC’s ancillary jurisdiction comes from the case *American Library Ass’n v. FCC*. See *Am. Library Ass’n v. FCC*, 406 F.3d 689, 691–92 (D.C. Cir. 2005) (“The Commission . . . may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission’s general jurisdiction grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”). Whether the FCC’s action satisfied the second prong was the central issue of *Comcast v. FCC*. See *Comcast*, 600 F.3d at 647–48.

<sup>78</sup> *Comcast*, 600 F.3d at 660.

regulate activities over which the statute fails to confer Commission authority.”<sup>79</sup> This direct denial of jurisdictional reach to the FCC over Comcast is specifically why direct legal authority guaranteeing a neutral Internet is essential.<sup>80</sup> Opponents to network neutrality legislation have maintained “any anti-consumer deviation since the Internet’s inception has been swiftly dealt with and remedied by existing regulators.”<sup>81</sup> The decision in *Comcast* makes it clear that ISPs are able to engage in discriminatory practices to which the FCC is without jurisdiction to regulate.<sup>82</sup> The *Comcast* decision also sharply reduces the FCC’s ability to protect consumers and promote competition and creates serious uncertainty about the FCC’s ability to perform basic oversight functions.<sup>83</sup>

### iii. FCC’s “Third Way” Jurisdiction

Following the decision in *Comcast v. FCC*, FCC Chairman Julius Genachowski unveiled the “third way” proposal under which the FCC would seek more power to police ISPs and enforce network neutrality rules.<sup>84</sup> Chairman Genachowski recognized the serious problem *Comcast* created, and hoped to solve it with his “third way” plan. The plan would give the Commission the power to implement important broadband policies that would protect consumers and promote competition by ensuring transparency in broadband access services and preserving the free and open Internet.<sup>85</sup> The “third way” proposal supports the FCC’s goal in restoring the “status quo” that existed prior to the

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<sup>79</sup> *Id.* (citing to Nat’l Ass’n of Regulatory Util. Comm’rs v. Fed. Comm’ns Comm’n., 533 F.2d 601 (1976)).

<sup>80</sup> See Werbach, *supra* note 21 (explaining that the recent decision in *Comcast v. FCC* “called into question the FCC’s legal authority over broadband access, opening the door to many more years of lawsuits and Congressional lobbying. Such prolonged uncertainty benefits no one”).

<sup>81</sup> Vitello, *supra* note 8, at 539.

<sup>82</sup> See *Third Way*, *supra* note 14.

<sup>83</sup> *Id.*

<sup>84</sup> See Sara Jerome, *First Look: FCC Moderation Just an ‘Illusion,’ Says Former Commish*, THE HILL (Sept. 13, 2010, 8:07 AM), <http://thehill.com/blogs/hilicon-valley/technology/118295-first-look-former-fcc-commish-calls-agencys-moderation-claims-an-illusion>. The Third Way approach specifically states that the Commission would:

[r]ecognize the transmission component of broadband access service—and only this component—as a telecommunications service; [a]pply only a handful of provisions of Title II . . . that, prior to the *Comcast* decision, were widely believed to be within the Commission’s purview for broadband; [s]imultaneously renounce—that is, forbear from—application of the many sections of the Communications Act that are unnecessary and inappropriate for broadband access service; and [p]ut in place up-front forbearance and meaningful boundaries to guard against regulatory overreach.

*Third Way*, *supra* note 14.

<sup>85</sup> *Third Way*, *supra* note 14.

court's decision in *Comcast*, that restricted the FCC's role in regulating broadband Internet service.<sup>86</sup> Chairman Genachowki maintains that the "third way" will remain in line with "the bipartisan consensus . . . [and] that the FCC should adopt a restrained approach to broadband communications, one carefully balanced to unleash investment and innovation while also protecting and empowering consumers."<sup>87</sup>

Under the "third way," the FCC would be able to regulate broadband services by placing them under telecommunication service regulation.<sup>88</sup> Recognizing the serious drawbacks a full suite of telecommunication obligations would pose on broadband communications, Chairman Genachowski promised that the FCC would not subject broadband services to the complete set of rules that govern telephone services upon reclassification; rather, the FCC would implement a "forbearance" process in order for FCC regulation to remain moderate.<sup>89</sup> Forbearance is necessary because many sections of the Communications Act are unnecessary and inappropriate for broadband access service and would impede against the promotion of goals long associated with the Internet, such as protecting consumers and fair competition.<sup>90</sup>

The "third way" approach is a step in the right direction. Its most important virtues are that it will establish necessary boundaries and constraints to regulatory overreach and restore the status quo that existed before the *Comcast* decision.<sup>91</sup> But it is just that—a step. Without actual implementation by Congress of legislation embodying these goals, the FCC's "third way" leads to a dead end.<sup>92</sup>

## II. ALLOWING THE FCC TO IMPOSE REGULATIONS ON ISPS IS VITAL FOR ONLINE BUSINESS

The Internet is an important resource for business. Any individual can use the Internet as a platform for their product,

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> See Charles Cooper, *The FCC's "Third Way," Will it Work?*, CBS NEWS (May 6, 2010, 1:13 PM), [http://www.cbsnews.com/8301-501465\\_162-20004332-501465.html](http://www.cbsnews.com/8301-501465_162-20004332-501465.html). See also Hercules K., *supra* note 13 (stating that following the *Comcast* decision the FCC issued a notice of inquiry asking if the FCC should reclassify broadband as a telecommunications service, over which the FCC has definite jurisdiction).

<sup>89</sup> See Cooper, *supra* note 88.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* Namely, that the FCC would not be given greater obligations than what was in place prior to the decision in *Comcast*. *Id.*

<sup>92</sup> The "third way" approach is another example of *policy* being implemented by the FCC, which is not legally enforceable under the decision in *Comcast*.

content, thoughts and opinions. Without regulation, ISPs could impose restrictions and additional costs on users that would burden freedom of speech and small business innovation, resulting in economic loss and the potential violation of Constitutional rights.

#### A. Free Speech

Minnesota Senator Al Franken pronounced net neutrality as “the first amendment issue of our time.”<sup>93</sup> The important debate surrounds whose First Amendment rights will prevail—those of ISPs, or those of content providers and individual users.<sup>94</sup> The Internet is a “blank canvas” that allows “anyone to contribute and to innovate without permission,”<sup>95</sup> and is viewed as a democratic medium that fosters innovation and free speech.<sup>96</sup> The Supreme Court of the United States, in *Reno v. ACLU*,<sup>97</sup> overturned the Communications Decency Act;<sup>98</sup> in doing so, the Court gave Internet users the highest level of free speech protections, recognizing the benefits of openness of expression, competition, and innovation.<sup>99</sup>

Proponents of network neutrality are concerned about effects on innovation by content providers as well as a diminution of free expression.<sup>100</sup> The free speech argument relates to the power that ISPs would hold if they were given the ability to filter their traffic. ISPs may be in the position to restrict content they do not agree with.<sup>101</sup> This data discrimination would restrict their

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<sup>93</sup> Jamilah King, *Al Franken: Net Neutrality is the Free Speech Issue of our Time*, COLORLINES (Aug. 20, 2010, 3:11 PM), [http://colorlines.com/archives/2010/08/600\\_convene\\_for\\_broadband\\_town\\_hall.html](http://colorlines.com/archives/2010/08/600_convene_for_broadband_town_hall.html).

<sup>94</sup> Hercules K., *supra* note 13 (“When this question is finally settled, we could see innovation and online startups severely stifled.”).

<sup>95</sup> Preserving a Free and Open Internet, *supra* note 3.

<sup>96</sup> See *Frequently Asked Questions*, SAVE THE INTERNET (last visited Dec. 28, 2010), <http://www.savetheinternet.com/frequently-asked-questions> (“Net Neutrality is the reason why the Internet has driven economic innovation, democratic participation, and free speech online.”).

<sup>97</sup> *Reno v. ACLU*, 521 U.S. 844 (1997).

<sup>98</sup> The Communications Decency Act was an attempt to protect minors from explicit material on the Internet by criminalizing the knowing transmission of “obscene or indecent” messages to any recipient under 18. *Id.* at 859. All nine Justices of the Court voted to strike down anti-indecency provisions of the Communications Decency Act, finding they violated the freedom of speech provisions of the First Amendment. *Id.* at 874.

<sup>99</sup> See Hercules K., *supra* note 13. A letter on behalf of the Writer’s Guild of America was sent to the FCC, urging the agency to move forward with network neutrality rules. Gross, *supra* note 69. The open structure of the Internet gives musicians and other creators and innovators an equal technological playing field with some of the biggest companies. *Id.* The result is a blossoming marketplace that compensates creators and rewards fans with an array of access to large amounts of music. *Id.*

<sup>100</sup> Vitello, *supra* note 8, at 525.

<sup>101</sup> BROADBAND CONNECTIVITY COMPETITION POLICY, *supra* note 5, at 59–60.

subscribers from rival content instead of offering unfettered access to the Internet.<sup>102</sup> The Federal Trade Commission notes that “[t]he end result might resemble an Internet analogous to contemporary cable-television service where you are given access to a standard set of channels, but must pay to receive premium content.”<sup>103</sup> Network providers could interfere with the connection between buyer and seller, or restrict their subscribers to content in which they have a financial interest.<sup>104</sup> Analogizing ISPs to telephone companies, one could argue that because telephone companies cannot tell consumers who they can call, ISPs should not dictate what people can do online.<sup>105</sup>

### B. Economic Effects on Online Business

A neutral, open Internet benefits both consumers and businesses.<sup>106</sup> FCC Chairman Genachowski stated: “The principles that will protect the open Internet are an essential step to maximize investment and innovation in the network and on the edge of it—by establishing rules of the road that incentivize competition, empower entrepreneurs, and grow the economic pie to the benefit of all.”<sup>107</sup> The fact that the Internet is an open system<sup>108</sup> is why it is such a powerful engine for creativity, innovation, and economic growth.<sup>109</sup> Chairman Genachowski notes: “The Internet has unleashed the creative genius of countless entrepreneurs and has enabled the creation of jobs—and the launch of small businesses and the expansion of large ones—all across America.”<sup>110</sup> The potential for jobs and opportunity are everywhere broadband exists.<sup>111</sup>

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<sup>102</sup> *Id.*

<sup>103</sup> Vitello, *supra* note 8, at 525.

<sup>104</sup> INTERNET POLICY STATEMENT, *supra* note 38, at 15. *See also* Vishesh Kumar & Christopher Rhoads, *Google Wants its Own Fast Track on the Web*, WALL ST. J., Dec. 15, 2008, at A1 (“AT&T . . . recently launched its own online video service, called VideoCrawler, to compete with YouTube and others. One way AT&T can win that competition is to give their own video service preferential treatment on their network.”).

<sup>105</sup> Letter from Vinton Cerf, Chief Internet Evangelist, Google, Inc., to Joe Barton, Chairman, Comm. On Energy & Commerce, U.S. House of Representatives, and John D. Dingell, Ranking Member, Comm. On Energy & Commerce, U.S. House of Representatives (Nov. 8, 2005), *available at* <http://googleblog.blogspot.com/2005/11/vint-cerf-speaks-out-on-net-neutrality.html>.

<sup>106</sup> Preserving a Free and Open Internet, *supra* note 3.

<sup>107</sup> *Id.*

<sup>108</sup> Open systems are computer systems that include specific installations that are configured to allow unrestricted access by people and other computers. *Open system (computing)*, WIKIPEDIA (last visited Dec. 28, 2010), [http://en.wikipedia.org/wiki/Open\\_System\\_\(computing\)](http://en.wikipedia.org/wiki/Open_System_(computing)).

<sup>109</sup> Preserving a Free and Open Internet, *supra* note 3.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* There are countless examples of Internet-related success stories. One example is the story of Allie Brosch, creator of the humorous blog “Hyperbole and a Half,”

The fewer obstacles that exist for innovators online, the more economic opportunities are available.<sup>112</sup> If ISPs are allowed to redirect or block certain kinds of content, they will impinge upon the democratic nature of the Internet.<sup>113</sup> As a result, the ability of consumers to access and share information of their choosing may be diminished.<sup>114</sup> Take for example, a startup content distributor online company similar to YouTube or Twitter. This startup company (“StartUp”) seeks to compete with the aforementioned giants, but cannot adequately do so without equal access to bandwidth.<sup>115</sup> For content providers such as StartUp that utilize large amounts of bandwidth, the lack of an open channel may sufficiently degrade the quality of the content.<sup>116</sup> In turn, this can affect its ability to adequately compete, as customers are less likely to access content that is subject to periodic pauses or other interruptions.<sup>117</sup> The tiered system offered by the ISPs could also result in ISPs favoring companies they own<sup>118</sup> or those with which they select to do

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created while she was studying for a physics final. As of April 2010, she makes a living operating the site through ads and related merchandise. See *FAQ*, HYPERBOLE AND A HALF (last visited Dec. 28, 2010), [http://hyperboleandahalf.blogspot.com/p/faq\\_10.html](http://hyperboleandahalf.blogspot.com/p/faq_10.html).

<sup>112</sup> Preserving a Free and Open Internet, *supra* note 3.

<sup>113</sup> Susan Crawford, *FAQ on Net Neutrality*, SUSAN CRAWFORD BLOG (May 31, 2006), [http://scrawford.blogware.com/blog\\_archives/2006/5/31/1998151.html](http://scrawford.blogware.com/blog_archives/2006/5/31/1998151.html) (“Network providers will have every incentive to favor their own services and make exclusive deals.”).

<sup>114</sup> Brauer-Rieke, *supra* note 1, at 596. ISPs selling a higher priority service to users can be analogized to someone purchasing a spot at the front of the line that simply pushes everyone else further back. See *Net Neutrality, “Paid Prioritization,” and “Network Management”—Part I*, ETI VIEWS AND NEWS (Sept. 2010), <http://www.econtech.com/newsletter/september2010/september2010a2.php>.

<sup>115</sup> See Yoo, *supra* note 35, at 1881 (suggesting tiered access will have an effect directly on businesses by prohibiting bandwidth-intensive startup companies from gaining access to potential customers due to their inability to purchase increased bandwidth).

<sup>116</sup> See ETI VIEWS AND NEWS, *supra* note 114.

<sup>117</sup> *Id.* An article concerning the Google/Verizon deal lists three possible scenarios resulting from tiered access: 1) YouTube vs. other video channels: If YouTube (owned by Google) paid Verizon for prioritized access, its videos would be swiftly downloaded to a user’s computer, while videos hosted elsewhere would be much slower. For competitors of YouTube, this would result in an unequal playing field where potential customers and users would opt to look elsewhere to host their videos, as YouTube would be much faster; 2) Amazon vs. your store: Amazon could afford to pay to ensure priority access for its content, while a small e-commerce website could not pay such fees; 3) Images vs. video: Marketing options would be affected, companies would choose to use lower bandwidth-consuming options, such as images as opposed to videos. See Ruud Hein, *Google & Verizon Deal Would End Net Neutrality, Favor Big Players*, SEARCH ENGINE PEOPLE, <http://www.searchenginepeople.com/blog/google-verizon-deal-would-end-net-neutrality-favor-big-players.html> (last visited Dec. 28, 2010).

<sup>118</sup> See Vitello, *supra* note 8, at 526 (noting that allowing ISPs to vertically integrate (vertical integration occurs when a company merges its operations with its own supply and distributive markets) will give them the incentive to prioritize their own data packets at the expense of others, which could lead to monopoly prices).

business.<sup>119</sup> ISPs could use data discrimination technologies to restrict their subscribers to rival content.<sup>120</sup> If this rival content is the broadband provider's own offering, and is not subject to such minimized broadband use that results in slower access, then consumers will not bother with companies like StartUp<sup>121</sup> and will stick with what works the fastest, which could result in the vertical foreclosure of downstream<sup>122</sup> content markets.<sup>123</sup> In order to maintain fairness it is important that ISPs make "technically comparable dedicated channels available to competing downstream providers of the same types of services that the service provider itself offers."<sup>124</sup>

Because there is currently no law ensuring network neutrality, companies that rely on the Internet to distribute their products and services operate in an uncertain marketplace.<sup>125</sup> In fact, Internet giants such as Google, eBay, Yahoo!, Microsoft, and Apple have protested various propositions by ISPs to manipulate networks in ways that affect bandwidth use.<sup>126</sup> These companies assembled and sent an open letter to FCC Chairman Genachowski about the need for the FCC to enforce a "guarantee of neutral, nondiscriminatory access by users."<sup>127</sup> The absence of a comprehensive legal framework exerts a drag on the market.<sup>128</sup>

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<sup>119</sup> See Helling, *supra* note 11, at 54.

<sup>120</sup> BROADBAND CONNECTIVITY COMPETITION POLICY, *supra* note 5, at 52.

<sup>121</sup> ETI VIEWS AND NEWS, *supra* note 114.

<sup>122</sup> Downstream markets are "[m]arket[s] at the next stage of the production/distribution chain." *Downstream market*, CONCURRENCES, [http://www.concurrences.com/article.php?id\\_article=12295&lang=en](http://www.concurrences.com/article.php?id_article=12295&lang=en) (last visited Dec. 28, 2010). In this case, these content providers supply consumers with access to the content, after the content is actually created. Think: YouTube. YouTube is a video-sharing website on which users can upload, share, and view videos. YouTube uses technology to display a wide variety of user-generated video content, including movie clips, TV clips, and music videos, as well as amateur content such as video blogging and short original videos. See *YouTube*, WIKIPEDIA, <http://en.wikipedia.org/wiki/YouTube> (last visited Dec. 28, 2010).

<sup>123</sup> ETI VIEWS AND NEWS, *supra* note 114.

<sup>124</sup> *Id.*

<sup>125</sup> See Vuze, Inc., WC Docket No. 07-52, 14 (Fed. Comm'ns Comm'n Nov. 14, 2007), available at <http://www.openinternetcoalition.com/files/Vuze%20Petition%2011-14-07%20FINAL.pdf>.

<sup>126</sup> See Yoo, *supra* note 35, at 1856-57. Google in particular was once a leading advocate of network neutrality. See Richard Whitt, *Facts About Our Network Neutrality Policy Proposal*, GOOGLE PUBLIC POLICY BLOG (Aug. 12, 2010, 1:26 PM), <http://googlepublicpolicy.blogspot.com/search/label/Net%20Neutrality>. Google, however, later changed its mind. See *infra* notes 135-38 and accompanying text.

<sup>127</sup> Berin Szoka & Adam Thierer, *Net Neutrality, Slippery Slopes & High-Tech Mutually Assured Destruction*, 11 PROGRESS & FREEDOM FOUNDATION 1, 2 (Oct. 2009), available at <http://www.scribd.com/doc/21520140/Net-Neutrality-Slippery-Slopes-High-Tech-Mutually-Assured-Destruction>.

<sup>128</sup> Werbach, *supra* note 21 ("Venture capitalists seeking the next YouTube or Twitter want assurance that a broadband access provider won't throttle the new application to advantage its own affiliates.").



Legislation that regulates network neutrality will help guarantee a fair marketplace on the Internet and maximize competition and innovation by prohibiting barriers of entry for new companies.<sup>129</sup>

### III. WHY LEGISLATION IS NEEDED

FCC Chairman Genachowski conceded that the “FCC’s role . . . should *not* involve regulating the Internet itself.”<sup>130</sup> Rather, the FCC exists to provide consumers with basic protection against anticompetitive conduct by the companies that provide broadband access services which consumers subscribe to in order to access the Internet.<sup>131</sup> The FCC needs authority “to prevent these companies from restricting lawful innovation or speech, or engaging in unfair practices.”<sup>132</sup> The FCC has already shown that it can prevent unreasonable discrimination in the ruling it issued against Comcast, before it was struck down by the Court of Appeals. In *Comcast v. FCC*, no service was “blocked,” rather Comcast’s actions were reprimanded because they were not done to “exercise reasonable network management.”<sup>133</sup>

#### A. What ISPs Want

One of the most controversial aspects of the network neutrality debate centers around whether ISPs should have the right to offer customers prioritized delivery of Internet traffic and to impose additional charges for those services.<sup>134</sup> Since the appellate court’s decision in *Comcast v. FCC*,

the FCC has been trying to find a way to regulate broadband delivery, and that effort has been the subject of a series of private meetings at the agency’s headquarters. . . . At the meetings, officials from the nation’s biggest Internet service and content providers, including Google and Verizon, have tried to reach a consensus on how broadband Internet service should be regulated in light of the decision.<sup>135</sup>

As a result of these “secret talks,” two communication behemoths have presented a proposal that offers compromised

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<sup>129</sup> Benjamin, *supra* note 7, at 175.

<sup>130</sup> *Third Way*, *supra* note 14. See also Edward Wyatt, *Google and Verizon Near Deal on Web Pay Tiers*, N.Y. TIMES, (Aug. 4, 2010) [http://www.nytimes.com/2010/08/05/technology/05secret.html?\\_r=2&hp](http://www.nytimes.com/2010/08/05/technology/05secret.html?_r=2&hp), (“The F.C.C. has said that it does not want to impose strict regulation on Internet service and rates, but seeks only the authority to enforce broadband privacy and guarantee equal access.”).

<sup>131</sup> See *Third Way*, *supra* note 14.

<sup>132</sup> *Id.*

<sup>133</sup> INTERNET POLICY STATEMENT, *supra* note 38.

<sup>134</sup> See ETI VIEWS AND NEWS, *supra* note 114.

<sup>135</sup> Wyatt, *supra* note 130.

solutions to the major disputed elements of network neutrality.<sup>136</sup> The *New York Times* reported: “Google and Verizon, two leading players in Internet service and content, are nearing an agreement that could allow Verizon to speed some online content to Internet users more quickly if the content’s creators are willing to pay for the privilege.”<sup>137</sup> Google is a major content provider and Verizon is a major ISP, and the proposal they put forth

would allow an altogether new fee to be charged for wireless throughput—an access fee, a toll paced on data after it leaves [the] hosting firm’s building, or [the] company-owned server farm. This means that content providers—bloggers, e-commerce sites, social networks, you name it—will all be assessed wireless transmission fees. The higher the fee paid, the faster their data will be allowed to travel.<sup>138</sup>

The proposal has elicited much criticism, especially because it exempts wireless and other online services from network neutrality.<sup>139</sup> The inherent danger in allowing tiered access is that ISPs could essentially act as “Internet gatekeepers.”<sup>140</sup> Barriers of entry for online innovators would be significantly raised if they were required to negotiate with ISPs to be assured access to users. This would result in benefits for large Internet players and foreclose competition for small businesses that use the Internet as their main platform.<sup>141</sup>

Consumer advocates are fervently against the proposal because they feel that it would concentrate in a few corporations’ control of a free and open Internet, where currently consumers

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<sup>136</sup> Werbach, *supra* note 21.

<sup>137</sup> Wyatt, *supra* note 130. “The agreement could eventually lead to higher charges for Internet users.” *Id.*

<sup>138</sup> Jeff Sayre, *How the Death of Net Neutrality Effects [sic] You*, JEFFSAYRE.COM, <http://jeffsayre.com/2010/08/16/how-the-death-of-net-neutrality-effects-you/> (last visited Dec. 28, 2010).

<sup>139</sup> See VERIZON & GOOGLE, VERIZON-GOOGLE LEGISLATIVE FRAMEWORK PROPOSAL, available at <http://www.scribd.com/doc/35599242/Verizon-Google-Legislative-Framework-Proposal> (“Regulatory Authority: The FCC would have exclusive authority to oversee broadband Internet access service, but would not have any authority over Internet software applications, content or services. Regulatory authorities would not be permitted to regulate broadband Internet access service.”). See also Wyatt, *supra* note 130 (“Wireless companies, meanwhile, want no restrictions on wireless broadband, which they see as a different technology than Internet service over wires.”).

<sup>140</sup> See Hercules K., *supra* note 13. See also Vint Cerf *Speaking Out on Internet Neutrality*, CIRCLEID (Nov. 10, 2005, 10:27 AM), [http://www.circleid.com/posts/vint\\_cerf\\_speaking\\_out\\_on\\_internet\\_neutrality/](http://www.circleid.com/posts/vint_cerf_speaking_out_on_internet_neutrality/) (“The remarkable social impact and economic success of the Internet is in many ways directly attributable to the architectural characteristics that were part of its design. The Internet was designed with no gatekeepers over new content or services.”).

<sup>141</sup> See Hercules K., *supra* note 13.

decide which companies are successful.<sup>142</sup> This would result in a non-neutral Internet which could give large ISPs such as AT&T, Comcast, Verizon and Google as well as content providers the power to turn the Internet into a system similar to cable television and pick winners and losers online.<sup>143</sup>

#### B. What the House and Senate Have Tried to Do

Whether government regulation is needed is a significant question when it comes to network neutrality. Proponents of network neutrality believe that the government needs to pass legislation to prevent ISPs from discriminating against certain Internet content. Opponents are against implementation of legislation, arguing that ISPs should be given the “freedom to establish their own Internet discrimination policies, and the ability to regulate the content Internet users can access at a reasonable speed.”<sup>144</sup> Because of the Google-Verizon proposal (proposing tiered Internet access), and the recent decision in *Comcast v. FCC*, it is clear that federal regulatory legislation is needed to protect against data discrimination by ISPs.

There has been much debate over whether it is necessary for policymakers to take steps to ensure equal access to the Internet for content providers and consumers, and what those steps should be.<sup>145</sup> On the one hand, “more specific regulatory guidelines may be necessary to protect the marketplace from potential abuses which could threaten the net neutrality concept.”<sup>146</sup> On the other hand, opponents to legislation regulating network neutrality contend that “existing laws and [FCC] policies are sufficient to deal with potential anticompetitive behavior<sup>147</sup> and that such regulations would have

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<sup>142</sup> See Wyatt, *supra* note 130 (quoting Gigi B. Sohn, president and a founder of Public Knowledge, a consumer advocacy group: “The point of a network neutrality rule is to prevent big companies from dividing the Internet between them”).

<sup>143</sup> Josh Silver, *Google-Verizon Deal: The End of The Internet as We Know It*, THE HUFFINGTON POST (Aug. 5, 2010, 9:26 AM), [http://www.huffingtonpost.com/josh-silver/google-verizon-deal-the\\_e\\_b\\_671617.html](http://www.huffingtonpost.com/josh-silver/google-verizon-deal-the_e_b_671617.html). Silver makes an interesting point in an author’s note. He brings up a quote Google made in 2006:

Today the Internet is an information highway where anybody—no matter how large or small, how traditional or unconventional—has equal access. But the phone and cable monopolies, who control almost all Internet access, want the power to choose who gets access to high-speed lanes and whose content gets seen first and fastest. They want to build a two-tiered system and block the on-ramps for those who can’t pay.

*Id.* These words are in stark contrast to the Google-Verizon proposal.

<sup>144</sup> Roberts, *supra* note 2, at 767.

<sup>145</sup> Gilroy, *supra* note 24.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* The court’s holding in *Comcast v. FCC* makes it clear that any existing power the FCC currently holds is without a doubt insufficient to protect against anti-

negative effects on the expansion and future development of the Internet.”<sup>148</sup>

Congress has proposed a substantial amount of network neutrality legislation, none of which has been enacted into law. There have been two proposed bills that deserve consideration. The first is the “Internet Freedom Preservation Act”<sup>149</sup> (“IFPA”) proposed by the Senate. It is the most comprehensive bill to date and includes a majority of critical principles needed for effective legislation ensuring network neutrality. The House proposed a similar bill: the Internet Freedom Preservation Act of 2008 (“IFPA 2008”).<sup>150</sup> Like the IFPA, IFPA 2008 seeks to amend the Communications Act,<sup>151</sup> and states that “[i]t is the policy of the United States . . . to maintain the freedom to use . . . broadband telecommunications networks, including the Internet, without unreasonable interference from or discrimination by network operators.”<sup>152</sup>

IFPA 2008 states that it is the policy of the United States “to guard against unreasonable discriminatory favoritism for, or degradation of, content by network operators based upon its source, ownership, or destination on the Internet.”<sup>153</sup> Furthermore, IFPA 2008 requires the FCC to commence a proceeding to assess if ISPs are “refrain[ing] from blocking, thwarting, or unreasonably interfering with the ability of consumers to . . . access, use, send, receive, or offer lawful content, applications, or services” of their choice.<sup>154</sup> However, IFPA 2008 is inadequate because it proposes to amend the Communications Act of 1934 with “policies” and not “laws.”<sup>155</sup> This lack of legal authority is problematic, because ISPs will not have the same incentives to obey policies as they would laws.<sup>156</sup> IFPA 2008 also fails to outline any potential remedies for those injured by anti-neutral Internet violators, or penalties for those who have violated network neutrality principles.<sup>157</sup> Because of these shortcomings, IFPA 2008 fails to alleviate current concerns

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neutral Internet actions taken by ISPs.

<sup>148</sup> Gilroy, *supra* note 24.

<sup>149</sup> See S. 215, 110th Cong. (2007).

<sup>150</sup> See H.R. 5353, 110th Cong. (2008).

<sup>151</sup> *Id.* at § 3.

<sup>152</sup> *Id.* at § 12(1).

<sup>153</sup> *Id.* at § 12(4).

<sup>154</sup> *Id.* at § 4(a)(2)(A).

<sup>155</sup> *Id.* at § 12. The bill begins by stating that its purpose is “[t]o establish broadband *policy*.” *Id.* (emphasis added).

<sup>156</sup> This is the same problem posed by the FCC’s Policy Statement. See *supra* Part II(A).

<sup>157</sup> See H.R. 5353 at §§ 2–3, 12.

regarding network neutrality. In fact, the Act itself even questions the need for enforceable rules, permitting the FCC to assess “whether the need for enforceable rules governing openness, consumer rights, and consumer protections or prohibiting unreasonable discrimination is lessened if a broadband network provider provides significantly high bandwidth speeds to consumers.”<sup>158</sup>

IFPA seeks to amend the Communications Act of 1934 to ensure network neutrality.<sup>159</sup> The Bill states that ISPs shall “not block, interfere with, discriminate against, impair, or degrade the ability of any person to use a broadband service to access, use, send, post, receive, or offer any lawful content, application, or service made available via the Internet.”<sup>160</sup> Additionally, IFPA requires the FCC to “establish enforcement and expedited adjudicatory review procedures”<sup>161</sup> as well as penalties to ISPs who violate network neutrality rules.<sup>162</sup> The idea behind IFPA was that:

[t]he internet [is] a robust engine of economic development by enabling anyone with a good idea to connect to consumers and compete on a level playing field. The marketplace picked winners and losers, not some central gatekeeper. That freedom—the very core of what makes the Internet what it is today—must be preserved.<sup>163</sup>

Under this legislation, ISPs must operate the network in a nondiscriminatory manner, but would remain free to manage the network to protect the security of the network or offer different levels of broadband connection to users.<sup>164</sup> The different levels would be offered without charge for such prioritization.<sup>165</sup>

There have been numerous obstacles for both the FCC and Congress in attempting to regulate network neutrality; advocates have been wary of ISPs providing tiered access in any form, and proponents have been unwilling to budge on the allowance of governmental regulation of any kind. IFPA offers a compromise between the two extremes and is therefore the optimal proposal for ensuring network neutrality while continuing to allow ISPs to offer special services to their customers, but not at the expense of

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<sup>158</sup> *Id.* at § 4(a)(2)(F).

<sup>159</sup> *See* S. 215, 110th Cong. (2007).

<sup>160</sup> *Id.* at § 12(a)(1).

<sup>161</sup> *Id.* at § 12(e)(2).

<sup>162</sup> *See id.* at § 12(f).

<sup>163</sup> *U.S. Senators Dorgan and Snowe Introduce Internet Freedom Preservation Act, GOVERNMENT TECHNOLOGY* (Jan. 10, 2007), <http://www.govtech.com/e-government/US-Senators-Dorgan-and-Snowe-Introduce.html>.

<sup>164</sup> *See* S. 215 at §§ 12 (a)(4)–(6).

<sup>165</sup> *Id.*

unfair competition. It should be implemented, along with the policy found in the FCC's "third way" proposal, to ensure that concrete laws are in place to guide both the FCC and ISPs in ensuring network neutrality.

#### CONCLUSION

It is necessary that Congress adopt legislation to clarify the FCC's authority regarding broadband Internet service providers. The benefits of passing the proposed legislation are enormous, and the outcome in *Comcast* coupled with the Google-Verizon proposal reflects the importance of implementing legislation. The argument made by ISPs that legislation prevents them from profiting from the access to the Internet they provide to their consumers is unfounded under the passage of this legislation as ISPs will still be able to profit by making access to the Internet quicker. Free speech concerns will also be protected by passage of this legislation. If ISPs were allowed to discriminate against data they could slow access to speech in which they disapproved. Legislation is needed proactively, rather than retroactively, and the previous examples of discrimination and the desire of ISPs to continue down that path strongly suggest implementation.

#### AUTHOR'S NOTE

On December 21, 2010, the FCC announced the passage of an order to preserve Internet freedom and openness.<sup>166</sup> The order contains three primary focuses: transparency, no blocking, and no unreasonable discrimination.<sup>167</sup> Transparency is established to ensure that ISPs are clear about their network management practices by publicly disclosing these practices, performance characteristics, and terms and conditions of their broadband service are sufficient for consumers to make informed decisions.<sup>168</sup> "No blocking" ensures that fixed broadband providers shall not block lawful content, applications, services, or non-harmful devices; and mobile broadband providers may not block lawful websites, or block applications that compete with their voice or video telephone services.<sup>169</sup> "No unreasonable discrimination" is established to ensure that ISPs refrain from

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<sup>166</sup> Press Release, Fed. Comm'ns Comm'n, FCC Acts to Preserve Internet Freedom and Openness (Dec. 21, 2010), *available at* [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2010/db1221/DOC-303745A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2010/db1221/DOC-303745A1.pdf).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

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unreasonably discriminating in transmitting lawful network traffic.<sup>170</sup>

The rules outlined in this order are subject to “reasonable network management” and are considerably diluted for wireless providers.<sup>171</sup> Whether the FCC has the power to enforce these rules due to the decision in *Comcast v. FCC* will surely be hotly debated in the months to come, as the almost 200 pages of rules are sifted through and analyzed.<sup>172</sup>

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> See FEDERAL COMMUNICATIONS COMMISSION, 10-201, IN THE MATTER OF PRESERVING THE OPEN INTERNET BROADBAND INDUSTRY PRACTICES (2010), available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2010/db1223/FCC-10-201A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2010/db1223/FCC-10-201A1.pdf).