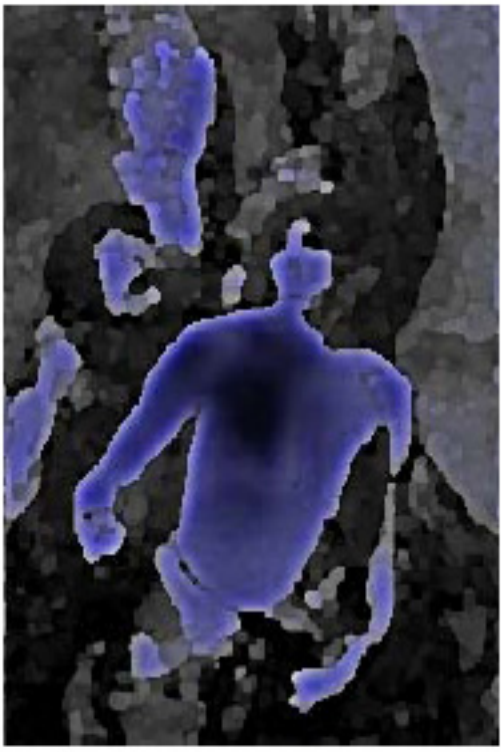

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Broadband Reclassification and Net Neutrality

Contents

Why Net Neutrality Rules and Broadband "Third Way" Reclassification Are Unnecessary and Unlawful

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The highly polarized debate over so-called net neutrality at the Federal Communications Commission (FCC) exposes serious philosophical differences about the appropriate role of government in managing technological change. Neither side is unfortunately free either from hyperbole or fear-mongering.[1] And neither side is completely right.

Introduction

The question of the moment is a narrower one of whether the FCC can, should or indeed has the legal authority to reclassify broadband Internet access as a Title II common carrier service. It is the much-ballyhooed "Third Way" proposal of FCC Chairman Genachowski,[2] promoted as a purported way to restore federal regulatory power over Internet services. Most of the relevant background and history of this issue are laid out, in admirable detail, by economists Lee Selwyn and Helen Golding in their accompanying article. Yet that analysis misses several important points and, in this author's view, substitutes preferred public policy for legal constraints on administrative agency action.

The thesis of this essay is that in the aftermath of the *Comcast* decision,[3] "reclassification" of broadband is beyond the FCC's statutory powers. That does not mean that net neutrality is necessarily a bad thing or that classifying certain portions of the Internet's architecture as "telecommunications" is improper. For instance, the data pipes used by Internet transport providers have for years been treated as classic Title II telecom services, purchased

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1 *See, e..g., Comcast, Net Neutrality Advocates Clash at FCC Hearing*, ArsTechnica, Feb. 25, 2008, http://arstechnica.com/old/content/2008/02/comcast-and-net-neutrality-advocates-clash-at-fcc-hearing.ars.

2 J. Genachowski, *The Third Way: A Narrowly Tailored Broadband Framework,* May 6, 2020, http://www.openinternet.gov/speech-the-third-way-narrowly-tailored-broadband-framework-chairman-julius-genachowski.html; A. Schlick, *A Third-Way Legal Framework for Addressing the Comcast Dilemma,* May 6, 2010, http://www.openinternet.gov/speech-third-way-legal-framework-for-addressing-the-comcast-dilemma.html; *FCC's Third Way:Regulate Internet Access, Not Internet Content,* VentureBeat, May 6, 2010, http://venturebeat.com/2010/05/06/fcc-third-way-net-neutrality/.

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

from common carriers and bundled by Tier 1 backbone network operators as an "information service." But the difference between Internet "peering" and telecom "interconnection" is as stark as the difference between non-discrimination on the public switched telephone network (PSTN) and packet agnosticism by Internet Service Providers (ISPs). The two networks are radically different in design, history and usage — and legal treatment as well.

All of this goes to a basic point: common carrier regulation, for Title II purposes, traditionally applies to both utility services offered by monopoly providers and competitive services offered in contested (or at least contestable) markets.[4] On the other hand, the dominant history and tradition of telecom regulation since the late 1970s (under the FCC's landmark decisions in *Computer II*[5] and *Specialized Common Carriers*[6]) has been to replace command-and-control utility regulation — whether via rate of return, tariffs, cost-justification, etc. — with competition. Likewise, the FCC has consistently treated services that are not transparent, transmission-only "plain old telephone service" (POTS) conduits as "enhanced" even where, as is almost always the case, they utilize telecom services or pipes as an input.[7] This

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4 "The 'contestable markets' literature suggests that even monopolists may behave competitively if they face the threat of swift entry by effective competitors whenever the monopolist raises prices above cost or reduces product quality. Thus, potential competition may, in principle, constrain market power as effectively as actual competition." *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992,* Further Notice of Proposed Rulemaking, 16 FCC Rcd. 17312 (2001). *See* W. Baumol, J. Panzar, & R. Willig, CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE (1988).

5 *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry),* 77 F.C.C. 2d 384 (1980), *aff'd, CCIA v. FCC,* 693 F.2d 198 (D.C. Cir. 1982).

6 *Specialized Common Carrier Services,* 29 F.C.C.2d 870 (1971), *aff'd Washington Utilities & Transportation Comm'n v. FCC,* 513 F.2d 1142 (9th Cir.), *cert. denied,* 423 U.S. 836 (1975). *See, e.g., MCI Telecomms. Corp. v. FCC, 5*80 F.2d 590 (D.C. Cir. 1978).

7 A basic service provides "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer-supplied information." *Computer II,* 77 F.C.C. 2d at 420; *CCIA v. FCC,* 693 F.2d at 205 n.18. As codified, "telecommunications" offers communications of the user's choosing "without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). The FCC views the two essentially interchangeably, concluding in 1999, for instance, that protocol processing services which had previously qualified as "enhanced" should be treated as "information services" under the 1996 Act because they satisfy the statutory requirements of offering "a capability for . . . transforming [and] processing . . . information via telecommunications." *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934,* Third Order on Reconsideration, 14 FCC Rcd. 16299 (1999).

means that, under *Computer II*, ISPs are not local exchange companies (LECs) unless one ignores the very basis for treating services employing data processing to change the "form or content" of information as unregulated. If the issue of broadband reclassification is not addressed with sensitivity to the history and traditions of FCC common carrier regulation, one can all too easily arrive at conclusions that simply cannot be squared with the legal framework applied to telecommunications for more than 30 years.[8]

It may well be correct that telco-cable duopolies for last-mile wired broadband are a second-order solution, economically and as a matter of public policy. That does not, however, compel the Selwyn-Golding conclusion that the FCC should or can decide, ***ipsi dixit,*** that broadband Internet access is a telecom service under the scheme adopted by Congress — drawn largely from the ***Computer II*** dichotomy — in the 1996 Telecom Act.[9] There is no FCC power to "restore" via the Third Way because the agency never had such power in the first instance. By asking the wrong question, proponents of net neutrality and broadband reclassification get the wrong legal answer. What Congress can, and perhaps even should, do legislatively is something the FCC cannot do administratively.

None of this is written in stone. As I have observed elsewhere and advocated as early as 1996 on behalf of Netscape,[10] ***Computer II*** is dead because as a technical matter its regulatory silos no longer reflect the reality of modern Internet protocol (IP) networking. On that point, Selwyn-Golding are obviously right that the treatment of domain name service (DNS) and local

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[8] *See generally* R. Cannon, *The Legacy of the Federal Communications Commission's Computer Inquiries,* 55 Fed. Comm. L.J. 167, 169 (2003) ("To say that the FCC does not regulate the Internet is to miss the lessons of this history. While it is true that computer networks are unregulated, computer networks were very much a part of the Commission's policy. They were the intended direct beneficiaries of the Computer Inquiries.").

[9] When Congress passed the 1996 Act, it generally retained the *Computer II* basic/enhanced distinction. However, the revisions implemented in 1996 used slightly different terminology, derived from the parallel provisions of the AT&T divestiture decree. *United States v. American Tel. & Tel. Co.,* 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States,* 460 U.S. 1001 (1983).

[10] *E.g.,* G. Manishin, *Regulation of the Communications Functions of the Internet: "A War Between Two Worlds,"* Fall Internet World '96 (Dec. 1996), http://www.manishin.com/iworld/iworld1.html. This view is not alone. "New technologies, while perhaps similar in appearance or in functionality, should not be stuffed into what may be ill-fitting regulatory categories in the name of regulation. Rather, the Commission should continue the approach of studying new technologies and only stepping in where the purpose for which the Commission was created, protecting the public interest, demands it." J. Oxman, *The FCC and the Unregulation of the Internet,* OPP Working Paper No. 31 at 24-25 (1999), http://www.fcc.gov/opp/workingp.html.

number portability (LNP) cannot be harmonized. On the other hand, while packets are packets, Signaling System 7 (SS7) is not IP, and the precedents the FCC set in the infancy of the Internet are still the law. So long as we have the present Communications Act codification of *Computer II,* therefore, the responsibility for revising or updating the regulatory treatment of broadband is one for Congress, not the FCC. That the political process appears unwilling to act, at least as quickly as the agency and its public interest community supporters would wish, is not in our political system a justification for taking regulatory action that flies in the face of decades of statutory decisions, tradition and history.

The Strange Road From Cable Open Access to Net Neutrality

A brief voyage into historical roots is necessary. In the aftermath of *United States v. AT&T Co.* and its separation of monopoly local from competitive long-distance telephony,[11] there arose a widespread suspicion that vertical integration by monopolists into access-dependent markets was almost inherently anticompetitive. (We can debate another time whether the *AT&T* decree theory was based on bottleneck monopolies or regulatory evasion.)[12] Given that bias, in the cable television industry special scrutiny was given to mergers which combined upstream content providers with downstream multiple system operator (MSO) distributors, *e.g.,* TCI-Turner, AOL-TimeWarner, etc. In a handful of instances, decrees were imposed by the Antitrust Division setting prophylactic rules for content access by unaffiliated producers.[13]

That in large degree is the same competition theory animating the movie studio antitrust cases of the late 1940s and 1950s[14] — *i.e.*, the presumption that a provider of entertainment content will foreclose competition by refusing access to rivals if permitted to integrate downstream into distribution (in that case, first-run theatrical exhibition). Funny thing, though, was that — as Justice Scalia famously once said about predatory pricing — it rarely ever occurred and even more rarely ever was proven.[15]

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11 *United States v. American Tel. & Tel. Co.,* 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States,* 460 U.S. 1001 (1983).

12 G. Manishin, *Withering Away: The Demise of the "AT&T Theory,"* Regulatory Reform, Industrial Regulation Committee Newsletter, vol. 2, no. 1 (ABA Section of Antitrust Law 1987).

13 *See generally* D. Waterman, *Vertical Integration and Program Access in the Cable Television Industry,* 47 Fed. Comm. L.J., no. 3, http://www.law.indiana.edu/fclj/pubs/v47/no3/waterman.html; C. Yoo, *Vertical Integration and Media Regulation in the New Economy,* Yale J. on Reg., Winter 2002, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=319122.

14 *United States v. Paramount Pictures, Inc.,* 334 US 131 (1948).

15 *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986).

In the late 1990s, following enactment of the Telecom Act of 1996, the theory resurfaced in connection with the launch of cable modem service by means of an industry-financed venture, and once high-flying ".com" company, Excite@Home. Given the widespread political animosity to cable, it was relatively popular to argue (well before LECs entered the digital television business) that their franchised natural monopolies gave cable operators the incentive and ability to deny access to unaffiliated content on their emerging broadband networks.[16] Known as "cable open access," the solution for that perceived risk was a proposal to prohibit cable MSOs from offering cable modem service only bundled at retail; thus requiring the separate provision of wholesale broadband access to competing ISPs.[17]

As the General Accounting Office reported, however, differences in technology and regulatory history governing different networks created legal silos "generally tailored to the specific services each network originally supported."[18]

> [E]ven with passage of the Telecommunications Act of 1996, communications law retains a "stovepiped" — or compartmentalized — structure under which each traditional communications service is governed by particular laws. Significant debate exists over what laws and regulations apply to certain providers of Internet transport and whether, when providing this service, all providers should be held to the same rules despite fundamental differences in

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16 *See, e.g.,* Consumers Union, *Consumer and Public Interest Groups Tell FCC Chairman that the Internet's Future is Jeopardized by the Cable Industry's Broadband Plans*, Press Release, July 29, 1999, http://www.consumersunion.org/other/0729coaldc799.htm; GAO, TECHNOLOGICAL AND REGULATORY FACTORS AFFECTING CONSUMER CHOICE OF INTERNET PROVIDERS, Report 01-93, Oct. 2000, http://www.gao.gov/new.items/d0193.pdf (GAO Report).

17 *See generally AT&T Corp. v. City of Portland,* 43 F. Supp. 2d 1146 (D. Or. 1999), *rev'd,* 216 F.3d 871 (9th Cir. 2000); *MediaOne Group, Inc. v. County of Henrico,* 97 F. Supp. 2d 712 (E.D. Va. 2000); M. Lemley & L. Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era,* 48 UCLA L. Rev. 925 (2001); M. Cooper, *Open Access to the Broadband Internet: Technical and Economic Discrimination in Closed, Proprietary Networks,* 71 U. Colo. L. Rev. 1011 (2000); H. Feld, *Whose Line is it Anyway? The First Amendment and Cable Open Access,* 8 CommLaw Conspectus 23 (2000); J. Speta, *Handicapping the Race for the Last Mile?: A Critique of Open Access Rules for Broadband Platforms,* 17 Yale J. on Reg. 39 (2000).

18 GAO REPORT, supra note 16, at 6-7. The cable open access debate focused on the sightly different legal issue of whether the definition of "cable service"— first included in the 1984 Cable Act and later modified in the Telecommunications Act of 1996 — includes cable modem broadband. "Cable service" is defined by as "the one-way transmission to subscribers of video programming or other programming service together with subscriber interaction, if any, which is required for selection or use of such programming." The words "or use" in the definition were added by the 1996 Act. 47 U.S.C. § 153(8).

> network technologies. These issues highlight how the once sharp demarcations that defined types of communications providers and the services they offered are fading. As these distinctions continue to blur, additional complex issues surrounding the governance of the communications industry are likely to arise.

The predicted risk that cable broadband providers would block access to unaffiliated Internet content never ripened into reality. Legislation on Capitol Hill did not pass and a petition asking the FCC to impose a cable open access requirement was rejected in 2002, later affirmed by ***BrandX***.[19] That decision was consistent with the agency's overall deregulatory approach to both LECs and cable MSOs under the 1996 Act, paralleling, for instance, its reversal of an earlier "line sharing" mandate for telco DSL and later rescission of the UNE-P unbundling rules applicable to incumbent LECs (ILECs).

Given the failure both of fact and policy, proponents of cable open access moved to a discrimination theme, analogizing to the ***Carterfone*** doctrine.[20] That is, instead of basing competition policy on a threat of total vertical foreclosure, or blocking, advocates suggested the "real" risk was more subtle discrimination, treating unaffiliated content on worse terms than the broadband provider's own Web sites.[21] Hence, under this reasoning, a two-pronged regulatory response called for (a) prohibitions on content discrimination, and (b) mandatory allowance of any end user device so long as it does not cause technical network harm. This repurposed approach benefited from former Chairman Martin's ILEC-centric views. Coupled with a classic Washington PR debacle by Comcast — which denied and then effectively lied about network

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[19] *High-Speed Access to the Internet Over Cable and Other Facilities,* Memorandum Opinion and Order, 17 FCC Rcd. 4798 (2002); *NCTA v. Brand X,* 545 U.S. 967 (2005).

[20] *Use of the Carterfone Device in Message Toll Telephone Service,* 13 F.C.C.2d 420 (1968). In February 2007, a petition for rulemaking was filed with by Skype, asking that the FCC apply the *Carterfone* regulations to the wireless industry — which would mean that OEMs, portals and others will be able to offer wireless devices and services without the cellular operators needing to approve the handsets.

[21] "Vertically integrated network operators have the economic incentive and ability to discriminate by using their distribution 'pipe' — which they control — to favor their own services over a competitor's services." Comments of Dish Network LLC, *Preserving the Open Internet,* GN Docket No. 09-191, at 1 (Jan 14, 2010). The present Chairman has adopted much of this theory, explaining in a major September 2009 speech that "there are compelling reasons to be concerned about the future of openness." The chief reasons offered were "limited competition among service providers" and "the economic incentives of broadband providers," which "increasingly compete with voice and video products provided over the Internet." J. Genachowski, *Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity,* Brookings Inst., Sept. 21, 2009, http://www.openinternet.gov/read-speech.html.

management controls it imposed on BitTorrent peer-to-peer Internet traffic[22] — the party-switching Chairman's vote supported a bare 3-2 majority for articulation of four net neutrality "principles" and their later enforcement against Comcast in a complaint proceeding.[23] (Extension of the *Carterfone* doctrine beyond telephony, whether to cable, broadband, wireless or all three, remains an open and also very heated issue.)

Yet in many ways, the Commission's net neutrality principles and the drum beat for their codification represent a solution in search of a problem. More than a decade after the commercial emergence of cable broadband, one might fairly expect that if the theory against vertical integration into content were accurate, many (or at least a fair number) of notable examples of anticompetitive use of broadband access and network management would have emerged. That is not the case; no one pretends there has been widespread blockage of or discrimination against unaffiliated content by cable broadband providers. In the author's view, that is because the business economics of broadband access are in conflict with the assumption by net neutrality proponents that the local wired distribution duopoly gives operators an incentive to discriminate. There are at least three principal reasons why vertically integrated content providers seem to lack incentives to discriminate:

1. Broadband providers need to attract and retain customers by making available the full spectrum of digital Web content consumers have come to expect from ISP access.

2. Speed and quality of service (QoS) are competitive differentiators in the broadband market, so use of network management practices to degrade competing content represents a self-defeating business choice for ISPs.

3. The ideal of broadband network openness is reinforced by the inherent open architecture of Internet itself, meaning there has never been a need for an *Open Network Architecture* proceeding[24] for IP communications.

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[22] Wired, *Comcast Disclosure Draws Cautious Praise,* Sept. 22, 2008, http://www.wired.com/epicenter/2008/09/comcast-disclos/.

[23] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* Policy Statement, 20 FCC Rcd. 14986 (2005) (entitling consumers to (1) access the lawful Internet content of their choice; (2) run applications and use services of their choice, subject to law enforcement needs; (3) connect their choice of legal devices that do not harm the network; and (4) competition among network providers, service providers, and content providers); *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications,* Memorandum Opinion and Order, 23 FCC Rcd. 13028 (2008).

[24] *Bell Operating Company Provision of Enhanced Services; 1998 Biennial Review — Review of Computer III and ONA Safeguards and Requirements, Further Notice of Proposed Rulemaking,* Report and

As a factual matter, therefore, the business incentives of broadband ISPs are qualitatively different from those predicted by the bottleneck monopoly theory against vertical integration. This means that policies designed to promote or maintain net neutrality are unnecessary. There are also cogent reasons why net neutrality may be a bad policy idea. The network incumbents' argument that reclassification would compel application to broadband of full rate-of-return, public utility regulation is vastly overstated.[25] On the other hand, reclassification and mandated network neutrality present the same underlying economic problem as telco access charges — namely "uneconomic bypass" of the public Internet by major corporate interests looking for QoS and non-latent transmission of preferred, and commercially valuable, digital content. Just as the post-divestiture treatment of access pricing for telephony was animated by the need to avoid forcing large users off the PSTN,[26] so too does preventing broadband providers from offering "first class" service to corporate users create economic incentives for enterprise VPNs to bypass the public Internet.

The Black Hole of Ancillary Jurisdiction

Turning to the legal basis for reclassification, the FCC has only itself to blame for the conundrum now facing the agency. Had *Computer II* and *Specialized Carrier* forbearance not proven to be such successful drivers of entry, competition and innovation, those one-time regulatory experiments would not have been enshrined in the 1996 Act. But they are, and they are there because they worked really well.

Order, 13 FCC Rcd. 6040 (1998), Report and Order, 14 FCC Rcd. 4289, *recon.,* 14 FCC Rcd. 21628 (1999).

25 Much of the opposition to "reclassification" stems from the fear that characterizing Internet access as a telecommunications service would carry with it the full panoply of legacy Title II dominant carrier regulation, such as rate-of-return pricing, entry and exit licensing and the like. The two, however, are not co-extensive. It has been the law for several decades, codified by Congress in 1996, that the FCC enjoys the ability to refrain or "forbear" from regulation. Reclassifying broadband as a Title II telecom service could, at least hypothetically, be coupled with a simultaneous decision forbearing from application of most substantive regulations to ISPs. Yet at least to public interest advocates, that would be viewed as a loss; in their regulatory paradigm broadband represents the new common carriage and should be offered on a quasi-utility basis. That perception will need to be changed if proponents of reclassification are to stand a realistic chance of persuading the agency and, more importantly, successfully withstanding judicial review.

26 *NARUC v. FCC,* 737 F.2d 109 (1984); R. Mansell, *The Telecommunication Bypass Threat: Real or Imagined?,* 20 J. Econ. 145 (1986).

Left without a doctrinal basis on which to rest net neutrality under its existing Title II jurisdiction over "telecommunications,"[27] the Commission was therefore relegated to reliance on so-called ancillary jurisdiction to justify application of its net neutrality principles to Comcast. Yet this created a classic ***elephant in the room*** problem. Ancillary jurisdiction under ***Southwestern Cable*** represents the low-water mark of communications jurisprudence.[28] It was fashioned as a legal matter to permit FCC control of CATV, the infant predecessor to today's robust cable programming industry, as a means of protecting the Commission's power to regulate broadcast television. And the motivation was hardly benign; the FCC imposed syndicated exclusivity, distant signal limits and a variety of restrictive rules on cable in order to prevent a perceived competitive threat to off-air television. It was protectionism to the core.[29]

As thus formed, ancillary jurisdiction epitomizes the conservative critique of administrative agencies as regulatory capture. Attempts to extend the theory beyond that protectionist core have consistently been rebuffed by the courts, for instance the D.C. Circuit's reversal in 2005 of a "broadcast flag" mandate for digital television on the ground that the FCC has no direct statutory jurisdiction over TV device manufacturers with regard to their technical features.[30] And in ***Comcast,*** the D.C. Circuit did the same thing again.

The problem, as Judge Tatel explained in *Comcast*, is that for claimed regulatory jurisdiction under Title I to be properly ancillary, it has got to be ancillary to something.[31] Without a basis under Title II's information/telecom dichotomy to assert jurisdiction over broadband, the FCC was therefore without either direct **or** ancillary jurisdiction. At least not without identifying the protectionist core of ancillary jurisdiction as the basis of its actions. Had

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[27] Although information services are made available "via telecommunications," 47 U.S.C. §153(20), information service providers by definition do not provide "telecommunications" and therefore cannot be "telecommunications carriers" or "providers" of telecommunications under the 1996 Act.

[28] *United States v. Southwestern Cable Co.,* 392 U.S. 157, 173 (1968).

[29] "In Southwestern Cable, the Commission argued that restricting the geographic reach of cable television was necessary to fulfill its Title III responsibility to foster broadcast service. The Court agreed. . . ." *Comcast,* 600 F.3d at 652.

[30] "Although somewhat amorphous, ancillary jurisdiction is nonetheless constrained." *American Library Assn. v. FCC,* 406 F.3d 689, 692 (D.C. Cir. 2005). "In the seven decades of its existence, the FCC has never before asserted such sweeping authority." *Id.* at 691. "[T]he disputed broadcast flag regulations rest on no apparent statutory foundation and, thus, appear to be ancillary to nothing." *Id.* at 702.

[31] 600 F.3d at 661 ("the Commission has failed to tie its assertion of ancillary authority over Comcast's Internet service to any 'statutorily mandated responsibility.'")

the Commission concluded that VoIP and Internet content distribution presented threats to the commercial viability of landline telephony (Title II) and broadcast television (Title III) — which as disruptive technologies they surely do — then it would have been fully within ***Southwestern Cable*** to restrict the former in order to protect its plenary statutory jurisdiction over both of the latter.[32]

Neither Chairman Genachowski's FCC nor any modern administrative agency can take such a position today, obviously, as a political matter. There is no longer an appetite in Congress to utilize governmental regulation to protect incumbents and vested commercial interests against competition and new entry. Hence, because it lacked and still lacks the political will to justify net neutrality on the ground of protecting its Title II and III jurisdiction over telephony and broadcasting — by sheltering the legacy providers of those services against disintermediation — the agency can never provide the requisite "nexus" demanded by the *Comcast* opinion.[33] Indeed, neither the Commission nor opponents of net neutrality (presumably for different reasons) dare even to mention the possibility of using protectionism as the justification on remand in *Comcast*. Rather than calling out the elephant in its room, the FCC like the proverbial blind man is trying to describe it by feel, using different words.

That is because "reclassification" is simply **not** "nexus" for ancillary jurisdiction purposes. Instead of supplying the requisite linkage between Titles I and II lacking in *Comcast,* reclassification just *defines the agency around the problem.* By affixing a new label to broadband Internet access, the FCC hopes to offer a direct statutory basis for broadband regulation, deeming the "transport component" of broadband to be a Title II form of "telecommunications." Many are predicting that this transparent effort to evade the court of appeals' reasoning will be met with almost certain reversal.[34]

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[32] The *Comcast* decision briefly address the additional FCC-offered rationale that Internet openness and nondiscrimination is ancillary to the "just and reasonable practices" mandate of sections 201(b) and 202(a), applicable to telecom carriers. Judge Tatel's opinion dismissed this post-hoc justification not on the substance, but rather because Administrative Procedure Act precedent requires a reviewing federal court to sustain or reverse a regulatory order on the same grounds offered by the agency in its underlying decision. They do not appear to have been invoked as a legal matter to justify reclassification.

[33] That the Commission has gone part of the way with VoIP, applying E-911, LNP and USF rules without formally calling VoIP telecommunications for Title II purposes, does not suggest it is prepared to go all the way with broadband, or that the precedents established on VoIP are valid legal support for its current broadband reclassification proposal.

[34] Since the statutory definition of "telecommunications services," to which Title II applies, does not support the FCC's Third Way proposal, the Notice of Inquiry actually invents a new category, referred to as "Internet Connectivity Service (ICS)," and suggests that

The analysis supplied in this symposium issue is unfortunately not a basis for more sanguine predictions. Indeed, precious little defensible legal reasoning can be employed to justify redefining Internet broadband access as POTS in the current statutory environment. In the author's judgment, there are three principal reasons the FCC's reclassification proposal is invalid as a legal matter under *Comcast*.

1. If *BrandX* was a rational administrative decision, then as a matter of *Chevron* deference[35] the opposite of *BrandX* — in other words a decision that classifying services for *Computer II* purposes should disregard the final, integrated service offered at retail to consumers — *is* irrational absent materially changed circumstances.

2. A court of appeals' decision is not a changed circumstance justifying reversal of a long-established agency policy, even after the Supreme Court clarified recently that the APA does not impose a higher burden on administrative agencies for policy changes.[36]

3. A political desire to "fire up the base," as proposed by one public interest advocated for net neutrality reclassification, is as unseemly as it is unlawful.[37] That Congress has proven unable since April to approve legislation that would amend the 1996 Act to allow reclassification by the FCC is an inappropriate justification for agency action — in fact, if anything it cuts the other way.

Comcast, Network Management and Paid Prioritization

A subtle irony to the very polarized debate over net neutrality is that network management is inherent in and necessary to both IP and switched telecom network engineering.

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reclassification would apply only to that category of service. *Framework for Broadband Internet,* Notice of Inquiry, GN Docket No. 10-127, 25 FCC Rcd. 7866, 7866 ¶ 1 n.1 (2010).

[35] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 842 (1984). The Supreme Court acknowledged in *BrandX* that cable Internet service does contain a telecommunications "component," but deferred to the Commission's determination that this component is "functionally integrated" into a single "offering" properly classified as an "information service." 545 U.S. at 991. None of the facts related to that prior administrative determination have changed.

[36] *FCC v. Fox Television Stations, Inc.,* 129 S. Ct. 1800, 1810-11 (2009), http://supreme.justia.com/us/556/07-582/.

[37] H. Feld, *What Congressional Dems Have To Fear If the FCC Bungles Net Neutrality,* Huffington Post, Aug. 20, 2010, http://www.huffingtonpost.com/harold-feld/what-congressional-dems-h_b_689724.html.

Like most contrasts between these architectures, the technical need for network management is in the middle for telecom and at the edges for the Internet, illuminating the old comparison between a slow and smart network (telephony) and a fast but dumb network (Internet).[38] From an engineering perspective, the mythical "five nines" of QoS on the public switched telephone network is achieved, in large measure, only by utilizing constantly updated criteria for "choking" and "throttling" traffic to eliminate congestion and avoid blockages — for instance during radio call-in contests, American Idol voting, and the like. Those network management practices are rarely disclosed, often changed without notice and have been utilized in the ordinary course with nary any regulatory supervision almost forever.

In that context, from where rises the argument that Title II's ban on unreasonable discrimination and its traditional common carrier obligations preclude use of network management on broadband networks? It cannot be from the facts, as network management is at best ***equally if not more elusive*** on the PSTN. Nor can it be from the law, as Title II precedents, even for monopoly ILECs, have never imposed a ban on or technical regulation of network management practices. Again, while the FCC has held that specific classes of telephone traffic (like controversial free conference calling services that share rural terminating access charges between LECs and long-distance companies) cannot be blocked, advocates for net neutrality long ago distanced themselves from justifying their position on the existence or risk of outright content blocking.

It is even more ironic, also, that for cable network operators, broadband is a shared service, with which many users communicate over the same networkcapacity. Unlike circuit-switched telephony, cable modem service necessarily will be degraded for some users if others sharing the available capacity act like bandwidth hogs.[39] Thus from a technical perspective, reasonable network management is far more important on cable broadband, networks where it is now suspect at the FCC, that on the PSTN, where the agency historically professes to enforce common carrier obligations but almost never ventures into the realm of deciding which engineering practices qualify as "reasonable" for purposes of section 201(b) of the Act.[40]

The complaint that without net neutrality rules, these network engineering decisions will not be transparent to users is unsound. FCC reclassification is not required in order to ensure disclosure because as a non-common carrier service, broadband is subject to FTC oversight and

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[38] R. Cringely, *Out of Sight, Out of Mind: Big Old Stupid Telephone Companies are Throwing Away Their Only Real Asset,* PBS.org, June 24, 2004, http://www.pbs.org/cringely/pulpit/2004/pulpit_20040624_000457.html.

[39] "Cable television systems also can offer customers physical transport to the Internet at high speeds, but the speed can degrade when many customers simultaneously use the cable system for transport to the Internet." GAO Report, supra note 16, at 5.

[40] 47 U.S.C. § 201(b).

sanction for misleading trade practices. (Shared authority between the two agencies is hardly uncommon in telecom, for instance with respect to the "do not call" list and associated telemarketing sales rule.)

Nor is it correct that in the absence of net neutrality regulations, a "two-tiered" Internet will for the first time distinguish among packets and content relative to delivery speed. The fact is that we already have an Internet architecture in which wealthy content providers can and do buy preferred access via hosting, caching, edge networking, etc. ISPs vary widely in bandwidth and downstream speed, as do backbone transport and peering providers. It's been true for more than a decade that when buying Internet access, you get what you pay for in America.

So what's wrong with an Internet toll road? Nothing, in my view. First, discrimination in communications pricing to offer different classes of service is nothing new. As early as the 1920s, the Supreme Court distinguished among classes of service for purposes of the filed rate doctrine, subjecting higher-priced services offering confirmed message delivery to a wider scope of common law liability.[41] Second, from a policy perspective, where is the harm in an upgraded Internet service if, as should be assumed, broadband is not degraded for "the rest of us"? As Paul Misener of Amazon has persuasively suggested,[42]

> If paid performance enhancement for some content is equally available and does not degrade the performance of other content, then it should be permissible. And, following this principle, in addition to moving [Web hosts], leasing private lines and edge caching, Internet content providers (and consumers) should be able to purchase "quality of service" or "managed services" from network operators on the same basis — equal availability and no harm to other content.

This does not at all diminish the politically liberating and democratizing impact of the Internet and Web technologies.[43] It merely recognizes that the United States operates under the model of a competitive market economy, in which buyers choose which price points and product features best meet their needs. Everyone is not treated the same on airlines, in hotels or

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41 *Western Union Tel. Co. v. Priester,* 276 U.S. 252 (1928); *Western Union Union Tel. Co. v. Esteve Bros.,* 256 U. S. 566 (1920).

42 P. Misener, *A Potential Net Neutrality Win-Win-Win,* CNet News.com, July 22, 2010, http://news.cnet.com/8301-13578_3-20011284-38.html ("There have been nearly four years of Net neutrality detente in which — despite a lack of clear, complete, enforceable laws or regulations on the subject — two realities are manifest: there have been very few incidents that might be considered 'violations' of Net neutrality, and network operators have not deployed innovative new services that consumers and content providers would be willing to purchase. Each of these realities deserves attention.").

43 *See, e.g.,* G. Manishin, *Twitter's Still a Revolutionary Technology,* LexDigerati, Sept. 24, 2010, http://manishin.com/law/?p=1806.

on America's freeways in rush hour. From that perspective, there is little reason to mandate anything different for Internet access and content.

Congress and Google-Verizon

Lastly, the political situation offered by proponents as a rationale for reclassification fails for one overriding reason — Congress makes the law, not administrative agencies. There can be no valid contention that the failure of Capitol Hill to report out or enact bills to reverse *Comcast* and provide statutory authority for net neutrality regulations is not fatal. Once Congress codified *Computer II's* information/telecom dichotomy in 1996, it took away from the agency the right to tinker with the statute's definitional silos applicable to communications.

The 1996 Act of course also dramatically expanded the FCC's jurisdiction and responsibilities, so this *quid pro quo* is hardly debilitating. Moreover, Congress has proven adept at revising the Communications Act to sanction administrative actions that courts perceived as exceeding statutory bounds. For instance, the 1996 Act itself gave the FCC power to require mandatory forbearance and detariffing that the Supreme Court a mere two years before held were beyond the agency's authority.[44] And the administrative creation of a do-not-call telemarketing list in 2003 was affirmed retroactively by Congress less than a week after one federal district court held it unlawful.[45] A legislative "fix" for *Comcast* would thus be trivial.[46]

That does not mean it will occur, and signals are many that with mid-term elections hotly contested, Congress has little desire to wade into the maze of net neutrality. Sen. John Kerry remarked that, having failed to sustain net neutrality legislation in the Senate, proponents needed to persuade the FCC to reclassify because Congress is unable to act.[47] In my judgment, to the contrary, this compels an agency realization that reclassification would exceed its political base as well as its legislative authority. Yet it is also plain that politics plays a major role in the net neutrality debates. Google and Verizon's August 2010 announcement of a proposed compromise framework for net neutrality was lambasted for carving out wireless and leaving

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[44] *MCI Telecomms. Corp. v. American Tel. & Tel. Co.,* 512 U.S. 218 (1994).

[45] *U.S. Security v. FTC,* No. 03-122 (W.D. Okla. Sept. 23, 2003); H.R. 3161, Public L. No. 108-82, 108th Cong. (Sept. 29, 2003) ("The do-not-call registry provision of the Telemarketing Sales Rule (16 C.F.R. 310.4(b)(1)(iii)), which was promulgated by the Federal Trade Commission, effective March 31, 2003, is ratified.").

[46] The FCC, like other federal agencies, "literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC, 476* U.S. 355, 374 (1986).

[47] *Kerry: Net-Neutrality Legislation Unlikely, FCC Must Act,* The Hill, Aug. 5, 2010, http://thehill.com/blogs/hillicon-valley/technology/112935-kerry-net-neutrality-legislation-unlikely-fcc-must-act.

open the possibility of service differentiation based on "paid prioritization."[48] That is a very defensible proposal, one that fairly balances a variety of different interests, and deserves consideration on the merits.

Conclusion

Net neutrality illustrates in very real terms how the collapse of *Computer II* in today's era of accelerating technological convergence presents vexing problems of definition and process. The "old" statutory model of communications, launched by the 1996 Act after a decade of legislative wrangling, is ill-suited to resolution of the thorny issue of technologically neutral FCC regulation. In the long run, what is clearly needed is a new Telecom Act that treats similar services the same, regardless of network technology, thus eliminating regulatory silos. It's a hard job but someone's got to do it. That someone is Congress, not the FCC.

[48] *Blogs Not Neutral on Google,* PewResearchCenter, Aug. 19, 2010, http://pewresearch.org/pubs/1704/blogs-net-neutrality-google-new-york-mosque; see E. Schmidt & I. Sidenberg, *From Google and Verizon, A path to An Open Internet*, Washington Post, Aug. 10, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/08/09/AR2010080905647.html.

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