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JERRY KANG
Professor of Law
University of California, Los Angeles

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CONTENTS

CHAPTER 2

ENTRY

p.158, add N&Q 9:

9. *FCC to States: Don't be obstructionist.* In a 2009 Order, the FCC heard evidence that local jurisdictions were taking too long to process wireless service facility siting applications.* Of approximately 3,300 applications then pending, the FCC was told that about 760 had been pending for more than 1 year, about 180 for more than 3 years. Based on such evidence, the FCC made two clarifications. First, it set timelines for what counts as "a reasonable period of time," 47 U.S.C. § 332(c)(7)(B)(ii), within which state and local zoning authorities must make its decision (90 days for collocation request; 150 days for all other siting requests). After that time, the firm could sue in federal court based on the local authorities' "failure to act." § 332(c)(7)(B)(v). Second, the FCC held that denying a siting application solely because service is available from another provider would "prohibit or have the effect of prohibiting the provision of personal wireless services," in violation of § 332(c)(7)(B)(i)(II).

* *See In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, 24 FCC Rcd 13994 (2009).

CHAPTER 3

PRICING

p.207, replace Note: Pricing other Telephony Services with:

NOTE: INTERCARRIER COMPENSATION

Recall our careful study of interstate access charges. Well, these access charges are just a subset of the more general problem of *intercarrier compensation*. Back when AT&T was effectively a monopoly, things were so much simpler. Now, the modern "telephone" environment comprises heterogeneous networks owned by different firms. Therefore, completing a simple phone call often requires networks to hand off traffic to other networks. When those bits exchange, are pennies exchanged as well? And if so, who or what sets the prices?

LEC ←→ IXC: Access Charges. We have already learned that LECs provide exchange access to interexchange carriers (IXCs) to originate and terminate calls. For such services, IXCs have to pay LECs *access charges*. As we have already discussed, the FCC regulates the rates of interstate access charges of the largest LECs (RBOCs & GTE).[*]

You might assume that the rates charged by competitive LECs (CLECs) to IXCs would *not* be regulated: after all, CLECs are newer entrants that lack the historical market dominance of the incumbent. Nevertheless, CLECs enjoy a terminating access monopoly for all its subscribers. Put another way, suppose

[*] Although the details are beyond the scope of this text, there has been some deregulation on this front. As price-cap LECs can demonstrate that they are subject to competition with regards to certain services, certain services have been allowed to fall outside of rate regulation. *See generally In the Matter of Access Charge Reform*, 5th R&O and Further NPRM, 14 FCC Rcd 14221 (1999) ("Pricing Flexibility Order").

that a long-distance caller wants to contact someone who subscribes to a CLEC. The caller's IXC must pay access charges to the terminating CLEC—there's no way to avoid this party if the call is to be completed. In the 1990s, some CLECs tariffed exorbitant fees for terminating long distance calls and insisted that IXCs pay the filed rates. The FCC adjudicated some of these rates as unjust and unreasonable under § 201.[*] To avoid similar ploys, in 2001, the FCC adopted a general rule that capped CLEC interstate access charges to the price charged by competing ILECs.[†]

Although the FCC sets interstate access charges, the state PUCs set intrastate access charges. Since 1996, the FCC has tried aggressively to push down interstate access charges to their actual cost. By contrast, states generally have been much slower to follow suit. That's why interstate access charges tend to be lower than intrastate access charges.

LEC ←→ LEC: Reciprocal Compensation. Now suppose you live in a downtown loft and are calling a nearby office building. Your wireline telephone provider is Verizon, but the office building is serviced by a competitive LEC (CLEC) called TelePacific. In order to complete the call, somehow the signal must traverse Verizon's network onto Telepacific's. Are there access charges here too?

Although this handoff between LECs seems technologically and conceptually similar to the IXC-LEC handoff inherent in long distance, the access charge regime does not apply. Instead, in the parlance of the 1996 Telecommunications Act, it's called "reciprocal compensation." Section 251(b)(5) specifically requires all LECs to establish "reciprocal compensation arrangements for the transport and termination of telecommunications." The rates that LECs might charge each other is governed by private negotiated agreement between the carriers or set by state PUCs, which must regulate in a manner consistent with the FCC's pricing methodology. In magnitude, these reciprocal compensation payments tend to be lower than either intra- or interstate access charges.

At this point, you can already see the potential arbitrariness of intercarrier compensation. Access charges arose from the break-up of AT&T, and are different depending on whether they are intra- or interstate. By contrast, reciprocal compensation agreements arose from the Telecommunications Act of 1996,

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[*] *See, e.g., In the Matters of AT&T Corp., Complainant, v. Business Telecom, Inc.*, MO&O, 16 FCC Rcd 12312 (2001) (holding that BTI's rate of 7.18 cents per minute violated § 201(b)).

[†] *See* 47 CFR § 61.26(b).

as it tried to induce competition in the local loop. Things get even crazier if we add cell phones (CMRS)[*] and the Internet. As the FCC recently put it:

> As a result of this long history, today, there are two primary types of intercarrier compensation regulation: (1) access charges; and (2) reciprocal compensation. However, the rates that apply to traffic under these systems continue to depend on a number of factors including: (1) where the call begins and ends (interstate, intrastate, or "local"); (2) what types of carriers are involved (incumbent LECs, competitive LECs, interexchange carriers (IXCs), wireless); and (3) the type of traffic (wireline voice, wireless voice, ISP-bound, data). The resulting patchwork of rates and regulations is inefficient, wasteful and slowing the evolution to IP [Internet Protocol] networks.[†]

Gaming the system. This crazy patchwork has led to gaming and arbitrage. Consider for example "access stimulation" where the goal is to drive calls to a terminating LEC that can charge high interstate access charges. Various "free" services such as "free telephone conference" numbers and adult chat lines are free to end-users like you and me because they're making a killing from our IXCs who have to pay per minute access charges. As the FCC explains:

> [A]ccess stimulation [involves] arrangements in which carriers, often competitive carriers, profit from revenue-sharing agreements by operating in an area where the incumbent carrier has a relatively high per-minute interstate access rate. Under our existing rules, the competitive carrier benchmarks its rate to that of the incumbent rural carrier, but the revenue-sharing arrangement results in a volume of traffic that is more consistent with a larger carrier. A competitive carrier could, for example, generate millions of dollars in revenues

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[*] Roughly speaking, CMRS providers cannot demand "access charges" from IXCs who terminate long distance calls to cell phones. They're, of course, free to negotiate private agreements if they can do so. *See In the Matter of Petitions of Sprint PCS and AT&T Corp., For Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd 13192, ¶¶ 8-9 (2002). If a CMRS terminates "local" traffic from a nearby LEC (or vice versa) in the same Metropolitan Trading Area (MTA), then the reciprocal compensation regime applies. Any such compensation, if there is any, must involve the sending network paying the receiving network for terminating calls. *See* 47 C.F.R. § 20.11(a)(b) (principle of "mutual compensation"). Don't fret over the details since the FCC is in the process of revamping all these rules.

[†] *In the Matter of Connect America Fund*, NPRM & Further NPRM, 26 FCC Rcd 4554, 4707 ¶ 502 (2011).

> each month from other carriers simply by entering into a revenue sharing arrangement with a company that operates a chat line.[*]

Or consider "phantom traffic," which is a call whose true origin is unknown or disguised in order to avoid various intercarrier connection charges.

Towards a comprehensive overhaul. You should now have a sense of why intercarrier compensation has to be comprehensively overhauled. There are too many irrationalities and inefficiencies, even without considering the implicit subsidy issue. This reform will be intricately tied to providing universal service of broadband Internet to all Americans.

p.249; add N&Q 7:

7. *Things in flux: The National Broadband Plan of 2010.* As part of the American Recovery and Reinvestment Act of February 2009, Congress instructed the FCC to submit a national broadband plan to ensure access to broadband capability by all Americans at affordable prices.[†] In March 2010, after dozens of workshops and field hearings, the FCC satisfied that request by delivering CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN ("BROADBAND PLAN"). The FCC's goal is to have each household and business have access to actual download speeds of 4Mbps and actual upload speeds of 1 Mbps by 2020.[‡] In order to do that, the FCC explicitly recognized the need to work through complex universal service and intercarrier compensation issues. First, it recommended the creation of a new Connect America Fund (CAF) that would help address the broadband availability gap. Second, it suggested slowly phasing out the current High-Cost programs (one of the four categories of beneficiaries of the current USF) and moving those funds into the CAF. Third, the FCC recommended phasing out per-minute access charges (not just interstate access charges but also intrastate charges). Fourth, it sought to broaden the base of contributors into the CAF. All of these transitions will involve complex rulemakings,[§] many of which will be challenged in court. In any event, be aware that in the next decade, we will move away from subsidizing "plain old telephone service"

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[*] *Id.* at ¶ 36.

[†] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k), 123 Stat. 115, 515-16 (2009) (ARRA).

[‡] FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 135 (2010).

[§] *See, e.g.*, *Connect America Fund*, NOI & NPRM, 25 FCC Rcd. 6657 (2010).

(POTS) and move toward subsidizing broadband Internet, which by then will increasingly be the platform through which voice and other communication services are provided. (We learn much more about the Internet in the next Chapter.)

CHAPTER 4

BAD CONTENT

replace p. 274 N&Q 9 to p.281 N&Q 7 with:

9. *The Golden Globes saga.* At the 2003 *Golden Globes* award, U2 singer and social activist Bono accepted his award with the words "this is really, really, fucking brilliant. Really, really, great." As could be predicted, many viewers filed complaints. The FCC's enforcement bureau denied them, partly on the grounds that a mere fleeting expletive did not amount to "indecency." Months later, the full Commission reversed and put the broadcast industry on notice.[*] In 2006, after complicated procedural maneuvers, the FCC issued an Order holding that various broadcasts had violated the standard announced in the *Golden Globes Order*. (The broadcasters, however, were not required to pay a fine.) On appeal, the 2nd Circuit Court of Appeals held that the FCC's decision was arbitrary and capricious because it had changed indecency policy in the *Golden Globes Order* without providing adequate explanation.[†] The Supreme Court granted cert. and issued the following opinion.

FCC v. FOX TELEVISION STATIONS, INC.

129 S. Ct. 1800 (2009)

JUSTICE SCALIA delivered the opinion of the Court, except Part III-E.

II. THE PRESENT CASE

This case concerns utterances in two live broadcasts aired by Fox Television Stations, Inc. . . . prior to the Commission's *Golden Globes Order*. The first occurred during the 2002 Billboard Music Awards, when the singer Cher exclaimed, "I've also had critics for the last 40 years saying that I was on my way out every year. Right. So f*** 'em." The second involved a segment of the 2003

[*] *Golden Globes Order*, 19 F.C.C. Rcd. 4975 (2004).

[†] Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2nd Cir. 2007).

Billboard Music Awards, during the presentation of an award by Nicole Richie and Paris Hilton, principals in a Fox television series called "The Simple Life." Ms. Hilton began their interchange by reminding Ms. Richie to "watch the bad language," but Ms. Richie proceeded to ask the audience, "Why do they even call it 'The Simple Life?' Have you ever tried to get cow s*** out of a Prada purse? It's not so f***ing simple."

[The opinion next described the complex procedural maneuvers that led up to the *Remand Order*, in which the FCC upheld the indecency findings for the broadcasts described above. See *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002, and March 8, 2005*, *21 FCC Rcd. 13299 (2006) (Remand Order)*.—ED.]

III. ANALYSIS

A. GOVERNING PRINCIPLES

The Administrative Procedure Act . . . permits . . . the setting aside of agency action that is "arbitrary" or "capricious". Under what we have called this "narrow" standard of review, we insist that an agency "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co. (1983)*. We have made clear, however, that "a court is not to substitute its judgment for that of the agency," *ibid.,* and should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc. (1974)*.

In overturning the Commission's judgment, the Court of Appeals here relied in part on Circuit precedent requiring a more substantial explanation for agency action that changes prior policy.

We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. The Act mentions no such heightened standard. And our opinion in *State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance.

To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. See *United States v. Nixon (1974)*. And of course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it,

and that the agency *believes* it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must -- when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.

B. APPLICATION TO THIS CASE

Judged under the above described standards, the Commission's new enforcement policy and its order finding the broadcasts actionably indecent were neither arbitrary nor capricious. First, the Commission forthrightly acknowledged that its recent actions have broken new ground, taking account of inconsistent "prior Commission and staff action" and explicitly disavowing them as "no longer good law." *Golden Globes Order*. . . . There is no doubt that the Commission knew it was making a change. That is why it declined to assess penalties; and it relied on the *Golden Globes Order* as removing any lingering doubt.

Moreover, the agency's reasons for expanding the scope of its enforcement activity were entirely rational. It was certainly reasonable to determine that it made no sense to distinguish between literal and nonliteral uses of offensive words, requiring repetitive use to render only the latter indecent. As the Commission said with regard to expletive use of the F-Word, "the word's power to insult and offend derives from its sexual meaning." And the Commission's decision to look at the patent offensiveness of even isolated uses of sexual and excretory words fits with the context-based approach we sanctioned in *Pacifica*.

When confronting other requests for *per se* rules governing its enforcement of the indecency prohibition, the Commission has declined to create safe harbors for particular types of broadcasts. The Commission could rationally decide it needed to step away from its old regime where nonrepetitive use of an expletive was *per se* nonactionable because that was "at odds with the Commission's overall enforcement policy."

The fact that technological advances have made it easier for broadcasters to bleep out offending words further supports the Commission's stepped-up enforcement policy. And the agency's decision not to impose any forfeiture or other sanction precludes any argument that it is arbitrarily punishing parties without notice of the potential consequences of their action.

C. THE COURT OF APPEALS' REASONING

The Court of Appeals found the Commission's action arbitrary and capricious on three grounds. First, the court criticized the Commission for failing to explain why it had not previously banned fleeting expletives as "harmful 'first blow[s].'" In the majority's view, without "evidence that suggests a fleeting expletive is harmful [and] . . . serious enough to warrant government regulation," the agency could not regulate more broadly.

There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency. It is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained. See, *e.g., State Farm* (addressing the costs and benefits of mandatory passive restraints for automobiles). It is something else to insist upon obtaining the unobtainable. Here it suffices to know that children mimic the behavior they observe -- or at least the behavior that is presented to them as normal and appropriate. Programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives. Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission. If enforcement had to be supported by empirical data, the ban would effectively be a nullity.

The Commission had adduced no quantifiable measure of the harm caused by the language in *Pacifica*, and we nonetheless held that the "government's interest in the 'well-being of its youth' . . . justified the regulation of otherwise protected expression." If the Constitution itself demands of agencies no more scientifically certain criteria to comply with the *First Amendment*, neither does the Administrative Procedure Act to comply with the requirement of reasoned decisionmaking.

The court's second objection is that fidelity to the agency's "first blow" theory of harm would require a categorical ban on *all* broadcasts of expletives; the Commission's failure to go to this extreme thus undermined the coherence of its rationale.

[T]he agency's decision to consider the patent offensiveness of isolated expletives on a case-by-case basis is not arbitrary or capricious. "Even a prime-time recitation of Geoffrey Chaucer's Miller's Tale," we have explained, "would not be likely to command the attention of many children who are both old enough to understand and young enough to be adversely affected." *Pacifica*. The same rationale could support the Commission's finding that a broadcast of the film Saving Private Ryan was not indecent -- a finding to which the broadcasters point

as supposed evidence of the Commission's inconsistency. The frightening suspense and the graphic violence in the movie could well dissuade the most vulnerable from watching and would put parents on notice of potentially objectionable material. See *In re Complaints Against Various Television Licensees Regarding Their Broadcast on Nov. 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan," (2005)* (noting that the broadcast was not "intended as family entertainment"). The agency's decision to retain some discretion does not render arbitrary or capricious its regulation of the deliberate and shocking uses of offensive language at the award shows under review -- shows that were expected to (and did) draw the attention of millions of children.

Finally, the Court of Appeals found unconvincing the agency's prediction (without any evidence) that a *per se* exemption for fleeting expletives would lead to increased use of expletives one at a time. But even in the absence of evidence, the agency's predictive judgment basis in the (which merits deference) makes entire sense. To predict that complete immunity for fleeting expletives, ardently desired by broadcasters, will lead to a substantial increase in fleeting expletives seems to us an exercise in logic rather than clairvoyance.

E. THE DISSENTS' ARGUMENTS[*]

JUSTICE BREYER and JUSTICE STEVENS rely upon two supposed omissions in the FCC's analysis . . . . Neither of these omissions could undermine the coherence of the rationale the agency gave, but the dissenters' evaluation of each is flawed in its own right.

First, both claim that the Commission failed adequately to explain its consideration of the constitutional issues inherent in its regulation. . . . According to JUSTICE BREYER, the agency said "next to nothing about the relation between the change it made in its prior 'fleeting expletive' policy and the *First-Amendment*-related need to avoid 'censorship.'" The *Remand Order* does, however, devote four full pages of small-type, single-spaced text (over 1,300 words not counting the footnotes) to explaining why the Commission believes that its indecency-enforcement regime (which includes its change in policy) is consistent with the *First Amendment* -- and therefore not censorship as the term is understood.

Second, JUSTICE BREYER looks over the vast field of particular factual scenarios unaddressed by the FCC's 35-page *Remand Order* and finds one that

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[*] This Part of the opinion is only a plurality, with Justices Roberts, Thomas, and Alito joining.—ED.

is fatal: the plight of the small local broadcaster who cannot afford the new technology that enables the screening of live broadcasts for indecent utterances.

We doubt, to begin with, that small-town broadcasters run a heightened risk of liability for indecent utterances. In programming that they originate, their down-home local guests probably employ vulgarity less than big-city folks; and small-town stations generally cannot afford or cannot attract foul-mouthed glitteratae from Hollywood. Their main exposure with regard to self-originated programming is live coverage of news and public affairs. But the *Remand Order* went out of its way to note that the case at hand did not involve "breaking news coverage," and that "it may be inequitable to hold a licensee responsible for airing offensive speech during live coverage of a public event". As for the programming that small stations receive on a network "feed": This *will* be cleansed by the expensive technology small stations (by JUSTICE BREYER's hypothesis) cannot afford.

[More fundamental is Judge Breyer's] false assumption that the *Remand Order* makes no provision for the avoidance of unfairness -- that the single-utterance prohibition will be invoked uniformly, in all situations. The *Remand Order* made very clear that this is not the case. . . . [T]he fact that the [FCC] believed that Fox (a large broadcaster that used suggestive scripting and a deficient delay system to air a prime-time awards show aimed at millions of children) "fail[ed] to exercise 'reasonable judgment, responsibility and sensitivity,'" says little about how the Commission would treat smaller broadcasters who cannot afford screening equipment. Indeed, that they would not be punished for failing to purchase equipment they cannot afford is positively suggested by the *Remand Order*'s statement that "[h]olding Fox responsible for airing indecent material in this case does not . . . impose undue burdens on broadcasters."

There was, in sum, no need for the Commission to compose a special treatise on local broadcasters. [8] And JUSTICE BREYER can safely defer his concern for those yeomen of the airwaves until we have before us a case that involves one.

* * *

The Second Circuit believed that children today "likely hear this language far more often from other sources than they did in the 1970's when the Commission first began sanctioning indecent speech," and that this cuts against more stringent regulation of broadcasts. Assuming the premise is true (for this point the Second Circuit did not demand empirical evidence) the conclusion does not necessarily follow. The Commission could reasonably conclude that the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children. In the end, the Second Circuit and the broadcasters quibble with the Commission's

policy choices and not with the explanation it has given. We decline to "substitute [our] judgment for that of the agency," *State Farm,* and we find the Commission's orders neither arbitrary nor capricious.

The judgment of the United States Court of Appeals for the Second Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.[*]

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

In my view, the Federal Communications Commission failed adequately to explain *why* it *changed* its indecency policy from a policy permitting a single "fleeting use" of an expletive, to a policy that made no such exception. . . . Its explanation . . . discussed several factors well known to it the first time around, which by themselves provide no significant justification for a *change* of policy.

I

That law grants those in charge of independent administrative agencies broad authority to determine relevant policy. But it does not permit them to make policy choices for purely political reasons nor to rest them primarily upon unexplained policy preferences. Federal Communications Commissioners have fixed terms of office; they are not directly responsible to the voters; and they enjoy an independence expressly designed to insulate them, to a degree, from "'the exercise of political oversight.'" *Freytag v. Commissioner (1991)* (SCALIA, J., concurring in part and concurring in judgment); see also *Morrison v. Olson (1988)*. That insulation helps to secure important governmental objectives, such as the constitutionally related objective of maintaining broadcast regulation that does not bend too readily before the political winds. But that agency's comparative freedom from ballot-box control makes it all the more important that courts review its decisionmaking to assure compliance with applicable provisions of the law -- including law requiring that major policy decisions be based upon articulable reasons.

The statutory provision applicable here is the [APA]. This legal requirement helps assure agency decisionmaking based upon more than the personal preferences of the decisionmakers. Courts have applied the provision sparingly, grant-

[*] The concurring opinion of Justice Thomas was omitted. The concurring in part and concurring in the judgment opinion of Justice Kennedy was omitted. The dissenting opinions of Justice Stevens and of Justice Ginsburg were omitted.—ED.

ing agencies broad policymaking leeway. But they have also made clear that agency discretion is not "'unbounded.'" *Burlington Truck Lines, Inc. v. United States (1962)*.

The law has also recognized that it is not so much a particular set of substantive commands but rather it is a *process*, a process of learning through reasoned argument, that is the antithesis of the "arbitrary." This means agencies must follow a "logical and rational" decisionmaking "process." *Allentown Mack Sales & Service, Inc. v. NLRB (1998)*. An agency's policy decisions must reflect the reasoned exercise of expert judgment. See *Burlington Truck Lines* (decision must reflect basis on which agency "exercised its expert discretion"); see also *Humphrey's Executor v. United States (1935)* (independent agencies "exercise . . . trained judgment . . . 'informed by experience'"). And, as this Court has specified, in determining whether an agency's policy choice was "arbitrary," a reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Overton Park*.

Moreover, an agency must act consistently. The agency must follow its own rules. *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co. (1932)*. And when an agency seeks to change those rules, it must focus on the fact of change and explain the basis for that change. See, *e.g., Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs. (2005)* ("*Unexplained* inconsistency is" a "reason for holding an interpretation to be an arbitrary and capricious change from agency practice" (emphasis added)).

To explain a change requires more than setting forth reasons why the new policy is a good one. It also requires the agency to answer the question, "Why did you change?" And a rational answer to this question typically requires a more complete explanation than would prove satisfactory were change itself not at issue. An (imaginary) administrator explaining why he chose a policy that requires driving on the right-side, rather than the left-side, of the road might say, "Well, one side seemed as good as the other, so I flipped a coin." But even assuming the rationality of that explanation for an *initial* choice, that explanation is not at all rational if offered to explain why the administrator *changed* driving practice, from right-side to left-side, 25 years later.

In *State Farm*, a unanimous Court applied these commonsense requirements to an agency decision that rescinded an earlier agency policy. The Court wrote that an agency must provide an explanation for the agency's "*revocation*" of a prior action that is more thorough than the explanation necessary when it does not act in the first instance. The Court defined "revocation," not simply as *rescinding* an earlier policy, but as "a *reversal of the agency's former views* as to the proper course." *State Farm* (emphasis added).

At the same time, the Court described the need for explanation in terms that apply, not simply to pure *rescissions* of earlier rules, but rather to changes of policy as it more broadly defined them. It said that the law required an explanation for such a *change* because the earlier policy, representing a "'settled course of behavior[,] embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies . . . best if the settled rule is adhered to.'" *State Farm*. Thus, the agency must explain *why* it has come to the conclusion that it should now change direction. Why does it now reject the considerations that led it to adopt that initial policy? What has changed in the world that offers justification for the change? What other good reasons are there for departing from the earlier policy?

Contrary to the majority's characterization of this dissent, it would not (and *State Farm* does not) require a "*heightened standard*" of review. Rather, the law requires application of the *same standard* of review to different circumstances, namely circumstances characterized by the fact that *change* is at issue. It requires the agency to focus upon the fact of change where change is relevant, just as it must focus upon any other relevant circumstance. It requires the agency here to focus upon the reasons that led the agency to adopt the initial policy, and to explain why it now comes to a new judgment.

I recognize that *sometimes* the ultimate explanation for a change may have to be, "We now weigh the relevant considerations differently." But at other times, an agency can and should say more. Where, for example, the agency rested its previous policy on particular factual findings; or where an agency rested its prior policy on its view of the governing law; or where an agency rested its previous policy on, say, a special need to coordinate with another agency, one would normally expect the agency to focus upon those earlier views of fact, of law, or of policy and explain why they are no longer controlling. Regardless, to say that the agency here must answer the question "why change" is not to require the agency to provide a justification that is "*better* than the reasons for the old [policy]." It is only to recognize the obvious fact that *change* is sometimes (not always) a relevant background feature that sometimes (not always) requires focus (upon prior justifications) and explanation lest the adoption of the new policy (in that circumstance) be "arbitrary, capricious, an abuse of discretion."

That is certainly how courts of appeals, the courts that review agency decisions, have always treated the matter in practice. The majority's holding could in this respect significantly change judicial review in practice, and not in a healthy direction. After all, if it is *always* legally sufficient for the agency to reply to the question "why change?" with the answer "we prefer the new policy" (even when the agency *has not considered* the major factors that led it to adopt its old policy), then why bother asking the agency to focus on the fact of change? More to the point, *why* would the law exempt this and no other aspect of an

agency decision from "arbitrary, capricious" review? Where does, and why would, the APA grant agencies the freedom to change major policies on the basis of nothing more than political considerations or even personal whim?

Avoiding the application of any *heightened* standard of review, the Court in *State Farm* recognized that the APA's "nonarbitrary" requirement affords agencies generous leeway when they set policy. But it also recognized that this leeway is not absolute. The Court described its boundaries by then listing considerations that help determine whether an explanation is adequate. Mirroring and elaborating upon its statement in *Overton Park,* the Court said that a reviewing court should take into account whether the agency had "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*.

II

We here must apply the general standards set forth in *State Farm* and *Overton Park* to an agency decision that changes a 25-year-old "fleeting expletive" policy from (1) the old policy that would normally permit broadcasters to transmit a single, fleeting use of an expletive to (2) a new policy that would threaten broadcasters with large fines for transmitting even a single use (including its use by a member of the public) of such an expletive, alone with nothing more.

Consider the requirement that an agency at least minimally "consider . . . important aspect[s] of the problem." *State Farm*. The FCC failed to satisfy this requirement, for it failed to consider two critically important aspects of the problem that underlay its initial policy judgment (one of which directly, the other of which indirectly). First, the FCC said next to nothing about the relation between the change it made in its prior "fleeting expletive" policy and the First-Amendment-related need to avoid "censorship," a matter as closely related to broadcasting regulation as is health to that of the environment. The reason that discussion of the matter is particularly important here is that the FCC had *explicitly* rested its prior policy in large part upon the need to avoid treading too close to the constitutional line.

The FCC [has] repeatedly made clear that it based its "fleeting expletive" policy upon the need to avoid treading too close to the constitutional line as set forth in Justice Powell's *Pacifica* concurrence. What then did it say, when it changed its policy, about *why* it abandoned this Constitution-based reasoning? The FCC devoted "four full pages of small-type, single-spaced text," responding to industry arguments that, *e.g.*, changes in the nature of the broadcast industry

made *all* indecency regulation, *i.e.*, *18 U.S.C. § 1464*, unconstitutional. In doing so it repeatedly *reaffirmed* its view that *Pacifica* remains good law. All the more surprising then that, in respect to *why* it abandoned its prior view about the critical relation between its prior fleeting expletive policy and Justice Powell's *Pacifica* concurrence, it says no more than the following:

> "[O]ur decision is not inconsistent with the Supreme Court ruling in *Pacifica*. The Court explicitly left open the issue of whether an occasional expletive could be considered indecent." And, (repeating what it already had said), "*[Pacifica]* specifically reserved the question of 'an occasional expletive' and noted that it addressed only the 'particular broadcast' at issue in that case." *Remand Order*.

These two sentences are not a summary of the FCC's discussion about why it abandoned its prior understanding of *Pacifica*. They *are* the discussion. These 28 words (repeated in two opinions) do not acknowledge that an entirely different understanding of *Pacifica* underlay the FCC's earlier policy; they do not explain why the agency changed its mind about the line that *Pacifica* draws or its policy's relation to that line; and they tell us nothing at all about what happened to the FCC's earlier determination to search for "compelling interests" and "less restrictive alternatives." They do not explain the transformation of what the FCC had long thought an insurmountable obstacle into an open door. The result is not simply *Hamlet* without the prince, but *Hamlet* with a prince who, in midplay and without explanation, just disappears.

[I do not] claim that agencies must always take account of possible constitutional issues when they formulate policy. But the FCC works in the shadow of the *First Amendment* and its view of the application of that Amendment to "fleeting expletives" directly informed its initial policy choice. Under these circumstances, the FCC's failure to address this "aspect" of the problem calls for a remand to the agency.

Second, the FCC failed to consider the potential impact of its new policy upon local broadcasting coverage. This "aspect of the problem" is particularly important because the FCC explicitly took account of potential broadcasting impact. *Golden Globe Order* ("The ease with which broadcasters today can block even fleeting words in a live broadcast is an element in our decision"). Indeed, in setting forth "bleeping" technology changes (presumably lowering bleeping costs) as justifying the policy change, it implicitly reasoned that lower costs, making it easier for broadcasters to install bleeping equipment, made it less likely that the new policy would lead broadcasters to reduce coverage, say by canceling coverage of public events. ("[T]echnological advances have made it possible . . . to prevent the broadcast of a single offending word or action without blocking or disproportionately disrupting the message of the speaker or performer").

What then did the FCC say about the likelihood that smaller independent broadcasters, including many public service broadcasters, still would not be able to afford "bleeping" technology and, as a consequence, would reduce local coverage, indeed cancel coverage, of many public events? It said nothing at all.

The FCC cannot claim that local coverage lacks special importance. To the contrary, "the concept of localism has been a cornerstone of broadcast regulation for decades." *In re Broadcast Localism (2008).*

Neither can the FCC now claim that the impact of its new policy on local broadcasting is insignificant and obviously so. Broadcasters tell us, as they told the FCC, the contrary. They told the FCC, for example, that the costs of bleeping/delay systems, up to $ 100,000 for installation and annual operation, place that technology beyond the financial reach of many smaller independent local stations.

As one local station manager told the FCC,

> "[t]o lessen the risk posed by the new legal framework . . . I have directed [the station's] news staff that [our station] may no longer provide live, direct-to-air coverage" of "live events where crowds are present . . . unless they affect matters of public safety or convenience. Thus, news coverage by [my station] of live events where crowds are present essentially will be limited to civil emergencies." App. 236-237 (declaration of Dennis Fisher).

What did the FCC say in response to this claim? What did it say about the likely impact of the new policy on the coverage that its new policy is most likely to affect, coverage of *local* live events -- city council meetings, local sports events, community arts productions, and the like? It said nothing at all.

The plurality acknowledges that the Commission entirely failed to discuss this aspect of the regulatory problem. But it sees "no need" for discussion in light of its, *i.e.*, the plurality's, own "doubt[s]" that "small-town broadcasters run a heightened risk of liability for indecent utterances" as a result of the change of policy. The plurality's "doubt[s]" rest upon its views (1) that vulgar expression is less prevalent (at least among broadcast guests) in smaller towns, (2) that the greatest risk the new policy poses for "small-town broadcasters" arises when they broadcast local "news and public affairs," and (3) that the *Remand Order* says "little about how the Commission would treat smaller broadcasters who cannot afford screening equipment," while also pointing out that the new policy "'does not . . . impose undue burdens on broadcasters'" and emphasizing that the case before it did not involve "'breaking news.'"

As to the first point, about the prevalence of vulgarity in small towns, I confess ignorance. But I do know that there are independent stations in many large

and medium sized cities. As to the second point, I too believe that coverage of local public events, if not news, lies at the heart of the problem.

I cannot agree with the plurality, however, about the critical third point, namely that the new policy obviously provides smaller independent broadcasters with adequate assurance that they will not be fined. . . . The *Remand Order* says that there "is *no outright news exemption from our indecency rules.*" . . . [Further,] it says *nothing* about a station's *inability to afford* delay equipment (a matter that in individual cases could itself prove debatable). All the FCC had to do was to *consider* this matter and either grant an exemption or explain why it did not grant an exemption. But it did not.

III

The three reasons the FCC did set forth in support of its change of policy cannot make up for the failures I have discussed. Consider each of them. First, as I have pointed out, the FCC based its decision in part upon the fact that "bleeping/delay systems" technology has advanced. I have already set forth my reasons for believing that that fact, without more, cannot provide a sufficient justification for its policy change.

Second, the FCC says that the expletives here in question always invoke a coarse excretory or sexual image; hence it makes no sense to distinguish between whether one uses the relevant terms as an expletive or as a literal description. [This answer] does not help to justify the *change* in policy. The FCC was aware of the coarseness of the "image" the first time around.

Third, the FCC said that "perhaps" its "most importan[t]" justification for the new policy lay in the fact that its new "contextual" approach to fleeting expletives is better and more "[c]onsistent with" the agency's "general approach to indecency" than was its previous "categorica[l]" approach, which offered broadcasters virtual immunity for the broadcast of fleeting expletives. *Remand Order*. This justification, however, offers no support for the change without an understanding of *why, i.e., in what way,* the FCC considered the new approach better or more consistent with the agency's general approach.

[T]the FCC found that the new policy was better in part because, in its view, the new policy better protects children against what it described as "'the first blow'" of broadcast indecency . . . .

The difficulty with this argument, however, is that it does not explain the *change.* . . . So, to repeat the question: What, in respect to the "first blow," has changed?

The FCC points to no empirical (or other) evidence to demonstrate that it previously understated the importance of avoiding the "first blow." Like the majority, I do not believe that an agency must always conduct full empirical studies

of such matters. But the FCC could have referred to, and explained, relevant empirical studies that suggest the contrary. One review of the empirical evidence, for example, reports that "[i]t is doubtful that children under the age of 12 understand sexual language and innuendo; therefore it is unlikely that vulgarities have any negative effect." Kaye & Sapolsky, Watch Your Mouth! An Analysis of Profanity Uttered by Children on Prime-Time Television, 2004 Mass Communication & Soc'y 429, 433 (Vol. 7) (citing two studies). The Commission need not have accepted this conclusion. But its failure to discuss this or any other such evidence, while providing no empirical evidence at all that favors its position, must weaken the logical force of its conclusion.

The FCC also found the new policy better because it believed that its prior policy "would as a matter of logic permit broadcasters to air expletives at all hours of a day so long as they did so one at a time." *Remand Order*. This statement, however, raises an obvious question: Did that happen? The FCC's initial "fleeting expletives" policy was in effect for 25 years. Had broadcasters during those 25 years aired a series of expletives "one at a time?" If so, it should not be difficult to find evidence of that fact. But the FCC refers to none. Indeed, the FCC did not even claim that a change had taken place in this respect. It spoke only of the pure "logic" of the initial policy "permitting" such a practice. That logic would have been apparent to anyone, including the FCC, in 1978 when the FCC set forth its initial policy.

V

In sum, the FCC's explanation of its change leaves out two critically important matters underlying its earlier policy, namely *Pacifica* and local broadcasting coverage. Its explanation rests upon three considerations previously known to the agency ("coarseness," the "first blow," and running single expletives all day, one at a time). With one exception, it provides no empirical or other information explaining why those considerations, which did not justify its new policy before, justify it now.

I need not decide whether one or two of these features, standing alone, would require us to remand the case. Here all come together. And taken together they suggest that the FCC's answer to the question, "Why change?" is, "We like the new policy better." This kind of answer, might be perfectly satisfactory were it given by an elected official. But when given by an agency, in respect to a major change of an important policy where much more might be said, it is not sufficient.

With respect, I dissent.

NOTES & QUESTIONS

1. *Arbitrary ch-ch-ch-changes*? Everyone agrees that agencies are entitled to change their minds, indeed even completely reverse course. But what is the standard by which they can do so without running afoul of the Administrative Procedure Act? Try to articulate the standard suggested by Justice Scalia's majority opinion. Next, do the same for Justice Breyer's dissent. Is there any real difference in the verbal articulations? Or is the difference in the way they apply their standards to the facts of particular cases such as this one?

2. *Why rational?* The Court majority concludes that the FCC's decision to change course in the *Golden Globes Order* is rational, and not "arbitrary and capricious." Why?

3. *Why irrational?* The dissent concludes the opposite because the FCC did not adequately consider the First Amendment and because of the impact on local broadcasters. Again, be able to explain these arguments.

4. *Role of evidence.* In the "arbitrary and capricious" analysis, facts should matter. So, consider the following three issues: (1) the harm suffered by children because of the "first blow" of indecency; (2) the behavior of broadcasters in some race-to-the-bottom to air as much indecency as possible; (3) the relationship between small-town broadcasters and their taste for vulgarity. What kind of "evidence," if any, do the Justices demand to resolve uncertainties over such factual disputes? Perhaps "common sense" or "logic" should suffice. Do you recall what the D.C. Circuit Court of Appeals wrote in *Act III* about the need (or lack thereof) of psychological harm studies? Should it matter that judges are engaged in an APA review versus a First Amendment analysis?

5. *The administrative state (a.k.a. headless fourth branch).* In his dissent, Justice Breyer characterizes the administrative agency as being shielded from political checks and pressures; accordingly, it should be reviewed more closely by the judiciary. Justice Scalia, in an omitted part of the plurality section of his opinion, provided a different characterization:

> JUSTICE BREYER purports to "begin with applicable law," but in fact begins by stacking the deck. He claims that the FCC's status as an "independent" agency sheltered from political oversight requires courts to be "all the more" vigilant in ensuring "that major policy decisions be based upon articulable reasons." Not so. The independent agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction. Indeed, the precise policy change at issue here was spurred by significant political pressure from Congress.

Later he adds:

> There is no reason to magnify the separation-of-powers dilemma posed by the Headless Fourth Branch, by letting Article III judges -- like jackals stealing the lion's kill -- expropriate some of the power that Congress has wrested from the unitary Executive.

It sounds like there's a substantial disagreement on the purpose and constitutional position of agencies. Can you explain this disagreement? Does anything turn on it?

6. *Raw politics*. When a new President is elected and changes course, he can say that that's his political mandate after winning the election. When Congress changes control, contrary legislation can be passed under the idea of majority political rule. Interestingly, the judiciary behaves differently about changing its mind. From this opinion, should agencies act more like legislatures or courts? Justice Breyer writes, "I recognize that sometimes the ultimate explanation for a change may have to be, 'We now weigh the relevant considerations differently.'" What are those cases if this is not one of them? By insisting on more verbiage, are we just encouraging administrative agencies to cloak their political judgments behind a technocratic veneer?

7. *The missing First Amendment*. The Court made clear that the case was being decided on statutory grounds. On remand, however, the Second Circuit Court of Appeals addressed the constitutional question. *See* Fox v. FCC, 2010 U.S. App. LEXIS 14293 (July 13, 2010). The court held that the FCC's indecency policy, as set forth in its 2001 Industry Guidance, violated the First Amendment by being vague and chilling speech. It provided numerous examples of vagueness, and asked, for instance, why "bullshitter" should be deemed indecent but not "dickhead." It also noted that the two exceptions to the presumptive rule against "fuck" or "shit"—bona fide news, and artistic necessity—were themselves vague. The court also cataloged numerous examples of chilled speech. No doubt the Supreme Court will soon have the final constitutional say.

CHAPTER 6

CONSOLIDATION

p.559, insert just before Part "2. Local Caps":

In 2009, the D.C. Circuit Court of Appeals addressed the legality of this regulation in Comcast v. FCC.* The court was unhappy because it felt that the agency had ignored the issue of competition. It wrote that "[t]he Commission's dereliction in this case is particularly egregious . . . [because the court had] expressly instructed the agency on remand to consider fully the competition that cable operators face from DBS companies."† Accordingly, the court vacated the cable national horizontal ownership caps, thereby leaving consolidation questions to generally applicable antitrust laws.

p.605, replace last paragraph with:

Congress did not seem very happy about this regulation. On May 15, 2008, the Senate passed a joint resolution by voice that said that this rule "shall have no force or effect."‡ Similarly, on June 17, 2008, the House Appropriations Financial Services Subcommittee passed a spending bill that included a provision denying funding to the FCC to implement the FCC's new rule.§ But neither resolution nor bill was eventually enacted.

This revised regulation was also challenged in court by private parties. The FCC (under the leadership of the current Chairman Julius Genachowski) asked the 3rd Circuit Court of Appeals to delay ruling on the revised cross-ownership rule because the agency was in the process of conducting yet another major media ownership proceeding for 2010.** The court complied for a while, but then

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* 579 F.3d 1 (2009).

† *Id*. at *9.

‡ S.J. Res. 28, 110th Cong. (2008).

§ Erin McNeill, *Spending Plan Would Block Funds for Enforcing Media Ownership Rules*, CQ WEEKLY, June 23, 2008, at 1702.

** *2010 Quadrennial Regulatory Review*, NOI, 25 FCC Rcd. 6086 (2010).

lifted the stay on March 23, 2010.* Accordingly, as of that date, the revised rule excerpted above has been the law of the land. The FCC reports that approximately 50 newspaper/broadcast combinations now exist within the same local market.†

* *See* Prometheus Radio Project v. FCC, 2010 WL 1133326(3rd Cir. 2010) (not reported in F.3d).

† *See 2010 Quadrennial Regulatory Review*, *supra*, at ¶4.

CHAPTER 7

ACCESS

p.730, add after N&Q 5:

6. *Taken to court.* Not surprisingly, Comcast sued the FCC. In Comcast v. FCC, 600 F.3d 642 (D.C. Cir. 2010), the D.C. Circuit Court of Appeals addressed only the narrow issue of ancillary jurisdiction—whether the FCC had the power to regulate an ISP's network management practices. It concluded that the FCC did not. (We read that opinion *infra* CHAPTER 8: CLASSIFICATION » B. PRESENT: INTERNET » 3. LIMITS OF ANCILLARY JURISDICTION.) This forced the FCC back to the drawing board, under the leadership of a new Chairman, Julius Genachowski. In December 2010, the Commission went the route of rulemaking instead of adjudication.

PRESERVING THE OPEN INTERNET; BROADBAND INDUSTRY PRACTICES

25 FCC Rcd 17905 (2010)

I. PRESERVING THE FREE AND OPEN INTERNET

1. [W]e adopt three basic rules that are grounded in broadly accepted Internet norms, as well as our own prior decisions:

i. **Transparency.** Fixed and mobile broadband providers must disclose the network management practices, performance characteristics, and terms and conditions of their broadband services;

ii. **No blocking.** Fixed broadband providers may not block lawful content, applications, services, or non-harmful devices; mobile broadband providers may not block lawful websites, or block applications that compete with their voice or video telephony services; and

iii. **No unreasonable discrimination.** Fixed broadband providers may not unreasonably discriminate in transmitting lawful network traffic.

3. [T]he Internet has thrived because of its freedom and openness--the absence of any gatekeeper blocking lawful uses of the network or picking winners

and losers online. Consumers and innovators do not have to seek permission before they use the Internet to launch new technologies, start businesses, connect with friends, or share their views. The Internet is a level playing field. Consumers can make their own choices about what applications and services to use and are free to decide what content they want to access, create, or share with others. This openness promotes competition. It also enables a self-reinforcing cycle of investment and innovation in which new uses of the network lead to increased adoption of broadband, which drives investment and improvements in the network itself, which in turn lead to further innovative uses of the network and further investment in content, applications, services, and devices. A core goal of this Order is to foster and accelerate this cycle of investment and innovation.

10. The framework we adopt aims to ensure the Internet remains an open platform--one characterized by free markets and free speech--that enables consumer choice, end-user control, competition through low barriers to entry, and the freedom to innovate without permission. The framework does so by protecting openness through high-level rules, while maintaining broadband providers' and the Commission's flexibility to adapt to changes in the market and in technology as the Internet continues to evolve.

II. THE NEED FOR OPEN INTERNET PROTECTIONS

A. The Internet's Openness Promotes Innovation, Investment, Competition, Free Expression, and Other National Broadband Goals

13. Like electricity and the computer, the Internet is a "general purpose technology" that enables new methods of production that have a major impact on the entire economy. The Internet's founders intentionally built a network that is open, in the sense that it has no gatekeepers limiting innovation and communication through the network. Accordingly, the Internet enables an end user to access the content and applications of her choice, without requiring permission from broadband providers. This architecture enables innovators to create and offer new applications and services without needing approval from any controlling entity, be it a network provider, equipment manufacturer, industry body, or government agency. End users benefit because the Internet's openness allows new technologies to be developed and distributed by a broad range of sources, not just by the companies that operate the network. For example, Sir Tim Berners-Lee was able to invent the World Wide Web nearly two decades after engineers developed the Internet's original protocols, without needing changes to those protocols or any approval from network operators. Startups and small businesses benefit because the Internet's openness enables anyone connected to the network to reach and do business with anyone else, allowing even the smallest and most remotely located businesses to access national and global markets, and contribute to the economy through e-commerce and online advertising. Be-

cause Internet openness enables widespread innovation and allows all end users and edge providers (rather than just the significantly smaller number of broadband providers) to create and determine the success or failure of content, applications, services, and devices, it maximizes commercial and non-commercial innovations that address key national challenges--including improvements in health care, education, and energy efficiency that benefit our economy and civic life.

14. The Internet's openness is critical to these outcomes, because it enables a virtuous circle of innovation in which new uses of the network--including new content, applications, services, and devices--lead to increased end-user demand for broadband, which drives network improvements, which in turn lead to further innovative network uses. Novel, improved, or lower-cost offerings introduced by content, application, service, and device providers spur end-user demand and encourage broadband providers to expand their networks and invest in new broadband technologies. Streaming video and e-commerce applications, for instance, have led to major network improvements such as fiber to the premises, VDSL, and DOCSIS 3.0. These network improvements generate new opportunities for edge providers, spurring them to innovate further. Each round of innovation increases the value of the Internet for broadband providers, edge providers, online businesses, and consumers. Continued operation of this virtuous circle, however, depends upon low barriers to innovation and entry by edge providers, which drive end-user demand. Restricting edge providers' ability to reach end users, and limiting end users' ability to choose which edge providers to patronize, would reduce the rate of innovation at the edge and, in turn, the likely rate of improvements to network infrastructure. Similarly, restricting the ability of broadband providers to put the network to innovative uses may reduce the rate of improvements to network infrastructure.

15. Openness also is essential to the Internet's role as a platform for speech and civic engagement. . . . Due to the lack of gatekeeper control, the Internet has become a major source of news and information, which forms the basis for informed civic discourse. Many Americans now turn to the Internet to obtain news, and its openness makes it an unrivaled forum for free expression. Furthermore, local, state, and federal government agencies are increasingly using the Internet to communicate with the public, including to provide information about and deliver essential services.

16. Television and radio broadcasters now provide news and other information online via their own websites, online aggregation websites such as Hulu, and social networking platforms. Local broadcasters are experimenting with new approaches to delivering original content, for example by creating neighborhood-focused websites; delivering news clips via online video programming aggregators, including AOL and Google's YouTube; and offering news from

citizen journalists. In addition, broadcast networks license their full-length entertainment programs for downloading or streaming to edge providers such as Netflix and Apple. Because these sites are becoming increasingly popular with the public, online distribution has a strategic value for broadcasters, and is likely to provide an increasingly important source of funding for broadcast news and entertainment programming.

17. Unimpeded access to Internet distribution likewise has allowed new video content creators to create and disseminate programs without first securing distribution from broadcasters and multichannel video programming distributors (MVPDs) such as cable and satellite television companies. Online viewing of video programming content is growing rapidly.

18. We [also] expect that open Internet protections will help close the digital divide by maintaining relatively low barriers to entry for underrepresented groups and allowing for the development of diverse content, applications, and services.[44]

19. For all of these reasons, there is little dispute in this proceeding that the Internet should continue as an open platform.

B. Broadband Providers Have the Incentive and Ability to Limit Internet Openness

20. For purposes of our analysis, we consider three types of Internet activities: providing broadband Internet access service; providing content, applications, services, and devices accessed over or connected to broadband Internet access service ("edge" products and services); and subscribing to a broadband Internet access service that allows access to edge products and services. These activities are not mutually exclusive.

21. [B]roadband providers potentially face at least three types of incentives to reduce the current openness of the Internet. *First,* broadband providers may have economic incentives to block or otherwise disadvantage specific edge providers or classes of edge providers . . . . A broadband provider might use this power to benefit its own or affiliated offerings at the expense of unaffiliated offerings.

22. Today, broadband providers have incentives to interfere with the operation of third-party Internet-based services that compete with the providers' rev-

[44] For example, Jonathan Moore founded Rowdy Orbit IPTV, an online platform featuring original programming for minority audiences, because he was frustrated by the lack of representation of people of color in traditional media. The Internet's openness--and the low costs of online entry--enables businesses like Rowdy Orbit to launch without having to gain approval from traditional media gatekeepers.

enue-generating telephony and/or pay-television services. . . . Online content, applications, and services available from edge providers . . . increasingly offer actual or potential competitive alternatives to broadband providers' own voice and video services, which generate substantial profits. Interconnected Voice-over-Internet-Protocol (VoIP) services, which include some over-the-top VoIP services, "are increasingly being used as a substitute for traditional telephone service," and over-the-top VoIP services represent a significant share of voice-calling minutes, especially for international calls. Online video is rapidly growing in popularity, and MVPDs have responded to this trend by enabling their video subscribers to use the Internet to view their programming on personal computers and other Internet-enabled devices. Online video aggregators such as Netflix, Hulu, YouTube, and iTunes that are unaffiliated with traditional MVPDs continue to proliferate and innovate, offering movies and television programs (including broadcast programming) on demand, and earning revenues from advertising and/or subscriptions. Several MVPDs have stated publicly that they view these services as a potential competitive threat to their core video subscription service.

23. In addition, a broadband provider may act to benefit edge providers that have paid it to exclude rivals (for example, if one online video site were to contract with a broadband provider to deny a rival video site access to the broadband provider's subscribers). . . . [Also], delivery networks that are vertically integrated with content providers, including some MVPDs, have incentives to favor their own affiliated content. If broadband providers had historically favored their own affiliated businesses or those incumbent firms that paid for advantageous access to end users, some innovative edge providers that have today become major Internet businesses might not have been able to survive.

24. *Second,* broadband providers may have incentives to increase revenues by charging edge providers, who already pay for their own connections to the Internet, for access or prioritized access to end users. Although broadband providers have not historically imposed such fees, they have argued they should be permitted to do so.

25. Broadband providers would be expected to set inefficiently high fees to edge providers because they receive the benefits of those fees but are unlikely to fully account for the detrimental impact on edge providers' ability and incentive to innovate and invest, including the possibility that some edge providers might exit or decline to enter the market. The unaccounted-for harms to innovation are negative externalities . . . . Moreover, fees for access or prioritized access could trigger an "arms race" within a given edge market segment. If one edge provider pays for access or prioritized access to end users, subscribers may tend to favor that provider's services, and competing edge providers may feel that they must respond by paying, too.

26. Fees for access or prioritization to end users could reduce the potential profit that an edge provider would expect to earn . . . and thereby reduce edge providers' incentives to invest and innovate. In the rapidly innovating edge sector, moreover, many new entrants are new or small "garage entrepreneurs," not large and established firms. These emerging providers are particularly sensitive to barriers to innovation and entry . . . .

27. Some commenters argue that an end user's ability to switch broadband providers eliminates these problems. But many end users may have limited choice among broadband providers, as discussed below. Moreover, those that can switch broadband providers may not benefit from switching if rival broadband providers charge edge providers similarly for access and priority transmission and prioritize each edge provider's service similarly. Further, end users may not know whether charges or service levels their broadband provider is imposing on edge providers vary from those of alternative broadband providers, and even if they do have this information may find it costly to switch. For these reasons, a dissatisfied end user, observing that some edge provider services are subject to low transmission quality, might not switch broadband providers (though they may switch to a rival edge provider in the hope of improving quality).

28. Some commenters contend that, in the absence of open Internet rules, broadband providers that earn substantial additional revenue by assessing access or prioritization charges on edge providers could avoid increasing or could reduce the rates they charge broadband subscribers, which might increase the number of subscribers to the broadband network. Although this scenario is possible,[80] no broadband provider has stated in this proceeding that it actually would use any revenue from edge provider charges to offset subscriber charges. In addition, these commenters fail to account for the likely detrimental effects of access and prioritization charges on the virtuous circle of innovation described above. Less content and fewer innovative offerings make the Internet less attractive for end users than would otherwise be the case. Consequently, we are

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[80] Economics literature recognizes that access charges could be harmful under some circumstances and beneficial under others. *See, e.g.,* E. Glen Weyl, *A Price Theory of Multi-Sided Platforms, 100 AM. ECON. REV. 1642, 1642-72 (2010)* (the effects of allowing broadband providers to charge terminating rates to content providers are ambiguous); *see also* John Musacchio et al., *A Two-Sided Market Analysis of Provider Investment Incentives with an Application to the Net-Neutrality Issue,* 8 REV. OF NETWORK ECON. 22, 22-39 (2009) (noting that there are conditions under which "a zero termination price is socially beneficial"). Moreover, the economic literature on two-sided markets is at an early stage of development. Mark Armstrong, *Competition in Two-Sided Markets,* 37 RAND J. OF ECON. 668 (2006); Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets,* 1 J. EUR. ECON. ASS'N 990 (2003).

unable to conclude that the possibility of reduced subscriber charges outweighs the risks of harm described herein.

29. *Third,* if broadband providers can profitably charge edge providers for prioritized access to end users, they will have an incentive to degrade or decline to increase the quality of the service they provide to non-prioritized traffic. This would increase the gap in quality (such as latency in transmission) between prioritized access and non-prioritized access, induce more edge providers to pay for prioritized access, and allow broadband providers to charge higher prices for prioritized access. Even more damaging, broadband providers might withhold or decline to expand capacity in order to "squeeze" non-prioritized traffic, a strategy that would increase the likelihood of network congestion and confront edge providers with a choice between accepting low-quality transmission or paying fees for prioritized access to end users.

30. Moreover, if broadband providers could block specific content, applications, services, or devices, end users and edge providers would lose the control they currently have over whether other end users and edge providers can communicate with them through the Internet. Content, application, service, and device providers (and their investors) could no longer assume that the market for their offerings included all U.S. end users. And broadband providers might choose to implement undocumented practices for traffic differentiation that undermine the ability of developers to create generally usable applications without having to design to particular broadband providers' unique practices or business arrangements.

32. Although these threats to Internet-enabled innovation, growth, and competition do not depend upon broadband providers having market power with respect to end users, most would be exacerbated by such market power. . . . The risk of market power is highest in markets with few competitors, and most residential end users today have only one or two choices for wireline broadband Internet access service. As of December 2009, nearly 70 percent of households lived in census tracts where only one or two wireline or fixed wireless firms provided advertised download speeds of at least 3 Mbps and upload speeds of at least 768 Kbps--the closest observable benchmark to the minimum download speed of 4 Mbps and upload speed of 1 Mbps that the Commission has used to assess broadband deployment. About 20 percent of households are in census tracts with only one provider advertising at least 3 Mbps down and 768 Kbps up. For Internet service with advertised download speeds of at least 10 Mbps down and upload speeds of at least 1.5 Mbps up, nearly 60 percent of households lived in census tracts served by only one wireline or fixed wireless broadband provider, while nearly 80 percent lived in census tracts served by no more than two wireline or fixed wireless broadband providers.

33. Including mobile broadband providers does not appreciably change these numbers. The roll-out of next generation mobile services is at an early stage, and the future of competition in residential broadband is unclear. The record does not enable us to make a predictive judgment that the future will be more competitive than the past. Although wireless providers are increasingly offering faster broadband services, we do not know, for example, how end users will value the trade-offs between the benefits of wireless service (*e.g.,* mobility) and the benefits of fixed wireline service (*e.g.,* higher download and upload speeds). We note that the two largest mobile broadband providers also offer wireline or fixed service; this could dampen their incentive to compete aggressively with wireline (or fixed) services.

34. In addition, customers may incur significant costs in switching broadband providers because of early termination fees; the inconvenience of ordering, installation, and set-up, and associated deposits or fees; possible difficulty returning the earlier broadband provider's equipment and the cost of replacing incompatible customer-owned equipment; the risk of temporarily losing service; the risk of problems learning how to use the new service; and the possible loss of a provider-specific email address or website.

C. Broadband Providers Have Acted to Limit Openness

35. These dangers to Internet openness are not speculative or merely theoretical. Conduct of this type has already come before the Commission in enforcement proceedings. As early as 2005, [Madison River Communications,] a broadband provider that was a subsidiary of a telephone company paid $ 15,000 to settle a Commission investigation into whether it had blocked Internet ports used for competitive VoIP applications. In 2008, the Commission found that Comcast disrupted certain peer-to-peer (P2P) uploads of its subscribers, without a reasonable network management justification and without disclosing its actions. Comparable practices have been observed in the provision of mobile broadband services. After entering into a contract with a company to handle online payment services, a mobile wireless provider allegedly blocked customers' attempts to use competing services to make purchases using their mobile phones. A nationwide mobile provider[, AT&T,] restricted the types of lawful applications[, e.g., VoIP applications on the iPhone,] that could be accessed over its 3G mobile wireless network.

36. There have been additional allegations of blocking, slowing, or degrading P2P traffic. . . . For example, in May 2008 a major cable broadband provider[, Cox,] acknowledged that it had managed the traffic of P2P services. In July 2009, another cable broadband provider[, RCN,] entered into a class action set-

tlement agreement stating that it had "ceased P2P Network Management Practices," but allowing the provider to resume throttling P2P traffic. There is evidence that other broadband providers have engaged in similar degradation.[111] In addition, broadband providers' terms of service commonly reserve to the provider sweeping rights to block, degrade, or favor traffic. For example, [Cox] reserves the right to engage, "without limitation," in "port blocking, . . . traffic prioritization and protocol filtering." Further, a major mobile broadband provider[, MetroPCS,] prohibits use of its wireless service for "downloading movies using peer-to-peer file sharing services" and VoIP applications. And a cable modem manufacturer[, Zoom Telephonics,] recently filed a formal complaint with the Commission alleging that [Comcast] has violated open Internet principles through overly restrictive device approval procedures.

37. These practices have occurred notwithstanding the Commission's adoption of open Internet principles . . . .

D. The Benefits of Protecting the Internet's Openness Exceed the Costs

39. [T]he costs associated with the open Internet rules adopted here are likely small. . . . [T]he high-level rules we adopt carefully balance preserving the open Internet against avoiding unduly burdensome regulation. Our rules against blocking and unreasonable discrimination are subject to reasonable network management, and our rules do not prevent broadband providers from offering specialized services such as facilities-based VoIP. In short, rules that reinforce the openness that has supported the growth of the Internet, and do not substantially change this highly successful status quo, should not entail significant compliance costs.

40. Some commenters[, e.g., Verizon] contend that open Internet rules are likely to reduce investment in broadband deployment. We disagree. There is no evidence that prior open Internet obligations have discouraged investment; and numerous commenters explain that, by preserving the virtuous circle of innovation, open Internet rules will increase incentives to invest in broadband infrastructure. Moreover, if permitted to deny access, or charge edge providers for prioritized access to end users, broadband providers may have incentives to allow congestion rather than invest in expanding network capacity.

41. The magnitude and character of the risks we identify make it appropriate to adopt prophylactic rules now to preserve the openness of the Internet, ra-

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[111] A 2008 study by the Max Planck Institute revealed significant blocking of BitTorrent applications in the United States. Comcast and Cox were both cited as examples of providers blocking traffic. *See generally* MARCEL DISCHINGER ET AL., MAX PLANCK INSTITUTE, DETECTING BITTORRENT BLOCKING (2008).

ther than waiting for substantial, pervasive, and potentially irreversible harms to occur before taking any action.

42. Finally, we note that there is currently significant uncertainty regarding the future enforcement of open Internet principles and what constitutes appropriate network management, particularly in the wake of the court of appeals' vacatur of the *Comcast Network Management Practices Order*. . . . Providing clear yet flexible rules of the road that enable the Internet to continue to flourish is the central goal of the action we take today.[143]

III. OPEN INTERNET RULES

43. To preserve the Internet's openness and broadband providers' ability to manage and expand their networks, we adopt high-level rules embodying four core principles: transparency, no blocking, no unreasonable discrimination, and reasonable network management.

A. Scope of the Rules

44. We find that open Internet rules should apply to "broadband Internet access service," which we define as:

A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.

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[143] Contrary to the suggestion of some, neither the Department of Justice nor the FTC has concluded that the broadband market is competitive or that open Internet rules are unnecessary. In the submission in question, the Department observed that: (1) the wireline broadband market is highly concentrated, with most consumers served by at most two providers; (2) the prospects for additional wireline competition are dim due to the high fixed and sunk costs required to provide wireline broadband service; and (3) the extent to which mobile wireless offerings will compete with wireline offerings is unknown. [T]he Department cautioned that care must be taken to avoid stifling infrastructure investment, [and] it expressed particular concern about price regulation, which we are not adopting. In 2007, the FTC issued a staff report on broadband competition policy. Like the Department, the FTC staff did not conclude that the broadband market is competitive. To the contrary, the FTC staff made clear that it had not studied the state of competition in any specific markets. With regard to the merits of open Internet rules, the FTC staff report recited arguments pro and con, and called for additional study.

The term "broadband Internet access service" includes services provided over any technology platform, including but not limited to wire, terrestrial wireless (including fixed and mobile wireless services using licensed or unlicensed spectrum), and satellite.

45. "Mass market" means a service marketed and sold on a standardized basis to residential customers, small businesses, and other end-user customers such as schools and libraries. . . . The term does not include enterprise service offerings, which are typically offered to larger organizations through customized or individually negotiated arrangements.

46. "Broadband Internet access service" encompasses services that "provide the capability to transmit data to and receive data from all or substantially all Internet endpoints." To ensure the efficacy of our rules in this dynamic market, we also treat as a "broadband Internet access service" any service the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in these rules.

47. A key factor in determining whether a service is used to evade the scope of the rules is whether the service is used as a substitute for broadband Internet access service. For example, an Internet access service that provides access to a substantial subset of Internet endpoints based on end users preference to avoid certain content, applications, or services; Internet access services that allow some uses of the Internet (such as access to the World Wide Web) but not others (such as e-mail); or a "Best of the Web" Internet access service that provides access to 100 top websites could not be used to evade the open Internet rules applicable to "broadband Internet access service." Moreover, a broadband provider may not evade these rules simply by blocking end users' access to some Internet endpoints. Broadband Internet access service likely does not include services offering connectivity to one or a small number of Internet endpoints for a particular device, *e.g.,* connectivity bundled with e-readers, heart monitors, or energy consumption sensors, to the extent the service relates to the functionality of the device. Nor does broadband Internet access service include virtual private network services, content delivery network services, multichannel video programming services, hosting or data storage services, or Internet backbone services (if those services are separate from broadband Internet access service). These services typically are not mass market services and/or do not provide the capability to transmit data to and receive data from all or substantially all Internet endpoints.

49. We recognize that there is one Internet (although it is comprised of a multitude of different networks), and that it should remain open and interconnected regardless of the technologies and services end users rely on to access it. However, for reasons discussed in Part III.E below related to mobile broadband--including the fact that it is at an earlier stage and more rapidly evolving--

we apply open Internet rules somewhat differently to mobile broadband than to fixed broadband at this time. We define "fixed broadband Internet access service" as a broadband Internet access service that serves end users primarily at fixed endpoints using stationary equipment, such as the modem that connects an end user's home router, computer, or other Internet access device to the network. This term encompasses fixed wireless broadband services (including services using unlicensed spectrum) and fixed satellite broadband services. We define "mobile broadband Internet access service" as a broadband Internet access service that serves end users primarily using mobile stations.[153] Mobile broadband Internet access includes services that use smartphones as the primary endpoints for connection to the Internet.

B. Transparency

A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.[172]

55. The rule does not require public disclosure of competitively sensitive information or information that would compromise network security or undermine the efficacy of reasonable network management practices.

56. [C]ommenters disagree about the appropriate level of detail [for disclosure.] We believe that at this time the best approach is to allow flexibility . . . . We expect that effective disclosures will likely include some or all of the following types of information . . . .

Network Practices

. *Congestion Management:* If applicable, descriptions of congestion management practices; types of traffic subject to practices; purposes served by practices; practices' effects on end users' experience; criteria used in practices, such as indicators of congestion that trigger a practice, and the typical frequency of

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[153] *See 47 U.S.C. § 153*(34) ("The term 'mobile station' means a radio-communication station capable of being moved and which ordinarily does move.").

[172] For purposes of these rules, "consumer" includes any subscriber to the broadband provider's broadband Internet access service, and "person" includes any "individual, group of individuals, corporation, partnership, association, unit of government or legal entity, however organized," cf. 47 C.F.R. § 54.8(a)(6). We also expect broadband providers to disclose information about the impact of "specialized services," if any, on last-mile capacity available for, and the performance of, broadband Internet access service. See infra Part III.G.

congestion; usage limits and the consequences of exceeding them; and references to engineering standards, where appropriate.

. *Application-Specific Behavior:* If applicable, whether and why the provider blocks or rate-controls specific protocols or protocol ports, modifies protocol fields in ways not prescribed by the protocol standard, or otherwise inhibits or favors certain applications or classes of applications. n178

. *Device Attachment Rules:* If applicable, any restrictions on the types of devices and any approval procedures for devices to connect to the network. (For further discussion of required disclosures regarding device and application approval procedures for mobile broadband providers, see paragraph 98, *infra.*)

. *Security:* If applicable, practices used to ensure end-user security or security of the network, including types of triggering conditions that cause a mechanism to be invoked (but excluding information that could reasonably be used to circumvent network security).

Performance Characteristics

. *Service Description:* A general description of the service, including the service technology, expected and actual access speed and latency, and the suitability of the service for real-time applications.

. *Impact of Specialized Services:* If applicable, what specialized services, if any, are offered to end users, and whether and how any specialized services may affect the last-mile capacity available for, and the performance of, broadband Internet access service.

Commercial Terms

. *Pricing:* For example, monthly prices, usage-based fees, and fees for early termination or additional network services.

. *Privacy Policies:* For example, whether network management practices entail inspection of network traffic, and whether traffic information is stored, provided to third parties, or used by the carrier for non-network management purposes.

. *Redress Options:* Practices for resolving end-user and edge provider complaints and questions.

We emphasize that this list is not necessarily exhaustive, nor is it a safe harbor . . . .

57. [B]roadband providers must, at a minimum, prominently display or provide links to disclosures on a publicly available, easily accessible website that is available to current and prospective end users and edge providers as well as to the Commission, and must disclose relevant information at the point of sale. Current end users must be able to easily identify which disclosures apply to their service offering. Broadband providers' online disclosures shall be considered

disclosed to the Commission for purposes of monitoring and enforcement. We may require additional disclosures directly to the Commission.

C. No Blocking and No Unreasonable Discrimination

1. No Blocking

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

64. The phrase "content, applications, services" refers to all traffic transmitted to or from end users of a broadband Internet access service, including traffic that may not fit cleanly into any of these categories. The rule protects only transmissions of lawful content, and does not prevent or restrict a broadband provider from refusing to transmit unlawful material such as child pornography.

65. We also note that the rule entitles end users to both connect and use any lawful device of their choice, provided such device does not harm the network.[202] A broadband provider may require that devices conform to widely accepted and publicly-available standards applicable to its services.[203]

66. We make clear that the no-blocking rule bars broadband providers from impairing or degrading particular content, applications, services, or non-harmful devices so as to render them effectively unusable (subject to reasonable network management).[204] Such a prohibition is consistent with the observation of a num-

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[202] We note that MVPDs, pursuant to section 629 and the Commission's implementing regulations, are already subject to similar requirements that give end users the right to attach devices to an MVPD system provided that the attached equipment does not cause electronic or physical harm or assist in the unauthorized receipt of service. See Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availibility of Navigation Devices, Report and Order, 13 FCC Rcd 14775 (1998); 47 U.S.C. § 549; 47 C.F.R. §§ 76.1201-03. Nothing in this Order is intended to alter those existing rules.

[203] For example, a DOCSIS-based broadband provider is not required to support a DSL modem. *See* ACA Comments at 13-14; *see also* Satellite Broadband Commenters Comments at 8-9 (noting that an antenna and associated modem must comply with equipment and protocol standards set by satellite companies, but that "consumers can [then] attach . . . any personal computer or wireless router they wish").

[204] We do not find it appropriate to interpret our rule to impose a blanket prohibition on degradation of traffic more generally. Congestion ordinarily results in degradation of traffic, and such an interpretation could effectively prohibit broadband providers from permitting congestion to occur on their networks. Although we expect broadband providers to continue to expand the capacity of their networks--and we believe our rules help ensure that they continue to have incentives to do so--we recognize that some network congestion may be unavoidable.

ber of commenters that degrading traffic can have the same effects as outright blocking . . . .

67. Some concerns have been expressed that broadband providers may seek to charge edge providers simply for delivering traffic to or carrying traffic from the broadband provider's end-user customers. To the extent that a content, application, or service provider could avoid being blocked only by paying a fee, charging such a fee would not be permissible under these rules.[209]

2. No Unreasonable Discrimination

A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not unreasonably discriminate in transmitting lawful network traffic over a consumer's broadband Internet access service. Reasonable network management shall not constitute unreasonable discrimination.

70. *Transparency.* Differential treatment of traffic is more likely to be reasonable the more transparent to the end user that treatment is.

71. End-User Control. Maximizing end-user control is a policy goal Congress recognized in Section 230(b) of the Communications Act, and end-user choice and control are touchstones in evaluating the reasonableness of discrimination.[215] . . . . Thus, enabling end users to choose among different broadband offerings based on such factors as assured data rates and reliability, or to select quality-of-service enhancements on their own connections for traffic of their choosing, would be unlikely to violate the no unreasonable discrimination rule, provided the broadband provider's offerings were fully disclosed and were not harmful to competition or end users. [217]

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[209] We do not intend our rules to affect existing arrangements for network interconnection, including existing paid peering arrangements.

[215] "The rapidly developing array of Internet and other interactive computer services . . . offer[] users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops." *47 U.S.C. § 230*(a)(1)-(2) (emphasis added).

[217] n217 In these types of arrangements "[t]he broadband provider does not get any particular leverage, because the ability to select which traffic gets priority lies with individual subscribers. Meanwhile, an entity providing content, applications, or services does not need to worry about striking up relationships with various broadband providers to obtain top treatment. All it needs to worry about is building relationships with users and explaining to those users whether and how they may want to select the particular content, application, or service for priority treatment." CDT Comments.

72. Some commenters suggest that open Internet protections would prohibit broadband providers from offering their subscribers different tiers of service or from charging their subscribers based on bandwidth consumed. . . . The framework we adopt today does not prevent broadband providers from asking subscribers who use the network less to pay less, and subscribers who use the network more to pay more.

73. *Use-Agnostic Discrimination.* Differential treatment of traffic that does not discriminate among specific uses of the network or classes of uses is likely reasonable. For example, during periods of congestion a broadband provider could provide more bandwidth to subscribers that have used the network less over some preceding period of time than to heavier users. Use-agnostic discrimination (sometimes referred to as application-agnostic discrimination) is consistent with Internet openness because it does not interfere with end users' choices about which content, applications, services, or devices to use. Nor does it distort competition among edge providers.

74. *Standard Practices.* The conformity or lack of conformity of a practice with best practices and technical standards adopted by open, broadly representative, and independent Internet engineering, governance initiatives, or standards-setting organizations is another factor to be considered in evaluating reasonableness.

75. In evaluating unreasonable discrimination, the types of practices we would be concerned about include, but are not limited to, discrimination that harms an actual or potential competitor to the broadband provider (such as by degrading VoIP applications or services when the broadband provider offers telephone service), that harms end users (such as by inhibiting end users from accessing the content, applications, services, or devices of their choice), or that impairs free expression (such as by slowing traffic from a particular blog because the broadband provider disagrees with the blogger's message).[228]

76. [A] commercial arrangement between a broadband provider and a third party to directly or indirectly favor some traffic over other traffic in the broadband Internet access service connection to a subscriber of the broadband provider (*i.e.,* "pay for priority") would raise significant cause for concern. First, pay for priority would represent a significant departure from historical and current practice. Since the beginning of the Internet, Internet access providers have typically not charged particular content or application providers fees to reach the

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[228] *Cf., e.g.,* CDT Comments at 5 (describing decision by Telus, one of Canada's largest broadband providers, to block a web site created by an employee labor union that displayed information about the union's contract dispute with Telus)

providers' retail service end users or struck pay-for-priority deals, and the record does not contain evidence that U.S. broadband providers currently engage in such arrangements. Second this departure from longstanding norms could cause great harm to innovation and investment in and on the Internet. As discussed above, pay-for-priority arrangements could raise barriers to entry on the Internet by requiring fees from edge providers, as well as transaction costs arising from the need to reach agreements with one or more broadband providers to access a critical mass of potential end users. Fees imposed on edge providers may be excessive because few edge providers have the ability to bargain for lesser fees, and because no broadband provider internalizes the full costs of reduced innovation and the exit of edge providers from the market. Third, pay-for-priority arrangements may particularly harm non-commercial end users, including individual bloggers, libraries, schools, advocacy organizations, and other speakers, especially those who communicate through video or other content sensitive to network congestion. Even open Internet skeptics acknowledge that pay for priority may disadvantage non-commercial uses of the network, which are typically less able to pay for priority, and for which the Internet is a uniquely important platform. Fourth, broadband providers that sought to offer pay-for-priority services would have an incentive to limit the quality of service provided to non-prioritized traffic. In light of each of these concerns, as a general matter, it is unlikely that pay for priority would satisfy the "no unreasonable discrimination" standard. The practice of a broadband Internet access service provider prioritizing its own content, applications, or services, or those of its affiliates, would raise the same significant concerns and would be subject to the same standards and considerations in evaluating reasonableness as third-party pay-for-priority arrangements.[235]

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[235] We reject arguments that our approach to pay-for-priority arrangements is inconsistent with allowing content-delivery networks (CDNs). CDN services are designed to reduce the capacity requirements and costs of the CDN's edge provider clients by hosting the content for those clients closer to end users. Unlike broadband providers, third-party CDN providers do not control the last-mile connection to the end user. And CDNs that do not deploy within an edge provider's network may still reach an end user via the user's broadband connection. Moreover, CDNs typically provide a benefit to the sender and recipient of traffic without causing harm to third-party traffic. Though we note disagreement regarding the impact of CDNs on other traffic, the record does not demonstrate that the use of CDNs has any material adverse effect on broadband end users' experience of traffic that is not delivered via a CDN. Indeed, the same benefits derived from using CDNs can be achieved if an edge provider's own servers happen to be located in close proximity to end users. Everything on the Internet that is accessible to an end user is not, and cannot be, in equal proximity from that end user. Finally, CDN providers unaffiliated with broadband providers generally do not compete with edge providers and thus generally lack economic incentives (or the ability) to discrimi-

77. Because we agree with the diverse group of commenters who argue that any nondiscrimination rule should prohibit only unreasonable discrimination, we decline to adopt the more rigid nondiscrimination rule proposed in the *Open Internet NPRM*. A strict nondiscrimination rule would be in tension with our recognition that some forms of discrimination, including end-user controlled discrimination, can be beneficial. . . . We disagree with commenters who argue that a standard based on "reasonableness" or "unreasonableness" is too vague to give broadband providers fair notice of what is expected of them. This is not so. "Reasonableness" is a well-established standard for regulat[ing] conduct.[239] As other commenters have pointed out, the term "reasonable" is "both administrable and indispensable to the sound administration of the nation's telecommunications laws."[240]

D. Reasonable Network Management

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

Legitimate network management purposes include: ensuring network security and integrity, including by addressing traffic that is harmful to the network; addressing traffic that is unwanted by end users (including by premise operators), such as by providing services or capabilities consistent with an end user's choices regarding parental controls or security capabilities; and reducing or mitigating the effects of congestion on the network. The term "particular network architecture and technology" refers to the differences across access platforms such as cable, DSL, satellite, and fixed wireless.

85. We agree with commenters that the Commission should not adopt the "narrowly or carefully tailored" standard discussed in the *Comcast Network Management Practices Order*. We find that this standard is unnecessarily restrictive and may overly constrain network engineering decisions. Moreover, the

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nate against edge providers. We likewise reject proposals to limit our rules to actions taken at or below the "network layer."

[239] As recently as 1995, Congress adopted the venerable "reasonableness" standard when it recodified provisions of the Interstate Commerce Act. ICC Termination Act of 1995, Pub. L. No. 104-88, § 106(a) (now codified at *49 U.S.C. § 15501)*.

[240]

AT&T ("And no one has seriously suggested that Section 202 should itself be amended to remove the 'unreasonable' qualifier on the ground that the qualifier is too 'murky' or 'complex.' Seventy-five years of experience have shown that qualifier to be both administrable and indispensable to the sound administration of the nation's telecommunications laws.").

"narrowly tailored" language could be read to import strict scrutiny doctrine from constitutional law, which we are not persuaded would be helpful here. Broadband providers may employ network management practices that are appropriate and tailored to the network management purpose they seek to achieve, but they need not necessarily employ the most narrowly tailored practice theoretically available to them.

86. We also acknowledge that reasonable network management practices may differ across platforms. For example, practices needed to manage congestion on a fixed satellite network may be inappropriate for a fiber-to-the-home network. We also recognize the unique network management challenges facing broadband providers that use unlicensed spectrum to deliver service to end users.

87. The principles guiding case-by-case evaluations of network management practices are much the same as those that guide assessments of "no unreasonable discrimination," and include transparency, end-user control, and use- (or application-) agnostic treatment.

88. *Network Security or Integrity and Traffic Unwanted by End Users.* Broadband providers may implement reasonable practices to ensure network security and integrity, including by addressing traffic that is harmful to the network. . . . We make clear that, for the singling out of any specific application for blocking or degradation based on harm to the network to be a reasonable network management practice, a broadband provider should be prepared to provide a substantive explanation for concluding that the particular traffic is harmful to the network, such as traffic that constitutes a denial-of-service attack on specific network infrastructure elements or exploits a particular security vulnerability.

89. Broadband providers also may implement reasonable practices to address traffic that a particular end user chooses not to receive. Thus, for example, a broadband provider could provide services or capabilities consistent with an end user's choices regarding parental controls, or allow end users to choose a service that provides access to the Internet but not to pornographic websites. Likewise, a broadband provider serving a premise operator could restrict traffic unwanted by that entity, though such restrictions should be disclosed. Our rule will not impose liability on a broadband provider where such liability is prohibited by section 230(c)(2) of the Act.

91. *Network Congestion.* Numerous commenters support permitting the use of reasonable network management practices to address the effects of congestion, and we agree that congestion management may be a legitimate network management purpose. For example, broadband providers may need to take reasonable steps to ensure that heavy users do not crowd out others. What constitutes congestion and what measures are reasonable to address it may vary

depending on the technology platform for a particular broadband Internet access service. For example, if cable modem subscribers in a particular neighborhood are experiencing congestion, it may be reasonable for a broadband provider to temporarily limit the bandwidth available to individual end users in that neighborhood who are using a substantially disproportionate amount of bandwidth.

E. Mobile Broadband

93. There is one Internet, which should remain open for consumers and innovators alike, although it may be accessed through different technologies and services.

94. However . . . [m]obile broadband is an earlier-stage platform than fixed broadband, and it is rapidly evolving.

95. Moreover, most consumers have more choices for mobile broadband than for fixed (particularly fixed wireline) broadband. Mobile broadband speeds, capacity, and penetration are typically much lower than for fixed broadband . . . . In addition, existing mobile networks present operational constraints that fixed broadband networks do not typically encounter. This puts greater pressure on the concept of "reasonable network management" for mobile providers, and creates additional challenges in applying a broader set of rules to mobile at this time.

96. In light of these considerations, we conclude it is appropriate to take measured steps at this time . . . . We apply certain of the open Internet rules, requiring compliance with the transparency rule and a basic no-blocking rule. n299

1. Application of Openness Principles to Mobile Broadband

a. Transparency

98. [W]e require mobile broadband providers to follow the same transparency rule applicable to fixed broadband providers. Further, although we do not require mobile broadband providers to allow third-party devices or all third-party applications on their networks, we nonetheless require mobile broadband providers to disclose their third-party device and application certification procedures, if any; to clearly explain their criteria for any restrictions on use of their network; and to expeditiously inform device and application providers of any decisions to deny access to the network or of a failure to approve their particular devices or applications.

b. No Blocking

99. We adopt a no blocking rule that guarantees end users' access to the web and protects against mobile broadband providers' blocking applications that compete with their other primary service offering--voice and video telephony--

while ensuring that mobile broadband providers can engage in reasonable network management:

A person engaged in the provision of mobile broadband Internet access service, insofar as such person is so engaged, shall not block consumers from accessing lawful websites, subject to reasonable network management; nor shall such person block applications that compete with the provider's voice or video telephony services, subject to reasonable network management.

100. End users expect to be able to access any lawful website through their broadband service, whether fixed or mobile. Web browsing continues to generate the largest amount of mobile data traffic, and applications and services are increasingly being provisioned and used entirely through the web, without requiring a standalone application to be downloaded to a device. Given that the mobile web is well-developed relative to other mobile applications and services, and enjoys similar expectations of openness that characterize web use through fixed broadband, we find it appropriate to act here. We also recognize that accessing a website typically does not present the same network management issues that downloading and running an app on a device may present. At this time, a prohibition on blocking access to lawful websites (including any related traffic transmitted or received by any plug-in, scripting language, or other browser extension) appropriately balances protection for the ability of end users to access content, applications, and services through the web and assurance that mobile broadband providers can effectively manage their mobile broadband networks.

102. The prohibition on blocking applications that compete with a broadband provider's voice or video telephony services does not apply to a broadband provider's operation of application stores or their functional equivalent. In operating app stores, broadband providers compete directly with other types of entities, including device manufacturers and operating system developers, n316 and we do not intend to limit mobile broadband providers' flexibility to curate their app stores similar to app store operators that are not subject to these rules.

2. Ongoing Monitoring

104. Although some commenters support applying the no unreasonable discrimination rule to mobile broadband, for the reasons discussed above, we decline to do so, preferring at this time to put in place basic openness protections and monitor the development of the mobile broadband marketplace. We emphasize that our decision to proceed incrementally with respect to mobile broadband at this time should not suggest that we implicitly approve of any provider behavior that runs counter to general open Internet principles. Beyond those practices expressly prohibited by our rules, other conduct by mobile broadband providers, particularly conduct that would violate our rules for fixed broadband, may not necessarily be consistent with Internet openness and the public interest.

G. Specialized Services

112. In the *Open Internet NPRM,* the Commission recognized that broadband providers offer services that share capacity with broadband Internet access service over providers' last-mile facilities, and may develop and offer other such services in the future. These "specialized services," such as some broadband providers' existing facilities-based VoIP and Internet Protocol-video offerings, differ from broadband Internet access service and may drive additional private investment in broadband networks and provide end users valued services, supplementing the benefits of the open Internet. At the same time, specialized services may raise concerns regarding bypassing open Internet protections, supplanting the open Internet, and enabling anticompetitive conduct. For example, open Internet protections may be weakened if broadband providers offer specialized services that are substantially similar to, but do not meet the definition of, broadband Internet access service, and if consumer protections do not apply to such services. In addition, broadband providers may constrict or fail to continue expanding network capacity allocated to broadband Internet access service to provide more capacity for specialized services. If this occurs, and particularly to the extent specialized services grow as substitutes for the delivery of content, applications, and services over broadband Internet access service, the Internet may wither as an open platform for competition, innovation, and free expression.

113. We agree with the many commenters who advocate that the Commission exercise its authority to closely monitor and proceed incrementally with respect to specialized services, rather than adopting policies specific to such services at this time.

114. We will closely monitor the robustness and affordability of broadband Internet access services, with a particular focus on any signs that specialized services are in any way retarding the growth of or constricting capacity available for broadband Internet access service.

NOTES & QUESTIONS

1. *Distinguishing actors*. The FCC's Open Internet rules distinguish between "fixed" and "mobile" broadband Internet access service providers. What's the difference? *See supra* ¶ 49. Do you think it makes sense to create separate rules for fixed versus mobile providers?

2. *No blocking*. What does "no blocking" mean for fixed providers? What does it mean for mobile providers?

3. *No unreasonable discrimination*. First, to whom does this requirement apply: fixed, mobile, or both? Second, from the FCC's perspective, what counts as unreasonable discrimination. Consider, for example, stopping spam, giving

faster speeds to end users customers who are willing to pay more, and allowing "pay for priority"? (Remember, "reasonable network management" does not count as unreasonable discrimination.) Do you agree with the FCC's assessments?

4. *Improvements?* If you don't like these rules, what would you have done differently?

5. *Legal challenge*. Verizon filed a "notice of appeal" almost immediately and tried to force the case to the D.C. Circuit Court of Appeals, under 28 U.S.C. 402(b), which gives exclusive jurisdiction to that court on a narrow subset of cases. (The more general way is to file a "petition for review" under 28 U.S.C. § 402(a), which does not restrict venue solely to the D.C. Circuit.) The court dismissed the appeal on the grounds that it was premature, because the Open Internet rules had not yet been given "public notice" through official publication in the Federal Register.

6. *Does the FCC even have the power?* This excerpt of the *Comcast Order* focused on the FCC's substantive analysis of which network management practices might justify departure from net neutrality. But there is another, prior question—one of power and jurisdiction. Does the FCC even have the power to issue such an Order? That question will be addressed *infra* Chapter 8: Classification » B. Present: Internet » 3. Limits of Ancillary Jurisdiction.

CHAPTER 8

CLASSIFICATION

p.792, insert at end of page:

Well, on appeal, the D.C. Circuit panel did not include Judge Edwards, but the result was all the same.

COMCAST V. FCC

600 F.3d 642 (D.C. Cir. 2010).

TATEL, Circuit Judge:

In this case we must decide whether the Federal Communications Commission has authority to regulate an Internet service provider's network management practices. . . . The Commission has failed to make that showing.

II.

Congress has given the Commission express and expansive authority to regulate common carrier services, including landline telephony (Title II of the [Communications] Act); radio transmissions, including broadcast television, radio, and cellular telephony (Title III); and "cable services," including cable television (Title VI). In this case, the Commission does not claim that Congress has given it express authority to regulate Comcast's Internet service. Indeed, in its still-binding 2002 *Cable Modem Order*, the Commission ruled that cable Internet service is neither a "telecommunications service" covered by Title II of the Communications Act nor a "cable service" covered by Title VI. The Commission therefore rests its assertion of authority over Comcast's network management practices on the broad language of section 4(i) of the Act: "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions," 47 U.S.C. § 154(i).

Courts have come to call the Commission's section 4(i) power its "ancillary" authority, a label that derives from three foundational Supreme Court decisions:

United States v. Southwestern Cable Co. (1968), *United States v. Midwest Video Corp., (1972) (Midwest Video I)*, and *FCC v. Midwest Video Corp. (1979) (Midwest Video II)*.

We recently distilled the holdings of these three cases into a two-part test. In *American Library Ass'n v. FCC[(D.C. Cir. 2005)]*, we wrote: "The Commission . . . may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission's general jurisdictional 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." Comcast concedes that the Commission's action here satisfies the first requirement because the company's Internet service qualifies as "interstate and foreign communication by wire" within the meaning of Title I of the Communications Act. 47 U.S.C. § 152(a). Whether the Commission's action satisfies *American Library's* second requirement is the central issue in this case.

IV.

The Commission argues that the *Order* satisfies *American Library's* second requirement because it is "reasonably ancillary to the Commission's effective performance" of its responsibilities under several provisions of the Communications Act. These provisions fall into two categories: those that the parties agree set forth only congressional policy and those that at least arguably delegate regulatory authority to the Commission. We consider each in turn.

A.

The Commission relies principally on section 230(b), [which] states, in relevant part, that "[i]t is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services" and "to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet."

In addition, the Commission relies on section 1, in which Congress set forth its reasons for creating the Commission in 1934: "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . at reasonable charges, . . . there is created a commission to be known as the 'Federal Communications Commission' . . . ." 47 U.S.C. § 151.

The Commission acknowledges that [these sections] are statements of policy that themselves delegate no regulatory authority. Still, the Commission maintains that the two provisions, like all provisions of the Communications Act, set

forth "statutorily mandated responsibilities" that can anchor the exercise of ancillary authority.

In support of its reliance on congressional statements of policy, the Commission points out that in both *Southwestern Cable* and *Midwest Video I* the Supreme Court linked the challenged Commission actions to the furtherance of various congressional "goals," "objectives," and "policies." *See, e.g., Southwestern Cable* (plurality opinion). In particular, the Commission notes that in *Midwest Video I*, the plurality accepted its argument that the Commission's "concern with CATV carriage of broadcast signals . . . extends . . . to requiring CATV affirmatively to further statutory *policies*." (plurality opinion) (emphasis added).

We read *Southwestern Cable* and *Midwest Video I* quite differently. In those cases, the Supreme Court relied on policy statements not because, standing alone, they set out "statutorily mandated responsibilities," but rather because they did so in conjunction with an express delegation of authority to the Commission, i.e., Title III's authority to regulate broadcasting.

The teaching of [these and other related cases]—that policy statements alone cannot provide the basis for the Commission's exercise of ancillary authority—derives from the "axiomatic" principle that "administrative agencies may [act] only pursuant to authority delegated to them by Congress." *Am. Library*. Policy statements are just that—statements of policy. They are not delegations of regulatory authority.

In this case the Commission cites neither section 230(b) nor section 1 to shed light on any express statutory delegation of authority found in Title II, III, VI, or, for that matter, anywhere else. That is, unlike the way it successfully employed policy statements in *Southwestern Cable* and *Midwest Video I*, the Commission does not rely on section 230(b) or section 1 to argue that its regulation of an activity over which it concededly has no express statutory authority (here Comcast's Internet management practices) is necessary to further its regulation of activities over which it does have express statutory authority (here, for example, Comcast's management of its Title VI cable services).

B.

This brings us to the second category of statutory provisions the Commission relies on to support its exercise of ancillary authority. Unlike section 230(b) and section 1, each of these provisions could at least arguably be read to delegate regulatory authority to the Commission.

We begin with section 706 of the Telecommunications Act of 1996, which provides that "[t]he Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or

other regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 1302(a). As the Commission points out, section 706 does contain a direct mandate--the Commission "shall encourage . . . ." In an earlier, still-binding order, however, the Commission ruled that section 706 "does not constitute an independent grant of authority." *In re Deployment of Wireline Servs. Offering Advanced Telecomms. Capability (1998)* (Wireline Deployment Order). Instead, the Commission explained, section 706 "directs the Commission to use the authority granted in other provisions . . . to encourage the deployment of advanced services."

Because the Commission has never questioned, let alone overruled, that understanding of *section 706*, and because agencies "may not . . . depart from a prior policy *sub silentio*," *FCC v. Fox Television Stations, Inc.(2009)*, the Commission remains bound by its earlier conclusion that section 706 grants no regulatory authority.

The Commission's attempt to tether its assertion of ancillary authority to section 256 of the Communications Act suffers from the same flaw. Section 256 directs the Commission to "establish procedures for . . . oversight of coordinated network planning . . . for the effective and efficient interconnection of public telecommunications networks." 47 U.S.C. § 256(b)(1). In language unmentioned by the Commission, however, section 256 goes on to state that "[n]othing in this section shall be construed as expanding . . . any authority that the Commission" otherwise has under law, id. § 256(c)--precisely what the Commission seeks to do here.

The Commission next cites section 257. Enacted as part of the Telecommunications Act of 1996, that provision gave the Commission fifteen months to "complete a proceeding for the purpose of identifying and eliminating . . . market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services." 47 U.S.C. § 257(a). Although the section 257 proceeding is now complete, that provision also directs the Commission to report to Congress every three years on any remaining barriers. . . . We readily accept that certain assertions of Commission authority could be "reasonably ancillary" to the Commission's statutory responsibility to issue a report to Congress. . . . But the Commission's attempt to dictate the operation of an otherwise unregulated service based on nothing more than its obligation to issue a report defies any plausible notion of "ancillariness."

Next the Commission argues that its exercise of authority over Comcast's network management practices is ancillary to its section 201 common carrier authority--though the section 201 argument the Commission sets forth in its brief is very different from the one appearing in the *Order*. As indicated above, section 201 provides that "[a]ll charges, practices, classifications, and regulations for and in connection with [common carrier] service shall be just and reasona-

ble." 47 U.S.C. § 201(b). In the *Order*, the Commission found that by blocking certain traffic on Comcast's Internet service, the company had effectively shifted the burden of that traffic to other service providers, some of which were operating their Internet access services on a common carrier basis subject to Title II. By marginally increasing the variable costs of those providers, the Commission maintained, Comcast's blocking of peer-to-peer transmissions affected common carrier rates.

Instead, the Commission now argues that voice over Internet Protocol (VoIP) services—in essence, telephone services using Internet technology—affect the prices and practices of traditional telephony common carriers subject to section 201 regulation. According to the Commission, some VoIP services were disrupted by Comcast's network management practices. We have no need to examine this claim, however, for the Commission must defend its action on the same grounds advanced in the Order. *SEC v. Chenery Corp.(1943)*.

The same problem undercuts the Commission's effort to link its regulation of Comcast's network management practices to its Title III authority over broadcasting. The Commission contends that Internet video "has the potential to affect the broadcast industry" by influencing "local origination of programming, diversity of viewpoints, and the desirability of providing service in certain markets." But the Commission cites no source for this argument in the *Order*, nor can we find one.

[The court's analysis why 47 U.S.C. § 543, which addresses cable television rates, did not provide ancillary jurisdiction has been omitted.—ED.]

V.

"[T]he allowance of wide latitude in the exercise of delegated powers is not the equivalent of untrammeled freedom to regulate activities over which the statute fails to confer . . . Commission authority." *NARUC II [(D.C. Cir. 1989)]*. Because the Commission has failed to tie its assertion of ancillary authority over Comcast's Internet service to any "statutorily mandated responsibility," *Am. Library,* we grant the petition for review and vacate the *Order*.

So ordered.

NOTES & QUESTIONS

1. *What* Brand X *decided*. In an omitted portion of the opinion, the court addressed specifically what the Supreme Court had decided in *Brand X*. The court pointed out, first, that the Supreme Court's discussion of ancillary jurisdiction was dicta. The court conceded that even if technically dicta, Supreme Court statements can nevertheless be "authoritative." But any such hard question did not have to be answered because "the Commission stretche[d] the

Court's words too far. By leaping from *Brand X's* observation that the Commission's ancillary authority may allow it to impose *some* kinds of obligations on cable Internet providers to a claim of plenary authority over such providers, the Commission runs afoul of *Southwestern Cable* and *Midwest Video I*."[*]

2. *Positive law source of the ancillary jurisdiction doctrine*. We've been studying ancillary jurisdiction for a while now. Where exactly does this doctrine come from? Does it come from federal common law, a federal statute, the Constitution, or some combination?

3. *Easy first step*. What is step #1 of the ancillary jurisdiction inquiry, and why was it satisfied?

4. *Policy statements.* After this opinion, can congressional or agency policy statements act as a source of power for ancillary jurisdiction? Does this answer make sense?

5. *Paradise lost*. The court holds that the FCC waived some of its arguments based on Title II and Title III. What are these arguments? Why might they be strong? And how were they waived?

6. *The FCC response*. The FCC decided not to file for cert. review with the Supreme Court. Instead, it has gone back to the drawing board, which has culminated into the Open Internet rules we read in the prior chapter. Here's the portion of that Report & Order that discusses the question of ancillary jurisdiction.

PRESERVING THE OPEN INTERNET; BROADBAND INDUSTRY PRACTICES

25 FCC Rcd 17905 (2010)

IV. THE COMMISSION'S AUTHORITY TO ADOPT OPEN INTERNET RULES

116. Congress has demonstrated its awareness of the importance of the Internet and advanced services to modern interstate communications. In Section 230 of the Act, for example, Congress announced "the policy of the United States" concerning the Internet, which includes "promot[ing] the continued development of the Internet" and "encourag[ing] the development of technologies which maximize user control over what information is received by . . ." while also "preserv[ing] the vibrant and competitive free market that presently exists

[*] *Id.* at650.

for the Internet and other interactive computer services" and avoiding unnecessary regulation. Other statements of congressional policy further confirm the Commission's statutory authority. In Section 254 of the Act, for example, Congress charged the Commission with designing a federal universal program that has as one of several objectives making "[a]ccess to advanced telecommunications and information services" available "in all regions of the Nation," and particularly to schools, libraries, and health care providers. To the same end, in Section 706 of the 1996 Act, Congress instructed the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms)" and, if it finds that advanced telecommunications capability is not being deployed to all Americans "on a reasonable and timely basis," to "take immediate action to accelerate deployment of such capability." This mandate provides the Commission both "authority" and "discretion" "to settle on the best regulatory or deregulatory approach to broadband."[356] As the legislative history of the 1996 Act confirms, Congress believed that the laws it drafted would compel the Commission to protect and promote the Internet, while allowing the agency sufficient flexibility to decide how to do so.[357] Congress did not limit its instructions to the Commission to one section of the communications laws. Rather, it expressed its instructions in multiple sections which, viewed as a whole, provide broad authority to promote competition, investment, transparency, and an open Internet through the rules we adopt today.

A. Section 706 of the 1996 Act Provides Authority for the Open Internet Rules

117. Section 706 of the 1996 Act directs the Commission (along with state commissions) to take actions that encourage the deployment of "advanced telecommunications capability." "[A]dvanced telecommunications capability," as defined in the statute, includes broadband Internet access. Under Section 706(a), the Commission must encourage the deployment of such capability by "utilizing, in a manner consistent with the public interest, convenience, and necessity," various tools including "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to

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[356] *Ad Hoc Telecomms. Users Comm. v. FCC, 572 F.3d 903, 906-07 (D.C. Cir. 2009).*

[357] S. Rep. No. 104-23, at 51 (1995) ("The goal is to accelerate deployment of an advanced capability that will enable subscribers in all parts of the United States to send and receive information in all its forms--voice, data, graphics, and video--over a high-speed switched, interactive, broadband, transmission capability.").

infrastructure investment."[360] [O]ur open Internet rules will have precisely that effect.

118. In *Comcast,* the D.C. Circuit identified Section 706(a) as a provision that "at least arguably . . . delegate[s] regulatory authority to the Commission," and in fact "contain[s] a direct mandate--the Commission 'shall encourage.'"[361] The court, however, regarded the Commission as "bound by" a prior order[362] that, in the court of appeals' understanding, had held that Section 706(a) is not a grant of authority. In the *Advanced Services Order,* to which the court referred, the Commission held that Section 706(a) did not permit it to encourage advanced services deployment through the mechanism of forbearance without complying with the specific requirements for forbearance set forth in Section 10 of the Communications Act.[364] The issue presented in the 1998 proceeding was whether the Commission could rely on the broad terms of Section 706(a) to trump those specific requirements. In the *Advanced Services Order,* the Commission ruled that it could not do so, noting that it would be "unreasonable" to conclude that Congress intended Section 706(a) to "allow the Commission to eviscerate [specified] forbearance exclusions after having expressly singled out [those exclusions] for different treatment in section 10." The Commission accordingly concluded that Section 706(a) did not give it independent authority--in other words, authority over and above what it otherwise possessed--to forbear from applying other provisions of the Act. The Commission's holding thus honored the interpretive canon that "[a] specific provision . . . controls one[] of more general application."

119. While disavowing a reading of Section 706(a) that would allow the agency to trump specific mandates of the Communications Act, the Commission nonetheless affirmed in the *Advanced Services Order* that Section 706(a) "gives this Commission an affirmative obligation to encourage the deployment of advanced services" using its existing rulemaking, forbearance and adjudicatory powers, and stressed that "this obligation has substance."[369] The *Advanced Services Order* is, therefore, consistent with our present understanding that Section

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[360] *47 U.S.C. § 1302*(a).

[361] Because Section 706 contains a "direct mandate," we reject the argument pressed by some commenters that Section 706 confers no substantive authority.

[362] *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability et al., Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012 (1998)* (*Advanced Services Order*).

[364] *See 47 U.S.C. § 160; see also Advanced Services Order, 13 FCC Rcd at 24046, para. 73.*

[369] *Advanced Services Order, 13 FCC Rcd at 24046, para. 74.*

706(a) authorizes the Commission . . . to take actions, within their subject matter jurisdiction . . . that encourage the deployment of advanced telecommunications capability . . . .[370]

120. In directing the Commission to "encourage the deployment . . . of advanced telecommunications capability to all Americans . . . by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment," Congress necessarily invested the Commission with the statutory authority to carry out those acts. Indeed, the relevant Senate Report explained that the provisions of Section 706 are "intended to ensure that one of the primary objectives of the [1996 Act]--to accelerate deployment of advanced telecommunications capability--is achieved," and stressed that these provisions are "a necessary fail-safe" to guarantee that Congress's objective is reached.[372] It would be odd indeed to characterize Section 706(a) as a "fail-safe" . . . if it conferred no actual authority. Here, under our reading, Section 706(a) authorizes the Commission to address practices, such as blocking VoIP communications, degrading or raising the cost of online video, or denying end users material information about their broadband service, that have the potential to stifle overall investment in Internet infrastructure and limit competition in telecommunications markets.

121. This reading of Section 706(a) obviates the concern of some commenters that our jurisdiction under the provision could be "limitless" or "unbounded." To the contrary, our Section 706(a) authority is limited in three critical respects. First, our mandate under Section 706(a) must be read consistently with Sections 1 and 2 of the Act, which define the Commission's subject matter jurisdiction over "interstate and foreign commerce in communication by wire and radio."[374]. .

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[370] To the extent the *Advanced Services Order* can be construed as having read Section 706(a) differently, we reject that reading of the statute for the reasons discussed in the text.

[372] S. Rep. No. 104-23, at 50-51 (1995).

[374] *47 U.S.C. §§ 151,* 152. The Commission historically has recognized that services carrying Internet traffic are jurisdictionally mixed, but generally subject to federal regulation. *See, e.g., Nat'l Ass'n of Regulatory Util. Comm'rs Petition for Clarification or Declaratory Ruling that No FCC Order or Rule Limits State Authority to Collect Broadband Data, Memorandum Opinion and Order, 25 FCC Rcd 5051, 5054,* paras. 8-9 & n.24 (2010). Where, as here, "it is not possible to separate the interstate and intrastate aspects of the service," the Commission may preempt state regulation where "federal regulation is necessary to further a valid federal regulatory objective, i.e., state regulation would conflict with federal regulatory policies." *Minn. Pub. Utils. Comm'n v. FCC, 483 F.3d 570, 578 (8th Cir. 2007); see also La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 375 n.4 (1986).* Except to the extent a state requirement conflicts on its face with a Commission decision herein, the Commission will evaluate preemption in light of

. Second, the Commission's actions under Section 706(a) must "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[375] Third, the activity undertaken to encourage such deployment must "utiliz[e], in a manner consistent with the public interest, convenience, and necessity," one (or more) of various specified methods. These include: "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." Actions that do not fall within those categories are not authorized by Section 706(a). Thus, as the D.C. Circuit has noted, while the statutory authority granted by Section 706(a) is broad, it is "not unfettered."[378]

122. Our understanding of Section 706(a) is . . . harmonious with other statutory provisions that confer a broad mandate on the Commission. Section 706(a)'s directive . . . is, for example, no broader than other . . . statutes that command the [FCC] to ensure "just" and "reasonable" rates and practices, or to regulate services in the "public interest." Indeed, our authority under Section 706(a) is generally consistent with--albeit narrower than--the understanding of ancillary jurisdiction under which this Commission operated for decades before the *Comcast* decision. The similarities between the two in fact explain why the Commission has not heretofore had occasion to describe Section 706(a) in this way: In the particular proceedings prior to *Comcast,* setting out the understanding of Section 706(a) that we articulate in this Order would not meaningfully have increased the authority that we understood the Commission already to possess.[381]

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the fact-specific nature of the relevant inquiry, on a case-by-case basis. We recognize, for example, that states play a vital role in protecting end users from fraud, enforcing fair business practices, and responding to consumer inquiries and complaints. *See, e.g., Vonage Order, 19 FCC Rcd at 22404-05, para. 1.* We have no intention of impairing states' or local governments' ability to carry out these duties unless we find that specific measures conflict with federal law or policy. In determining whether state or local regulations frustrate federal policies, we will, among other things, be guided by the overarching congressional policies described in Section 230 of the Act and Section 706 of the 1996 Act. *47 U.S.C. §§ 230,* 1302.

[375] *47 U.S.C. § 1302*(a).

[378] *Ad Hoc Telecomms. Users Comm., 572 F.3d at 906-07* ("The general and generous phrasing of § 706 means that the FCC possesses significant albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband.").

[381] Ignoring that Section 706(a) expressly contemplates the use of "regulating methods" such as price regulation, some commenters read prior Commission orders as suggesting that Section 706 authorizes only deregulatory actions. They are mistaken. The *Pulver Order* stated only that Section 706 did not contemplate the application of "economic and entry/exit regulation *inherent in Title II*" to information service Internet applications. *Pulver Order, 19 FCC Rcd*

123. Section 706(b) of the 1996 Act[382] provides additional authority to take actions such as enforcing open Internet principles. It directs the Commission to undertake annual inquiries concerning the availability of advanced telecommunications capability to all Americans and requires that, if the Commission finds that such capability is not being deployed in a reasonable and timely fashion, it "*shall take immediate action* to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." In July 2010, the Commission "conclude[d] that broadband deployment to *all* Americans is not reasonable and timely" and noted that "[a]s a consequence of that conclusion," Section 706(b) was triggered. Section 706(b) therefore provides express authority for the pro-investment, pro-competition rules we adopt today.

B. Authority to Promote Competition and Investment In, and Protect End Users of, Voice, Video, and Audio Services

124. The Commission also has authority under the Communications Act to adopt the open Internet rules in order to promote competition and investment in voice, video, and audio services. Furthermore, for the reasons stated in Part II, above, even if statutory provisions related to voice, video, and audio communications were the *only* sources of authority for the open Internet rules (which is not the case), it would not be sound policy to attempt to implement rules concerning only voice, video, or audio transmissions over the Internet.[385]

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at 3379, para. 19 n.69 (emphasis added). The open Internet rules that we adopt today do not regulate Internet applications, much less impose Title II (*i.e.,* common carrier) regulation on such applications. Moreover, at the same time the Commission determined in the *Cable Modem Declaratory Ruling* and the *Wireline Broadband Report and Order* that cable modem service and wireline broadband services (such as DSL) could be provided as information services not subject to Title II, it proposed new regulations under other sources of authority including Section 706. *See Cable Modem Declaratory Ruling.* On the same day the Commission adopted the *Wireline Broadband Report and Order,* it also adopted the *Internet Policy Statement,* which rested in part on Section 706. Our prior orders therefore do not construe Section 706 as exclusively deregulatory. And to the extent that any prior order does suggest such a construction, we now reject it. *See Ad Hoc Telecomms. Users Comm., 572 F.3d at 908* (Section 706 "direct[s] the FCC to make the major policy decisions and to select *the mix of regulatory and deregulatory tools* the Commission deems most appropriate in the public interest to facilitate broadband deployment and competition") (emphasis added).

[382] *47 U.S.C. § 1302*(b).

[385] *See supra* para. 48. Many broadband providers offer their service on a common carriage basis under Title II of the Act. *See Framework for Broadband Internet Serv., Notice of Inquiry, 25 FCC Rcd 7866, 7875, para. 21 (2010).* With respect to these providers, the rules we adopt today are additionally supported on that basis. With the possible exception of transpar-

1. The Commission Has Authority to Adopt Open Internet Rules to Further Its Responsibilities Under Title II of the Act

125. Section 201 of the Act delegates to the Commission "express and expansive authority" to ensure that the "charges [and] practices . . . in connection with" telecommunications services are "just and reasonable."[387] [I]nterconnected VoIP services, which include some over-the-top VoIP services, "are increasingly being used as a substitute for traditional telephone service." Over-the-top services therefore do, or will, contribute to the marketplace discipline of voice telecommunications services regulated under Section 201. Furthermore, companies that provide both voice communications and broadband Internet access services (for example, telephone companies that are broadband providers) have the incentive and ability to block, degrade, or otherwise disadvantage the services of their online voice competitors. Because the Commission may enlist market forces to fulfill its Section 201 responsibilities,[391] we possess authority to prevent these anticompetitive practices through open Internet rules.

126. Section 251(a)(1) of the Act imposes a duty on all telecommunications carriers "to interconnect directly or indirectly with the facilities of other telecommunications carriers." Many over-the-top VoIP services allow end users to receive calls from and/or place calls to traditional phone networks operated by telecommunications carriers. The Commission has not determined whether any such VoIP providers are telecommunications carriers. To the extent that VoIP services are information services (rather than telecommunications services), any blocking or degrading of a call from a traditional telephone customer to a customer of a VoIP provider, or vice-versa, would deny the traditional telephone customer the intended benefits of telecommunications interconnection under Section 251(a)(1). Over-the-top VoIP customers account for a growing share of telephone usage. If calls to and from these VoIP customers were not delivered efficiently and reliably by broadband providers, all users of the public switched telephone network would be limited in their ability to communicate, and Congress's goal of "efficient, Nation-wide, and world-wide" communications[396] across interconnected networks would be frustrated. To the extent that VoIP services are telecommunications services, a broadband provider's interference with traffic exchanged between a provider of VoIP telecommunications services and an-

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ency requirements, however, the open Internet rules are unlikely to create substantial new duties for these providers in practice.

[387] *47 U.S.C. § 201*(b).

[391] *See CCIA, 693 F.2d at 212; see also Orloff v. FCC, 352 F.3d 415, 418-19 (D.C. Cir. 2003)*

[396] *47 U.S.C. § 151.*

other telecommunications carrier would interfere with interconnection between two telecommunications carriers under Section 251(a)(1).[397]

2. The Commission Has Authority to Adopt Open Internet Rules to Further Its Responsibilities Under Titles III and VI of the Act

128. First, [open Internet] rules are necessary to the effective performance of our Title III responsibilities . . . . Internet video distribution is increasingly important to all video programming services, including local television broadcast service. Radio stations also are providing audio and video content on the Internet. At the same time, broadband providers--many of which are also MVPDs--have the incentive and ability to engage in self-interested practices that may include blocking or degrading the quality of online programming content, including broadcast content, or charging unreasonable additional fees for faster delivery of such content. Absent the rules we adopt today, such practices jeopardize broadcasters' ability to offer news (including local news) and other programming over the Internet, and, in turn, threaten to impair their ability to offer high-quality broadcast content.

129. The Commission likewise has authority under Title VI of the Act to adopt open Internet rules that protect competition in the provision of MVPD services. A cable or telephone company's interference with the online transmission of programming by DBS operators or stand-alone online video programming aggregators that may function as competitive alternatives to traditional MVPDs[407] would frustrate Congress's stated goals in enacting Section 628 [, 47 U.S.C. § 548,] of the Act, which include promoting "competition and diversity in the multichannel video programming market"; "increas[ing] the availability of satellite cable programming and satellite broadcast programming to persons in

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[397] *See also 47 U.S.C. § 256*(b)(1) (directing the Commission to "establish procedures for . . . oversight of coordinated network planning by telecommunications carriers and other providers of telecommunications service for the effective and efficient interconnection of public telecommunications networks used to provide telecommunications service"); *Comcast, 600 F.3d at 659* (acknowledging Section 256's objective, while adding that Section 256 does not "'expand[] . . . any authority that the Commission' otherwise has under law") (quoting *47 U.S.C. § 256*(c)).

[407] The issue whether online-only video programming aggregators are themselves MVPDs under the Communications Act and our regulations has been raised in pending program access complaint proceedings. *See, e.g., VDC Corp. v. Turner Network Sales, Inc.,* Program Access Complaint (Jan. 18, 2007); *Sky Angel U.S., LLC v. Discovery Commc'ns LLC,* Program Access Complaint (Mar. 24, 2010). Nothing in this Order should be read to state or imply any determination on this issue.

rural and other areas not currently able to receive such programming"; and "spur[ring] the development of communications technologies."[408]

130. When Congress enacted Section 628 in 1992, it was specifically concerned about the incentive and ability of cable operators to use their control of video programming to impede competition from the then-nascent DBS industry. Since that time, the Internet has opened a new competitive arena in which MVPDs that offer broadband service have the opportunity and incentive to impede DBS providers and other competing MVPDs--and the statute reaches this analogous arena as well.

131. Cable operators, telephone companies, and DBS operators alike are seeking to keep and win customers by expanding their MVPD offerings to include online access to their programming. For example, in providing its MVPD service, DISH (one of the nation's two DBS providers) relies significantly on online dissemination of programming, including video-on-demand and other programming, that competes with similar offerings by cable operators. . . . The open Internet rules will prevent practices by cable operators and telephone companies, in their role as broadband providers, that have the purpose or effect of significantly hindering (or altogether preventing) delivery of video programming protected under Section 628(b). The Commission therefore is authorized to adopt open Internet rules under Section 628(b), (c)(1), and (j).

C. Authority to Protect the Public Interest Through Spectrum Licensing

133. Open Internet rules for wireless services are further supported by our authority, under Title III of the Communications Act, to protect the public interest through spectrum licensing. . . . In considering whether to grant a license to use spectrum, therefore, the Commission must "determine . . . whether the

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[408] *47 U.S.C. § 548*(a). The Act defines "video programming" as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." *47 U.S.C. § 522*(20). Although the Commission stated nearly a decade ago that video "'streamed' over the Internet" had "not yet achieved television quality" and therefore did not constitute "video programming" at that time, *see Cable Modem Declaratory Ruling, 17 FCC Rcd at 4834, para. 63 n.236,* intervening improvements in streaming technology and broadband availability enable such programming to be "comparable to programming provided by . . . a television broadcast station," *47 U.S.C. § 522*(20). *See supra* Part II.A-II.B. (discussing increasing use of, and end-user demand for, online streaming of video content, including broadcast content). This finding is consistent with our prediction more than five years ago that "[a]s video compression technology improves, data transfer rates increase, and media adapters that link TV to a broadband connection become more widely used, . . . video over the Internet will proliferate and improve in quality." *Ann. Assessment of the Status of Competition in the Mkt. for the Delivery of Video Programming, Notice of Inquiry, 19 FCC Rcd 10909, 10932, para. 74 (2004)* (citation omitted).

public interest, convenience, and necessity will be served by the granting of such application."[428] Likewise, when identifying classes of licenses to be awarded by auction and the characteristics of those licenses, the Commission "shall include safeguards to protect the public interest" and must seek to promote a number of goals, including "the development and rapid deployment of new technologies, products, and services."[429] Even after licenses are awarded, the Commission may change the license terms "if in the judgment of the Commission such action will promote the public interest, convenience, and necessity."[430] The Commission may exercise this authority . . . even if the affected licenses were awarded at auction.[432]

134. The Commission previously has required wireless licensees to comply with open Internet principles, as appropriate in the particular situation before it. In 2007, when it modified the service rules for the 700 MHz band, the Commission . . . required C block licensees "to allow customers, device manufacturers, third-party application developers, and others to use or develop the devices and applications of their choosing in C Block networks, so long as they meet all applicable regulatory requirements and comply with reasonable conditions related to management of the wireless network (*i.e.,* do not cause harm to the network)."

135. AT&T contends that the Commission cannot apply "neutrality" regulations to wireless broadband services outside the upper 700 MHz C Block spectrum because any such regulations "would unlawfully rescind critical rulings in the Commission's *700 MHz Second Report and Order* on which providers relied in making multi-billion dollar investments," and that adopting these regulations more broadly to all mobile providers would violate the Administrative Procedure Act. We disagree. As explained above, the Commission retains the statutory authority to impose new requirements on existing licenses beyond those that were in place at the time of grant, whether the licenses were assigned by auction or by other means. In this case, parties were made well aware that the agency might extend openness requirements beyond the C Block, diminishing any reliance interest they might assert. To the extent that AT&T argues that application of openness principles reduced auction bids on the C Block spectrum, we find that the reasons for the price differences between the C Block and other 700 MHz spectrum blocks are far more complex. A number of factors, including unique auction dynamics and significant differences between the C Block spec-

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[428] *47 U.S.C. § 309*(a);

[429] *47 U.S.C. § 309*(j)(3).

[430] *47 U.S.C. § 316*(a)(1).

[432] *See 47 U.S.C. § 309*(j)(6); *Celtronix Telemetry v. FCC, 272 F.3d 585 (D.C. Cir. 2001).*

trum and other blocks of 700 MHz spectrum contributed to these price differences.

NOTES & QUESTIONS

1. *The § 706 arguments*. The D.C. Circuit Court of Appeals had suggested that the FCC was bound by a prior order, which rejected the notion that § 706 granted any substantive power. How does the FCC respond to this argument? And if that response is persuasive, how precisely does § 706 give the FCC power to enact net neutrality regulations?

2. *Title II arguments*. There is some claim that the statutory authority over common carriage under Title II allows the FCC to enact net neutrality rules? How precisely? In this sort of analysis, it's sometimes helpful to identify how some nascent industry threatens (or is threatened by) an industry that the FCC has jurisdiction over. Recall how even before Title VI was passed, the FCC attempted to regulate cable TV (nascent) on the grounds that it threatened broadcast TV (an industry governed by Title III). So, think about wireline telephony and VoIP. Who's threatening whom, and how might such a relationship strengthen the FCC's argument for ancillary jurisdiction?

3. *Title III arguments*. Do the same analysis for broadcasters who might be distributing their content over the Internet. Are they threatening or are they threatened by broadband Internet access providers, and again, why might this matter in terms of ancillary jurisdiction?

4. *Title VI arguments.* Repeat the analysis, but now think about, for example, DBS operators, who rely on the Internet to deliver video-on-demand to their subscribers.

5. *The "public interest" for spectrum*. This is another Title III sort of argument based on the requirement that spectrum licensees must serve the public interest. Can net neutrality be mandated, in order to serve the public interest? Could the same be done for broadcasters too?