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Christopher Terry

Scott Memmel

Ashley Turacek

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# Lost in a Novelty Mug: *U.S. Telecom*, the FCC, and Policy Resolution for Net Neutrality

by Christopher Terry\*  
Scott Memmel\*\*  
Ashley Turacek\*\*\*

## Abstract

This paper traces the history of net neutrality and the judicial reviews of the Federal Communication Commission's multiple attempts at regulation, including the agency's 2006 guidelines overturned in *Comcast v. FCC*, the 2010 rules overturned in *Verizon v. FCC*, and the FCC's reclassification of broadband in its 2015 net neutrality rules, as well as the contemporary battles over the agency's decision in November of 2017 to repeal the 2015 rules. As the FCC continues to wrestle with net neutrality and open internet regulations, the agency engaged in a series of continuing delays to impede a potential U.S. Supreme Court review of net neutrality in *U.S. Telecom v. FCC*. The result of the FCC's choice to delay a review, especially after certiorari was denied, is that it must now defend multiple and contradictory visions of regulatory intent at the same time. We argue that the agency's decision to delay a potential Supreme Court review further complicated a policy resolution to the issue of net neutrality, and in the process ensured that the agency will be engaged in legal battles over internet regulation for some time.

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\* Assistant Professor, Hubbard School of Journalism and Mass Communication, University of Minnesota.

\*\* Ph.D. Student and Editor, *Silha Bulletin*, Hubbard School of Journalism and Mass Communication, University of Minnesota.

\*\*\* J.D., University of Minnesota Law School.

## Introduction

The social, political, and regulatory battle over net neutrality has become a legal quagmire for the Federal Communications Commission (FCC). Now, more than 15 years after Columbia Law School Professor Tim Wu coined the term to describe network practices,<sup>1</sup> and more than a decade after the FCC's first inquiry into an Internet Service Provider's (ISP) violation of the principles, the agency faces challenges in the U.S. Court of Appeals for the D.C. Circuit over different versions of the rules, including a rebuke by the U.S. Senate in the form of a Congressional Review Act (CRA),<sup>2</sup> as well as significant legal pressure by technology companies, advocacy organizations, consumers, and other interested parties.

From the inception of net neutral principles by the agency in 2006, through the *Comcast Corp. v. FCC* decision,<sup>3</sup> into a second set of regulations and the corresponding *Verizon v. FCC* decision,<sup>4</sup> the agency lacked a formal delegation and jurisdiction. Then in 2015, partially at the direction of the D.C. Circuit, the agency reclassified broadband internet service under Title II,<sup>5</sup> sparking another pair of legal challenges in *U.S. Telecom v. FCC*.<sup>6</sup> In *U.S. Telecom*, the court upheld the FCC's decision to reclassify broadband and apply prohibitions on ISP's that prevented them from blocking, throttling, or prioritizing content.<sup>7</sup> The decision was appealed to the Supreme Court, but on the same day the FCC asked the Court for a delay in the case, (the first of seven such requests through the first half of 2018), the FCC's new chairman, Ajit Pai, released a draft version of an order that would repeal the agency's 2015 Net Neutrality Rules.<sup>8</sup> On November 5, 2018, the Supreme Court ultimately denied certiorari in the case.<sup>9</sup>

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1. Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. OF TELECOMM. & HIGH TECH. L. 141 (2003), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=388863](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=388863).

2. Jacob Kastrenakes, *Senate votes to reinstate net neutrality — but it has a long way to go*, VERGE (May 16, 2018), <https://www.theverge.com/2018/5/16/17357592/net-neutrality-senate-vote-cra-reinstate-fcc-rules>.

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

4. *Verizon Comm. Inc. v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

5. Open Internet Order, 30 FCC Rcd 5601 (7), 80 FR 19737 (2015), 81 FR 93638 (2016) available at [https://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2015/db0312/FCC-15-24A1.pdf](https://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-24A1.pdf).

6. *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

7. *Id.*

8. Restoring Internet Freedom Order, 33 FCC Rcd 311 (1), 83 Fed. Reg. 7852 (2018), available at <https://www.fcc.gov/document/fcc-releases-restoring-internet-freedom-order>.

9. Amy Howe, *Divided court denies review in "net neutrality" cases*, SCOTUSBLOG (Nov. 5, 2018), <http://www.scotusblog.com/2018/11/divided-court-denies-review-in-net-neutrality-cases/>.

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This paper explores the development of net neutrality policies between 2006-2017, as well as the court cases that have followed the agency's actions at each step of the policy process. With this backdrop, this paper argues that the request for the initial decision to delay *U.S. Telecom* was an oversight on the FCC's part, regardless of the Commission's long-term policy intent on net neutrality. By delaying the case, the agency added confusion and uncertainty, as (1) state attorneys general, (2) several technology companies and advocacy organizations, (3) state legislatures and governors, (4) local mayors, and (5) the U.S. Senate all took a variety of actions attempting to restore net neutrality, therefore making the repeal increasingly complicated and problematic. Further confusion was added when Brett Kavanaugh was nominated to the Supreme Court because he had already ruled on net neutrality in the D.C. Circuit, and therefore recused himself from the vote, which ultimately concluded with the Court denying cert in the case.<sup>10</sup> The significant amount of legal action against the FCC, as well as the legislative efforts, also demonstrates why the FCC should not have delayed the Supreme Court's decision to grant *certiorari* in *U.S. Telecom* and how the agency, by doing so, has continued the uncertain regulatory and legal environment that has surrounded net neutrality since its inception.

### 2005 Internet Policy Statement

On August 5, 2005, the FCC adopted a policy statement guaranteeing consumers the freedom to use their internet connections to access any content, using any device or application.<sup>11</sup> The statement first discussed the importance of the Internet, stating it has "a profound impact on American life" and has "fundamentally changed the way we communicate."<sup>12</sup> The FCC cited section 230(b) of the amended Communications Act of 1934, which included Congress' policy to "preserve the vibrant and competitive free market that presently exists for the Internet" and "to promote the continued development of the Internet."<sup>13</sup> The FCC also cited Congress' directive in section 706(a) of the Communications Act, which charged the Commission with "encourag[ing] the deployment on a reasonable and

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10. *Id.*

11. Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Policy Statement, 20 F.C.C.R. 14986 (2005) available at [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-05-151A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf).

12. *Id.*

13. Communications Act, 47 U.S.C. § 230 (2012).

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timely basis of advanced telecommunications capability . . . to all Americans” in the form of broadband internet service.<sup>14</sup>

Under the guidance from these Congressional directives and “to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers,” the FCC adopted four principles:<sup>15</sup>

*“To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to access the lawful Internet content of their choice.”*

*“To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement.”*

*“To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to connect their choice of legal devices that do not harm the network.”*

*“To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to competition among network providers, application and service providers, and content providers.”<sup>16</sup>*

The policy statement also differentiated telecommunications carriers from information service providers (ISPs), which were not subject to mandatory “common-carrier” regulation under Title II of the Communications Act.<sup>17</sup> However, the FCC contended that it had authority to regulate the internet and ISPs under Title I, which outlines the general provisions and purposes of the Act.<sup>18</sup> The FCC stated, “[t]he Commission, however, ‘has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications.’”<sup>19</sup> As a result, the Commission argued that it had jurisdiction necessary to ensure that providers of telecommunications for Internet access or Internet Protocol-enabled (IP-enabled) services are operated in a *neutral manner*” (emphasis added).<sup>20</sup>

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14. 47 U.S.C. § 1302(a).

15. 20 F.C.C.R. 14986.

16. *Id.* (emphasis in original).

17. 47 U.S.C. § 201 *et seq.*

18. *Id.* § 151.

19. 20 F.C.C.R. 14986.

20. *Id.*

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

Two years after the policy statement, in 2007, several of Comcast’s high-speed Internet service subscribers discovered that the company was interfering with their use of peer-to-peer networking applications.<sup>21</sup> Peer-to-peer programs allow users to exchange files with each other without going through a central server, though they consume large quantities of bandwidth. BitTorrent is an open-source, peer-to-peer networking protocol that has become increasingly popular among Internet users in recent years.<sup>22</sup> Peer-to-peer programs, including those relying on BitTorrent, have become a competitive threat to cable operators such as Comcast because they allow Internet users to view high-quality videos that they would otherwise have to pay for on cable television.

Comcast subscribers began to notice that they had problems using BitTorrent and similar technologies over their Comcast broadband connections. Due to the high volume of complaints, the Associated Press (AP) conducted several nationwide tests to investigate the allegations that Comcast was interfering with its customers’ use of peer-to-peer applications, including BitTorrent.<sup>23</sup> On October 17, 2007, the AP reported that the tests indicated that Comcast “actively interferes with attempts by some of its high-speed Internet subscribers to share files online.”<sup>24</sup> “Comcast’s interference affects all types of content, meaning that, for instance, an independent movie producer who wanted to distribute his work using BitTorrent and his Comcast connection could find that difficult or impossible.”<sup>25</sup> The AP further discovered that Comcast’s conduct had a “drastic effect . . . on one type of traffic—in some cases blocking it rather than slowing it down.”<sup>26</sup> The AP also concluded that “the method used” by Comcast was “difficult to circumvent and involves [Comcast] falsifying network traffic.”<sup>27</sup>

Similarly, the Electronic Frontier Foundation (EFF) published the results of its own testing and had come to the same conclusion: Comcast was selectively targeting customers who uploaded files using BitTorrent

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21. See Peter Svensson, *Comcast Blocks Some Internet Traffic*, ASSOC. PRESS (Oct. 19, 2007, 6:32 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/19/AR2007101900842.html>.

22. See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services.

23. Svensson, *supra* note 21.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

and other peer-to-peer protocols.<sup>28</sup> Following these test results, Comcast admitted that it targeted peer-to-peer traffic for interference. Comcast claimed that due to the bandwidth usage, it interfered “only during periods of peak network congestion” and “only . . . during periods of heavy network traffic.”<sup>29</sup>

On November 1, 2007, Free Press filed a complaint with the Federal Trade Commission (FTC) against Comcast<sup>30</sup> and asked the Commission to declare “that an Internet service provider violates the [Commission’s] Internet Policy Statement when it intentionally degrades a targeted Internet application.”<sup>31</sup> Additionally, Free Press filed a petition for declaratory ruling asking the Commission to “clarify that an Internet service provider violates the FCC’s Internet Policy Statement when it intentionally degrades a targeted Internet application.”<sup>32</sup> Separately, Vuze, Inc. filed a petition for rulemaking asking the Commission “to adopt reasonable rules that would prevent the network operators from engaging in practices that discriminate against particular Internet applications, content or technologies.”<sup>33</sup> The FCC issued an Order stating that it had jurisdiction over Comcast’s network management practices, and that it could resolve the dispute through adjudication rather than through rulemaking.<sup>34</sup>

Although Comcast complied with the Order, it appealed the Order based on three objections.<sup>35</sup> First, it argued that the Commission lacked jurisdiction over its network management practices.<sup>36</sup> Second, it argued that the Commission’s adjudicatory action was procedurally flawed because it circumvented the rulemaking requirements of the Administrative Procedure Act and violated the notice requirements of the Due Process Clause.<sup>37</sup> Finally, it asserted that parts of the Order are so poorly reasoned as to be arbitrary and capricious.<sup>38</sup>

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28. AT&T RST Packet *Ex Parte*, Attach. at 2.

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

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

31. Free Press Petition at i.

32. *Id.*

33. Vuze Petition at ii.

34. *In re Formal Compl. of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 F.C.C.R. 13,028 (2008).

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

36. *Id.* at 645.

37. *Id.*

38. *Id.*

In *Comcast*, the D.C. Circuit focused on whether the FCC had authority to regulate an ISP's network management practices.<sup>39</sup> Acknowledging that it has no express statutory authority over such practices, the Commission relies on section 4(i) of the Communications Act of 1934, which authorizes the Commission to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”<sup>40</sup>

Through the Communications Act of 1934, Congress gave the FCC express and expansive authority to regulate common carrier services, including landline telephony.<sup>41</sup> In the present case, the Commission did not claim that Congress had given it express authority to regulate Comcast's Internet services. In fact, in its 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.<sup>42</sup> Therefore, the Commission based its 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.”<sup>43</sup>

Courts refer to the Commission's section 4(i) power as its “ancillary” authority, a label that derived from three foundational Supreme Court decisions.<sup>44</sup> The D.C. Circuit distilled the holdings of these three cases into a two-part test.<sup>45</sup> In *American Library Ass'n v. FCC*, the court held: “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.”<sup>46</sup>

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39. *Id.*

40. *Id.* See also 47 U.S.C. § 151.

41. *Id.*

42. *In re High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4802, ¶ 7 (2002), *aff'd*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

43. 47 U.S.C. § 154(i). Order, 23 F.C.C.R. at 13,036, ¶ 15.

44. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (Midwest Video I), and *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (Midwest Video II). All three of these cases dealt with Commission jurisdiction over early cable systems when similar to 2009, the Communications Act gave the Commission no express authority to regulate such systems.

45. *Comcast Corp. v. F.C.C.*, at 646.

46. *American Library Ass'n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005).



Comcast conceded that the Commission's action satisfied the first requirement because the company's Internet service qualified as "interstate and foreign communication by wire" within the meaning of Title I of the Communications Act.<sup>47</sup> However, the issue arose in whether the Commission's action satisfied the second prong of the *American Library's* test. Prior to considering this issue, the court considered two threshold arguments that the Commission raised. First, it asserted that given a contrary position Comcast took in a California lawsuit, the company should be judicially estopped from challenging the Commission's jurisdiction over the company's network management practices.<sup>48</sup> Second, the Commission argued that even if Comcast's challenge can proceed, the court does not need to go through the usual ancillary authority analysis because a recent Supreme Court decision<sup>49</sup> provided clear reasoning that the Commission had authority to issue the Order.

Courts may invoke judicial estoppel "[w]here a party assumes a certain position in a legal proceeding, . . . succeeds in maintaining that position, . . . [and then,] simply because his interests have changed, assume[s] a contrary position."<sup>50</sup> The Commission's estoppel argument rested on the position Comcast took in a California case. In that case, Comcast claimed that the Commission had "subject matter jurisdiction" over its disputed network management practices.<sup>51</sup> The Commission interpreted this as meaning that any action by the Commission to prohibit those practices would satisfy both elements of the *American Library* test and thus lie within the Commission's ancillary authority.<sup>52</sup> Comcast claimed that it never argued that the Commission could justify exercising ancillary authority over its network management practices. Rather, it was claiming that by saying the Commission had "subject matter jurisdiction" over those practices, it was arguing no more than what it is claiming in this case.

The court agreed that both interpretations of Comcast's California argument are plausible; however, Comcast's is more so.<sup>53</sup> Its interpretation comported with the overall primary jurisdiction argument it advanced in that case. Specifically, for an issue to fall within an agency's primary

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47. *Comcast Corp. v. F.C.C.*, at 646. See also 47 U.S.C. § 151 *et seq.*

48. *Id.* at 647.

49. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

50. *Comcast Corp. v. F.C.C.*, at 642.

51. *Id.* at 647. See also *Hart v. Comcast of Alameda, Inc.*, No. 07-6350, 2008 WL 2610787 (N.D.Cal. June 25, 2008) (quoting *Fed. Power Comm'n v. La. Power & Light Co.*, 406 U.S. 621, 647, 92 S.Ct. 1827, 32 L.Ed.2d 369 (1972)).

52. *Id.*

53. *Id.*

jurisdiction, the agency need not possess definite authority to resolve it; rather, there need only be “sufficient statutory support for administrative authority . . . that the agency should at least be requested to . . . proceed[ ]” in the first instance.<sup>54</sup> Thus, the court did not interpret Comcast’s California argument as “inconsistent” with its argument in this case.

The Commission’s second threshold argument was that the Supreme Court’s decision in *Brand X* “already decided the jurisdictional question here.”<sup>55</sup> In that case, the Court reviewed the Commission’s 2002 Cable Modem Order, which removed cable Internet service from Title II and Title VI oversight by classifying it as an “information service.”<sup>56</sup> Although the Supreme Court acknowledged that cable Internet service does contain a telecommunications “component,” it deferred to the Commission’s determination that this component is “functionally integrated” into a single “offering” properly classified as an “information service.”<sup>57</sup> However, even if stretching the reasoning in *Brand X* to conclude 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*.<sup>58</sup>

The Commission argued that the Order satisfied *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.<sup>59</sup> However, the court held that the FCC failed to justify exercise of ancillary authority to regulate ISP’s network management practices; and that the Commission could not use its ancillary authority to pursue a stand-alone policy objective, rather than to support its exercise of a specifically delegated power.<sup>60</sup>

### 2010 Open Internet Order:

Following the *Comcast* decision,<sup>61</sup> the Commission issued an order imposing disclosure, anti-blocking, and anti-discrimination requirements on broadband providers. On December 21, 2010, the FCC adopted an order “preserving the free and open internet,” which the Commission called an “important step to preserve the Internet as an open platform for innovation, investment, job creation, economic growth, competition, and free

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54. *Id.* at 648.

55. *Id.* at 649.

56. *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, *supra* note 49.

57. *Comcast Corp. v. F.C.C.*, at 649.

58. *Id.* at 650.

59. *Id.*

60. *Id.*

61. *Id.*

expression.”<sup>62</sup> The measure, was passed 3-2 along party lines, actualized President Barack Obama’s campaign pledge to strengthen rules governing the nation’s ISPs.<sup>63</sup>

The order followed a public process “to determine whether and what actions might be necessary to preserve the characteristics that have allowed the Internet to grow into an indispensable platform supporting our nation’s economy and civic life, and to foster continued investment in the physical networks that enable the Internet.”<sup>64</sup> The process led to the conclusion by the FCC “that the 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.”<sup>65</sup> Additionally, the FCC contended that the 100,000 comments indicated that the internet had several economic impacts, including “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.”<sup>66</sup>

In the order, the FCC adopted three basic rules “[t]o provide greater clarity and certainty regarding the continued freedom and openness of the Internet.”<sup>67</sup> The first rule was “transparency,” which requires:

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.<sup>68</sup>

The FCC contended that such disclosure would “promote[] competition—as well as innovation, investment, end-user choice, and broadband adoption” by (1) “ensur[ing] that end users can make informed choices regarding the purchase and use of broadband service,” (2) increasing “end users’ confidence in broadband providers’ practices,” (3) “ensuring that startups and other edge providers have the technical

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62. 25 F.C.C.R. 17905 (2010), available at [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-10-201A1\\_Rcd.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1_Rcd.pdf).

63. Sam Gustin, *FCC Passes Compromise Net Neutrality Rules*, WIRED (Dec. 21, 2010), <https://www.wired.com/2010/12/fcc-order/>.

64. 25 F.C.C.R. 17905.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

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information necessary to create and maintain online content, applications, services, and devices, and to assess the risks and benefits of embarking on new projects,” (4) increasing “the likelihood that broadband providers will abide by open Internet principles,” and (5) “enabl[ing] the Commission to collect information necessary to assess, report on, and enforce the other open Internet rules.”<sup>69</sup>

The second rule prohibits ISPs from “blocking” content or access. The rule states, “[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 nonharmful devices, subject to reasonable network management.”<sup>70</sup>

The final rule prohibits “unreasonable discrimination in transmitting lawful network traffic.”<sup>71</sup> The rule provides that “[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.”<sup>72</sup>

The FCC provided several factors to determine whether the discrimination is reasonable or not. In terms of transparency, the FCC explained that increased transparency makes differential treatment more likely to be reasonable. Regarding end-user control, the FCC contended that “enabling end users to choose among different broadband offerings . . . would be unlikely to violate the no unreasonable discrimination rule.”<sup>73</sup> Furthermore, discriminating based on “specific uses of a network” or the “classes of uses” is likely unreasonable, according to the FCC.<sup>74</sup>

The FCC wrote in the order that “the types of practices [it] would be concerned about include, but are not limited to, discrimination that harms an actual or potential competitor to the broadband provider, that harms end users, or that impairs free expression.”<sup>75</sup> The FCC added that 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 Internet access service.”<sup>76</sup> Legitimate purposes include, “ensuring network

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69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

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security and integrity, including by addressing traffic that is harmful to the network; addressing traffic that is unwanted by end users[;] . . . and reducing or mitigating the effects of congestion on the network.”<sup>77</sup>

The FCC applied the new open internet rules to “broadband Internet access service,” which it defined 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.<sup>78</sup>

The FCC did not apply the rules to “premise operators,” including coffee shops, bookstores, airlines, and other entities when they acquire Internet service from a broadband provider to enable their patrons to access the Internet from their establishments,” or to “dial-up Internet access service” because “the underlying dial-up Internet access service is subject to protections under Title II of the Communications Act.”<sup>79</sup> Additionally, the FCC did not include mobile broadband as part of the new rules, citing that it “presents special considerations that suggest differences in how and when open Internet protections should apply.”<sup>80</sup>

The order cited elements of the 1996 Telecommunications Act and the Communications Act as its authority to adopt the Open Internet Rules. First, the FCC cited section 706(a),<sup>81</sup> which directed the Commission to take actions that encourage the deployment of “advanced telecommunications capability.”<sup>82</sup> The section also required that the FCC encourage such deployment 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 infrastructure investment.”<sup>83</sup> The FCC contended that in *Comcast*, the D.C. Circuit had identified section 706(a) as a provision that “at least arguably . . .

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77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* (“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.”).

81. Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996).

82. 25 F.C.C.R. 17905.

83. *Id.*

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delegate[s] regulatory authority to the Commission,” and in fact “contain[s] a direct mandate—the Commission ‘shall encourage.’”<sup>84</sup>

Second, the order cited Title II of the Communications Act,<sup>85</sup> which delegates to the Commission “express and expansive authority” to ensure that the “charges [and] practices . . . in connection with” telecommunications services are “just and reasonable.” Finally, the order cited Titles III and VI, which provide the FCC jurisdiction over video and audio services, and, according to the FCC, additional authority for open Internet rules.<sup>86</sup>

The order also addressed the First Amendment concerns raised by several broadband providers who argued that “open Internet rules are inconsistent with the . . . First Amendment . . . because broadband providers distribute their own and third-party content to customers, [making] speakers entitled to First Amendment protections.”<sup>87</sup> The FCC pushed back, contending that broadband providers typically are best described not as “speakers,” but rather as conduits for speech. The Commission further argued that broadband Internet access service “does not involve an exercise of editorial discretion,” finding that it is comparable to cable companies’ determination of which stations or programs to include as part of their service.<sup>88</sup> The FCC further asserted that even if their new rules implicated speech activity, they would not violate the First Amendment because they would pass intermediate scrutiny, which provides that a content-neutral regulation will be sustained if “it furthers an important or substantial government interest . . . unrelated to the suppression of free expression,” and if “the means chosen” to achieve that interest “do not burden substantially more speech than is necessary.”<sup>89</sup> The FCC contended that it had such an interest, namely that “preserving an open Internet to encourage competition and remove impediments to infrastructure investment while enabling consumer choice, end-user control, free expression, and the freedom to innovate without permission.”<sup>90</sup>

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84. 47 U.S.C. § 1302(a). *See also Comcast Corp. v. F.C.C.*, at 648.

85. 47 U.S.C. § 201 *et seq.*

86. 47 U.S.C. 301 *et seq.*; 47 U.S.C. § 401 *et seq.*

87. 25 F.C.C.R. 17905.

88. *Id.*

89. *Id.*

90. *Id.*

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***Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014)**

Following the FCC’s 2010 Open Internet Order,<sup>91</sup> Verizon filed petition for judicial review as well as notice of appeal,<sup>92</sup> marking the second time in less than five years in which the D.C. Circuit was confronted with an FCC effort to compel broadband providers to treat all Internet traffic the same regardless of source.<sup>93</sup>

As discussed in the 2010 order, the Commission claimed that section 706 of the Telecommunications Act of 1996 vested it with affirmative authority to enact measures encouraging the deployment of broadband infrastructure.<sup>94</sup> The court held that the Commission had reasonably interpreted section 706 to empower it to promulgate rules governing broadband providers’ treatment of Internet traffic.<sup>95</sup> However, the Commission had chosen to classify broadband providers in a manner that exempts them from treatment as common carriers, and the Communications Act expressly prohibits the Commission from regulating them as such. Therefore, the Commission had failed to establish that the anti-discrimination and anti-blocking rules do not impose *per se* common carrier obligations, and those portions of the Open Internet Order were vacated.

The court stated that they were not reviewing the “wisdom” of the Open Internet Order, but determining whether the Commission had demonstrated that the regulations fall within the scope of its statutory grant of authority.<sup>96</sup> The court stated that the Telecommunications Act of 1966 granted regulatory authority to the FCC and empowered it to promulgate rules governing broadband providers’ treatment of Internet traffic, including preserving and facilitating “virtuous circle” of innovation that had driven explosive growth of Internet.<sup>97</sup> However, the FCC was limited by its subject matter jurisdiction and the requirement that any regulation be tailored to specific statutory goal of accelerating broadband deployment.<sup>98</sup>

Verizon claimed that neither subsection (a) nor (b) of section 706 conferred any regulatory authority on the Commission. It also claimed that even if the provisions granted the Commission substantive authority, the scope of that authority did not permit the Commission to regulate

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91. *In the Matter of Preserving the Open Internet Broadband Indus. Practices*, 25 F.C.C. Rcd. 17905, 17905 (2010).

92. *Verizon*, 740 F.3d at 623.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 635.

97. *Id.*

98. *Id.*

broadband providers in the manner that the Open Internet Order rules did.<sup>99</sup> The court had stated that a *Chevron* deference was warranted even if the agency had interpreted a statutory provision that could be said to delineate the scope of the agency's jurisdiction.<sup>100</sup>

Here, the Commission has made an argument similar to that in *Comcast*, that section 706(a) granted it authority to regulate broadband providers.<sup>101</sup> However, the court held that the provision "does not constitute an independent grant of authority."<sup>102</sup> The court stated that the Commission is not bound forever by the strict interpretation of section 706(a). Nevertheless, the agency must acknowledge and explain the reasons for a changed interpretation.<sup>103</sup> Which the Commission failed to do in *Comcast*. However, the court concluded that in this case the Commission's current understanding of section 706(a) as a grant of regulatory authority represented a reasonable interpretation of an ambiguous statute.<sup>104</sup> Additionally, the court held that the Commission had authority under the Telecommunications Act to take steps to accelerate broadband deployment if and when it determined that such broadband deployment is not "reasonable and timely."<sup>105</sup>

Verizon's claim that neither subsection (a) nor (b) of section 706 conferred any regulatory authority on the Commission, and that even if it did the Open Internet Order fell beyond that scope, was rejected. The court held that the Commission could compel fixed broadband providers under the Telecommunications Act to adhere to open network management practices that would meaningfully promote broadband deployment.<sup>106</sup>

The court also concluded that prediction by the Commission that regulations compelling fixed broadband providers under the Telecommunications Act to adhere to open network management practices would encourage broadband deployment, was rational and supported by substantial evidence.<sup>107</sup> Additionally, the court held that the order compelling broadband providers under the Telecommunications Act to adhere to open network management practices could constitute common carriage per se with respect to edge providers.<sup>108</sup> The court went on to

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99. *Id.*

100. *Id.*

101. *Comcast Corp.*, 600 F.3d at 649.

102. *Id.* at 658.

103. *Verizon*, 740 F.3d at 636.

104. *Id.*

105. *Id.*

106. *Id.* at 643.

107. *Id.* at 644.

108. *Id.* at 655.



conclude that the anti-discrimination obligation imposed on fixed broadband providers has “relegated [those providers], *pro tanto*, to common carrier status,”<sup>109</sup> in violation of the Communications Act. Also, the Commission’s anti-blocking rules could not be sustained for lack of meritorious argument in order or in briefs before court.

Verizon argued that the disclosure rules were not severable, and that if the anti-discrimination and anti-blocking rules failed, the disclosure requirement must as well.<sup>110</sup> The court rejected their argument stating that the disclosure rules were severable. The court then vacated and remanded the anti-discrimination and the anti-blocking rules.<sup>111</sup>

### 2015 Open Internet Order:

Following the *Verizon* ruling, and following several of the court’s recommendations, in February 2015, the FCC adopted the 2015 Open Internet Order, titled “Protecting and Promoting the Open Internet.”<sup>112</sup> The Commission reasoned that it had been “committed to protecting and promoting an open Internet.”<sup>113</sup> The FCC added:

The open Internet drives the American economy and serves, every day, as a critical tool for America’s citizens to conduct commerce, communicate, educate, entertain, and engage in the world around them . . . [b]ut it must remain open: open for commerce, innovation, and speech; open for consumers and for the innovation created by applications developers and content companies; and open for expansion and investment by America’s broadband providers.<sup>114</sup>

The vote to adopt the proposed rules passed along party lines with the three Democratic-appointed commissioners voting in favor and the two Republican-appointed commissioners, Ajit Pai and Michael O’Rielly, voting against.<sup>115</sup>

Citing the *Verizon* decision,<sup>116</sup> the FCC asserted that section 706 afforded the Commission substantive authority under which it could adopt open Internet protections. However, in order to rely on section 706, the FCC was required by the D.C. Circuit in *Verizon* to change the

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109. *Id.* at 656 (citing *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689 (1979)).

110. *Verizon*, 740 F.3d at 659.

111. *Id.*

112. 2015 Open Internet Order, *supra* note 5.

113. *Id.*

114. *Id.*

115. Bill Chappell, *FCC Approves Net Neutrality Rules For ‘Open Internet’*, NPR (Feb. 26, 2015), <https://www.npr.org/sections/thetwo-way/2015/02/26/389259382/net-neutrality-up-for-vote-today-by-fcc-board>.

116. *Verizon*, 740 F.3d at 623.

classification of broadband providers as a “telecommunications service,” therefore classifying it under Title II.<sup>117</sup>

The Open Internet Order enforced net neutrality through a variety of provisions, including three “bright-line” rules prohibiting ISPs from blocking and throttling lawful internet content, as well as prohibiting paid prioritization for internet content delivery, which would allow ISPs to favor some internet traffic over others.<sup>118</sup> The rule against blocking echoed the 2010 order, stating that “[a] person engaged in the provision of 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.”<sup>119</sup> The 2015 order also reaffirmed the transparency rule in the 2010 order.<sup>120</sup>

However, the FCC added a separate rule in 2015 against throttling or the “degradation targeted at specific uses of a customer’s broadband connection.”<sup>121</sup> The rule provided that “[a] person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management.”<sup>122</sup>

Finally, the FCC adopted a rule against paid prioritization, which occurs “when a broadband provider accepts payment (monetary or otherwise) to manage its network in a way that benefits particular content, applications, services, or devices.”<sup>123</sup> The rule stated:

A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not engage in paid prioritization. “Paid prioritization” refers to the management of a broadband provider’s network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.<sup>124</sup>

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117. *Id.*; 2015 Open Internet Order, *supra* note 5 (“Taking the Verizon decision’s implicit invitation, we revisit the Commission’s classification of the retail broadband Internet access service as an information service and clarify that this service encompasses the so-called ‘edge service.’”).

118. 2015 Open Internet Order, *supra* note 5.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

However, the order did include a waiver for paid prioritization, a balancing test providing that the FCC “may waive the ban on paid prioritization only if the petitioner demonstrates that the practice would provide some significant public interest benefit and would not harm the open nature of the Internet.”<sup>125</sup>

The 2015 order, unlike the 2010 rules, included mobile broadband under the new rules. The order “update[d] the definition of public switched network to reflect current technology, by including services that use public IP addresses.”<sup>126</sup> Additionally, the FCC included mobile broadband services under its Title III authority “to protect the public interest through the management of spectrum licensing.”<sup>127</sup>

**United States Telecom Ass’n v. FCC, 825 F.3d 674  
(D.C. Cir. 2016)**

After the FCC issued the 2015 order, ISPs and industry associations petitioned for review in the D.C. Circuit. The Commission contended that it was justified in reclassifying broadband internet service as telecommunications service subject to common carrier regulation under Title II of the Communications Act, citing the *Verizon* ruling.<sup>128</sup> The court agreed in the current action with the Commission’s argument that consumers’ perceive broadband internet service as a standalone offering since consumers generally relied on broadband service to access third-party content.<sup>129</sup>

Conversely, U.S. Telecom argued that the Commission violated section 553 of the Administrative Procedure Act, which requires that a notice of proposed rulemaking (NPRM) “include . . . either the terms or substance of the proposed rule or a description of the subjects and issues involved.”<sup>130</sup> According to U.S. Telecom, the Commission violated this requirement because the NPRM proposed relied on section 706, not Title II.<sup>131</sup> The court rejected its argument stating that the Commission’s NPRM satisfied the test for validity of its final decision of reclassifying broadband service.<sup>132</sup>

U.S. Telecom went on to argue that the Commission lacked good reasons for reclassifying broadband because it could have “adopted

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125. *Id.*

126. *Id.*

127. *Id.*

128. *United States Telecom*, 825 F.3d at 698; *Verizon*, 740 F.3d at 623.

129. *Id.*

130. 5 U.S.C. § 553(b)(3).

131. *United States Telecom*, 825 F.3d at 700.

132. *Id.*

appropriate Open Internet rules based upon [section] 706 without reclassifying broadband.”<sup>133</sup> Again, the court rejected its argument stating that the Commission provided valid reason for changing its policy and reclassifying broadband service as telecommunications.<sup>134</sup> The Commission had argued that it would not have been able to adopt appropriate “net neutrality” rules under the Telecommunications Act without reclassifying broadband service.<sup>135</sup>

In addition to its first argument, U.S. Telecom claimed that the NPRM provided inadequate notice that the Commission would regulate interconnection arrangements under Title II.<sup>136</sup> However, as stated above, the court held that the NPRM provided adequate notice when it “expressly ask[s] for comments on a particular issue or otherwise ma[kes] clear that the agency [is] contemplating a particular change.”<sup>137</sup>

The court also held that the Commission reasonably reclassified mobile broadband service as a commercial mobile service because “Mobile broadband is a ‘mobile service’; it ‘is provided for profit’; and it is available ‘to the public’ or ‘a substantial portion of the public.’”<sup>138</sup> Additionally, the court held that any deficiency in the Commission’s NPRM was harmless with respect to the Commission’s redefinition of term “public switched network.”<sup>139</sup>

Full Service Network argued that the NPRM violated the APA’s notice requirement because it nowhere identified the rules from which the Commission later decided to forbear.<sup>140</sup> The court rejected this argument holding that the NPRM provided adequate notice of rules from which the Commission likely would not forbear.<sup>141</sup>

Full Service Network also challenged the Commission’s finding that “the availability of other protections adequately addresses commenters’ concerns about forbearance from the interconnection provisions under the section 251/252 framework.”<sup>142</sup> The court concluded that commenters’ concerns were adequately addressed, and that the Commission had

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133. *Id.* at 707.

134. *Id.*

135. *Id.*

136. *Id.* at 712.

137. *Id.* (citing *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1081 (D.C. Cir. 2009)).

138. *United States Telecom*, 825 F.3d at 714.

139. *Id.* at 725.

140. *Id.* at 727.

141. *Id.*

142. 2015 Open Internet Order, 30 FCC Rcd. at 5849–50 ¶ 51.

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authority to regulate network connections.<sup>143</sup> Furthermore, broadband service was within the Commission’s jurisdiction as interstate service.

The court held that commenters’ concerns about the FCC’s decision to forbear from applying mandatory network connection and facilities unbundling requirements as part of actions to promote open internet, or “net neutrality,” were adequately addressed, where FCC had authority to regulate network connections, broadband service fell within FCC’s jurisdiction as interstate service, and FCC had no obligation to determine legal status of each underlying hypothetical regulatory obligation prior to undertaking forbearance analysis.

US Telecom claimed that the NPRM provided inadequate notice that the Commission would issue a General Conduct Rule.<sup>144</sup> The court held that the Commission provided adequate notice that its “net neutrality” rules would issue general conduct rules prohibiting broadband internet providers from unreasonably interfering with end users’ access to lawful content.<sup>145</sup>

U.S. Telecom went on to argue that the NPRM violated the Due Process Clause which “requires the invalidation of laws [or regulations] that are impermissibly vague.”<sup>146</sup> The court ruled that the Commission’s general conduct rules were not impermissibly vague, and thus did not violate the Due Process Clause.<sup>147</sup>

Alamo argued that the open internet rules violated the First Amendment by forcing broadband providers to transmit speech with which they might disagree.<sup>148</sup> The court rejects this argument stating that “Common carriers have long been subject to nondiscrimination and equal access obligations akin to those imposed by the rules without raising any First Amendment question.”<sup>149</sup> Therefore, the new rules did not force broadband providers to transmit speech with which they might disagree in violation of the First Amendment.

On May 1, 2017, the D.C. Circuit denied petitions for en banc review of *U.S. Telecom v. FCC*, finding that such a review “would be particularly unwarranted at this point in light of the uncertainty surrounding the fate of the FCC’s Order.”<sup>150</sup> Judge Brett Kavanaugh, who was nominated by President Donald Trump to fill the vacant seat on the U.S. Supreme Court left by Justice Anthony Kennedy, wrote a dissenting opinion. He found that

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143. *United States Telecom*, 825 F.3d at 729.

144. *Id.* at 735.

145. *Id.*

146. *Id.* at 734.

147. *Id.*

148. *Id.* at 740.

149. *Id.*

150. *United States Telecom Ass’n v. FCC*, 855 F.3d 381 (D.C. Cir. 2017).

although the 2015 order “is one of the most consequential regulations ever issued by any executive or independent agency in the history of the United States[,] . . . [it] is unlawful and must be vacated, however, for two alternative and independent reasons.”<sup>151</sup>

First, Kavanaugh asserted that Congress “did not clearly authorize the FCC to issue the net neutrality rule” because it “has never enacted net neutrality legislation or clearly authorized the FCC to impose common-carrier obligations on Internet service providers.”<sup>152</sup> He added that the FCC needed “clear congressional authorization,” which was not provided by the 1934 Communications Act.<sup>153</sup>

Second, Kavanaugh argued that the 2015 order violated the First Amendment. He cited *Turner Broadcasting System, Inc. v. FCC* (1994)<sup>154</sup> and *Turner Broadcasting System, Inc. v. FCC*, (1997)<sup>155</sup> as evidence that the First Amendment “bars the Government from restricting the editorial discretion of Internet service providers, absent a showing that an Internet service provider possesses market power in a relevant geographic market.”<sup>156</sup> Kavanaugh contended that the FCC, in this case, had “not even tried to make a market power showing.”<sup>157</sup> He added, “The rule transforms the Internet by imposing common-carrier obligations on Internet service providers and thereby prohibiting Internet service providers from exercising editorial control over the content they transmit to consumers.” Conversely, the majority previously held in its 2016 ruling in *U.S. Telecom v. FCC* that “Common carriers have long been subject to nondiscrimination and equal access obligations akin to those imposed by the rules without raising any First Amendment question.”<sup>158</sup>

In total, including after the nomination of Kavanaugh, the FCC requested seven delays<sup>159</sup> to respond to the appeal, and thus the agency

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151. *Id.* at 417.

152. *Id.*

153. *Id.*

154. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994).

155. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997).

156. *United States Telecom Ass’n*, 855 F.3d at 418.

157. *Id.*

158. *United States Telecom*, 825 F.3d at 740.

159. *United States Telecom Ass’n*, 855 F.3d 674, *appeal docketed*, No. 17-504 (2017). See also Letter from Noel J. Francisco, U.S. Solicitor General, to Honorable Scott S. Harris, U.S. Supreme Court Clerk (Nov. 22, 2017), available at [https://www.supremecourt.gov/DocketPDF/17/17-504/21360/20171122164513445\\_Extension%20Letter%2017-504.pdf](https://www.supremecourt.gov/DocketPDF/17/17-504/21360/20171122164513445_Extension%20Letter%2017-504.pdf); Letter from Noel J. Francisco, U.S. Solicitor General, to Honorable Scott S. Harris, U.S. Supreme Court Clerk (Dec. 18, 2017), available at [https://www.supremecourt.gov/DocketPDF/17/17-504/24331/20171218170915732\\_Extension%20Letter%2017-498%20et%20al.%20%203rd.pdf](https://www.supremecourt.gov/DocketPDF/17/17-504/24331/20171218170915732_Extension%20Letter%2017-498%20et%20al.%20%203rd.pdf); Letter from Noel J. Francisco, U.S. Solicitor General, to Honorable Scott S. Harris, U.S. Supreme Court Clerk (Jan. 19, 2018), available at <https://www.supremecourt.gov/DocketPDF/17/17-504/28587/>

delayed the Supreme Court’s decision of whether it would hear the case. However, on November 5, 2018, the Supreme Court denied certiorari, leaving the D.C. Circuit ruling in place.<sup>160</sup>

Because Kavanaugh was nominated to serve on the U.S. Supreme Court, and was eventually sworn in, the FCC further complicated net neutrality by delaying the petition for cert. Kavanaugh, because he already ruled on the case, recused himself from the decision to grant cert.<sup>161</sup> Observers speculated that Chief Justice John Roberts recused himself because he owned stock in Time Warner, a company now owned by AT&T that was challenging the new net neutrality rules.<sup>162</sup> Thus, the issue, rather than being potentially resolved by a nine-judge panel before Justice Kennedy retired, remains quite complicated, especially for the FCC, which faces a D.C. Circuit ruling that favored the previous net neutrality rules.

### 2017 Restoring Internet Freedom Order

Amidst the FCC’s repeated successful attempts to delay the Supreme Court’s response to the *US Telecom* case, on December 14, 2017, the Commission, voted 3-2 along party lines to repeal its net neutrality rules in a Declaratory Ruling, a Report and Order, and an Order tilted “Restoring

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20180119205119723\_Extension%20Letter%20FCC.pdf; Letter from Noel J. Francisco, U.S. Solicitor General, to Honorable Scott S. Harris, U.S. Supreme Court Clerk (March 2, 2018), available at [https://www.supremecourt.gov/DocketPDF/17/17-504/37496/20180302173433022\\_Extension%20letter%2017-498%20et%20a%205th.pdf](https://www.supremecourt.gov/DocketPDF/17/17-504/37496/20180302173433022_Extension%20letter%2017-498%20et%20a%205th.pdf); Letter from Noel J. Francisco, U.S. Solicitor General, to Honorable Scott S. Harris, U.S. Supreme Court Clerk (March 30, 2018), available at [https://www.supremecourt.gov/DocketPDF/17/17-504/41801/20180330151236886\\_Extension%20Letter%2017-498%20through%2017-504.pdf](https://www.supremecourt.gov/DocketPDF/17/17-504/41801/20180330151236886_Extension%20Letter%2017-498%20through%2017-504.pdf); Letter from Noel J. Francisco, U.S. Solicitor General, to Honorable Scott S. Harris, U.S. Supreme Court Clerk (April 27, 2018), available at [https://www.supremecourt.gov/DocketPDF/17/17-504/44943/20180427164329429\\_Extension%20Letter%2017-498%20-%2017-17-504%20%207th.pdf](https://www.supremecourt.gov/DocketPDF/17/17-504/44943/20180427164329429_Extension%20Letter%2017-498%20-%2017-17-504%20%207th.pdf); Letter from Noel J. Francisco, U.S. Solicitor General, to Honorable Scott S. Harris, U.S. Supreme Court Clerk (May 30, 2018), available at [https://www.supremecourt.gov/DocketPDF/17/17-504/48612/20180530110336121\\_Extension%20Letter%2017-498%20%20-%2017-504%208th.pdf](https://www.supremecourt.gov/DocketPDF/17/17-504/48612/20180530110336121_Extension%20Letter%2017-498%20%20-%2017-504%208th.pdf).

160. Howe, *supra* note 9.

161. *Id.* (“With Roberts and Kavanaugh both recused, that left only seven justices. Justices Clarence Thomas, Samuel Alito and Neil Gorsuch indicated that they would have opted for *Munsingwear* vacatur, which would have left the D.C. Circuit’s ruling without any precedential value. But they would have needed at least one more vote for that result, which they were apparently not able to get with Roberts and Kavanaugh recused.”).

162. *Id.* (“The court’s newest justice, Brett Kavanaugh, was expected to recuse himself from voting on the petitions because he had participated in the cases while on the D.C. Circuit, and he did. But Chief Justice John Roberts also recused himself—presumably (although there is no way to know for sure) because he owns stock in one of the companies challenging the rules.”). See also Brian Fung, *The Supreme Court won’t take up net neutrality*, WASH. POST (Nov. 5, 2018), [https://www.washingtonpost.com/technology/2018/11/05/supreme-court-wont-take-up-net-neutrality-this-time/?utm\\_term=.34cd6a5a0336](https://www.washingtonpost.com/technology/2018/11/05/supreme-court-wont-take-up-net-neutrality-this-time/?utm_term=.34cd6a5a0336).

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Internet Freedom.”<sup>163</sup> FCC Chairman Ajit Pai, Commissioner Brendan Carr, and Commissioner Mike O’Reilly voted in favor of repeal while Commissioners Mignon Clyburn and Jessica Rosenworcel were opposed. The order contended that its purpose was to “reverse the Commission’s abrupt shift [in 2015] to heavy-handed utility-style regulation of broadband Internet access service and return to the light-touch framework under which a free and open Internet underwent rapid and unprecedented growth for almost two decades.”<sup>164</sup>

The Order first “[r]estor[ed] the classification of broadband Internet access service as an ‘information service’” as it had been classified prior to the 2015 Open Internet Order.<sup>165</sup> In so doing, the FCC argued, it would “end utility style regulation of the Internet in favor of the market-based policies necessary to preserve the future of Internet freedom.”<sup>166</sup> The FCC further argued that reclassification would allow for “light-touch” regulation meant to “promote investment and innovation better than applying costly and restrictive laws of a bygone era to broadband Internet access service.”<sup>167</sup> Additionally, the order reinstated the private mobile service classification of mobile broadband Internet access service. The FCC contended that “Congress intended the definition of ‘telecommunications service’ to include commercial mobile service.”<sup>168</sup>

Second, the Order “[adopted] transparency requirements that ISPs disclose information about their practices to consumers, entrepreneurs, and the Commission.”<sup>169</sup> The new rule, modifying the 2010 Open Internet Order rule by eliminating “many of the burdensome additional reporting obligations” stated:

Any person providing 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 to enable consumers to make informed choices regarding the purchase and use of such services and entrepreneurs and other small businesses to develop, market, and maintain Internet offerings. Such disclosure shall be made via a publicly available, easily accessible website or through transmittal to the Commission.<sup>170</sup>

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163. Restoring Internet Freedom Order, *supra* note 8.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*



More specifically, the new rule required ISPs to disclose several network practices, including instances of “blocking,”<sup>171</sup> “throttling,”<sup>172</sup> “affiliated prioritization,”<sup>173</sup> “paid prioritization,”<sup>174</sup> “congestion management,”<sup>175</sup> “application-specific behavior,”<sup>176</sup> “device attachment rules,”<sup>177</sup> and “security.”<sup>178</sup> The order also required disclosure of certain “performance characteristics” and “commercial terms of service,” including price, privacy policies, and redress options.

The FCC contended that increased transparency would allow consumers to “choose what works best for them,” rather than having the government make such a determination. In other words, according to the FCC, the new rule was meant to “ensure that consumers have the information necessary to make informed choices about the purchase and use of broadband Internet access service, which promotes a competitive marketplace for those services.”<sup>179</sup>

Finally, the FCC eliminated its conduct rules for ISPs, including the bright-line rules preventing blocking, throttling, and paid prioritization. The FCC provided three reasons for eliminating the conduct rules, including that the transparency rule “obviates the need for conduct rules by achieving comparable benefits at lower cost,” that the costs of such rules – decreasing

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171. Restoring Internet Freedom Order, *supra* note 8 (“Any practice (other than reasonable network management elsewhere disclosed) that blocks or otherwise prevents end user access to lawful content, applications, service, or non-harmful devices, including a description of what is blocked.”).

172. *Id.* (“Any practice (other than reasonable network management elsewhere disclosed) that degrades or impairs access to lawful Internet traffic on the basis of content, application, service, user, or use of a non-harmful device, including a description of what is throttled.”).

173. *Id.* (“Any practice that directly or indirectly favors some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, or resource reservation, to benefit an affiliate, including identification of the affiliate.”).

174. *Id.* (“Any practice that directly or indirectly favors some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, or resource reservation, in exchange for consideration, monetary or otherwise.”).

175. *Id.* (“These descriptions should include the types of traffic subject to the practices; the purposes served by the practices; the practices’ effects on end users’ experience; criteria used in practices, such as indicators of congestion that trigger a practice, including any usage limits triggering the practice, and the typical frequency of congestion; usage limits and the consequences of exceeding them; and references to engineering standards, where appropriate.”).

176. *Id.* (“Whether and why the ISP 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.”).

177. *Id.* (“Any restrictions on the types of devices and any approval procedures for devices to connect to the network.”).

178. *Id.* (“Any 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).”).

179. Restoring Internet Freedom Order, *supra* note 8.

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of innovation and investment – outweighed any benefits, and “the record does not identify any legal authority to adopt conduct rules for all ISPs, and we decline to distort the market with a patchwork of non-uniform, limited-purpose rules.”<sup>180</sup>

Regarding paid prioritization, the FCC asserted that the elimination of the rule “will help spur innovation and experimentation, encourage network investment, and better allocate the costs of infrastructure, likely benefiting consumers and competition.”<sup>181</sup> Turning to blocking and throttling, the FCC maintained that it “do[es] not support blocking lawful content, consistent with long-standing Commission policy.”<sup>182</sup> However, the Commission argued that there was “scant evidence that end users, under different legal frameworks, have been prevented by blocking or throttling from accessing the content of their choosing” and that there were no “actual incidents” that implicated free speech.

Furthermore, the FCC contended that the Federal Trade Commission (FTC), through its authority over unfair and deceptive practices,<sup>183</sup> already had “significant experience protecting against the harms to competition and to consumers that the [conduct rules] purport[ed] to reach.”<sup>184</sup> Thus, the FCC contended that the FTC already provides the appropriate flexibility and predictability to protect consumers and competition and addresses new practices that might develop with less harm to innovation.

Over two months after the vote, on Feb. 22, 2018, the FCC made the repeal of net neutrality official by publishing the new rules in the Federal Register.<sup>185</sup> Although minor portions took effect on April 23, several provisions did not.<sup>186</sup> After OMB review, the remaining portions of the

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180. *Id.*

181. *Id.*

182. *Id.*

183. 15 U.S.C § 45.

184. Restoring Internet Freedom Order, *supra* note 8.

185. Marguerite Reardon, *FCC officially publishes net neutrality repeal*, CNET (Feb. 22, 2018), <https://www.cnet.com/news/fcc-officially-publish-net-neutrality-repeal/>. See also Devin Coldewey, *The FCC’s order gutting net neutrality is now official – but the fight is just getting started*, TECHCRUNCH (Feb. 22, 2018), <https://techcrunch.com/2018/02/22/the-fccs-order-gutting-net-neutrality-is-now-official-but-the-fight-is-just-getting-started/>.

186. Benny Evangelista, *Net Neutrality Repeal Published in Federal Register*, GOV’T. TECH. (Feb. 22, 2018), <http://www.govtech.com/network/Net-Neutrality-Repeal-Published-in-Federal-Register.html>. See also Jon Brodtkin, *Ajit Pai hasn’t finalized net neutrality repeal – here’s a theory on why*, ARS TECHNICA (April 24, 2018), <https://arstechnica.com/tech-policy/2018/04/fcc-hasnt-finalized-net-neutrality-repeal-and-the-delay-might-be-strategic/>; Karl Bode, *No, Net Neutrality Isn’t Officially Dead (Yet), And The FCC Is Stalling For A Reason*, TECHDIRT (April 25, 2018), <https://www.techdirt.com/articles/20180424/08295039699/no-net-neutrality-isnt-officially-dead-yet-fcc-is-stalling-reason.shtml>.

2017 order went into legal effect on June 11, 2018 with several challenges to the rule changes pending in the DC Circuit.

### **Legal Challenges, Legislation Following the FCC’s 2017 Order**

Following the passage of the 2017 Order, and the publication of the new rules in the Federal Register on Feb. 22, 2018, (1) state attorneys general, (2) several technology companies and advocacy organizations, (3) state legislatures and governors, (4) local mayors, and (5) the U.S. Senate all took a variety of actions attempting to restore net neutrality, making the repeal increasingly complicated and problematic. The significant amount of legal action against the FCC, as well as the legislative efforts, further demonstrate why the FCC should not have delayed the Supreme Court’s decision to grant *certiorari* in *US Telecom*.

#### *Lawsuits Against the FCC*

Following the repeal of net neutrality, and again following the publication of the new rules in the Federal Register, 23 state attorneys general, as well as several companies and organizations, filed petitions for review in the U.S. Court of Appeals for the D.C. Circuit in an attempt to block the repeal of net neutrality and the enforcement of the 2017 Restoring Internet Freedom Order.

On February 22, twenty-two state attorneys general<sup>187</sup> and the attorney general of Washington, D.C. formally re-filed their petition for review in the U.S. Court of Appeals for the District of Columbia Circuit against the FCC after the Commission published the new rules in the Federal Register.<sup>188</sup> The attorneys general asked the D.C. Circuit to rule that the FCC’s 2017 Order was “arbitrary, capricious, and an abuse of discretion within the meaning of the Administrative Procedure Act.”<sup>189</sup> The petition asserted that the order violated “the Constitution, the Communications Act of 1934, as amended, and FCC regulations promulgated thereunder.” Additionally, the petition contended that the Order “conflict[ed] with the notice-and-comment rulemaking requirements of 5 U.S.C. § 553.”<sup>190</sup>

Meanwhile, several companies and organizations, including Free Press, Public Knowledge, Mozilla Corporation (Mozilla), and Vimeo, Inc., among others, filed separate lawsuits against the FCC. Mozilla was the first

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187. The attorneys general were from New York, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, and Mississippi, as well as New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington.

188. *New York v. Fed. Comm. Comm’n*, No. 18-1055 (D.C. Cir. 2018).

189. *Id.* 5 U.S.C. § 701 *et seq.*

190. *New York v. Fed. Comm. Comm’n*, No. 18-1055.

to formally re-file its complaint after the FCC published its new rules and asserted, like the attorneys general, that the FCC “depart[ed] from its prior reasoning and precedent” and, therefore, “violate[d] federal law, including, but not limited to, the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*, as amended, and the Telecommunications Act of 1996, and FCC regulations promulgated thereunder.”<sup>191</sup> Mozilla further argued that the 2017 Order was “arbitrary, capricious, and an and an abuse of discretion within the meaning of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*” and, additionally, was in violation of the FCC’s statutory mandates.<sup>192</sup> The petition for review called on the D.C. Circuit to “hold unlawful, vacate, enjoin, and set aside the Order, and that it provide additional relief as may be appropriate.”<sup>193</sup>

Further adding to the number of lawsuits filed against the FCC, INCOMPAS, a trade association whose members include streaming services, edge providers, and competitive carriers, such as Facebook, Google, and Netflix, also filed a petition for review.<sup>194</sup> The petition, filed on April 23, 2018 and signed by Markham C. Erickson of Steptoe & Johnson LLP, asserted that INCOMPAS and its members “would be aggrieved” by the 2017 Order, citing evidence “where the Department of Justice and the FCC found—contrary to ISP assertions—that broadband internet access providers representing nearly 70% of residential broadband internet access subscribers had the incentive and ability to engage in behavior that threatened an open internet.”<sup>195</sup> INCOMPAS contended that such evidence “[stood] in stark contrast with the Order’s newly found determination that ISPs lack such incentives and abilities.”<sup>196</sup> As a result, the petition requested the D.C. Circuit to “hold unlawful, vacate, enjoin, and set aside the Order, and that it provide additional relief as may be just and appropriate.”<sup>197</sup>

All the above lawsuits, including INCOMPAS’, were merged into one suit and were set to be heard by the D.C. Circuit, who took the case from the Ninth Circuit, which had been selected by the judicial lottery procedure.<sup>198</sup>

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191. *Mozilla Corp. v. Fed. Comm. Comm’n*, No. 18-1051 (D.C. Cir. 2018).

192. *Id.*

193. *Id.*

194. *INCOMPAS v. Fed. Comm. Comm’n*, 0:18-rev-01105 (D.C. Cir. 2018), available at [https://www.incompas.org/Files/filings/2018/04-23-18%20INCOMPAS%20Petition%20for%20Review%20RIF%20Order\\_as%20filed.pdf](https://www.incompas.org/Files/filings/2018/04-23-18%20INCOMPAS%20Petition%20for%20Review%20RIF%20Order_as%20filed.pdf).

195. *Id.*

196. *Id.*

197. *Id.*

198. Jon Brodtkin, *FCC must defend net neutrality repeal in court against dozens of litigants*, ARS TECHNICA (March 12, 2018), <https://arstechnica.com/tech-policy/2018/03/fcc-must-defend->

*Additional State Actions*

In addition to the lawsuits filed by the states attorneys general, governors in six states, according to the National Conference of State Legislatures (NCSL), also signed executive orders limiting business contracts to only be with ISPs that support or practice net neutrality principals.<sup>199</sup> For example, in Hawaii, Gov. David Y. Ige’s Executive Order No. 18-02 directed all state government agencies to only contract with ISPs “who demonstrate and contractually agree to support and practice net neutrality principles where all Internet traffic is treated equally.”<sup>200</sup> The order also required state agencies to add contractual language that “suppliers of telecommunications, Internet, broadband, and data communication services shall abide by net neutrality principles,” which include “providing access to all lawful content and applications regardless of the source,” “treating all data fairly [and] . . . the same,” and refraining from the practices of “throttling, restricting, or prioritizing internet content, applications, or certain data streams.”<sup>201</sup>

Rhode Island Gov. Gina M. Raimondo, in Executive Order 18-02;<sup>202</sup> New Jersey Gov. Philip D. Murphy, in Executive Order No. 9;<sup>203</sup> New York, Gov. Andrew M. Cuomo, in Executive Order No. 175;<sup>204</sup> Montana Gov. Steve Bullock, in Executive Order, No. 3-2018;<sup>205</sup> and Vermont Gov. Philip B. Scott, in Executive Order No. 2-18,<sup>206</sup> also required state entities award future contracts only to ISPs that adhere to these “net neutrality principles,” which generally prohibit blocking, throttling, and paid prioritization of lawful internet content by ISPs.

Additionally, the NCSL reported on May 14 that net neutrality legislation has been introduced in 29 states, with over 65 bills introduced requiring internet service providers to ensure various net neutrality principles.<sup>207</sup> In 13 states and Washington, D.C., 23 resolutions had been introduced “primarily expressing opposition to the Federal

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net-neutrality-repeal-in-court-against-dozens-of-litigants/. See also Dell Cameron, *A Key Player Just Joined the Lawsuit Against the FCC to Save Net Neutrality*, GIZMODO (April 24, 2018), <https://gizmodo.com/a-key-player-just-joined-the-lawsuit-against-the-fcc-to-1825506661>.

199. *Net Neutrality Legislation in States*, NATIONAL CONFERENCE OF STATE LEGISLATURES (May 14, 2018), <http://www.ncsl.org/research/telecommunications-and-information-technology/net-neutrality-legislation-in-states.aspx>.

200. Hawaii Executive Order No. 18-02.

201. *Id.*

202. Rhode Island Executive Order 18-02.

203. New Jersey Executive Order No. 9.

204. New York Executive Order No. 175.

205. Montana Executive Order, No. 3-2018.

206. Vermont Executive Order No. 2-18.

207. *Net Neutrality Legislation in States*, *supra* note 199.

Communications Commission's (FCC) repeal of net neutrality rules; urging the U.S. Congress enact legislation reinstating and requiring the preservation of net neutrality; or stating the chamber's support of general net neutrality principles."<sup>208</sup>

As of May 2018, two states had passed net neutrality legislation, including Washington, which was the first state to do so, and Oregon. On March 6, 2018, Washington Gov. Jay Inslee signed House Bill 2282, which was passed by the Washington House of Representatives on February 9 by a vote of 93-5 and by the state Senate on February 27 by a 35-14 vote.<sup>209</sup> The law first requires "[a]ny person providing broadband internet access service in Washington state [to] publicly disclose accurate information regarding the network management practices, performance characteristics, and commercial terms of its broadband internet access services."<sup>210</sup> In so doing, the law will "enable consumers to make informed choices regarding the purchase and use of such services and [to enable] entrepreneurs and other small businesses to develop, market, and maintain internet offerings."<sup>211</sup>

Second, the law prohibits any "person engaged in the provision of broadband internet access service in Washington state" from "(a) Block[ing] lawful content, applications, services, or nonharmful devices, subject to reasonable network management; (b) Impair[ing] or degrad[ing] lawful internet traffic on the basis of internet content, application, or service . . . or (c) Engag[ing] in paid prioritization."<sup>212</sup> The law includes exceptions if ISPs have an obligation or authorization "to address the needs of emergency communications or law enforcement, public safety, or national security authorities" or in cases in which the ISP regulates unlawful content.<sup>213</sup>

Finally, the law covers practices and matters "vital affecting the public interest for the purpose of applying the consumer protection act, chapter 19.86 RCW."<sup>214</sup> The statute states that any violation "is not reasonable in relation to the development and preservation of business" and also constitutes "an unfair or deceptive act in trade or commerce and an unfair method of competition" in violation of 19.86 RCW.<sup>215</sup>

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208. *Id.*

209. An Act Relating to Protecting an Open Internet in Washington State, H.B. 2282, 65th Legislature (2018), available at <http://lawfilesexternal.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/House/2282-S.SL.pdf>.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

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Like the Washington statute and the executive orders passed by six state governors, Oregon House Bill 4155 prohibited a public body from contracting “with a broadband Internet access service provider” that

(a) Engages in paid prioritization; (b) Blocks lawful content, applications or services or nonharmful devices; (c) Impairs or degrades lawful Internet traffic for the purpose of discriminating against or favoring certain Internet content, applications or services or the use of nonharmful devices; (d) Unreasonably interferes with or unreasonably disadvantages an end user’s ability to select, access and use the broadband Internet access service or lawful Internet content, applications or services or devices of the end user’s choice; or (e) Unreasonably interferes with or unreasonably disadvantages an edge provider’s ability to make devices or lawful content, applications or services available to end users.<sup>216</sup>

The law also required ISPs to “publicly disclose information regarding the provider’s network management practices and performance characteristics and the commercial terms of the provider’s broadband Internet access service sufficient for end users to verify that the service is provided in compliance with subsections (3) and (4) of this section.”<sup>217</sup> The law contained some exceptions, including if the ISP is the “sole provider of fixed broadband Internet access service to the geographic location subject to the contract.”<sup>218</sup>

#### *Local Mayors*

On April 27, 2018, more than 100 mayors across the United States, brought together by a coalition of open internet advocates, including the Daily Kos, Free Press, and Demand Progress, signed a pledge to uphold net neutrality provisions and only contract with ISPs upholding those provisions, further problematizing the FCC’s decision to repeal net neutrality.<sup>219</sup> The pledge begins by stating that in the last couple decades, “cities have increased their presence on the internet to provide information and services to constituents. . . . Cities have come to rely on the internet as an open medium with the assurance that a service provider will deliver a resident’s request for government content just the same as they deliver any

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216. Relating to Internet Service Providers, H.B. 4155, 79th Legislative Assembly (2018), available at <https://olis.leg.state.or.us/liz/2018R1/Downloads/MeasureDocument/HB4155>.

217. *Id.*

218. *Id.*

219. Dell Cameron, *100 US Mayors Sign Pledge to Defend Net Neutrality Against Crooked ISPs*, GIZMODO (April 27, 2018), <https://gizmodo.com/100-us-mayors-sign-pledge-to-defend-net-neutrality-agai-1825612839>.

other content.”<sup>220</sup> The pledge contended that the FCC had “violate[d] that principle” by passing the 2017 Order.<sup>221</sup>

As a result, the pledge includes six steps “to ensure the internet remains open and to keep gatekeepers from throttling, blocking or limiting government content on the internet.”<sup>222</sup> First, the mayors pledged to “[p]rocur[e] applicable internet services from companies that do not block, throttle, or provide paid prioritization of content on sites that cities run to provide critical services and information to their residents.” Second, the mayors agreed to “[e]nsure an open internet connection with any free or subsidized service [they] offer to [their] residents.” Third, they agreed to not “block, throttle or engage in paid prioritization when providing internet service directly to our residents, such as through free public Wi-Fi or municipal broadband.” Fourth, the pledge stated that ISPs would be required to provide “clear and accessible notices of filtering, blocking and prioritization policies with enforceable penalties for violations to protect consumers from deceptive practices.” Fifth, the mayors agreed to “[m]onitor the practices of [ISPs] so consumers and regulators can know when a company is violating open internet principles or commitments.” Finally, the pledge stated that the local officials would “[e]ncourage consumer use of ISPs, including municipal options, that abide by open internet policies.”<sup>223</sup>

The campaign’s website states that the FCC’s repeal of net neutrality “has sparked a national movement to demand the return of real Net Neutrality.”<sup>224</sup> Millions of people across the political spectrum are taking action in the streets, at their statehouses, outside the FCC and before Congress.”<sup>225</sup> Thus, the pledge suggests not only that the FCC’s decision was unpopular, but also that it had created confusion, complicating the rules and process around net neutrality.

#### *Congressional Action*

Further problematizing the FCC’s decision to repeal net neutrality before the Supreme Court could grant cert in *U.S. Telecom*, Sen. Edward J. Markey (D-Mass.) formally introduced in the U.S. Senate a resolution of

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220. *Cities Open Internet Pledge*, MAYORSFORNETNEUTRALITY.ORG, last accessed July 23, 2018, <https://docs.google.com/forms/d/e/1FAIpQLSctOwOuAZajo8BgYGzM410WemNeyBFnURoNWPg44971caMcuQ/viewform>.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Sign to email your mayor: Save net neutrality in my city!*, KOS MEDIA, last accessed July 23, 2018, <https://actionnetwork.org/letters/sign-to-email-your-mayor-set-net-neutrality-protections-in-my-city?source=MayorsNNPledgeSWFP&referrer=group-free-press-action-fund>.

225. *Id.*



disapproval in an attempt to overturn the FCC's repeal.<sup>226</sup> The resolution, introduced on February 27, was proposed under the Congressional Review Act (CRA), which allows Congress 60 days to challenge new rules passed by an independent agency, such as the FCC.<sup>227</sup>

On Jan. 15, 2018, Senate Democrats announced that they were one vote away from passing the resolution. In addition to all 49 Democratic Senators, they also had the support of Republican Sen. Susan Collins (R-Maine).<sup>228</sup> On May 14, Senate Democrats forced a vote on the resolution. On May 16, the Senate voted 52-47 in favor of the resolution, with all 49 Democratic senators voting for the resolution, as well as three Republicans, including Sens. Susan Collins (R-Maine), John N. Kennedy (R-La.), and Lisa A. Murkowski (R-Alaska).<sup>229</sup>

However, experts pointed out that the resolution faced a difficult challenge in the Republican-controlled House of Representatives, where passing the resolution required 150 out of 218 votes.<sup>230</sup> As of February 2018, only 80 Democrats, though *The Daily Dot* reported on April 26 that Rep. Mike Doyle (D-Pa.), who was leading the effort in the House, had gained support from 161 lawmakers, making the resolution 57 votes shy of passing.<sup>231</sup> Additionally, the resolution would require President Donald Trump's signature, which experts predicted was unlikely because White House press secretary Sarah Sanders told reporters on December 14, "The [Trump] administration supports the FCC's efforts and at the same time the White House certainly has and always will support a free and fair internet."<sup>232</sup>

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226. Brian Fung, *The FCC's vote repealing its net neutrality rules is finally official. Here's what happens now*, WASH. POST (Feb. 22, 2018), [https://www.washingtonpost.com/news/the-switch/wp/2018/02/22/the-fccs-net-neutrality-rules-will-die-on-april-23-heres-what-happens-now/?noredirect=on&utm\\_term=.a480aacfd22](https://www.washingtonpost.com/news/the-switch/wp/2018/02/22/the-fccs-net-neutrality-rules-will-die-on-april-23-heres-what-happens-now/?noredirect=on&utm_term=.a480aacfd22).

227. *Id.*

228. Cecilia Kang, *Senate Democrats Push for a Net Neutrality Vote. Do They Have a Chance?*, N.Y. TIMES (Jan. 16, 2018), <https://www.nytimes.com/2018/01/16/technology/senate-net-neutrality.html>.

229. Brian Fung, *Senate approves bipartisan resolution to restore FCC net neutrality rules*, WASH. POST (May 16, 2018), [https://www.washingtonpost.com/news/the-switch/wp/2018/05/16/net-neutrality-is-getting-a-big-vote-in-the-senate-today-heres-what-to-expect/?noredirect=on&utm\\_term=.57a8dfcd9711](https://www.washingtonpost.com/news/the-switch/wp/2018/05/16/net-neutrality-is-getting-a-big-vote-in-the-senate-today-heres-what-to-expect/?noredirect=on&utm_term=.57a8dfcd9711).

230. *Id.*

231. Andrew Wyrich, *As the net neutrality CRA deadline in Congress approaches, support continues to grow*, DAILY DOT (April 26, 2018), <https://www.dailydot.com/layer8/net-neutrality-cra-fcc/>.

232. *White House supports FCC net neutrality vote, 'free and fair internet'*, REUTERS (Dec. 14, 2017), <https://www.reuters.com/article/us-usa-internet-trump/white-house-supports-fcc-net-neutrality-vote-free-and-fair-internet-idUSKBN1E82VD>.

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Regardless of the outcome of the resolution, the actions taken by Congressional Democrats further demonstrate the complications and problems arising from the FCC's decision to repeal net neutrality while delaying the Supreme Court's decision of whether it would take up the *U.S. Telecom* case. Combined with the lawsuits filed against the FCC, as well as legislation and other legal actions taken by state and local officials, it is clear that the FCC created a significant legal confusion and uncertainty by choosing to pass the 2017 Order and, even more significantly, delaying the Supreme Court's decision.

### Conclusion

Uncertainty is rarely an environment for good policy making and the FCC's decision to delay a response in *US Telecom* has further complicated the net-neutrality issue, making a long-term resolution even less likely to be achieved. Although Congress may be the ultimate arbiter of the FCC's authority to regulate network traffic, because of the CRA passed in the Senate, which has now been introduced in the U.S. House of Representatives, a Supreme Court decision in *US Telecom* would have provided significant guidance to the agency on its delegated powers. Congress has not chosen to act since the *Comcast* decision to provide the agency with a formal delegation, so a Supreme Court decision would likely have provided precedent and interpretation to the agency and its critics, and at least a legal, if not a policy, resolution.

Descriptions of the Commission have suggested that the FCC is a great agency that spends all its time in court.<sup>233</sup> The delay in *US Telecom* has provided some support for this premise. Even if the 2015 Title II decision were upheld by the Court, (or if the Court denied *certiorari*) the current agency could have made a policy decision to virtually repeal sections of the law using its enforcement discretion. Instead, the agency currently finds itself in court both defending the 2015 order that reviewing courts have already upheld twice and, ironically, defending the decision to repeal the 2015 order at the same time. The FCC will also be defending its 2017 actions against a host of state laws<sup>234</sup> dealing with net neutrality provisions. In these state challenges the FCC will be arguing that it did not have the authority to impose the 2015 regulations, at the same time it attempts to argue that it has the authority to overrule state provisions, like those being debated in California, that provide net neutrality protections.

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233. *Communicators with Michael Copps and Amy Schatz*, CSPAN (March 29, 2018), <https://www.c-span.org/video/?298743-1/communicators-michael-copps-amy-schatz>.

234. Kaleigh Rogers, *Which States Have Net Neutrality Laws?*, MOTHERBOARD (April 9, 2018), [https://motherboard.vice.com/en\\_us/article/ywx5pw/which-states-have-net-neutrality-laws](https://motherboard.vice.com/en_us/article/ywx5pw/which-states-have-net-neutrality-laws).

Given the number of pending cases and the length of the process involved, it is likely that judicial review of the 2017 decision may outlive the current agency and administration. If a Democratic appointee becomes chair of the Commission, a new agency makeup could again change course on net neutrality, changing course on the changed course, expanding the potential legal reviews. Additionally, President Trump's nomination of Brett Kavanaugh to the Supreme Court further complicated net neutrality because Kavanaugh had already ruled in *US Telecom* and therefore recused himself from the vote to grant cert in the case, which was ultimately denied. Otherwise, the decision, under the previous nine-judge Supreme Court, may have broken along ideological lines, ruling in favor, perhaps, of the FCC. Instead, the FCC now faces a D.C. Circuit decision that favored the previous net neutrality rules.

The agency, under Chairman Pai, had a majority of commissioners opposed to net neutrality, and by extension, the 2015 Title II rules. By that metric, it makes sense that the agency was reluctant to pursue the case. The agency's initial request on November 22, 2017, for a delay in *US Telecom* was made on the same day the FCC released a draft of the order repealing the 2015 rules. This indicates the delay was a policy decision.

The agency has already successfully defended the 2015 rules twice on judicial review. If the Court did not take the case, the 2015 rules would have been upheld, just as if the Court had taken the case, but ruled in favor of the FCC. Both of these potential outcomes were problematic for the agency's approach on policy. After two wins, the majority of the Commission was hesitant to bet on a loss, even if that loss would have helped the FCC achieve its policy objectives. Yet, by not rolling the dice, the agency appears to have extended the battle over net neutrality for many years.