Northwestern Journal of Technology and Intellectual Property

Volume 11 | Issue 2 Article 6

2013

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Recommended Citation
Amanda Leese, *Net Transparency: Post-Comcast FCC Authority to Enforce Disclosure Requirements Critical to "Preserving the Open Internet"*, 11 Nw. J. Tech. & Intell. Prop. 81 (2013).
http://scholarlycommons.law.northwestern.edu/njtip/vol11/iss2/6

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NORTHWESTERN
JOURNAL OF TECHNOLOGY
AND
INTELLECTUAL PROPERTY

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January 2013 VOL. 11, NO. 2

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Northwestern Journal of Technology and Intellectual Property

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Northwestern Journal of Technology and Intellectual Property
Volume 11, Number 2 (January 2013)

Net Transparency: Post-*Comcast*[1] FCC Authority to Enforce Disclosure Requirements Critical to "Preserving the Open Internet"

By Amanda Leese[*]

I. WHAT'S THE TROUBLE WITH "PRESERVING THE OPEN INTERNET"[2]?

¶1 Net neutrality is the network design principle that posits that a network realizes its maximum utility when content, data, and users are treated equally.[3] Debate around an appropriate framework for network neutrality regulation has evolved significantly over the past two decades,[4] along with the contours of the policy itself.[5] As commercial and social activity moves increasingly online,[6] clarity regarding net neutrality regulation grows ever more critical. Yet despite a wealth of attention from proponents and

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[1] Comcast Corp.-NBC Universal v. Fed. Commc'ns Comm'n, 600 F.3d 642, 642 (D.C. Cir. 2010).

[2] Preserving the Open Internet, 76 Fed. Reg. 59,191, 59,191 (Sept. 23, 2011) [hereinafter Preserving the Open Internet] (codified, in part, at 47 C.F.R. pt. 8).

[3] *See, e.g.*, Tim Wu, *Network Neutrality FAQ*, TIMWU.ORG, http://timwu.org/network_neutrality.html (last visited Mar. 4, 2011) ("Network neutrality is best defined as a network design principle. The idea is that a maximally useful public information network aspires to treat all content, sites, and platforms equally.").

[4] *See* FED. TRADE COMM'N, FTC STAFF REPORT, BROADBAND CONNECTIVITY COMPETITION POLICY 51 (June 2007) [hereinafter FTC STAFF REPORT] (stating that regulatory debate regarding data transmission emerged during the 1980s and 1990s, and that public policy discussions and FCC rulemaking activity regarding broadband connectivity policy accelerated in the 2000s) (citing Vinton G. Cerf & David Farber, *The Great Debate: What is Net Neutrality?, Hosted by the Center for American Progress*, FORATV (July 17, 2006), http://archive.org/details/net_neutrality_debate); Tim Wu & Christopher Yoo, *Keeping the Internet Neutral?: Timothy Wu and Christopher Yoo Debate*, 59 FED. COMM. L.J. 575 (2007); *see also* James B. Speta, *Supervising Managed Services*, 60 DUKE L.J. 1715, 1721–32 (2011).

[5] *See, e.g.*, Jonathan E. Nuechterlein, *Antitrust Oversight of an Antitrust Dispute: An Institutional Perspective on the Net Neutrality Debate*, 7 J. ON TELECOMM. & HIGH TECH. L. 19, 24–26 (2009) (explaining that net neutrality "means different things to different people").

[6] Various reports from government, private sector, and independent research institutions testify to this growth in online activity. For example, in its second quarter (Q2) 2012 report, the U.S. Census Bureau showed a steady increase in the percentage of total retail sales composed of e-commerce retail activity over the past ten years, and reported that e-commerce sales as a percentage of total sales was 5.1%, up from 4.9% in (Q1) 2012, and 4.6% in (Q2) 2011. *Quarterly Retail E-Commerce Sales, 2nd Quarter 2012*, U.S. CENSUS BUREAU (Aug. 16, 2012), http://www.census.gov/ retail/mrts/www/data/pdf/ec_current.pdf. And, business research firms report double digit growth rates for e-commerce sales in 2011 and project increasing margins of total retail sales from e-commerce. *See* Sucharita Mulpuru, *U.S. Online Retail Forecast, 2011 to 2016*, FORRESTER 1 (Feb. 27, 2012) (projecting that "online sales will grow from 7% of overall retail sales to close to 9% by 2016"). The Pew Internet & American Life Project reports frequently on trends in online social activity, and in June 2012, reported that 82% of all American adults say they use the Internet at least occasionally, and for the first time, over half of adults aged 65 and older are online. Kathryn Zickuhr & Mary Madden, *Older Adults and Internet Use*, PEW INTERNET & AMERICAN LIFE PROJECT 2 (June 6, 2012), http://pewresearch.org/pubs/2281/; *see also* Preserving the Open Internet, 76 Fed. Reg. at 59,194 (discussing increased use of the internet as a source of news and forum for political discourse).

opponents alike, clarity remains elusive regarding federal authority for such regulation and the ideal scope of that regulation.

¶2 A central inquiry in the debate regarding the net neutrality regulatory environment is the extent to which the federal government has the authority to regulate the network management practices of Internet Service Providers ("ISPs").[7] Arguments for and against such regulation are well-trodden.[8] Opponents have argued that market forces will result in the provision of quality services and caution that overly burdensome regulations will deter ISP innovation.[9] Proponents contend that, without net neutrality requirements, market incentives for content discrimination will lead ISPs to discriminate against content that threatens their business models, impeding the type of innovation that has thus far marked the development of the Internet.[10] The Federal Communications Commission ("FCC" or "Commission"), for its part, has acted through its rulemaking process to establish guidelines for network management practices.

¶3 On September 23, 2011, the FCC published its Final Rules, "Preserving the Open Internet" ("Open Internet Rules" or "the Rules"), which took effect on November 20, 2011.[11] The Rules presented three ISP network management principles—transparency, no blocking, and nondiscrimination—to serve as "protections for broadband service to preserve and reinforce Internet freedom and openness."[12] As codified, the purpose of the Rules is to "preserve the Internet as an open platform enabling consumer choice, freedom of expression, end-user control, competition, and the freedom to innovate without permission."[13] The Rules are a development from a 2005 FCC *Internet Policy Statement*[14] and reflect regulations presented in, and public response to, a Notice of Proposed Rulemaking launched in November of 2009.[15] More generally, the Rules emerged after more than two decades of academic discussion of Internet law[16] and years of debate surrounding the role of these factors in sustaining an open and innovative network.[17] In reaction to this debate, the FCC addressed select concerns expressed by

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[7] *See* James Speta, *Supervising Managed Services*, 60 DUKE L.J. 1715, 1721 (2011) (explaining that "the terms of the network neutrality debate are well known: whether and to what extent government ought to supply rules that require the providers of broadband connectivity to carry traffic equally, without discrimination as to source, application, or content.").

[8] Detailed discussion of supportive and opposing review regarding net neutrality regulation lies outside the scope of this Comment. For a synopsis of arguments as of 2007, see FTC STAFF REPORT, *supra* note 4, at 51–69.

[9] *See, e.g.*, Michael K. Powell, *Preserving Internet Freedom: Guiding Principles for the Industry*, 3 J. ON TELECOMM. & HIGH TECH. L. 5, 12–13 (2004).

[10] *See, e.g.*, JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET—AND HOW TO STOP IT 178–81 (2008).

[11] Preserving the Open Internet, 76 Fed. Reg. at 59,192. These rules have since been codified, in part, at FCC Preserving the Open Internet Rule, 47 C.F.R. § 8 (2011).

[12] Preserving the Open Internet, 76 Fed. Reg. at 59,192.

[13] FCC Preserving the Open Internet Rule, 47 C.F.R. § 8.1 (2011).

[14] *See* Preserving the Open Internet, 76 Fed. Reg. at 59,202 (discussing that "these rules are an outgrowth of the Commission's Internet Policy Statement"). *See also* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 70 Fed. Reg. 60,222, 60,227 (Oct. 17, 2005).

[15] Open Internet Notice of Proposed Rulemaking, 74 Fed. Reg. 62,638 (Nov. 30, 2009); *see also* Preserving the Open Internet, 76 Fed. Reg. at 59,193 (providing background to the Rules); *The Rulemaking Process*, FED. COMMC'NS COMM'N, http://transition.fcc.gov/rules.html (last visited May 9, 2012).

[16] *See* Lawrence Lessig, *Foreward* to JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET—AND HOW TO STOP IT vii-viii (2008) (describing the development of book length coverage of the law of the Internet).

[17] *See* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 70 Fed. Reg. 60,222 (Oct. 17, 2005) (addressing the FCC's role in regulating Broadband). For early discussion, see,

industry leaders and critics regarding the Commission's authority to implement these Rules.[18] Nevertheless, the Rules have evoked debate between advocates and opponents alike over the authority of the FCC to implement the Rules.[19]

¶4 The scope of the limitations on FCC authority established in *Comcast v. FCC*[20] directly impacts this debate and the nature of future regulation. In *Comcast*, the D.C. Circuit found that the FCC did not have authority to enforce an order against Comcast for discriminatory network management practices, reasoning the Commission failed to prove its actions were rooted in direct statutory or indirect ancillary authority.[21] Some observers have argued the 2010 D.C. Circuit decision dealt a fatal blow to FCC authority to regulate ISP network management.[22]

¶5 Events subsequent to the *Comcast* decision have highlighted the importance of interpreting the scope and implications of the ruling. In November 2011, the U.S. Senate revisited the Rules, and rejected legislation to repeal the Rules.[23] Petitioners filed for review of the Rules in courts of appeals for the First, Second, Third, Fourth, and Ninth Circuits;[24] these cases were consolidated and are currently pending in the Court of Appeals for the District of Columbia.[25] On March 1, 2012, the D.C. Circuit dismissed an

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for example, James Speta, *Handicapping the Race for the Last Mile?: A Critique of Open Access Rules for Broadband Platforms*, 17 YALE J. ON REG. 39 (2000); Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 HARV. J.L. & TECH. 85 (2003); Michael K. Powell, *Preserving Internet Freedom: Guiding Principles for the Industry*, 3 J. ON TELECOMM. & HIGH TECH L. 5, 5 (2004); Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH L. 141 (2005); Robert D. Atkinson & Philip J. Weiser, *A "Third Way" on Network Neutrality*, THE INFORMATION TECHNOLOGY AND INNOVATION FOUNDATION (May 30, 2006), http://www.itif.org/files/netneutrality.pdf.

[18] Discussed throughout Preserving the Open Internet. Introduced in Preserving the Open Internet, 76 Fed. Reg. at 59,193, and exclusively treated in Preserving the Open Internet, 76 Fed. Reg. at 59,214–22. For example, the Rules allow for "pay-for-priority" arrangements, see Preserving the Open Internet, 76 Fed. Reg. at 59,204, that had previously been lobbied for by industry but criticized by net neutrality advocates.

[19] *See, e.g.*, Jasmin Melvin, *U.S. FCC Draws Tough Court for Web Rule Lawsuits*, REUTERS (Oct. 6, 2011, 5:54 PM), http://www.reuters.com/article/2011/10/06/usa-internet-rules-idUSN1E7951UO20111006 (reporting on petitions challenging FCC authority to implement the Rules and reporting that "[p]ublic interest groups have criticized the rules as too weak, saying the FCC was swayed by big industry players including AT&T . . . and Comcast Corp.").

[20] *Comcast*, *supra* note 1, at 642.

[21] *Id.* at 661.

[22] *See, e.g.*, Lee L. Selwyn & Helen E. Golding, *Revisiting the Regulatory Status of Broadband Internet Access: A Policy Framework for Net Neutrality and an Open Competitive Internet*, 63 FED. COMM. L.J. 91, 92–93 (arguing that, following the D.C. Circuit's *Comcast* decision, the FCC found itself in an "unforeseen and ultimately untenable" position where it was unable to ensure "reasonable and nondiscriminatory use" of internet access facilities).

[23] S.J. Res. 6, 112th Cong. (2011); Ben Parr, *Senate Rejects Bill to Repeal Net Neutrality*, MASHABLE (Nov. 10, 2011), http://mashable.com/2011/11/10/senate-rejects-net-neutrality-repeal/. Though not dispositive of Congressional intent, the vote invites review of legislative intent regarding FCC authority over the Rules.

[24] *See* Notice of Multicircuit Petitions for Review, In the Matter of Preserving the Open Internet, GN Docket No. 09-191 (Oct. 5, 2011); Broadband Industry Practices, WC Docket No. 07-52, Report and Order, 25 FCC Rcd. 17905 (2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-310240A1.pdf.

[25] Tom Schoenberg, *Verizon, Other 'Net Neutrality' Challenges Consolidated*, BLOOMBERG NEWS (Oct. 6, 2011), http://www.bloomberg.com/news/print/2011-10-06/verizon-six-other-net-neutrality-challenges-consolidated-in-washington.html; *see also* U.S. Judicial Panel on Multidistrict Litig., *Multi Circuit Petition Report*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. (Aug. 1, 2012), http://www.jpml.uscourts.gov/sites/jpml/files/Multi%20Circuit%20Petition%20(MCP)%20Docket%20Rep

FCC motion to stay a complaint brought by Verizon and Metro PCS against the FCC to challenge its implementation of the Rules.[26] Verizon and Metro PCS contend the D.C. Circuit's decision in *Comcast* established that the FCC lacks authority to regulate ISP network management practices and that the Commission's enforcement of the Rules "is in excess of [its] statutory authority."[27] The FCC, in response, claims the appellant's challenges are "baseless" and that the Rules "fulfill specific statutory directives to advance broadband investment and to ensure that wireless licensees act in the public interest."[28] The Court is expected to hear oral argument in late 2012.

¶6 This Comment explores the extent to which the *Comcast* decision limits FCC authority to enforce the transparency protection defined in the Rules, codified at 47 C.F.R. § 8. Analysis shows that, while *Comcast* may limit FCC authority to enforce elements of the Rules related to network management practices, the transparency requirement in the Rules is distinguishable from the content-based regulations, and *Comcast* does not foreclose FCC authority to enforce the transparency requirement. Part II presents the Rules and identifies unique aspects of the transparency requirement. Part III identifies applicable elements of the *Comcast* decision. Part IV discusses sources that impact FCC jurisdiction, including authorizing statutes and recent case law, with a focus on the scope of the *Comcast* limitations and Section 706 of the Telecommunications Act of 1996.[29] Part IV also addresses standards of review for considering when FCC action oversteps its authority. Part V highlights four specific reasons the FCC retains authority, post-*Comcast*, to enforce transparency requirements. Part VI concludes.

¶7 This Comment is limited in several ways. First, it addresses fixed broadband regulation, not mobile regulation. Further, the Comment does not provide an exhaustive list of authorizing statutes,[30] but rather analyzes sources of FCC authority that show the *Comcast* decision does not preclude enforcement of the transparency requirements in the Rules. Lastly, this Comment provides discussion specifically on post-*Comcast* FCC authority to implement the transparency protection in the Rules, rather than the merits of the content-based principles in the Rules.

II. THE RULES

¶8 The Rules outline three basic protections, familiar to observers of Internet law and regulation: transparency, no blocking, and nondiscrimination. The FCC contends these rules, in conjunction with "reasonable network management," will protect consumers, sustain innovation and investment in the network, and ensure sufficient flexibility to

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ort-8-1-2012.pdf.

[26] Verizon v. Fed. Commc'ns Comm'n, No. 11-1355 (D.C. Cir. Mar. 1, 2012) (order denying motion to hold case in abeyance).

[27] Protective Petition for Review at 4, *Verizon v. FCC*, No. 11-1356 (D.C. Cir. filed Sept. 30, 2011). Petitioners claim enforcement of the Rules "(1) is in excess of the Commission's statutory authority; (2) is arbitrary, capricious, and an abuse of discretion within the meaning of the Administrative Procedure Act; (3) is contrary to constitutional right; and (4) is otherwise contrary to law." *Id.*

[28] Brief for Appellee/Respondents at 4, *Verizon v. FCC*, No. 11-1355 (D.C. Cir. Sept.10, 2012), *available at* http://www.fcc.gov/document/verizon-v-fcc-usa-no-11-1355-dc-cir.

[29] Advanced Telecommunications Incentives, 47 U.S.C. § 706 (1996).

[30] For example, it does not discuss Telecommunications Act of 1996 provisions related to licensing or certain rulemaking requirements of the Administrative Procedure Act (APA).

providers to foster continued openness and innovation on the Internet.[31] In order to effectively discuss FCC authorization to enforce the transparency protection, it is necessary to define the transparency protection and consider the role transparency plays in relation to other protections provided in the Rules.

A. The Transparency Requirement

¶9 The transparency requirement in the Rules aims to ensure "[e]ffective disclosure of broadband providers' network management practices and the performance and commercial terms of their services."[32] The transparency rule requires the following:

> 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.[33]

¶10 The Rules state that, due to disagreement among commentators regarding the level of detail that should be subject to disclosure, the "best approach is to allow flexibility."[34] Rather than strictly defining the scope of disclosure, the Rules provide examples of disclosures that may satisfy the transparency protection, such as sharing information regarding network practices,[35] performance characteristics,[36] and commercial terms.[37] The Rules state clearly that this list is neither "exhaustive, nor is it a safe harbor," and that each provider must consider the appropriate scope of disclosure required for various service offerings.[38] While the Rules do not mandate a format or structure for disclosure, they require that disclosure be "sufficiently clear and accessible" and, at a minimum, be available online and at the point of sale.[39] The FCC also establishes limits on the transparency protection. For example, disclosure of "competitively sensitive information," such as measures to prevent spam, is not required.[40]

¶11 As discussed below, the transparency protection is distinguishable from other principles in that it is a defining element of other principles and ubiquitous throughout the Rules.

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[31] *See* Preserving the Open Internet, 76 Fed. Reg. at 59,202.

[32] *Id*.

[33] 47 C.F.R. § 8.3 (2011).

[34] Preserving the Open Internet, 76 Fed. Reg. at 59,203. In its appellee brief, the FCC refers to the Rules as "modest, high level rules." Brief for Appellee/Respondents at 4, *Verizon v. FCC*, No. 11-1355 (D.C. Cir. Sept. 10, 2012), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0910/DOC-316186A1.pdf.

[35] Preserving the Open Internet, 76 Fed. Reg. at 59,203 (providing, for example, congestion management, application-specific behavior, device attachment rules, and security).

[36] *Id*. (providing, for example, services description and impact of specialized services).

[37] *Id*. at 59,203–04 (providing, for example, pricing, privacy policies, and redress options).

[38] *Id*. at 59,204.

[39] *Id*.

[40] *Id*. at 59,203.

B. Content Management: No Blocking and Nondiscrimination

¶12 Both no blocking and nondiscrimination rules are network management principles that forbid ISPs from placing content-based restrictions on the movement of data across networks. Blocking refers specifically to a provider's refusal to transmit data for content-based reasons.[41] Nondiscrimination is a broader concept than no blocking and concerns a provider's "handling of network traffic," including both pricing and system management.[42] As codified, the Rules expressly require the following:

> **§ 8.5 No blocking**. (a) A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.[43]
>
> **§ 8.7 No unreasonable discrimination**. A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not unreasonably discriminate in transmitting lawful network traffic over a consumer's broadband Internet access service. Reasonable network management shall not constitute unreasonable discrimination.[44]

¶13 The transparency protection plays a role in both principles to the extent that transparency is central to "reasonable network management." The FCC has used reasonable network management to define the scope of these content-based principles in the Rules.[45] For example, the Rules explain that a provider's discriminatory treatment is more likely to be reasonable if that treatment is disclosed to the end-user.[46] Aiming to balance the protection of the users' rights and the providers' need to manage network congestion and security, the Rules state that such discrimination may be unreasonable where it impairs competition, harms end-users, or impairs freedom of expression.[47] Another example of the prevalence of the transparency principle throughout the Rules is the treatment of "pay-for-priority" structures. In what appears to reflect a change from earlier FCC policy, the Rules acknowledge the merits of usage-based pricing[48] and subject pay-for-priority pricing to a reasonable management standard.[49] The FCC explains that the use of reasonable management standards in the Rules displays treatment of the broadband industry as a contract, rather than a common carrier.[50] As discussed in

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[41] *Id*. at 59,205, *see also* 47 C.F.R. § 8.5 (2011).

[42] *Id*. at 59,205, *see also* 47 C.F.R. § 8.7 (2011).

[43] 47 C.F.R. § 8.5 (2011).

[44] *Id*. at § 8.7.

[45] *Compare* Preserving the Open Internet, 76 Fed. Reg. at 59,205 (stating ISPs "shall not block lawful content, applications, services or non-harmful devices, subject to reasonable network management"), *with id.* ("[r]easonable network management shall not constitute unreasonable discrimination").

[46] Preserving the Open Internet, 76 Fed. Reg.at 55,205.

[47] *Id*. at 55,206.

[48] *See id.* (explaining that prohibiting usage-based pricing would "force lighter end users of the network to subsidize heavier end users").

[49] *See id.* at 59,206–07. This FCC approach to pay-for-priority strategies appears to be a response to industry concerns and a drastic shift from the *Open Internet NPRM*, in which the FCC proposed a ban on any form of content discrimination without a "reasonableness" filter.

[50] *See id.* at 55,208 ("This flexibility to customize service arrangements for a particular customer is the

Part IV, this classification is significant in identifying statutory support for authority to implement the Rules.

C. Reasonable Network Management

¶14 The definition of "reasonable network management" is central to the Rules. Through the Rules, the Commission sought to provide sufficient guidance for the interpretation of what constitutes reasonable network management while avoiding a "narrowly" defined and overly restrictive standard that may "overly constrain network engineering decisions."[51] Consequently, the Rules provide a broad, purpose-based definition of reasonable network management: "A network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service."[52]

¶15 Beyond this definition, the Rules establish that reasonableness must be assessed on a *case-by-case* basis, may differ across varied platforms, and may accommodate measures taken by ISPs to manage network security, integrity, traffic unwanted by end users, and network congestion.[53] Finally, the Rules state clearly that all reasonable practices are not expressly listed in the Rules and that providers should have flexibility to "experiment, innovate, and reasonably manage their networks."[54]

D. Distinguishing the Transparency Requirement

¶16 The transparency requirement is compellingly presented,[55] distinguishable from the content management provisions, and prevalent throughout the Rules.[56] To the extent that transparency is necessary to allow consumers to express their market preferences, it implicates regulatory distinct considerations from those relevant to content-based regulation.[57] The unique role of this requirement and statutory support for its

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hallmark of private carriage, which is the antithesis of common carriage."). A common carrier is a services provider that (1) "holds himself out to serve indifferently all potential users" and (2) allows customers to "transmit intelligence of their own design and choosing." Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC (*NARUC*), 533 F.2d 601, 608–09 (D.C. Cir. 1976) (citing In the Matter of Amendment of Parts 2, 91, and 99 of the Commission's Rules Insofar as They Relate to the Industrial Radiolocation Service, 5 F.C.C.2d 197, 202 (1966)).

[51] Preserving the Open Internet, 76 Fed. Reg. at 55,209.

[52] 47 C.F.R. § 8.11(d) (2011). *See also* Preserving the Open Internet, 76 Fed. Reg. at 55,208.

[53] Preserving the Open Internet, 76 Fed. Reg. at 55,209.

[54] *Id.* at 55,210.

[55] *See id.* at 59,199 (explaining that complaints registered with the FCC provide cause for concerns regarding transparency); *see also id.* at 59,199, citing Catherine Sandoval, *Disclosure, Deception, and Deep-Packet Inspection*, 78 FORDHAM L. REV. 641, 666–84 (2009) ("In addition to the Madison River and Comcast-BitTorrent incidents described above, broadband providers appear to have covertly blocked thousands of BitTorrent uploads in the United States throughout early 2008.").

[56] This prevalence is demonstrated through reference to the transparency element throughout the Rules as presented by the FCC in the Federal Register. The transparency rule is discussed directly at, Preserving the Open Internet, 76 Fed. Reg. at 55,202-04, and discussed throughout the Rules. *See id.* at 59,205, 59,209, 59,210, 59,214, 59,220, 59,222, 59,223, 59,224, 59,225, 59,231.

[57] *Id*. at 59,202 (noting that "disclosure ensures that end users can make informed choices regarding the purchase and use of broadband service, which promotes a more competitive market for broadband services and can thereby reduce broadband providers' incentives and ability to violate open Internet principles").

implementation warrant consideration of FCC authority to pursue its implementation specifically, as distinct from the Rules, as a whole.

¶17 Transparency is the *sine qua non* of network neutrality.[58] The FCC has stated the purpose of the transparency requirement in the Rules is to ensure that "end users can make informed choices and innovators can develop, market, and maintain Internet-based offerings."[59] Implicit in this goal is the understanding that transparency impacts market competition and user behavior broadly, in a manner unlike the no blocking and nondiscrimination principles. While the latter are concerned with content management on a network, the transparency protection requires disclosure of network management practices and fosters market competition by guarding against consumer deception. Where transparency is *not* enforced, consumers have no way to reasonably favor one provider (and its system of network management) over another. A lack of market accountability would erode competition by denying ISPs the market reaction to their network management practices. This possibility is directly addressed in the Rules and is central to FCC authority to implement the transparency rule.[60]

¶18 The FCC not only expressly addresses this transparency imperative, but also demonstrates its importance by ranking it among the factors that may support a showing of reasonable discriminatory treatment[61] and network management practices.[62] Transparency is critical to the no blocking analysis to the extent that transparency is a factor in determining reasonableness, and blocking is permissible so long as it is recognized as "reasonable management."[63] The transparency requirement is implicated in each of the protections outlined in the Rules. Since the transparency requirement is distinct from content-based principles, and prevalent throughout the Rules as a whole, it is reasonable to assess the specific impact of the *Comcast* ruling on the authority of the FCC to implement the transparency requirement.

¶19 Part III identifies key elements of the *Comcast* decision and discusses the express and ancillary authorities provided to and argued by the FCC in the Rules.

III. THE *COMCAST* DECISION

¶20 The *Comcast* ruling directly addressed the authority of the FCC to enforce content management provisions—both no blocking and nondiscrimination. Many observers contend the *Comcast* decision will present significant challenges to future FCC

[58] *Id.* at 59,193 (recognizing transparency rules as "touchstone of reasonableness" and noting "the near-unanimous view that the Internet's openness and the transparency of its protocols have been critical to its unparalleled success").

[59] Preserving the Open Internet, 76 Fed. Reg. at 59,193.

[60] *Id.* at 59,217 ("[T]he Commission could conclude that transparency requirements 'would help promote the competitiveness . . . broadband-based communications services' and 'thereby facilitate the operation of market forces.'") (quoting the National Cable and Telecommunication Association (NCTA) on the role of transparency).

[61] *See supra* nn. 57–58, and accompanying text. *See also* Preserving the Open Internet, 76 Fed. Reg. at 59,205 ("Transparency is particularly important with respect to the discriminatory treatment of traffic as it is often difficult for end users to determine the causes of slow or poor performance . . . .").

[62] Preserving the Open Internet, 76 Fed. Reg. at 59,209 ("[P]rinciples guiding case-by-case evaluations of network management practices . . . include transparency, end-user control, and use-[or application]-agnostic treatment.").

[63] *Id.* at 59,205 (noting that the no blocking rules are subject to reasonable network management).

implementation of the Rules.[64] However, this Comment suggests that, while *Comcast* may have placed some restrictions on FCC authority to regulate the network management practices of ISPs, it does not foreclose FCC enforcement of the Rules, as a whole, or the enclosed transparency requirements.

¶21 The issue in *Comcast* was whether the FCC exceeded its authority by issuing an Order (the Order)[65] ruling that Comcast network management practices violated various principles of the FCC's Internet Policy Statement (IPS).[66] The FCC issued the Order in response to complaints filed by public advocacy groups seeking a declaratory ruling on Comcast's practice of interfering with peer-to-peer (P2P) networking applications, allegedly in violation of the FCC's IPS.[67] The Commission's Order stated the FCC had jurisdiction over Comcast's network management practices[68] and that, given alternatives available to Comcast, its decision to interfere with the P2P applications "contravened . . . federal policy."[69] The Order required that Comcast disclose its practices and stated an injunction would follow any resumption of such interferences. Comcast complied with the Order and petitioned for review, arguing the Commission acted outside of its jurisdiction, circumvented rulemaking procedures of the Administrative Procedure Act (APA), and acted in an "arbitrary and capricious manner."[70] In considering FCC authority to implement transparency requirements in the Rules, this Comment focuses on the D.C. Circuit's treatment of the issue of FCC jurisdiction.

¶22 In *Comcast*, the FCC had conceded that its Order was outside the scope of its express authority, so the D.C. Circuit's inquiry hinged on whether or not the FCC's actions were within FCC *ancillary* authority. To determine whether ancillary authority existed, the Court applied a two-step test, further detailed in Part IV, that requires the FCC's actions (1) fall within its general jurisdiction under Title I of the Communications Act, and (2) be reasonably ancillary to statutorily mandated responsibilities.[71] While the first element of this test was satisfied, the Court found the second step of the FCC's ancillary authority test was unfulfilled.[72] The Court concluded the Commission failed to show its actions were within its ancillary authority and vacated the Order.

¶23 In finding the Commission's actions were not reasonably ancillary to its statutorily mandated responsibilities, the Court rejected several provisions of the Communications Act the FCC provided in support of its authority. First, the Court eliminated several

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[64] Indeed, in the *Verizon* complaint, petitioners state that, with the Rules, the FCC "directly responds to this Court's decision in Comcast Corp. v. FCC, 600 F.3d 642 (2010)." *See* Protective Petition for Review at 2, *Verizon v. FCC*, No. 11-1356 (D.C. Cir. filed Sept 30, 2011).

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

[66] Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C. Rcd. 14,986 (2005) (*Internet Policy Statement*).

[67] *See* Comcast Corp. v. Fed. Commc'n Comm'n, 600 F.3d 642, 644–45 (D.C. Cir. 2010). As defined in *Comcast*, P2P programs "allow users to share large files directly with one another without going through a central server" consuming "significant amounts of bandwidth." This particular complaint concerned interference with data following to an application called BitTorrent.

[68] *Id.* at 645 (citing Formal Compl. of Free Press, 23 F.C.C. Rcd. at 13,033–50, para. 12–40).

[69] *Comcast*, 600 F.3d at 645 (citing Formal Compl. Of Free Press, 23 F.C.C. Rcd. at 13,052, para. 43).

[70] *Id.*

[71] *Id.* at 644 (quoting Am. Library Ass'n v. FCC, 406 F.3d 689, 692 (D.C. Cir. 2005)).

[72] *See Comcast*, 600 F.3d at 646. Comcast conceded that the first element of the two-step test from *American Library* used to assess FCC ancillary authority was satisfied, since "Internet service qualifies as 'interstate and foreign communication by wire.'"

sections as "policy statements,"[73] rather than authorizing statutes, distinguishing between the two and affirming that the former cannot serve as a basis for ancillary authority.[74] Next, the Court considered and rejected five statutory provisions that "could arguably be read to delegate regulatory authority to the Commission," [75] including Sections 706, 256, 257, 201, and 623 of the Communications Act.

¶24 In justifying its authority to implement the Open Internet Rules, the FCC cited, among others, four sections rejected in *Comcast* as authority for the FCC to implement the *Comcast* Order (Sections 706, 256, 257, and 201). However, due to several factors revisited in Part V, the Court's holding in *Comcast* did not foreclose FCC enforcement of the transparency requirement in the Rules. These factors include: (1) the transparency requirement is distinguishable from the content-management Order under review in *Comcast*; (2) the transparency requirement is supported by statutory sources that were not addressed in *Comcast* (such as Section 254 and 154); (3) Section 706, as read with appropriate *Chevron* deference,[76] supports FCC enforcement of the Rules; and (4) *Comcast*, in fact, recognizes authority provided by Section 257 to the FCC to enforce transparency requirements necessary to fulfill reporting obligations. To effectively explore these specific authorities, it is necessary to first identify the framework for the Commission's general authority to enforce the Rules.

¶25 Part IV reviews FCC express and ancillary authority as it relates to enforcement of the Rules, as well as the standard of review under which future FCC action may be scrutinized.

IV. SOURCES AND SCOPE OF FCC AUTHORITY: EXPRESS AUTHORITY, ANCILLARY AUTHORITY, AND A STANDARD OF REVIEW

¶26 The FCC derives its authority from express and ancillary sources. Ancillary authority is a Congressional power grant, rooted in the "broad language"[77] of Communications Act § 154(i), which has been restricted through case law. Most recently, the court in *Comcast* observed the ancillary power as "contingent upon specifically delegated powers."[78] To thoroughly address the extent to which the *Comcast* decision impacts FCC authority to implement the transparency requirements in the Rules, it is instructive to identify and analyze express authority,[79] the status of ancillary

[73] Sections dismissed as policy statements include Commc'ns Act Sections 230(b) and Section 151.

[74] *See Comcast*, 600 F.3d at 654. "Policy statements alone cannot provide the basis for the Commission's exercise of ancillary authority." The D.C. Circuit has stated that the "axiomatic principle" that policy statements are not authorizing is established in the following cases: U.S. v. Southwestern Cable Co, 392 U.S. 157 (1968) (*Southwestern Cable*), U.S. v. Midwest Video Co. (*Midwest Video I*), 406 U.S. 649 (1972), FCC v. Midwest Video Corp. (*Midwest Video II*), 440 U.S. 689 (1979), Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC (*NARUC II*), 533 F.2d 601 (D.C. Cir. 1976). *See Am. Library*, 406 F.3d at 691. The court provides several other examples of the application of this principle, including: *Computer and Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982); *Rural Tel. Coal. v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988); and *New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984).

[75] *Comcast*, 600 F.3d at 658.

[76] *See infra* notes 127–39 and accompanying text.

[77] *Id.* at 645 (citing 47 U.S.C. § 154(i)).

[78] *Comcast*, 600 F.3d at 653.

[79] Note that the FCC provides and analyzes much of its express authority directly in the Rules.

authority, and standard of review for evaluating whether the FCC has exceeded its authority. The following analysis of these authorities supports the argument that *Comcast* does not directly foreclose FCC enforcement of the transparency requirements in the Rules.

A. Express Authority

¶27 The FCC was created and authorized by Congress through the Communications Act of 1934.[80] Since that time, its authority has undergone statutory changes and been shaped by case law.[81] Initially, the Communications Act granted the FCC "express and expansive authority"[82] to regulate common carrier services such as landline telephone use,[83] radio transmissions such as broadcast television, radio, and cellular telephone use,[84] and cable services such as cable television.[85] As new technologies emerged, Congress responded, addressing the regulation of broadband services, specifically, with the Telecommunications Act of 1996.

¶28 In the Rules, the FCC presents four principle categories of authorizing sources, citing Sections from Titles I, II, III, and VI of the Communications Act,[86] the Cable Act of 1992,[87] and the 1996 Act[88] to establish its jurisdiction: (1) authority to implement Section 706 of the 1996 Act (Section 706);[89] (2) authority to implement responsibilities under Titles II, III, and VI to promote competition and investment in, as well as to protect end users of, voice, video, and audio services (market integrity sections);[90] (3) authority to "protect the public interest through spectrum licensing" (licensing sections);[91] and, (4) authority to collect information necessary to "perform its reporting obligations to Congress"[92] (reporting sections). Of these statutory provisions, there is a particularly strong argument for FCC authority to implement the transparency requirement in the Rules through Sections 706, market integrity Section 254,[1] and reporting Sections 154(k) and 257(a) and (c). The following discussion presents the FCC's argument for the authority it derives from these sections; Part IV assesses the impact of *Comcast*.

¶29 Section 706 of the 1996 Act (Section 1302 of the Communications Act, amended) defines advanced telecommunications capability as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality

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[80] 47 U.S.C. § 151

[81] For example: All Channel Receiver Act of 1962; the Communications Amendments Act of 1982; the Cable Television Consumer Protection and Competition Act of 1992.

[82] *Comcast*, 600 F.3d at 645.

[83] Wireline telecommunications services are governed by Title II of the Communications Act of 1934, which imposes various common-carrier requirements on telecommunications carriers [for wire services].

[84] Title III of the Act governs radio transmissions.

[85] Title IV of the Act governs cable services.

[86] *See* Preserving the Open Internet, 76 Fed. Reg. at 59,214–22.

[87] *Id.* at 59,219.

[88] *See id.* at 59,191, 59,214–16.

[89] Preserving the Open Internet, 76 Fed. Reg. at 59,214 (citing Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), Communications Act §§ 706, 151, 152, 230).

[90] *Id*. at 59,216 (citing Communications Act of 1996 §§ 201, 202, 251, 256, 303, 307, 548, 616, 628).

[91] *Id*. at 59,219 (citing Telecommunications Act of 1996 §§ 304, 316, 307, 309).

[92] *Id*. at 59,220 (citing Telecommunications Act of 1996 §§ 154, 257, 218).

voice, data, graphics, and video telecommunications using any technology."[93] Section 706 further establishes that the FCC has broad authority regarding broadband regulation, stating:

> (a) The Commission and each State commission with regulatory jurisdiction over telecommunications services *shall* encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, *measures that promote competition in the local telecommunications market*, or *other regulating methods that remove barriers to infrastructure investment*.
>
> (b) . . . the Commission *shall* determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it *shall* take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.[94]

¶30 Section 706 is one of several sources the FCC has presented to support its express authority to implement the Rules as a whole. While *Comcast* calls into question FCC ancillary authority to implement the Rules as a whole, the negative treatment of Section 706 in *Comcast* does not nullify all authority provided by the provision to the FCC to implement transparency requirements in the Rules.

¶31 The FCC argues market integrity provisions, Sections 230 and 254, lend particular support to enforce transparency requirements. Section 230, it claims, provides authority to adopt the Rules in two forms: first, in reference to Congressional policy of promoting "continued development of the Internet" and preserving "the competitive market;"[95] and, second, as an overarching Congressional policy that restricts Section 706 from becoming a "limitless" and "boundless" authority grant, thus demonstrating the more narrowing, authorizing scope of Section 706. Section 230 of the statute provides that it is the policy of the U.S.:

> (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
> (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
> (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

[93] 47 U.S.C. § 1302(c)(1) (2011).

[94] 47 U.S.C. § 1302(a), (b) (2011) (emphasis added).

[95] Preserving the Open Internet, 76 Fed. Reg. at 59,214 (stating that in § 230 of the Act, Congress announced "the policy of . . . promoting the continued development of the Internet . . . and encouraging the development of technologies which maximize user control over what information is received by individuals . . . while also preserving the vibrant and competitive free market that presently exists for the Internet and other interactive computer services.") (quoting 47 U.S.C. § 230 (1996)).

> (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and . . . .[96]

¶32 Arguing Congressional intent supports FCC power to implement the Rules, the Commission appears to interpret Section 230 in terms of Section 254, explaining that the FCC has the responsibility to design and maintain a "[f]ederal universal program that has as one of several objectives making 'access to advanced telecommunications and information services' available in 'all regions of the Nation.'"[97] The FCC argues that Sections 230 and 254 provide the FCC authority to adopt transparency requirements, to the extent transparency ensures that consumers make informed decisions regarding their ISPs, thus fostering a competitive telecommunications market.[98] However, since courts have established that Internet service provision is not a common carrier service,[99] and Section 230 is specific to common carrier services, it is arguable that Section 254 remains the market integrity provision that authorizes enforcement of the Rules.

¶33 Just as transparency requirements in the Rules are integral to FCC duties to comply with market integrity obligations, they also enable the FCC to fulfill its responsibility to report to Congress, as required under Sections 154(k), 257(a) and (c), and 218.[100] Section 218 is distinguishable from 154(k) and 257 in that it permits the FCC to collect "full and complete information," but, as with Section 230, its application is strictly limited to common carriers and therefore inapplicable.[101] Sections 154(k) and 257(a), however, are applicable to ISPs. Section 154(k) requires the FCC to present an annual report to Congress, including: "data . . . of value in the determination of questions connected with the regulation of interstate and foreign wire and radio communication," as well as "specific recommendations to Congress as to additional legislation which the Commission deems necessary."[102] Similarly, Section 257 requires the FCC to report to Congress every three years on "market entry barriers" in the telecommunications industry. To the extent these provisions authorize the FCC to collect information to formulate legislative proposals and reports for Congress, they lend authority to the Commission for the enforcement of the transparency requirement in the Rules.[103]

¶34 Thus, even after eliminating statutory support specific to common carriers, Sections 706, 254, 154, and 257 not only provide authority for FCC enforcement of the Rules, generally, but also offer specific, express support for enforcement of the transparency

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[96] 47 U.S.C. § 230(b) (1996).

[97] Preserving the Open Internet, 76 Fed. Reg. at 59,214 (quoting 47 U.S.C. § 254).

[98] *Id*. at 59,214–15.

[99] *See* Fed. Commc'ns Comm'n v. Brand X Internet Servs., 545 U.S. 967, 974 (2005) (stating ISPs are "not subject to mandatory common-carrier regulation under Title II, though the Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications, see [47 U.S.C.] §§ 151–161"). *See also* Fed. Commc'ns Comm'n v. Midwest Video Corp., 440 U.S. 689, 702 (1979) (*Midwest II*).

[100] Preserving the Open Internet, 76 Fed. Reg. at 59,220 (explaining that Sections 4(k) and 218 "provide authority for [the] transparency requirement in particular" and explaining, at n.162, that Section 257 operates similarly).

[101] *Id*.

[102] 47 U.S.C. § 154(k).

[103] Preserving the Open Internet, 76 Fed. Reg. at 59,220.

requirement. In addition to providing express authority, these statutes may also serve as a basis upon which the FCC may extend its ancillary authority.

B. Ancillary Authority

¶35 It is well established that, in order for an administrative agency to exercise authority, Congress must first delegate that authority.[104] Courts have held it to be "axiomatic" that an agency's authority be rooted in a statutory grant of power from Congress.[105] However, the nature of statutory power may not always be express. In addition to express authority, the FCC may exercise ancillary authority, as affirmed most recently by the court in *Comcast*.[106] Provided in Section 154(i) of the Communications Act, ancillary authority imposes on the FCC the duty 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."[107]

¶36 The scope of FCC jurisdiction under its ancillary authority has been distilled into a two-step test. The D.C. Circuit first clarified this test in *American Library Association v. FCC* when it held FCC ancillary authority exists where both elements of the two-step test 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.[108]

¶37 In *American Library,* and subsequent D.C. Circuit decisions, the Court has noted that the scope and limitations of the FCC's ancillary authority are derived from three Supreme Court cases:[109] *Southwestern Cable*,[110] *Midwest Video I*,[111] and *Midwest Video II*.[112]

¶38 In *Southwestern Cable*, the Court held the FCC had the authority to restrict the expansion of community antenna televisions (CATV) by enforcing carriage and duplicity rules against a CATV provider,[113] pursuant to its broad statutory authority under Sections 151[114] and 152[115] of the Communications Act. Thus, under the FCC's "broad

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[104] Am. Library Ass'n v. Fed. Commc'ns Comm'n, 406 F.3d 689, 691 (D.C. Cir. 2005); *see also id.* at 698 (quoting La. Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n, 476 U.S. 355, 374 (1986) ([T]he FCC "literally has no power to act . . . unless and until Congress confers power upon it.").

[105] *Comcast v. FCC*, 600 F.3d 642, 654 (D.C. Cir. 2010) (quoting *Am. Library Ass'n*, 406 F.3d at 691).

[106] *Am. Library Ass'n*, 406 F.3d at 692 ("The FCC may act either pursuant to express statutory authority to promulgate regulations addressing a variety of designated issues involving communications . . . or pursuant to ancillary jurisdiction.").

[107] 47 U.S.C. § 154(i) ("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.").

[108] *Am. Library Ass'n*, 406 F.3d at 691–92.

[109] *See Comcast,* 600 F.3d at 646 ("Courts have come to call the Commission's section 4(i) power its ancillary authority, a label that derivers from three foundational Supreme Court decisions [*Southwestern*, *Midwest I*, and *Midwest II*]."); *see also Am. Library Ass'n*, 406 F.3d at 700 ("The Supreme Court has delineated the parameters of . . . ancillary jurisdiction in three cases [*Southwestern*, *Midwest I*, and *Midwest II*])."

[110] U.S. v. Sw. Cable Corp., 392 U.S. 157 (1968).

[111] U.S. v. Midwest Video Corp. (*Midwest Video I*), 406 U.S. 649 (1972).

[112] FCC v. Midwest Video Corp. (*Midwest Video II*), 440 U.S. 689 (1979) .

[113] *Sw. Cable Corp.*, 392 U.S. at 161, 166.

[114] 47 U.S.C. § 151 (authorizing the FCC to "[m]ake available . . . to all the people of the United States .

responsibilities," the Commission had authority to take actions "reasonably ancillary to the effective performance of the Commission's various responsibilities."[116] Further, the Court found the FCC had issued an order "not inconsistent with" and "necessary in the execution of" the Communications Act.[117]

¶39 The subsequent *Midwest Video* decisions affirmed the two-step test presented in *Southwestern* for assessing the scope and limitations of ancillary authority. In *Midwest Video I*, the Court held the FCC was authorized to require CATVs with more than 3,500 subscribers to provide an outlet for local producers, reasoning the regulation was reasonably ancillary to the effective performance of the Commission's various other responsibilities.[118] In *Midwest Video II*, however, the Court found the FCC exceeded its authority when it issued rules requiring cable service providers with at least 3,500 subscribers and broadcast signals to both "make available certain channels for access by third parties" and "to furnish equipment and facilities for access purposes."[119] The Court noted that such regulation would (by the Commission's own admission) submit broadcasters to treatment as common carriers,[120] and reasoned that, since the Act prohibited treatment of broadcasters as common carriers,[121] the regulation in question could not satisfy the ancillary authority test.[122] In short, the Court established an important limitation on ancillary authority by holding ancillary authority was not capable of overriding express, statutory limitations on FCC authority.

¶40 In the decades since *Midwest Video II*, the two-step test has been applied numerous times by the D.C. Circuit, notably in *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC* (*NARUC II*)[123] and most recently in *Comcast v. FCC*. Consistent with the *Midwest Video II* constraints, the court in *NARUC II* found the "Commission's ancillary authority is 'incidental to, and contingent upon, *specifically delegated powers under the Act*.'"[124] The D.C. Circuit most recently revisited the scope of FCC ancillary power in *Comcast*, and reinforced its *NARUC II* restriction.[125]

¶41 In *Comcast*, the D.C. Circuit further refined the two-step test, specifying that provisions of the Communications Act which "set forth only congressional policy" do not satisfy the second element of the two-step test that requires ancillary authority be tied to

. . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges").

[115] 47 U.S.C. § 152 (extending FCC jurisdiction to "all interstate and foreign communication by wire or radio").

[116] *Sw. Cable Corp.*, 392 U.S. at 178.

[117] *Id*. at 181 (citing 47 U.S.C. §§ 154(i), 303(r)).

[118] *Midwest Video I*, 406 U.S. 649, 662 (1972). *See also Am. Library Ass'n*, 406 F.3d at 701.

[119] *Midwest Video II*, 440 U.S. 689, 691–96 (1979). *See also Am. Library Ass'n*, 406 F.3d at 701.

[120] *Midwest Video II*, 440 U.S. at 702.

[121] *Id*.

[122] *Id*. at 708–09.

[123] Nat'l Ass'n of Regulatory Util. Comm'rs v. Fed. Commc'ns Comm'n (*NARUC II*), 533 F.2d 601 (D.C. Cir. 1976).

[124] *Comcast v. FCC*, 600 F.3d 642, 653 (D.C. Cir. 2010) (quoting *NARUC II*, 533 F.2d at 612) (emphasis added).

[125] *Comcast*, 600 F.3d at 651–58 (refuting an expansive interpretation of the Commission's ancillary power, stating that policy statements alone "cannot provide the basis for the Commission's exercise of ancillary authority," and determining that in *Comcast* and in *NARUC II*, the FCC failed to establish its regulatory authority as ancillary to an express authority).

statutorily mandated responsibilities.[126] Reasoning that policy statements are "not delegations of regulatory authority," the Court held that ancillary authority must be tied to Title II, III, or VI provisions that "delegate regulatory authority to the Commission."[127]

¶42 These considerations of the scope of express and ancillary authority are instructive, but alone, they are not determinative of post-*Comcast* FCC authority to enforce transparency requirements in the Rules. The standard of review that a court will use to consider future challenges to FCC enforcement of the Rules will also impact future challenges to FCC authority to implement transparency requirements in Rules. The *Comcast* decision is as relevant to considering this standard as it is to determining the scope of ancillary authority. As discussed below, the standard demonstrated in *Comcast*, coupled with Court guidance regarding deference to FCC actions addressed in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet* (*Brand X*),[128] compose the appropriate framework for considering FCC authority to implement transparency requirements in the Rules. Analysis through this framework suggests there is support for FCC authority to enforce transparency requirements established in the Rules.

C. Comcast, Brand X, *and a Standard of Review*

¶43 In *Brand X*, the Supreme Court held that when FCC regulations are under review, the Commission is entitled to the deference established in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.* (*Chevron*). In *Comcast*, the D.C. Circuit found that the *Brand X* standard of review was not determinative, but based its reasoning on the fact that the FCC actions under dispute in *Comcast* conflicted with other precedent. Post-*Comcast*, the standard of review established in *Brand X* still requires courts to apply the deference framework established in *Chevron* ("Chevron deference") in reviewing FCC actions.[129] This treatment suggests that Section 706 provides authority to the FCC for enforcement of the Rules and the transparency requirement.

¶44 In *Brand X*, the Supreme Court considered the validity of an FCC Order that classified broadband providers as "information service" providers rather than "telecommunications service" providers.[130] The implication of the *Brand X* Order was that broadband providers would be subject to common carrier regulation under Title II of the Communications Act, rather than exempt, as telecommunications carriers. Petitioners challenged the Order, and the appeal went to the Ninth Circuit.[131] The Ninth Circuit decided not to apply Chevron deference, but rather grounded its holding in the "'*stare decisis* effect' of its own decision in *AT&T Corp. v. Portland*, 216 F.3d 871, which had

[126] *Comcast*, 600 F.3d at 651.

[127] *Id.* at 651–54.

[128] In *Brand X*, the Supreme Court reversed the 9th Circuit, holding that the FCC's interpretation of the term "telecommunications service" should have been reviewed using the deferential framework of *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc*. *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet, 545 U.S. 967, 980–82 (2005). *See infra* text accompanying notes 130–136.

[129] Chevron deference refers to the principle that, when interpreting a statute that is silent or ambiguous on an issue that falls within the general jurisdiction of a federal agency, a Court must defer to an interpretation by the agency that is reasonable under construction of the statute. *Id*. *See also* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

[130] *Brand X*, 545 U.S. at 968.

[131] *Id*. The Ninth Circuit won the case via judicial lottery.

held that cable modem service is a 'telecommunications service.'"[132] Upon Supreme Court review, a plurality reversed the Ninth Circuit, reasoning in part that *Chevron* provided the applicable framework for reviewing the FCC's Order.[133] The Court explained that "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the Chevron framework," but rather "[u]nexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act [APA]."[134] Reinforcing the deference afforded to agency's decisions in cases of statutory ambiguity, the Supreme Court emphasized that, in *Chevron* itself, "this Court deferred to an agency interpretation that was a recent reversal of agency policy."[135]

¶45 In *Comcast*, the FCC argued that the deference to the FCC the Supreme Court demonstrated in *Brand X* was binding in the *Comcast* case.[136] The D.C. Circuit dismissed this argument.[137] However, the court rejected the argument, not because the *Brand X* decision was not binding or not applicable, but rather because the actions in *Comcast* the FCC attempted to support with *Brand X* "[ran] afoul of *Southwestern Cable* and *Midwest Video I*."[138] Thus, so long as application of the Rules do not similarly contradict *Southwestern* and *Midwest Video* precedents (or otherwise conflict with binding case law), it appears that the *Brand X* precedent may remain binding in in the D.C. Circuit, even after *Comcast*, for purposes of interpreting FCC authority to enforce the Rules.

¶46 It seems likely that this *Brand X* deference will apply to future challenges to the FCC's authority to implement the Rules. Specifically, the *Brand X* application of Chevron deference calls into question the rejection in *Comcast* of the FCC's argument that Section 706 authorized its enforcement of the Order. As noted above, in *Comcast*, the sole reason the Court provided for rejecting the FCC's argument that 706 served as a delegated power that supports ancillary authority, was that a previous decision announced by the FCC conflicted with the Commission's interpretation in *Comcast*. Since *Brand X* establishes that Chevron deference should be used to review FCC orders in regards to interpretations of the Telecommunications Act,[139] and Chevron deference accords an agency the ability to "consider varying interpretations and the wisdom of its policy on a continuing basis," it seems the FCC should not be bound by its own previous

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[132] *Brand X*, 545 U.S. at 968

[133] *Id.* at 981.

[134] *Id*. (quoting Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 46–57 (1983)). The Court in *Brand X* continued to further clarify that "if the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating, since the whole point of Chevron is to leave the discretion provided by the ambiguities of a statute with the implementing agency.'" *Brand X*, 545 U.S. at 980–81.

[135] *Brand X*, 545 U.S. at 982.

[136] *Comcast*, 600 F.3d at 649–51.

[137] *Id*.

[138] *Comcast*, 600 F.3d at 651 (clarifying the "Commission cannot justify regulating the network management practices of cable Internet providers simply by citing *Brand X*'s recognition that it [the FCC] may have ancillary authority to require such providers to unbundle the components of their services" and confirming that "nothing… suggests that the Court was abandoning the fundamental approach to ancillary authority.").

[139] *Brand X*, 545 U.S. at 991–97 (discussing that the term "telecommunications service" as used in the Communications Act is ambiguous).

interpretations of Section 706, suggesting Section 706 may support FCC enforcement of the Rules.[140]

¶47 While the Court in *Comcast* appears to have left in tact the *Brand X* standard of review for FCC authority, its discussion of *Brand X* also reinforces requirements for establishing ancillary power that extends beyond the deference established in *Brand X*. Addressing the two-prong test described above, the *Comcast* ruling confirmed that FCC ancillary authority cannot be supported by broad authority, and the deferential *Brand X* treatment of FCC decisions must be "independently justified."[141] Further, the Court notes that such justification must be established on a "case-by-case basis."[142] Under this *Comcast* standard, it seems that FCC authority available through the *Brand X* interpretation of Section 706 may not, in isolation, provide sufficient authority to implement the Rules. However, in light of the *Brand X* standard of review, it also seems that the negative treatment in *Comcast* of authority granted through Section 706 should not vitiate ancillary authority that Section 706 may lend to FCC enforcement of the transparency requirement in the Rules.

¶48 Thus, in considering future challenges to FCC authority to enforce the Rules and, by inclusion, the transparency requirement, it appears the standard of review in *Brand X* requires courts to accord the FCC Chevron deference, where appropriate. Meanwhile, the standard established in *Comcast* appears to require a case-by-case analysis to determine when the FCC has properly justified use of its ancillary authority.

¶49 Part IV has discussed the role of express authority, the scope of ancillary authority, and the standards of review for FCC Orders as established by the Supreme Court in *Brand X* and by the D.C. Circuit in *Comcast*. Building on this foundation, Part V considers the impact of the *Comcast* decision on FCC authority to implement the Rules generally, and distinguishes the transparency protection from the Rules to clarify specific support for the latter.

V. THE *COMCAST* EFFECT ON THE TRANSPARENCY REQUIREMENT

¶50 While the *Comcast* decision may place some limitations on FCC authority to regulate the network management practices of ISPs, it does not foreclose FCC enforcement of the Rules as a whole, and its scope does not appear to limit authority to enforce transparency protections. As demonstrated above, transparency protections in the Rules are distinguishable from other requirements, and the *Comcast* decision poses a lesser threat to transparency protections outlined in the Rules than to content management protections.

¶51 Four factors demonstrate FCC authority to enforce the transparency protection and show that authority is consistent with the decision in *Comcast*. First, the facts in *Comcast* suggest it restricts regulation of content-focused network management practices, which may be distinguished from transparency requirements. Second, when evaluated with the

[140] *Id*. at 981 (citing *Chevron*, 467 U.S. at 863–864).

[141] *Comcast*, 600 F.3d at 651 (holding "each and every assertion of jurisdiction over cable television must be independently justified as reasonably ancillary to the Commission's power over broadcasting" (quoting *NARUC II*, 533 F.2d at 612)).

[142] *Id.* (establishing "the Commission must defend its exercise of ancillary authority on a case-by-case basis") (citing *Midwest Video I*, 440 U.S. at 696).

appropriate *Brand X* standard, Chevron deference indicates previous FCC interpretations of Section 706 do not preclude the FCC from basing ancillary authority on Section 706. Third, FCC authority to enforce the transparency requirement is supported by statutory sources that were not addressed in *Comcast*, including market integrity provisions, such as Section 254, and reporting provisions, such as Section 154. Fourth, *Comcast's* treatment of Section 257 reinforces, rather than erodes, FCC authority to implement transparency requirement, if not the Rules as a whole.

A. FCC activity under review in Comcast *is distinguishable from enforcement of the transparency requirements.*

¶52 The *Comcast* decision was concerned with content-based regulations, which may be distinguished from transparency regulations. The FCC Order reviewed in *Comcast* concerned ISP content discrimination of a P2P service, while the transparency requirement outlined in the Rules is concerned with ISP disclosure of its network management practices.[143] While the holding in *Comcast* may restrict FCC authority to determine whether ISP treatment of specific content is unreasonable, *Comcast* does not appear to directly restrict FCC authority to require ISP disclosure of such treatment. In addition to this distinction, specific statutory sources such as Communications Act Sections 706, 254, 154(k), and 257 also support FCC authority to enforce the transparency requirement in the Rules.

B. Section 706 authorizes FCC enforcement of the transparency requirements.

¶53 While the Court in *Comcast* rejected the FCC's argument that Section 706 provided authority for the FCC to issue the Order in *Comcast*, Section 706 may in fact authorize the Commission to enforce the transparency requirements established in the Rules. As noted above, *Brand X* established that Chevron deference should be applied, where appropriate.[144] *Brand X* also confirmed the applicability of two key Chevron principles: 1) that agency inconsistency is not grounds for finding a decision to be "arbitrary or capricious" under the APA, and 2) that an agency is not necessarily bound by its previous decisions.[145] The Court in *Comcast* held the FCC failed to establish that its implementation of the Order was authorized soley based upon the *Brand X* precedent, but it did not determine the *Brand X* standard was inapplicable.[146] Ironically, in *Comcast*, the D.C. Circuit based its rejection of Section 706 as an authorizing authority entirely on a previous FCC interpretation of the section.[147] However, granting the Commission the deference outlined in *Brand X* for purposes of evaluating Section 706, it appears that the Commission should be free to "consider varying interpretations and the wisdom of its

[143] *Compare In* re Formal Compl. of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, 23 FCC. Rcd. 13,028 (2008), *with* 47 C.F.R. § 8.3 (2011).

[144] *See supra* Part IV.C.

[145] *Id*.

[146] *Comcast*, 600 F.3d at 650 (holding the Court "need not decide whether the Court's discussion of ancillary authority in *Brand X* qualifies as 'authoritative'" because the Commission "runs afoul of *Southwestern Cable* and *Midwestern Video I*.").

[147] *Id.* at 659 (concluding that the "Commission remains bound by its earlier conclusion that section 706 grants no regulatory authority").

policy on a continuing basis,"[148] so long as that agency "adequately explains the reasons for a reversal of policy."[149] The history of the Open Internet Rules demonstrates ample explanation for the use of Section 706 the Commission asserts in the Rules, beginning with the 2005 Notice of Proposed Rulemaking and continuing through to the 2011 publication of the Rules. Thus, even assuming the validity of the *Comcast* rejection of Section 706 as an authority, it seems that a future Court would be able recognize the authority Section 706 provides for enforcing the Rules, given the FCC's explanation of its policy and notice to the industry.[150]

C. FCC authority to implement transparency requirements in the Rules is supported by statutory provisions that were not addressed in Comcast.

¶54 FCC authority to implement the Rules and the transparency requirement is also supported by statutory sources that were not addressed in *Comcast*, including market integrity and reporting provisions. Part IV discussed the statutory sources the FCC presented in the Rules that provide its authority to enforce the Rules, including Sections 706, 230, 254, 154(k), and 257. As noted, *Comcast* addressed Sections 706 (analyzed above), 230, and 257. However, the *Comcast* decision did not address the market integrity provision, Section 254, and the reporting provision, Section 154. Thus, the *Comcast* precedent does not detract from the authority these statutory sources provide the FCC. In fact, where the court in *Comcast* did address a reporting provision (Section 257), the language in *Comcast* may lend support for FCC authority to enforce transparency requirements.[151]

D. Comcast *treatment of Section 257 is consistent with FCC authority to implement transparency requirements.*

¶55 The treatment in *Comcast* of Section 257 reinforces, rather than erodes, FCC authority to implement transparency requirements, if not the Rules as a whole. As noted above, Section 257 requires the FCC to report to Congress every three years on "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services."[152] In *Comcast*, the Court rejected Section 257 as grounds for extending Commission ancillary authority to "dictate the operation of an otherwise unregulated service."[153] However, in that very paragraph,

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[148] *Brand X*, 545 U.S. at 981 (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 at 863–64, (1984)).

[149] *Id*. While this Comment is focused on FCC authority to implement the transparency requirement as opposed to the Rules as a whole, the process behind the announcement of the Rules suggests the FCC satisfied the "clear notice requirement" to receive Chevron deference for its Rules.

[150] Regarding the transparency requirement in the rules, the FCC voted to seek public comment on the draft Rules on Oct. 22, 2009 and held a series of open workshops before the Rules were published in the Federal Register on September 23, 2011 and became effective on November 20, 2011. *See generally Open Internet: Ensuring that every American has access to open and robust Internet service*, FED. COMMC'N. COMM., OPEN INTERNET, http://www.fcc.gov/topic/open-internet#history (last visited Sept. 15, 2012).

[151] *See infra* notes 153–54 and accompanying text.

[152] 47 U.S.C. § 257(a).

[153] *Comcast*, 600 F.3d at 659. ("We readily accept that certain assertions of Commission authority could be 'reasonably ancillary' to the Commission's statutory responsibility to issue a report to Congress. For example, the Commission might impose disclosure requirements on regulated entities in order to gather

the Court acknowledged Section 257 may be used as a basis for ancillary authority to perform such functions as "impos[ing] disclosure requirements on regulated entities."[154]

¶56 Thus, while the *Comcast* decision may restrict FCC authority to regulate the network management practices of ISPs, it does not destroy FCC authority to enforce the transparency requirements outlined in the Rules.

VI. ONWARD, TOWARDS A DISCLOSURE-BASED SYSTEM?

¶57 As the debate over net neutrality regulations continues, the authority of the FCC to enforce the Rules will remain a contentious issue. In considering that debate, this Comment has addressed the specific issue of the scope of post-Comcast FCC authority to implement transparency requirements outlined in the Rules. The Rules require "effective disclosure of broadband providers' network management practices and the performance and commercial terms of their services."155 This transparency protection is distinguishable from content-based regulations that require compliance with no blocking and nondiscrimination policies. The transparency protection is manifest throughout the Rules as a factor in determining "reasonable network management." To the extent the transparency requirement is critical to the FCC's mandate to monitor market competition and report to Congress, the statutory sources that provide FCC authority to enforce transparency rules are distinct from those that support enforcement of content-based regulations.

¶58 The decision in Comcast does not foreclose FCC enforcement of transparency requirements critical to the Open Internet Rules. While Comcast may restrict the ability of the FCC to regulate content-based network management practices, the precedent does not preclude FCC enforcement of the transparency requirement for the four reasons detailed above: the actions reviewed in Comcast are distinguishable from enforcement of the transparency requirements, Section 706 authorizes enforcement of the transparency requirement, authority to enforce transparency requirements is supported by statutory provisions unaddressed in Comcast, and the Comcast decision is consistent with the use of provisions such as Section 257 to authorize enforcement of the transparency requirements in the Rules.

¶59 This Comment has reserved for future discussion the merits of and authority to implement various forms of content-based net neutrality regulations. Rather, it has suggested that, under the current regulatory scheme, the FCC appears to have authority to enforce transparency requirements outlined in the Open Internet Rules.

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data needed for such a report.").

[154] *Id.*

[155] Preserving the Open Internet, 76 Fed. Reg. at 59,202.

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Northwestern Journal of Technology and Intellectual Property
Volume 11, Number 2 (January 2013)