
AN OVERLOOKED BASIS OF JURISDICTION FOR NET NEUTRALITY: THE WORLD TRADE ORGANIZATION AGREEMENT ON BASIC TELECOMMUNICATIONS SERVICES

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I. INTRODUCTION

Net neutrality is the principle that Internet service providers (“ISPs”) or broadband service providers (“BSPs”) must treat all data on the Internet equally.¹ Under the principle of net neutrality, ISPs and BSPs are not permitted to discriminate or charge differentially by user, content, site, platform, application, type of attached equipment, or modes of communication.² However, there has been a substantial amount of controversy over whether net neutrality should be imposed as a regulatory requirement.³ This issue has been particular-

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¹ See Dan Helling, *Net Neutrality and Preserving Freedoms of the Internet*, 6 LAW & SOC’Y J. UCSB 51, 53–54 (2007).

² See *id.* at 53–54, 58; see also *Net Neutrality 101*, SAVE THE INTERNET, FREE PRESS, <http://commcns.org/MQbKm1> (last visited Feb. 13, 2014).

³ Emily R. Roxberg, *FCC Authority Post-Comcast: Finding a Happy Medium in the Net Neutrality Debate*, 37 J. CORP. L. 223, 233–34 (2011) (discussing *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010)). See generally THE PROGRESS & FREEDOM FOUND., NET NEUTRALITY OR NET NEUTERING: SHOULD BROADBAND INTERNET SERVICES BE REGULATED (Thomas M. Lenard & Randolph J. May eds., 2006); Davina Sashkin, *Failure of Imagination: Why Inaction on Net Neutrality Regulation Will Result in a De Facto Legal*

ly contentious in the United States where the Federal Communications Commission (“FCC” or “Commission”) has begun to impose net neutrality requirements that focus on whether the FCC has jurisdiction to regulate broadband services.⁴

Net neutrality continues to be a controversial issue with powerful advocates both in favor and against the imposition of net neutrality requirements. The FCC and net neutrality advocates have argued that the failure to impose net neutrality requirements could limit the content to which subscribers and consumers wish to gain access.⁵ In a situation without net neutrality requirements, some argue that the service provider may have an incentive to provide cheaper and better access to its own content versus a third party’s content as it will provide a competitive advantage.⁶ To remedy this issue, net neutrality advocates have argued for government intervention to prevent such discrimination.⁷ Additionally, implementation of the net neutrality principle has been very controversial⁸ because consumers are already protected by existing regulations.⁹ Furthermore, any requirements regarding the provision of specific content could be viewed as a violation of the First Amendment.¹⁰ The controversy has also been based on the fact that some opponents of net neutrality argue that the FCC does not have the jurisdiction to regulate broadband.¹¹

Regime Promoting Discrimination and Consumer Harm, 15 COMMLAW CONSPECTUS 261 (2006).

⁴ *In re Preserving the Open Internet Broadband Industry Practices, Report and Order*, 21 F.C.C.R. 17,905, 17,906 (Dec 21, 2010) (requiring telecommunications and information-technologies providers to operate with the goal of keeping the Internet open) [hereinafter *Open Internet Order*]; see also Jennifer Wong, *Net Neutrality: Preparing for the Future*, 31 J. NAT’L ASS’N ADMIN. L. JUDICIARY 669, 680 (2011) (“In 2005 . . . the FCC pursued its first enforcement of net neutrality principles.”).

⁵ *Open Internet Order*, *supra* note 4, at 17,908–09.

⁶ See Helling, *supra* note 1, at 55 (“For example, if an ISP strikes up a deal with Google and not with smaller search engines, such as WebCrawler, Google’s searches could be pre-set to open faster than the smaller search engines on your computer, ultimately limiting the individual’s choice and fair market competition.”).

⁷ *Open Internet Order*, *supra* note 4, at 17,909, 17,911.

⁸ See Christopher R. Steffe, *Why We Need Net Neutrality Legislation Now Or: How I Learned to Stop Worrying and Trust the FCC*, 58 DRAKE L. REV. 1149, 1159 (2010) (“The current debate regarding network neutrality involves primarily two groups: (1) those who believe the principle of network neutrality should be legislated; and (2) those who wish to continue to allow the FCC, which has traditionally enforced the basic principles of the Internet, to enforce net neutrality.”).

⁹ See Wong, *supra* note 4, at 702-03 (“Many opponents of regulation also believe that current laws and free market forces already amply protect consumers from the hypothetical doomsday scenarios posed by net neutrality.”).

¹⁰ Christopher E. Roberts, *Can I Still Google My Yahoo? Reframing the Net Neutrality Debate—Why Legislation Actually Means Deregulation*, 77 UMKC L. REV. 765, 779 (2009).

¹¹ See Steffe, *supra* note 8, at 1164–65. But see Aaron K. Brauer-Rieke, *The FCC Tackles Net Neutrality: Agency Jurisdiction and the Comcast Order*, 24 BERKELEY TECH. L.J.

Despite FCC action in this area, early court cases have been unclear concerning the FCC's jurisdiction to fully implement net neutrality type-restrictions.¹² However, the United States Court of Appeals for the D.C. Circuit on January 14, 2014, determined that the FCC had not, in its recent net neutrality rulings, cited to any statutory authority that would "justify its order compelling a broadband provider to adhere to open network management practices."¹³

Furthermore, Congress has not been single-minded about whether the FCC should be afforded express jurisdiction to remedy net neutrality concerns.¹⁴ Accordingly, Congress has considered a number of bills that would either provide the FCC with clear net neutrality authority or prohibit the FCC from acting in this area.¹⁵ With the recent D.C. Circuit ruling on net neutrality, it is

593, 607–08 (2009) ("The Commission cited six separate provisions to support its Title I ancillary authority: section 1 of the Communications Act, section 201 of the Communications Act, section 706 of the Telecommunications Act of 1996, section 256 of the Telecommunications Act, section 257 of the Telecommunications Act, and section 601(4) of the Telecommunications Act.").

¹² See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1002–03 (2005) (deferring to the FCC, because the questions resolved "in the order under review involve[d] a 'subject matter [that] is technical, complex, and dynamic'"); *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (finding against the Commission, because the "Commission has failed to tie its assertion of ancillary authority over Comcast's Internet service to any 'statutorily mandated responsibility'").

¹³ *Verizon v. F.C.C.*, No. 11-1355, 2014 WL 113946, at *2 (D.C. Cir. Jan. 14, 2014) [hereinafter *Net Neutrality Decision*].

¹⁴ Edward Wiet, *A Ruling Could Support F.C.C.'s Net Neutrality Defense*, N.Y. TIMES BLOG (May 20, 2013, 5:53 PM), <http://commcns.org/1kGeLUw> ("Justice Antonin Scalia wrote that in cases where Congress has left ambiguous the outlines of a regulatory agency's, 'the court must defer to the administering agency's construction of the statute so long as it's permissible.'").

¹⁵ See, e.g., *Internet Freedom and Nondiscrimination Act of 2006*, H.R. 5417, 109th Cong. (2006) (attempting to amend the Clayton Act with respect to competitive and nondiscriminatory access to the Internet); *Communications Opportunity, Promotion, and Enhancement Act of 2006*, H.R. 5252, 109th Cong. (2006) (proposing to create a national franchise for video providers, and additionally addresses net neutrality, e911, and municipal broadband); *Network Neutrality Act of 2006*, H.R. 5273, 109th Cong. (2006) (proposing that it is the policy of the United States to, among other things, maintain the freedom to use broadband telecommunications networks, including the Internet, without interference from network operators. Outlines specified duties of broadband network providers to ensure broadband network neutrality, including the duty to: (1) enable users to utilize their broadband service to access all lawful content, applications, and services available over broadband networks, including the Internet; and (2) not block, impair, degrade, discriminate against, or interfere with the ability of any person to utilize their broadband service for lawful purposes. Provides exceptions for providers, including implementing reasonable measures to manage its networks and protect network security. Provides for implementation and enforcement of this Act through the Federal Communications Commission (FCC)); *Communications, Consumer's Choice, and Broadband Deployment Act of 2006*, S. 2686, 109th Cong. (2006) (Introduces Title ix – Section 901 on Internet Neutrality:

likely the FCC will soon consider next steps on net neutrality.

Both proponents and opponents of net neutrality have omitted from their debate an important and clear jurisdictional basis for the FCC to implement net neutrality requirements: the Basic Agreement on Trade in Telecommunications Services (“BATS”) of the World Trade Organization (“WTO”).¹⁶ Under the United States’ commitment to the BATS, the United States has the treaty obligation to implement many net neutrality principles for broadband services, including transparency, and fair and non-discriminatory interconnection for broadband services.¹⁷ While the BATS is not self-executing¹⁸ by the FCC,¹⁹ the

Sec. 901. Neutral networks for consumers.

(a) IN GENERAL- Beginning 1 year after the date of enactment of this Act, the Federal Communications Commission shall report annually to the Senate Committee on Commerce, Science, and Transportation and the House of Representatives Committee on Energy and Commerce for 5 years regarding—

(1) the developments in Internet traffic processing, routing, peering, transport, and interconnection;

(2) how such developments impact the free flow of information over the public Internet and the consumer experience using the public Internet;

(3) business relationships between broadband service providers and applications and online user services; and

(4) the development of and services available over public and private Internet offerings.

(b) DETERMINATIONS AND RECOMMENDATIONS- If the Commission determines that there are significant problems with any of the matters described in subsection (a) the Commission shall make such recommendations in its next annual report under subsection (a) as it deems necessary and appropriate to ensure that consumers can access lawful content and run Internet applications and services over the public Internet subject to the bandwidth purchased and the needs of law enforcement agencies. The Commission shall include recommendations for appropriate enforcement mechanisms but may not recommend additional rulemaking authority for the Commission.

Communications, Consumer’s Choice, and Broadband Deployment Act of 2006, S. 2686, 109th Cong. (2006).

¹⁶ WTO, Fourth Protocol to the General Agreement on Trade in Services, S/L/20 (Apr. 30, 1996), 36 I.L.M. 366 (1997) (granting the FCC the power to make “such rules and regulations . . . as may be necessary to carry out the provisions of . . . any international radio or wire communications treaty or convention”).

¹⁷ *Id.*; see also WTO, Telecommunications Services: Reference Paper, Negotiating Group on Basic Telecommunications (Apr. 24, 1996), available at <http://commens.org/1eZhXqF>.

¹⁸ See *Self-Executing Treaty Definition*, LEGAL INFO. INSTITUTE, CORNELL UNIV. LAW SCHOOL, <http://commens.org/1dMWgVY> (last visited Feb. 13, 2014) (A self-executing treaty is defined as a treaty that becomes judicially enforceable upon ratification. As opposed to a non-self executing treaty, which becomes judicially enforceable through the implementation of legislation. A treaty could be identified as either self executing or non-self executing by looking to various indicators, including statements that are made by Congress or the Executive regarding the treaty, indeterminate language of the treaty, or if the

FCC has the legal jurisdiction to implement the BATS under § 303(r) of the United States Code.²⁰ Accordingly, as discussed below, not only does the FCC have the legal authority to implement net neutrality regulations under the BATS,²¹ the United States has committed itself to its implementation, because BATS is a treaty.²² As the FCC will likely take further action to justify its net neutrality actions, BATS, coupled with § 303(r) of the Communications Act, provides the FCC with a solid jurisdictional basis for such actions.²³

II. NET NEUTRALITY

Net Neutrality is best understood as an equal platform where Internet users can choose the applications and services they wish to use, as well as the content they want to access, create, or share with others.²⁴ Advocates have stated that rules on net neutrality are necessary to protect innovations on the Internet and to preserve the kind of openness that has allowed the Internet to flourish.²⁵

treaty deals with a matter within the exclusive law-making power of Congress, indicating that Congress must create implementing legislation.).

¹⁹ Charles M. Oliver, *WTO Agreement on Basic Telecommunications Services and FCC Implementation*, 15 COMM. LAW. 13 (1998).

²⁰ 47 U.S.C. § 303(r) (2006).

²¹ Oliver, *supra* note 19, at 13.

²² ROBERT CARR ET AL., TELECOMMUNICATIONS EQUIPMENT: U.S. PERFORMANCE IN SELECTED MAJOR MARKETS, at 1-2 (Office of Studies, U.S. Int'l Trade Comm'n, Pub. 3150, 1998).

²³ Although we will explain further in the course of the article, Section 303(r) has been utilized consistently by the FCC as a basis for implementing treaties that the United States is a party to. For instance, in implementing the United States commitments made in treaties negotiated and agreed to under the ITU, the FCC utilizes Section 303(r) of the Communications Act as the basis of jurisdiction. Similarly, the FCC has relied on Section 303(r) to implement its WTO commitments in the past and continues to utilize the rules it adopted as part of this implementation. To date, there have been no challenges to the FCC's authority to implement treaties in its discretion. In fact, many of its licensees, such as wireless service providers, rely on and have commitments in their licenses or are required to comply with international law requiring compliance with international treaties. Therefore, we believe that the FCC has solid jurisdictional basis for such actions.

²⁴ CONSUMER & GOVERNMENTAL AFFAIRS BUREAU, FED. COMM'NS COMM'N, CONSUMER GUIDE: THE OPEN INTERNET (2013), available at <http://transition.fcc.gov/cgb/consumerfacts/openinternet.pdf>. For a fuller discussion about net neutrality regulation in the United States, see Barbara Van Schewick's report. BARBARA VAN SCHEWICK, NETWORK NEUTRALITY & QUALITY OF SERVICE: WHAT A NON-DISCRIMINATION RULE SHOULD LOOK LIKE 16, 18 (Stanford Law Sch. Ctr. for Internet & Soc'y, unnumbered working paper, 2012). See also David W. Opderbeck, *Does the Communications Act of 1934 Contain A Hidden Internet Kill Switch?*, 65 FED. COMM. L.J. 1, 31-32 (2013); Kevin Werbach, *Off the Hook*, 95 CORNELL L. REV. 535, 581 (2010) ("We can now see that future telecommunications and broadcast networks will all be based on Internet-like data networking technologies."); Susan P. Crawford, *The Internet and the Project of Communications Law*, 55 UCLA L. REV. 359, 362-63 (2007).

²⁵ VAN SCHEWICK, *supra* note 25, at 16 ("Network neutrality rules . . . impose some

Likewise, net neutrality advocates believe that network neutrality restrictions are critical to ensure that service providers are unable to block access to lawful applications provided by ISPs and BSPs or to downgrade their data streams.²⁶ These advocates also believe that net neutrality is necessary to preserve the Open Internet and its resulting benefits.²⁷

In order to accomplish these objectives, the FCC has focused on implementation requirements that would lead ISPs and BSPs to freely allow users to send and receive all lawful content, use all lawful services and applications, and also use all lawful devices that do not damage the network.²⁸ Regarding access, the FCC has encouraged ISPs to allow consumers to access all network, service, content, and application providers.²⁹ In addition, the FCC has announced Internet principles that declare that ISPs or BSPs “cannot prevent users from accessing the lawful Internet content, applications, and services of their choice, nor can they prohibit users from attaching non-harmful devices to the network.”³⁰

To advance these goals, the FCC has adopted three basic Open Internet rules: transparency; no blocking; and no unreasonable discrimination.³¹ These rules were recently struck down by the D.C. Circuit with respect to the treatment of common carriers.³² The purpose and intent of the FCC’s Open Internet

constraints on the evolution of the network in order to allow the Internet to continue to foster application innovation, preserve user choice or foster democratic discourse.”)

²⁶ *Id.* at 14.

²⁷ Julius Genachowski, Chairman, Fed. Commc’ns Comm’n, Prepared Remarks at the Brookings Institution: “Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity” 3 (Sept. 21, 2009), *available at* <http://commcns.org/1g3kPk1>.

²⁸ David W. Opderbeck, *Does the Communications Act of 1934 Contain A Hidden Internet Kill Switch?*, 65 *FED. COMM. L.J.* 1, 3–4 (2013).

²⁹ Genachowski, *supra* note 28, at 4.

³⁰ *Id.* at 4.

³¹ The three basic Open Internet rules are:

1. Transparency: Broadband providers must disclose information regarding their network management practices, performance, and the commercial terms of their broadband services;

2. No Blocking: Fixed broadband providers (such as DSL, cable modem or fixed wireless providers) may not block lawful content, applications, services or non-harmful devices. Mobile broadband providers may not block lawful websites, or applications that compete with their voice or video telephony services;

3. No Unreasonable Discrimination: Fixed broadband providers may not unreasonably discriminate in transmitting lawful network traffic over a consumer’s broadband Internet access service. The no blocking and no unreasonable discrimination rules are subject to limited exceptions for “reasonable network management.

Open Internet Order, *supra* note 4, at 17,906.

³² Net Neutrality Decision, *supra* note 13, at 4 (“Because the Commission has failed to establish that the anti-discrimination and anti-blocking rules do not impose *per se* common carrier obligations, we vacate those portions of the *Open Internet Order*.”).

rules are to guarantee that the Internet continues to be the stage for innovation and job creation.³³ The FCC's rules empower consumers and entrepreneurs.³⁴ The rules also protect free expression, promote competition, and increase certainty in the marketplace by providing greater predictability for all stakeholders regarding federal policy in this area.³⁵ Finally, the FCC's Internet rules spur investment both at the "edge," and at the core of broadband networks.³⁶

In its adoption of these rules, the FCC has emphasized that at no point would the adoption result in content regulation.³⁷ The FCC recognized the First Amendment issues that would arise if content regulation were addressed.³⁸ Instead, the FCC focused on ensuring that the purpose of the Open Internet rules was to clarify high-level, flexible rules of the road for broadband to ensure that neither the government nor the companies that provide broadband service could restrict innovation on the Internet.³⁹

III. THE IMPORTANCE OF NET NEUTRALITY

The wireless broadband market in the United States, like other countries, is fairly limited in terms of competition.⁴⁰ Therefore, competition is a critical

³³ Genachowski, *supra* note 28, at 4.

³⁴ Open Internet Order, *supra* note 4, at 18,043.

³⁵ *Id.* at 17,906.

³⁶ *Id.*

³⁷ *Id.* at 17,982, 17,985.

³⁸ *Id.* at 17,981–85.

³⁹ *Id.* at 17,906–07; see also Barbara S. Esbin, *A Point of View: Net Neutrality Regulation in the United States*, PROGRESS & FREEDOM FOUND.: PROGRESS SNAPSHOT (RELEASE 4.21), Oct. 2008, at 1, available at <http://commcns.org/1mfc3qX> (discussing the history of net neutrality).

⁴⁰ *In re* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Sixteenth Report*, 28 F.C.C.R. 3700, 3728 (Mar. 21, 2013). The United States telecommunications market for broadband services, especially on the network side, is characterized by limited competition. See also *Competition and Regulation in a Converged Broadband World*, Int'l Telecomm. Union (Feb. 2013), available at <http://commcns.org/1osM9yt> (This report was prepared by Dr. Christian Koboldt of DotEcon Limited, under the direction of the Telecommunication Development Bureau (BDT) Regulatory and Market Environment Division (RME). This report is part of a new series of ITU reports on broadband that are available online and free of charge at the ITU Universe of Broadband portal. The FCC, in this Report provides a detailed assessment of competitive market conditions across the entire mobile wireless sector, particularly broadband.) *In re* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Sixteenth Report*, 28 F.C.C.R. 3700, 3728 (Mar. 21, 2013). Currently, "the four nationwide service providers (AT&T, Sprint Nextel, T-Mobile and Verizon Wireless), which, by the end of 2011, accounted for just over 90 percent of the nation's mobile wireless subscribers (including wholesale connections and machine-to-machine connections), with AT&T and Verizon Wireless together accounting for 64 per-

concern to policy makers.⁴¹ Accordingly, consumers who must rely on obtaining broadband access through BSPs or ISPs have raised concerns about access to these limited networks.⁴² Net neutrality proponents allege that telecommunications companies that supply broadband access may seek to impose a tiered service model in order to control their network pipeline.⁴³ This action may limit competition for broadband services, create artificial scarcity, and force subscribers to buy uncompetitive services.⁴⁴ Net neutrality proponents argue that this limitation discriminates results in certain websites not being made available to consumers – a form of discrimination.⁴⁵

Proponents of net neutrality include a broad range of interests.⁴⁶ For example, Internet giants Google, Facebook, and Amazon, who depend on access to the networks of competitors, are the biggest supporters of net neutrality.⁴⁷ Today, net neutrality also finds powerful support in government, beginning with President Obama himself, who has stated that the adoption of the FCC's net neutrality rules will preserve the free and open nature of the Internet, while "encouraging innovation, protecting consumer choice, and defending free speech."⁴⁸ President Obama reiterated his support for the Open Internet rules,

cent." *In re* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Sixteenth Report*, 28 F.C.C.R. 3700, 3732 (Mar. 21, 2013). These service providers have increased their subscriber base and now "cover in excess of 91 percent of the U.S. population in large proportions of the western, mid-western, and eastern United States." *In re* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Sixteenth Report*, 28 F.C.C.R. 3700, 3737 (Mar. 21, 2013).

⁴¹ ROBERT D. ATKINSON, THE INFO. TECH. & INNOVATION FOUND., THE ROLE OF COMPETITION IN A NATIONAL BROADBAND POLICY 1 (2007), available at <http://commcns.org/1jDAYT5>.

⁴² Lawrence Lessig & Robert W. McChesney, *No Tolls on The Internet*, WASH. POST, June 8, 2006, at A23.

⁴³ *Id.*

⁴⁴ *Id.* ("[Network owners] would be able to sell access to the express lane to deep-pocket corporations and relegate everyone else to the digital equivalent of a winding dirt road.").

⁴⁵ Brendan Sasso, *Google, Facebook, Netflix Defend Net Neutrality Rules in Court*, HILL (Nov. 16, 2012), <http://commcns.org/LYYVF1> ("The supporters of the [Open Internet] rules say [that] all websites should be treated equally, whether they are large corporate services or small personal blogs."); see Lessig & McChesney, *supra* note 41 ("Without net neutrality, the Internet would start to look like cable TV. A handful of massive companies would control access and distribution of content, deciding what you get to see and how much it costs.").

⁴⁶ Sasso, *supra* note 44 (noting that some of the major supporters of net neutrality include "Amazon, Dish Network, eBay, Facebook, Google, Netflix, Sony[,] and Twitter").

⁴⁷ Marguerite Reardon, *Amazon, Facebook, and Google Back FCC on Net Neutrality*, CNET (Oct. 19, 2009), <http://commcns.org/1btY5wG>.

⁴⁸ President Barack Obama, Statement on Today's FCC Vote on Net Neutrality (Dec.

when Julius Genachowski resigned as FCC Chairman in 2013.⁴⁹ Other supporters of net neutrality include consumer advocate and human rights groups, such as Free Press.⁵⁰

Opponents of net neutrality, including Verizon and the Cato Institute, claim that the imposition of net neutrality regulations would degrade broadband services or freeze them at the status quo, because the regulations would discourage innovation.⁵¹ Many opponents, such as the large wireless service providers and cable operators believe the marketplace is the correct venue in which to allow the issue of net neutrality to be decided; not the regulatory arena.⁵² Some opponents of net neutrality argue that net neutrality is a violation of the network providers' property rights.⁵³

Other opponents of net neutrality argue that prioritization of bandwidth is

21, 2010). More specifically, President Obama stated that:

Today's decision will help preserve the free and open nature of the Internet while encouraging innovation, protecting consumer choice, and defending free speech. Throughout this process, parties on all sides of this issue – from consumer groups to technology companies to broadband providers – came together to make their voices heard. This decision is an important component of our overall strategy to advance American innovation, economic growth, and job creation. As a candidate for President, I pledged to preserve the freedom and openness that have allowed the Internet to become a transformative and powerful platform for speech and expression. That's a pledge I'll continue to keep as President. As technology and the market continue to evolve at a rapid pace, my Administration will remain vigilant and see to it that innovation is allowed to flourish, that consumers are protected from abuse, and that the democratic spirit of the Internet remains intact.

Id.

⁴⁹ President Barack Obama, Statement by the President on Julius Genachowski (Mar. 22, 2013) (“Because of [Chairman Genachowski’s] leadership, we have expanded high-speed [I]nternet access, fueled growth in the mobile sector, and continued to protect the open Internet as a platform for entrepreneurship and free speech”).

⁵⁰ *Major U.S. Consumer Groups Support FCC Action on Net Neutrality*, FREE PRESS (Oct. 21, 2009), <http://commcns.org/1exFUR3>. In his letter to FCC Chairman Julius Genachowski, Craig Aaron, senior program director at Free Press states:

The fight for Net Neutrality is often mistakenly portrayed as a clash of corporate interests. That's simply not the case. Certain companies may oppose Net Neutrality or sow unfounded fears about what the FCC is doing, but consumer groups and public advocates are united in their support for an open Internet. The FCC should not be deterred by the phone and cable industry's attempts to muddy this debate with myths, misdirection and manufactured outrage. We need strong and clear Net Neutrality rules now to safeguard the Internet's future.

Id.

⁵¹ Robert Pepper, *Network Neutrality: Avoiding a Net Loss*, TECHNEWSWORLD (Mar. 14, 2007), <http://commcns.org/1jeqyG7>.

⁵² *Id.*

⁵³ Kelsey Zahourek, *Net Neutrality Infringes on Private Property Rights*, PROP. RTS. ALLIANCE (Sept. 21, 2011), <http://commcns.org/1gdPy07>.

necessary for future innovation on the Internet.⁵⁴ These opponents argue that BSPs should have the ability to provide preferential treatment in the form of tiered services.⁵⁵ For example, a network service provider, such as a wireless service provider, could give data-transmission priority to those companies that pay a premium, which will “give an advantage to the most important or most profitable [Internet] traffic.”⁵⁶ The opponents explain that the added revenue received from such services could be used for the building of increased broadband access to more consumers.⁵⁷ These advocates have also expressed that net neutrality regulation would have adverse consequences for innovation and competition in the market for broadband access by making it more difficult for network providers to recover their expenditures in the broadband networks.⁵⁸

IV. THE FCC’S OPEN INTERNET ORDER

On December 21, 2010, the FCC adopted the Open Internet Order.⁵⁹ In this order, the FCC imposed three requirements on broadband service providers: transparency; a prohibition on blocking websites and certain applications; and no unreasonable discrimination.⁶⁰ The transparency rule required a network provider to “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.”⁶¹ Under the “no-blocking” rule, the fixed broadband provider cannot “block lawful content, applications, services, or non-harmful devices.”⁶² Also under the “no-blocking” rule, the mobile broadband provider cannot “block lawful websites, or block applications that compete with [the provider’s] voice or video telephony services.”⁶³ Further, the network providers are subject to the doctrine of reasonable network management.⁶⁴

⁵⁴ See, e.g., JONATHAN D. HART, *INTERNET LAW* (2007).

⁵⁵ Alan Davidson & Tom Tauke, *A Joint Policy Proposal For an Open Internet*, GOOGLE PUBLIC POLICY BLOG (Aug. 9, 2010, 1:38 PM), <http://commcns.org/1osIAIv>.

⁵⁶ Robert D. Atkinson & Philip J. Weiser, *A Third Way on Network Neutrality*, 47 *NEW ATLANTIS* 47, 47 (2006).

⁵⁷ *Id.*

⁵⁸ *FTC to Host Workshop on Broadband Connectivity Competition Policy*, F.T.C. (Dec. 2007), available at <http://commcns.org/1fls8Cm>.

⁵⁹ Open Internet Order, *supra* note 4, at 17,905-06.

⁶⁰ *Id.* at 17,906.

⁶¹ *Id.* at 17,937.

⁶² *Id.* at 17,906.

⁶³ *Id.*; see also 47 C.F.R. § 8.5(b) (2012).

⁶⁴ Open Internet Order, *supra* note 4, at 17,928; see also 47 C.F.R. § 8.5(b).

Finally, the FCC established the “No Unreasonable Discrimination” rule, under which broadband providers “shall not *unreasonably* discriminate in transmitting lawful network traffic” to their customers.⁶⁵ The FCC found that network practices are reasonable if they are “tailored to achieving a legitimate network management purpose.”⁶⁶ Legitimate network purposes include: “ensuring network security and integrity”; contending with “traffic that is unwanted by end users” (for example, parental controls); or “reducing or mitigating the effects of congestion on the network.”⁶⁷

The FCC issued these rules based on their jurisdiction over communications by wire and radio.⁶⁸ Further, the FCC stated that they were implementing these rules based on the specific statutory mandates in the Communications Act as amended by the Telecommunications Act of 1996, including provisions that direct the Commission to enhance Internet investment and to protect and promote voice, video, and audio communications services.⁶⁹ Specifically, the FCC found that Section 706 of the Telecommunications Act of 1996 directs the Commission (along with state commissions) to take actions that encourage the deployment of “advanced telecommunications capability.”⁷⁰ “Advanced telecommunications capability,” as defined in the Act, includes broadband Internet access.⁷¹ Under Section 706(a), the Commission is required to encourage the deployment of such capability by “utilizing, in a manner consistent with the public interest, convenience, and necessity,” various tools, including “measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”⁷²

Broadband service providers including Metro PCS and Verizon subsequently challenged this order in court.⁷³ In their joint brief, appellants Metro PCS and Verizon argued that the challenged order should be vacated because the open Internet rules are unconstitutional under the First Amendment.⁷⁴ Further, the appellants argued that the FCC does not have authority to regulate mobile Internet access under the Communications Act.⁷⁵ The appellants also argued

⁶⁵ 47 C.F.R. § 8.7 (2012).

⁶⁶ Open Internet Order, *supra* note 4, at 17,908.

⁶⁷ *Id.* at 17,952.

⁶⁸ 47 U.S.C. § 152(a) (2006).

⁶⁹ *See* Telecommunications Act of 1996, 47 U.S.C. § 1302(a) (2011).

⁷⁰ *Id.*

⁷¹ *Id.* at § 1302(d)(1).

⁷² *Id.* at § 1302(a).

⁷³ Joint Brief for Verizon & MetroPCS, at xii, *Verizon v. Fed. Comm’n Comm’n* (Docket No. 11-1355, Document No. 1381604) (D.C. Cir. July 2, 2012), *available at* <http://commens.org/1bQU9Rs>.

⁷⁴ *Id.* at 3.

⁷⁵ *Id.* at 14-15.

that the Commission cannot impose license conditions because it lacks the statutory authority in the first instance to regulate broadband services.⁷⁶ In addition, the appellants argued that the Communications Act expressly forbids the FCC from applying common-carrier regulation to broadband Internet access, so the rules are invalid.⁷⁷ Finally, the appellants argued that the rules are arbitrary and capricious.⁷⁸

In light of the Net Neutrality decision, the addition of the BTA as a jurisdictional basis will ensure that the FCC can act, consistent with U.S. law, on imposing certain net neutrality restrictions.

V. A TRUE BASIS OF JURISDICTION: THE WTO BASIC AGREEMENT ON TRADE IN TELECOMMUNICATIONS SERVICES

Despite all of the focus on net neutrality, advocates and opponents have both overlooked a key jurisdictional basis that would enable the FCC to have clear jurisdiction⁷⁹ over net neutrality. Perhaps even more importantly, the BATs requires, the United States to implement certain net neutrality obligations.⁸⁰ Since 1998, the United States and over 107 other countries agreed to the BATS;⁸¹ the most far-reaching trade agreement on telecommunications services to date.⁸² As part of this agreement, the United States had great foresight to include within its commitments a broad range of new services and technologies.⁸³ More specifically, the United States foresaw the coming growth in internet-based services and committed itself, as did several other countries, to cover packet-switched services, among other critical telecommunications services.⁸⁴ Packet switched services are in fact the equivalent of broadband services and the United States, during the negotiations, expressly included these services to protect its growing IP-based services providers, such as MCI

⁷⁶ *Id.* at 11-12.

⁷⁷ *Id.* at 11.

⁷⁸ *Id.* at 11-12.

⁷⁹ WTO, Post-Uruguay Round Negotiations on Basic Telecommunications, *available at* <http://commens.org/1exGb6H> (last visited Jan. 21, 2014).

⁸⁰ *See* WTO, Telecommunications Services: List of Commitments and Exemptions, <http://commens.org/1hhO08I> (last visited Jan. 21, 2014).

⁸¹ *See id.*

⁸² Edmund Andrews, *68 Nations Back Openings of Telephone Markets and the Unlocking of State Monopolies*, N.Y. TIMES, Feb. 16, 1997, at 1, 14.

⁸³ WTO, Services: Sector by Sector, Telecommunications Services (last visited Jan. 21, 2014), <http://commens.org/MQcMhY>.

⁸⁴ 47 U.S.C. § 303(r); *see generally* Fourth Protocol to the General Agreement on Trade in Services, *supra* note 16; *see also* Negotiating Group on Basic Telecommunications, *supra* note 17.

Communications.⁸⁵

Because of this commitment by the United States, it is bound to implement all of its commitments under the BATS for IP-based services.⁸⁶ As part of this trade agreement, each country is responsible for implementing its commitments.⁸⁷ In the United States, treaties are the supreme law of the land.⁸⁸ Further, under Section 303(r) of the Communications Act, the FCC has the authority to implement treaty commitments without further Congressional authority required.⁸⁹ Accordingly, to the extent that the BATS requires net neutrality type-regulation, the United States is under an obligation to adopt and implement such regulation.⁹⁰ Because of Section 303(r) of the Communications Act, the FCC may be that implementing body if it so chooses (no further statutory authority is required).⁹¹

However, Section 303(r) has been utilized consistently by the FCC as a basis for implementing treaties that the United States is a party too. For instance, in implementing the United States commitments made in treaties negotiated and agreed to under the international organization, the International Telecommunications Union, the FCC utilizes Section 303(r) of the Communications Act as the basis of jurisdiction.⁹² Similarly, the FCC has relied on Section 303(r) to implement its WTO commitments in the past and continues to utilize

⁸⁵ See *High Speed, IP Based Voice and Data*, SWIFTBROADBAND (Sept. 2008), <http://commcns.org/1gC8wfq>.

⁸⁶ See WTO, The United States of America Schedule of Specific Commitments Supplement 2 (Apr. 11, 1997), <http://commcns.org/1hh0081>.

⁸⁷ See *generally* Services: Sector by Sector, Telecommunications Services, *supra* note 85.

⁸⁸ U.S. Const. art. VI (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”)

⁸⁹ 47 U.S.C. § 303(r); see *generally* Fourth Protocol to the General Agreement on Trade in Services, *supra* note 16.

⁹⁰ 47 U.S.C. § 303(r); see *generally* Fourth Protocol to the General Agreement on Trade in Services, *supra* note 16.

⁹¹ *In re* Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission’s Rules CC Docket 98-141 (Oct. 6, 1999).

⁹² See *generally In re* Amendment of Parts 1, 2, 15, 25, 73, and 90 of the Commission’s Rules to Make Non-Substantive Editorial Revisions to the Table of Frequency Allocations and to Various Other Rules, *Order*, DA 10-762, 25 FCC (July 21, 2010), <http://commcns.org/LYZuPC>; see also *In re* SES Americom, Inc. Petition for Declaratory Ruling Regarding Direct Broadcast Satellite Service to the U.S. Market from the 105.5° W.L. Orbital Location, IBFS File No. SAT-PDR-20070129-00024 Call Sign S2731, *Order*, (Jan. 16, 2003), available at <http://commcns.org/1b13tqL>.

the rules it adopted as part of this implementation.⁹³ To date, there have been no challenges to the FCC's authority to implement treaties in its discretion.⁹⁴ In fact, many of its licensees, such as wireless service providers, rely on and have commitments in their licenses or are required to comply with international law requiring compliance with international treaties.⁹⁵

In committing to the BATS, there were certain key principles, which mimic those of net neutrality, which the United States committed to implement for packet switched services.⁹⁶ Specifically, the Reference Paper to the BATS, which the United States committed to implement, requires the adoption of requirements on transparency, anti-competitive practices and fair interconnection.⁹⁷

With regard to transparency, a significant portion of the BATS agreement, including the reference paper, is based on transparency.⁹⁸ The negotiators of the BATS agreement recognized early on that transparency was critical in order to enable competition in the telecommunications marketplace.⁹⁹

The agreement also requires the adoption of rules that prevent anti-competitive practices by telecommunications service providers.¹⁰⁰ Specifically, the BATS provides that: "Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices."¹⁰¹

The BATS goes further and specifically identifies anti-competitive safeguards that must be addressed.¹⁰² These include: (a) engaging in anti-

⁹³ See, e.g., *In re International Settlements Policy Reform Joint Petition for Rulemaking of AT&T Inc., Sprint Nextel Corporation and Verizon Modifying the Commission's Process to Avert Harm to U.S. Competition and U.S. Customers Caused by Anticompetitive Conduct*, FCC IB Docket No. 11-80 RM-11322, IB Docket No. 05-254, IB Docket No. 09-10 (Nov. 29, 2012), 7250-51 (2011); see also *Review of Foreign Ownership Policies for Common Carrier and Aeronautical RadioLicenses under Section 310(b)(4) of the Communications Act, as Amended*, 26 FCC 11703 (2011).

⁹⁴ Mike Ludwig, *How Verizon's Challenge to FCC Net Neutrality Rules Could Silence Minority Voices*, TRUTHOUT (Sept. 11, 2013, 12:58 PM), <http://commcns.org/1gxpBlx>.

⁹⁵ In fact, satellite operators are required under Part 25 of the FCC's rules to engage in international coordination consistent with the ITU Convention and other treaties. See e.g., *In re EchoStar Satellite Operating Co., Application for Special Temporary Authority Related to Moving the EchoStar 6 Satellite from the 77° W.L. Orbital Location to the 96.2° W.L. Orbital Location, and to Operate at the 96.2° W.L. Orbital Location*, *Memorandum Opinion and Order*, File No. SAT-STA-20130220-00023, at ¶ 9 (July 9, 2013), <http://commcns.org/1btYLIT> (discussing international coordination requirements under the ITU treaty).

⁹⁶ Negotiating Group on Basic Telecommunications, *supra* note 17.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

competitive cross-subsidization; (b) using information obtained from competitors with anti-competitive results; and (c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.¹⁰³

Accordingly, similar to some of the basic net neutrality principles, the BATS requires the imposition of anti-competitive safeguard to prevent anti-competitive behavior in the telecommunications market.¹⁰⁴ Based on this requirement, it is reasonable for the FCC to utilize this commitment to implement at least the no blocking and anti-discrimination provisions of the current net neutrality requirements, among other future requirements.

The BATS requires fair and non-discriminatory interconnection among telecommunications suppliers.¹⁰⁵ Specifically, the BATS requires that interconnection is available among telecommunications service networks in order to allow the networks of different suppliers to interconnect.¹⁰⁶ Further, the BATS requires that interconnection shall be at any technically feasible point and that interconnection agreements be made public.¹⁰⁷ This provision was agreed upon in order to limit the ability of dominant or significant telecommunications suppliers to require unreasonable interconnection points and to ensure that there is transparency in the interconnection process.¹⁰⁸

Further, the BATS requires that interconnection is provided under the following: Under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favorable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates; in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided; and upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.¹⁰⁹

The BATS recognizes that interconnection is a complex process, so it provides for dispute settlement.¹¹⁰ Accordingly, a service supplier under the BATS

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ WTO: Agreement on Telecommunications Services (Fourth Protocol to the General

requesting interconnection with a major supplier has recourse with an independent body at any time or after a publicly-known reasonable period of time.¹¹¹ The key principles underlying net neutrality include transparency, interconnection, and non-discrimination.¹¹² The BATS covers all of these.¹¹³ In fact, because it is a treaty, the BATS provides the FCC with authority to implement a significant subset of net neutrality principles as rules.¹¹⁴

Despite its commitment to the WTO reference paper for packet switched services, the United States has not implemented these commitments for broadband services.¹¹⁵ In fact, there is no indication that the FCC has even considered this as a basis for jurisdiction.¹¹⁶ This may be in part because no United States government body has examined whether these commitments have been or should be implemented—the review process consists only of regular annual reviews by the United States Trade Representative seeking input on and reviewing compliance with other countries' trade agreement commitments.¹¹⁷ This is despite express language in Section 303(r) of the Communications Act, which permits the FCC to implement treaties.¹¹⁸ Accordingly, the FCC should

Agreement on Trade in Services (GATS)), 36 I.L.M. 354, 367-68 (1997) (Reference Paper) (provisions related to interconnection, including negotiations, transparency, and dispute resolution).

¹¹¹ *Id.* (dispute resolution).

¹¹² *See* Open Internet Order, *supra* note 16 (adopting three basic rules for preserving Internet openness and net neutrality: transparency, no blocking, and non-discrimination).

¹¹³ WTO: Agreement on Telecommunications Services (Fourth Protocol to the General Agreement on Trade in Services (GATS)), 36 I.L.M. 354, 367-69 (1997) (Reference Paper) (definitions and principles).

¹¹⁴ *See* 47 U.S.C. 303(r) (authority to prescribe rules and regulations necessary to carry out a treaty); Schedule of Specific Commitments by the United States (2nd Suppl.) at 2-3, WTO: Agreement on Telecommunications Services (Fourth Protocol to the General Agreement on Trade in Services (GATS)), GATS/SC/90/Suppl.2 (Apr. 11, 1997) (undertaking obligations contained in reference paper); WTO: Agreement on Telecommunications Services (Fourth Protocol to the General Agreement on Trade in Services (GATS)), 36 I.L.M. 354, 367-69 (1997) (Reference Paper) (definitions and principles).

¹¹⁵ Schedule of Specific Commitments by the United States (2nd Suppl.) at 2-3, WTO: Agreement on Telecommunications Services (Fourth Protocol to the General Agreement on Trade in Services (GATS)), GATS/SC/90/Suppl.2 (Apr. 11, 1997).

¹¹⁶ *See* Press Release, FCC, FCC Acts to Preserve Internet Freedom and Openness (Dec. 21, 2010), available at <http://commcns.org/1bQUxzg> (summarizing the FCC's jurisdictional bases for implementing Internet rules and regulations). *See also* KATHLEEN ANN RUANE, CONG. RESEARCH SERV., R40234, THE FCC'S AUTHORITY TO REGULATE NET NEUTRALITY AFTER COMCAST V. FCC 13-15, 19-22 (2013).

¹¹⁷ Part of the issue here may be that the FCC has not engaged in its own process of annual or other regular review to ensure its rules comply with U.S. treaty commitments. Because Section 303(r) of the Communications Act is discretionary, such a review process is optional. *See* 47 U.S.C. 303(r).

¹¹⁸ Section 303(r) of the Communications Act permits the FCC to Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any

consider, after appropriate notice and comment, the use of the BATS in adopting further net neutrality regulations. It provides the United States with a solid basis to exercise jurisdiction in this area.¹¹⁹ Furthermore, failure to implement the commitments of the BATS for broadband services leaves the United States at risk to WTO dispute settlement.¹²⁰

VI. CONCLUSION

Net neutrality continues to be a very controversial area. Both sides have focused significantly on whether the FCC has the appropriate jurisdiction to act in this area.¹²¹ Over time, the jurisdictional basis that the FCC has utilized has been uncertain and the recent Net Neutrality decision¹²² has resulted in the FCC's jurisdiction being made uncertain. However, what is certain is that the BATS and Section 303(r) of the Communications Act provide the FCC with a clear jurisdictional basis for the implementation of net neutrality rules. In fact, the United States' failure to implement these requirements means it is in violation of its treaty requirements.

international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

47 U.S.C. 303(r).

¹¹⁹ See 47 U.S.C. 303(r); WTO: Agreement on Telecommunications Services (Fourth Protocol to the General Agreement on Trade in Services (GATS)) (Reference Paper), 36 I.L.M. 354, 367-69 (1997) (definitions and principles); Schedule of Specific Commitments by the United States (2nd Suppl.) at 2-3, WTO: Agreement on Telecommunications Services (Fourth Protocol to the General Agreement on Trade in Services (GATS)), GATS/SC/90/Suppl.2 (Apr. 11, 1997).

¹²⁰ Boutheina Guermazi, *Exploring the Reference Paper on Regulatory Principles*, WTO, available at <http://commens.org/1btYUpi> (last visited Sept. 26, 2013) (explaining that once the reference paper is adopted, "the principles . . . become binding commitments and enforceable through dispute settlement under WTO.").

¹²¹ See RUANE, *supra* note 115.

¹²² See Net Neutrality Decision, *supra* note 13.