
UNSCRAMBLING THE FCC'S NET NEUTRALITY ORDER: PRESERVING THE OPEN INTERNET—BUT WHICH ONE?

Larry Downes[†]

I. INTRODUCTION

This article offers a critical reading of the Federal Communications Commission's ("FCC" or "Commission") December 23, 2010 Report and Order entitled "Preserving the Open Internet."¹ This year-long proceeding, concluded just as the 2010 lame duck Congress was about to adjourn, resulted in significant new regulations for some broadband Internet access providers.

The new rules enact into law a version of what is sometimes referred to as the "net neutrality" principle. Proponents of net neutrality regulation argue that the Internet's defining feature—and the key to its unarguable success—is the content-neutral routing and transport of individual packets through the network by Internet service providers, a feature of the network that requires strong protection and enforcement by the FCC.² The FCC describes its new rules as rules of the road to ensure a "level playing field" for application and other service providers in accessing U.S. markets, consumers, and devices.³

[†] Larry Downes is Senior Adjunct Fellow with TechFreedom. His books include LARRY DOWNES, *UNLEASHING THE KILLER APP: DIGITAL STRATEGIES FOR MARKET DOMINANCE* (Harvard Business School Press 1998) and, most recently, LARRY DOWNES, *THE LAWS OF DISRUPTION: HARNESSING THE NEW FORCES THAT GOVERN LIFE AND BUSINESS IN THE DIGITAL AGE* (Basic Books 2009). This article was adapted from testimony delivered on February 15, 2011, before the House Judiciary Committee's Subcommittee on Intellectual Property, Competition, and Internet. *Ensuring Competition on the Internet: Net Neutrality and Antitrust Before the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Larry Downes, Senior Adjunct Fellow, TechFreedom). The author thanks Berin Szoka and Adam Marcus for helpful comments and corrections on an earlier draft.

¹ *In re Preserving the Open Internet*; Broadband Industry Practices, *Report and Order*, 25 F.C.C.R. 17905 (Dec. 21, 2010) [hereinafter *Open Internet Order*].

² See Kim Hart and Sara Kehaulani Goo, *Tech Faceoff: Net Neutrality in the Eye of the Beholder*, WASH. POST (July 2, 2006), <http://commcns.org/sV1fjD>.

³ See Tim Wu, *Net Neutrality FAQ*, <http://commcns.org/rOeb2M> (last visited Oct. 7, 2011). Wu is generally regarded as having coined the term "net neutrality," which does not,

Yet many who share the enthusiasm of all five Commissioners for the Open Internet—and not just the three Commissioners who voted to approve the new regulations—were troubled by the politics of the proceeding and the scope of the resulting Order.⁴ The Open Internet rulemaking dominated the agency's agenda for the first year of Chairman Julius Genachowski's term, pushing higher priority issues, including a looming mobile broadband spectrum crisis and reform of the archaic Universal Service Fund, to the backburner.⁵ Approval for Comcast's merger with NBC Universal was repeatedly delayed.⁶ In the controversy spawned by the net neutrality proceeding, the agency's visionary National Broadband Plan was largely forgotten.⁷

In the end, the agency failed to produce any evidence of a need for regulatory intervention to “preserve” this robust ecosystem. Nor could it overcome a chorus of criticism from Congress and legal academics, who continued to remind the FCC that it had no authority from Congress to manage engineering practices of broadband access providers.⁸ The likelihood is very high that legal challenges will result in a ruling that the rulemaking was beyond the agency's limited jurisdiction.⁹

As with any lawmaking involving disruptive technologies, moreover, the risk of unintended consequences is high.¹⁰ In its haste to pass rules before the

however, appear in the text of the *Open Internet Order*. The FCC prefers the term “Open Internet.” Chloe Albanesius, *What Do the FCC's Net Neutrality Rules Mean For You?*, PCMAG (Dec. 22, 2010), <http://commcns.org/veUgEM>.

⁴ See Grant Gross, *Net Neutrality Rules Aren't Strong Enough for Broadband*, IDG NEWS SERVICE (Oct. 3, 2011), <http://commcns.org/voTTYW>; Tina Nguyen, *Liberal Group Challenges FCC Net Neutrality Ruling*, DAILY CALLER (Sept. 28, 2011), <http://commcns.org/rYqP10>.

⁵ See Larry Downes, *Spectrum Worries at CES: Déjà Vu All Over Again*, CNET NEWS (Jan. 8, 2011), <http://commcns.org/sTT9Vm>; Larry Downes, *Is Net Neutrality Blocking FCC Spectrum Auctions?*, CNET NEWS (July 29, 2011), <http://commcns.org/sbi5zC>; Sara Jerome, *End of the Julius Genachowski Era May Come Soon at the FCC*, THE HILL (Mar. 9, 2011), <http://commcns.org/vEnnEj>.

⁶ See *In re Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees*, Order, 25 F.C.C.R. 3802 (Apr. 16, 2010); Commission Announces Revised Pleading Schedule for its Review of Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., to Assign and Transfer Control of FCC Licenses, *Public Notice*, 25 F.C.C.R. 4407 (May 5, 2010); *In re Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees*, *Memorandum Opinion and Order*, 26 F.C.C.R. 4238 (Jan. 18, 2011).

⁷ Chloe Albanesius, *FCC National Broadband Plan One Year Later: Where Are We Now?*, PCMAG (Mar. 17, 2011), <http://http://commcns.org/rKCQJV>; Transcript: *FCC Chief On Defensive Over Stalled Broadband Plan*, NPR (Oct. 6, 2010), <http://commcns.org/tOWaGR>.

⁸ See, e.g., H.R.J. Res. 37, 112th Cong. (2011).

⁹ See Larry Downes, *Net Neutrality: The Fight Goes On*, FORBES (Apr. 12, 2011), <http://commcns.org/skmDfp>.

¹⁰ See Larry Downes, *The Laws of Disruption: Harnessing the New Forces that Govern*

opening of a new Congress with a Republican-controlled House, the Commission's Democratic majority interfered with the continued evolution of this vital technology.

This article dissects several key aspects of the Open Internet Order, including the evolution of what the agency terms its "prophylactic" rules, the perceived market failures that led the agency to issue them, and a number of approved exceptions, caveats, and exemptions that reveal a fundamental misunderstanding by the agency of the meaning of "the Open Internet" in the first place. Additionally, it includes a discussion of the largely unexamined costs of enforcing the rules, as well as the most significant holes in the agency's legal justification for issuing them.

II. BACKGROUND

The FCC published the Open Internet Order at the last possible moment before the 2010 Christmas holiday, capping off years of debate on the subject of whether or not the agency needed to step in to save the Internet.¹¹ The end of the process was as controversial as the start—only Chairman Genachowski fully supported the Order. His two Democratic colleagues concurred in the vote (one approved in part and concurred in part) and issued separate opinions indicating their belief that stronger measures and a sounder legal foundation were required to withstand likely court challenges.¹² The two Republican Commissioners vigorously dissented in strident terms unusual in this kind of regulatory action.¹³

How did the FCC arrive at this unsatisfactory conclusion? In October 2009, the agency first proposed the new rules, but their efforts were upended by an April 2010 court decision that held the agency lacked authority to regulate broadband Internet access providers.¹⁴ After flirting with the dangerous idea of "reclassifying" broadband to bring it under the old rules reserved for what's left of traditional telephone service ("Title II"), the Chairman backed away.¹⁵ Speaking to state regulators in mid-November, the Chairman made no mention of net neutrality or reclassification, saying only that "At the FCC, our primary

Life and Business in the Digital Age 18-19 (Basic Books 2009).

¹¹ See, e.g., Declan McCullagh, *Ten Things that Finally Killed Net Neutrality*, CNET NEWS (Sept. 6, 2007), <http://commcns.org/tgZDtF>.

¹² *Open Internet Order*, *supra* note 1, at 18044-48 (Copps, Comm'r, concurring); *id.* at 18082-83 (Clyburn, Comm'r, approving in part, concurring in part).

¹³ *Id.* at 18049 (McDowell, Comm'r, dissenting); *id.* at 18084 (Baker, Comm'r, dissenting).

¹⁴ *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010).

¹⁵ *In re Framework for Broadband Internet Service, Notice of Inquiry*, 25 F.C.C.R. 7866, 7867 (June 17, 2010).

focus is simple: the economy and jobs.”¹⁶

Just a few days later, however, at the Web 2.0 Summit in San Francisco, the Chairman promised that net neutrality rules would be finalized after all, and soon. The reaction was frenzied.¹⁷ From then until the Commission’s final meeting of the year, Commissioners and agency watchers lobbied hard and voiced outrage with changing drafts of the rules, whose contents were not entirely clear.¹⁸ In oral comments delivered at the December meeting, two Commissioners complained that they had not seen the version they were to vote on until midnight the night before the vote.¹⁹ Moreover, journalists covering the event did not have the document all five Commissioners referenced repeatedly in their spoken comments, and had to wait two more days for all the separate opinions to be collated and published.²⁰

This attempt to rush the Open Internet Order out the door was likely related to a change in congressional composition, though indirectly. Since FCC Commissioners do not serve at the whim of Congress or the President, the 2010 mid-term election results technically had no effect on the agency; even with a Republican House, successful legislation to block or overturn FCC actions is unlikely. But passing *some* version of Open Internet rules as Congress was nearly adjourned, in the end, was perhaps the best chance the Chairman had for getting these new rules into the Federal Register. It also enabled the FCC to divert political pressure elsewhere. Tired of the rancor and distraction of net neutrality, the new rules—incomplete, awkward, and without a solid legal foundation—move the issue from the offices of the FCC to the courts and Congress.

Even before the Order was published in the Federal Register, Verizon and MetroPCS challenged its validity in the U.S. Court of Appeals for the D.C. Circuit.²¹ However, since the Order was deemed “a rulemaking document subject to publication in the Federal Register, and is not a licensing decision

¹⁶ Julius Genachowski, Chairman, FCC, *Our Information Infrastructure: Opportunities and Challenges*, Prepared Remarks at NARUC Annual Meeting at 1 (Nov. 15, 2010), <http://commcns.org/s4Fe3i>.

¹⁷ Sara Jerome, *FCC Chairman Genachowski Knocks Google, Verizon for Slowing Net-Neutrality Efforts*, THE HILL (Nov. 17, 2010), <http://commcns.org/vxpc1Y>.

¹⁸ Ryan Singel, *FCC Net Neutrality Rules Slammed from All Sides*, WIRED (Dec. 20, 2010), <http://commcns.org/unlHhO>; Joel Rose, *Critics: ‘Net Neutrality’ Rules Full of Loopholes*, NPR (Dec. 22, 2010), <http://commcns.org/tru1hU>.

¹⁹ See *Open Internet Order*, *supra* note 1, at 18049-50 (McDowell, Comm’r, dissenting).

²⁰ See Amy Gahrn, *Why Is FCC’s ‘Net Neutrality’ Order Still a Secret?*, CNN TECH (Dec. 21, 2010), <http://commcns.org/u77GHP>; Stacey Higginbotham, *FCC’s New Net Neutrality Compromise Is Better*, GIGAOM (Dec. 20, 2010), <http://commcns.org/rjxyX>.

²¹ See Marguerite Reardon, *Verizon Fires Legal Shot Against Net Neutrality Rules*, CNET NEWS (Jan. 20, 2011), <http://commcns.org/u2p3sp>; Marguerite Reardon, *FCC Moves to Dismiss Net Neutrality Lawsuits*, CNET NEWS (Jan. 31, 2011), <http://commcns.org/rZ9hBK>.

‘with respect to specific parties,’” the suits were dismissed.²²

After months of review by both the FCC and OMB, the Order was finally published in the Federal Register on September 23, 2011, leading to a new flood of legal challenges.²³ Verizon again filed its petition for review in the D.C. Circuit, while public interest groups filed petitions in five different U.S. circuit courts of appeals in an attempt to remove the case from the D.C. Circuit, the court that had ruled against the FCC in the 2010 *Comcast* case.²⁴ Ultimately, a lottery conducted by the Joint Panel on Multidistrict Litigation determined that the D.C. Circuit would hear the consolidated petitions.²⁵

Shortly after the Commission passed the Order, Congress began its new term by pursuing two avenues for overturning the rules and limiting the FCC’s ability to enact future Internet regulations. First, Rep. Marsha Blackburn (R-TN), introduced legislation in the opening days of Congress to prohibit the agency from regulating the Internet in any way.²⁶ Second, under the Congressional Review Act, Congress attempted to undo the agency action through a joint Resolution of Disapproval, a filibuster-proof measure.²⁷ In April 2011, most House Republicans and some Democrats passed the Resolution, which would nullify the rules.²⁸ However, the pending Resolution required Democratic support in the Senate and faced a promised Presidential veto.²⁹

In the end, the Resolution failed in the Senate.³⁰ Even so, Republicans have

²² *Verizon v. FCC*, No. 11-1014, 2011 WL 1235523, at *1 (D.C. Cir. Apr. 4, 2011) (“The order will therefore be subject to judicial review upon publication in the Federal Register. . . . [T]he prematurity is incurable.”).

²³ Preserving the Open Internet, 76 Fed. Reg. 59,192 (Sept. 23, 2011) (to be codified at 7 C.F.R. pts. 0 and 8).

²⁴ See Petitions for Review of the Federal Communications Commission’s In re Preserving the Open Internet, GN Docket No. 09-191; Broadband Industry Practices; WC Docket No. 07-52, *Report and Order*, 25 F.C.C.R. 17905 (2010), *Notice of Multicircuit Petitions for Review*, attach. A (Oct. 5, 2011) (Free Press, People’s Production House, Media Mobilizing Project, Mountain Area Information Network, and Access Humboldt filed suits in the First, Second, Third, Fourth, and Ninth Circuits, respectively).

²⁵ In Re: Federal Communications Commission, In the Matter of Preserving the Open Internet, Report and Order, FCC 10-201, 76 Fed. Reg. 59192 (2011), Published on September 23, 2011, *Consolidation Order*, 1 (Judicial Panel on Multidistrict Litigation, Oct. 6, 2011), available at <http://commcns.org/sOFyyT>.

²⁶ See Internet Freedom Act, H.R. 96, 112th Cong. (2011). Specifically, the bill would prevent the FCC from “propos[ing], promulgat[ing], or issu[ing] any regulations regarding the Internet or IP-enabled services.”

²⁷ See 5 U.S.C. § 802 (2006).

²⁸ H.R.J. RES. 37, 112th Cong. (as passed by the House and placed on the Senate Calendar, April 13, 2011).

²⁹ See Larry Downes, *Tech Priorities for New Congress: From Old to New*, CNET NEWS (Jan. 19, 2011), <http://commcns.org/s3hKma>; Larry Downes, *The Net Neutrality Fight Goes On*, FORBES (Apr. 12, 2011), <http://commcns.org/skmDfp>.

³⁰ Josh Smith, *Senate Blocks Resolution to Overturn Net Neutrality Rules*, THE ATLANTIC

already tried to use the Open Internet Order as a bargaining chip in on-going budget negotiations.³¹ Congress, meanwhile, has made life difficult for the agency by threatening to hold up appropriations to implement the Order.³² Key Members have increased oversight of the agency, and have demonstrated an unwillingness to grant the FCC any new authority while the Open Internet rules stand.³³

III. “NOT NEUTRALITY” OR GOVERNMENT TAKEOVER? THE RULES REVEALED

In the end, the FCC voted to approve three new rules that apply to some broadband Internet providers. One requires providers to disclose their network management practices to consumers, which the majority refers to as “transparency.”³⁴ The second prohibits broadband Internet service providers from blocking content, applications, services, and non-harmful devices; a lesser standard is applied to mobile broadband providers.³⁵ The last forbids fixed broadband providers (*e.g.*, cable and telephone) from exercising “unreasonable” discrimination in delivering lawful network traffic requested by consumers.³⁶

There has been a great deal of criticism of the final rules, much of it reaching a fevered pitch even before the text was made public. At one extreme, advocates for stronger rules have rejected the new rules as meaningless, as

(Nov. 10, 2011), <http://commcns.org/sCMMjb>.

³¹ Compare Kathleen Hennessey, *Tensions Escalate Over Republican Budget Cuts*, L.A. TIMES, Feb. 18, 2011, <http://commcns.org/sKPQMH> (discussing inclusion of amendment barring funding for the FCC to enforce open Internet rules), with Julie Hirschfeld Davis et al., *Wrangle Over U.S. Budget Compromise Defines Next Two Years' Fiscal Debate*, BLOOMBERG (Apr. 9, 2011), <http://commcns.org/uRcaVN> (noting the removal of Republican language preventing funding for open Internet items being removed from the final Fiscal Year 2011 spending package).

³² Juliana Gruenwald, *GOP Taking Aim Again At Net Neutrality Through Spending Measures*, NAT'L J. (June 15, 2011), <http://commcns.org/tkg9BE>.

³³ For example, House Oversight Committee Chairman Darrell Issa (R-CA) has said, “Until net neutrality is rolled back, I don't believe Congress is going to be willing to give the FCC any new power.” See Sara Jerome, *Issa: No Auction Authority for FCC Unless Net Neutrality Is Repealed*, THE HILL (Apr. 19, 2011), <http://commcns.org/uUJLxU>; Larry Downes, *Is Net Neutrality Blocking FCC Spectrum Auctions?*, CNET NEWS (July 29, 2011), <http://commcns.org/sbi5zC>.

³⁴ *Open Internet Order*, *supra* note 1, app. A § 8.3 (amending Part 8 of Title 47 of the Code of Federal Regulations and requiring public disclosure of a broadband provider's network management practices, performance and commercial terms).

³⁵ *Id.*, app. A § 8.5 (amending Part 8 of Title 47 of the Code of Federal Regulations and prohibiting the blocking of the above-mentioned services, subject to “reasonable network management”).

³⁶ *Id.*, app. A § 8.7 (adding Part 8 to the Code of Federal Regulations).

“fake net neutrality,”³⁷ “not neutrality,”³⁸ or the latest evidence that the FCC has been captured by the industries it regulates.³⁹ On the other end, critics decry the new rules as a government takeover of the Internet and blatant censorship.⁴⁰

In all the furor, one aspect of the rules that was not seriously discussed is just how little the final text differs from the draft proposed by the FCC in October 2009.⁴¹ Indeed, many of those critical of the final rules as being too watered down forget their enthusiasm for the initial draft, which in key respects did not change at all in the intervening year of comments, conferences, hearings, and litigation.⁴²

Many of the changes that were made can be traced to comments the FCC received on the original draft, as well as interim proposals from industry and Congress. In particular, a legislative framework offered jointly by Verizon and Google in August 2010⁴³ and a bill circulated by Rep. Henry Waxman just before the 2010 mid-term elections⁴⁴ seemed to influence many of the FCC’s limited changes.

This section describes the final rules and notes how and where they differ from the rules originally proposed.

³⁷ See, e.g., Brian Montopoli, *Liberals Lash Out at ‘Fake Net Neutrality’*, CBS NEWS (Dec. 21, 2010), <http://commcns.org/stXLD3>; Nate Anderson, *Why Everyone Hates New Net Neutrality Rules—Even NN Supporters*, ARS TECHNICA (Dec. 21, 2010), <http://commcns.org/rtBYmq>.

³⁸ Tim Karr, *Not Neutrality*, SAVE THE INTERNET (Dec. 22, 2010), <http://commcns.org/snPatl>. The Save the Internet campaign is managed by Free Press, an ardent supporter of net neutrality.

³⁹ See *id.*

⁴⁰ See, e.g., John Fund, *The Net Neutrality Coup*, WALL ST. J. (Dec. 21, 2010), <http://commcns.org/slmTjM>; Sara Jerome, *Cato: Glenn Beck ‘Mistaken’ About Net Neutrality*, THE HILL (Dec. 9, 2010), <http://commcns.org/vjD5lM>.

⁴¹ Compare *Open Internet Order*, *supra* note 1, app. A, with *In re Preserving the Open Internet; Broadband Industry Practices, Notice of Proposed Rulemaking*, 24 F.C.C.R. 13064, app. A (Oct. 22, 2009) [hereinafter *Open Internet NPRM*].

⁴² Matt Peckham, *Net Neutrality Proponents Sued by Net Neutrality Proponents?*, TECHLAND (Sept. 29, 2011), <http://commcns.org/sU5ogL>.

⁴³ See *Verizon-Google Legislative Framework Proposal* (Aug. 9, 2010) [hereinafter V-G Proposal], <http://commcns.org/vV23Uj>; Alan Davidson, *A Joint Policy Proposal for an Open Internet*, GOOGLE PUBLIC POLICY BLOG (Aug. 9, 2010), <http://commcns.org/vrAIAp>. As a proposed “legislative framework,” the Verizon-Google proposal was addressed to Congress and not the FCC. The two companies, in other words, agreed that any Open Internet rules should be enacted legislatively rather than through an FCC rulemaking, in part because of grave doubts about the agency’s jurisdiction over broadband Internet service providers. Ars Technica’s Nate Anderson has done a great service in laying out the text of the final rules side-by-side with the proposed legislative framework offered by Verizon and Google. See Nate Anderson, *Why is Verizon Suing Over Net Neutrality Rules It Once Supported?*, ARS TECHNICA (Jan. 15, 2011), <http://commcns.org/vMjS4E>.

⁴⁴ Sara Jerome, *Draft of Waxman’s Net-Neutrality Legislation Leaked Amid Talks*, THE HILL (Sept. 17, 2010) [hereinafter Waxman Bill], <http://commcns.org/v3Nh2B>.

A. Transparency

Compare the final text of the transparency rule with the version first proposed by the FCC:

Proposed: Subject to reasonable network management, a provider of broadband Internet access service must disclose such information as is reasonably required for users and content, application and service providers to enjoy the protections specified in this part.⁴⁵

Final: 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 service 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.⁴⁶

The final transparency rule is stronger than the original proposal and clarifies what must be disclosed. Rather than the vague requirement in the draft for disclosures sufficient to “enjoy the protections” of the Open Internet rules, the final rule requires disclosures sufficient for consumers to make “informed choices” about the services for which they pay. The final version creates a standard that will be more easily enforced.

As the agency makes clear, the transparency rule has teeth.⁴⁷ While the agency declines to make specific decisions about the contents of disclosures to customers and how they must be communicated, it lays out a non-exhaustive list of nine major categories of required information, including network practices, performance characteristics, and commercial terms.⁴⁸ Given these requirements, it’s hard to imagine a complying document or posting that will not run to several pages of very small text. Though similar to the version that appeared in Rep. Waxman’s draft legislation,⁴⁹ the final transparency rule also reflects key concepts introduced in the Verizon-Google Legislative Framework Proposal from earlier in the year.⁵⁰

The rule’s broad requirement, unfortunately, may be its undoing. Like other mandatory disclosures accompanying complex products or services (*e.g.*, mortgages, credit cards, pharmaceuticals, electronic devices, privacy notices, etc.) information “sufficient” to make an “informed” choice is usually far more

⁴⁵ *Open Internet NPRM*, *supra* note 41, app. A § 8.15.

⁴⁶ *Open Internet Order*, *supra* note 1, app. A § 8.3.

⁴⁷ *Id.* ¶¶ 53-61.

⁴⁸ *Id.* ¶ 56.

⁴⁹ Compare Waxman Bill, *supra* note 44, with *Open Internet Order*, *supra* note 1, app. A § 8.3.

⁵⁰ Compare V-G Proposal, *supra* note 43, at 1-2, with *Open Internet Order*, *supra* note 1, app. A § 8.3.

information than any non-expert consumer could possibly absorb and evaluate. At least one study confirms what is obvious to any consumer—the more information one is given, the less likely he or she is to pay attention to any of it, including what may be important.⁵¹

The FCC recognizes that risk, but believes it has an answer. The majority notes that a “key purpose of the transparency rule is to enable third-party experts such as independent engineers and consumer watchdogs to monitor and evaluate network management practices, in order to surface potential open Internet violations.”⁵²

Perhaps the agency has in mind here organizations like the Broadband Internet Technical Advisory Group (“BITAG”), which was been established by a broad coalition of participants in the Internet ecosystem to develop “consensus on broadband network management practices or other related technical issues.”⁵³ Alternatively, it might imagine that some of the public interest groups who have most strenuously rallied for the rules will become responsible stewards of their implementation, trading the pens of political rhetoric for responsible analysis and advocacy to their members and other consumers.

Whether or not the disclosures change the behavior of ISPs or consumers, they will certainly cost time and money for both. While the Commission believes that, “[f]or a number of reasons . . . the costs of the disclosure rule we adopt today are outweighed by the benefits of empowering end users and edge providers to make informed choices,”⁵⁴ many critics believe otherwise.⁵⁵ The Commission did not provide support for any of its “reasons,” and offered no details on either the likely costs or benefits of the transparency rule. Indeed, the Commission refused to conduct any market power analysis, believing it unnecessary.⁵⁶

⁵¹ See generally Florencia Marotta-Wurgler, *Does Disclosure Matter?*, NYU CENTER FOR LAW, ECONOMICS, AND ORGANIZATION (2010), available at <http://commcns.org/rtv3Nr>.

⁵² *Open Internet Order*, *supra* note 1, ¶ 60.

⁵³ BROADBAND INTERNET TECHNICAL ADVISORY GROUP, <http://www.bitag.org/> (last visited Oct. 6, 2011).

⁵⁴ *Open Internet Order*, *supra* note 1, ¶ 59.

⁵⁵ See Gerald R. Faulhaber and David J. Farber, *The Open Internet: A Customer-Centric Framework*, 4 INT'L J. COMM. 302 (2010); Gerald R. Faulhaber, *Economics of Net Neutrality: A Review*, COMMS. AND CONVERGENCE REV., vol. 3, no. 1, 2011. While the Office of Management and Budget ultimately approved the order, it held up publication of the new rules for several months. Rumors circulated that OMB was not satisfied the FCC had given adequate consideration to the cost to providers of the transparency rule, as required by the Paperwork Reduction Act. See Grant Gross, *FCC Moves Toward Implementing Net Neutrality Rules*, COMPUTERWORLD (June 30, 2011), <http://commcns.org/uj96qg>. See also Steve Augustino, *Inside the Burdens of the Net Neutrality Rules*, TELECOM LAW MONITOR (Aug. 11, 2011), <http://commcns.org/rJVh86>.

⁵⁶ See *Open Internet Order*, *supra* note 1, ¶ 32 n.87.

B. Blocking

The final version of the blocking rule consolidated the “Content,” “Applications and Services,” and “Devices” rules of the original draft.⁵⁷ The final rule states:

A person engaged in the provision of fixed broadband Internet access services, insofar as such person is so engaged, shall not block lawful content, applications, services or non-harmful devices, subject to reasonable network management.⁵⁸

The limitations of the final blocking rule have generated the most criticism of all the rules. First, copyright reformers objected to the word “lawful” appearing in the rule.⁵⁹ “Lawful” content, applications, and services do not include activities that constitute copyright and trademark infringements. As a result, the rule allows broadband providers to use whatever mechanisms they want to reduce or eliminate traffic involving illegal file-sharing, spam, viruses and other malware.⁶⁰ A provider who completely blocks access to a website offering unlicensed products is not violating the rules.⁶¹

The rule would appear to give ISPs wide latitude in dealing with “unlawful” content. Even sites that are only partially unlawful, for example, may be blocked without violating the rule. The majority, after all, finds that in the interests of consumer privacy it is “generally preferable to neither require nor encourage broadband providers to examine Internet traffic in order to discern which traffic is subject to the rules,” or perform what is known as deep packet inspection.⁶² Without deep packet inspection, however, it is not technically possible to determine whether a consumer is trying to access the lawful or unlawful portion of a mixed website.

A second concern is the repeated caveat for “reasonable network management,” which gives access providers leeway to balance traffic during peak times, limit users whose activity may be harming other customers (*e.g.*,

⁵⁷ See *Open Internet NPRM*, *supra* note 41, app. A §§ 8.5-8.9.

⁵⁸ *Open Internet Order*, *supra* note 1, app. A § 8.5.

⁵⁹ Cindy Cohn, *A Review of the Verizon and Google Net Neutrality Proposal*, ELECTRONIC FRONTIER FOUNDATION (Aug. 10, 2010), <http://commcns.org/u3y4oD>.

⁶⁰ *Open Internet Order*, *supra* note 1, ¶¶ 107, 111. See also *id.*, app. A § 8.9 (“Nothing in this part prohibits reasonable efforts by a provider of broadband Internet access service to address copyright infringement or other unlawful activity.”).

⁶¹ *Id.* ¶¶ 107, 111. See also *id.*, app. A § 8.9 (“Nothing in this part prohibits reasonable efforts by a provider of broadband Internet access service to address copyright infringement or other unlawful activity.”). Indeed, they may be required by court order to block access to entire domains under the 2008 PRO-IP Act, which the Department of Homeland Security’s Immigration and Customs Enforcement division has been using to “seize” registrations of domains it believes are involved in copyright and trademark infringement. See Larry Downes, *Five Essential Changes to Protect IP Act*, CNET NEWS (Aug. 17, 2011), <http://commcns.org/ua5ell>.

⁶² *Open Internet Order*, *supra* note 1, ¶ 48.

continuous and very large file transfers), and other “legitimate network management” purposes.⁶³ Critics argue the more flexible definition of “reasonable network management” in the final rules, which takes into account “the particular network architecture and technology of the broadband Internet access service,” removed the sting of the draft rule.⁶⁴

But these are not substantive modifications. The original draft of the rules included the limitation for “reasonable network management,” and refused to apply any of the rules to unlawful activities.⁶⁵ The definition of “reasonable network management” in the draft is different, but functionally equivalent, to the final version.

The more substantial objection is to the special treatment for mobile broadband providers, which may block applications, services, or devices without violating the rule.⁶⁶ Specifically, the rule mandates that mobile broadband providers

shall not block consumers from accessing lawful websites, subject to reasonable network management, nor shall such person block applications that compete with the providers’ voice or video telephony services, subject to reasonable network management.⁶⁷

This carve-out for mobile broadband is a significant departure from the original rules, because the draft rule did not distinguish between fixed and mobile Internet providers.⁶⁸ The final rule also has an exception to the exception for applications, such as VoIP and video, which compete with the provider’s own offerings.⁶⁹ That special treatment does not keep mobile providers from using “app stores” to exclude services they do not approve.⁷⁰

The shift to a more nuanced rule should not be surprising. It was foreshadowed by the Commissioners in the NPRM, who acknowledged that different technologies “may require differences in how, to what extent, and when the principles apply.”⁷¹ For example, given the constraints on mobile networks, what constitutes “reasonable network management” might include

⁶³ *Id.* ¶ 82.

⁶⁴ Compare *id.* ¶ 82, with *Open Internet NPRM*, *supra* note 41, ¶ 135. See also Rahul Gaitonde, *MetroPCS Accused of Violating Open Internet Order*, BROADBANDANDBREAKFAST (Jan. 20, 2011), <http://commcns.org/sVty11>.

⁶⁵ *Open Internet NPRM*, *supra* note 41, ¶ 131-140.

⁶⁶ Larry Downes, “Fake Neutrality” or Government Takeover?: Reading the FCC’s Net Neutrality Report (Part III), TECHLIBERATION (Jan. 5, 2011), <http://commcns.org/uMTzPS>. See Press Release, *Free Press Files Suit to Challenge FCC’s Open Internet Rules*, FREE PRESS (Sept. 28, 2011), <http://commcns.org/sKfHpi>.

⁶⁷ *Open Internet Order*, *supra* note 1, app. A § 8.5.

⁶⁸ The October 2009 NPRM did express concern about applying the same rule to fixed and mobile broadband. *Open Internet NPRM*, *supra* note 41, ¶ 13.

⁶⁹ *Open Internet Order*, *supra* note 1, ¶ 101.

⁷⁰ *Id.* ¶ 102.

⁷¹ *Open Internet NPRM*, *supra* note 41, ¶ 13.

more expansive limits on customer use of high-bandwidth applications using voice and video. Given the agency's unease about mobile, the NPRM sought comment on these differences and asked for further comment in a later Public Notice.⁷² Several parties pointed out that wireless broadband is a newer technology and one still very much in development.⁷³ They argued that robust competition could likely police blocking practices unwanted by consumers.⁷⁴

The majority took these concerns into account in the final rule, excluding mobile providers from more stringent requirements for fixed broadband. This was not so much a reversal as a return to prior policy. The FCC's 2005 Open Internet policy statements—from which the draft and final rules derive—applied only to fixed broadband access.⁷⁵ As a result, it was the NPRM's tentative inclusion of mobile broadband that surprised many in the industry.⁷⁶

C. Unreasonable Discrimination

The third rule states that providers of “fixed” broadband Internet access service “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.”⁷⁷

There were two significant changes to the final rule. The draft rule, like the blocking rules, would have applied to all broadband providers, including

⁷² See *id.* ¶ 171-174; Further Inquiry Into Two Under-Developed Issues in the Open Internet Proceeding, *Public Notice*, 25 F.C.C.R. 12637 (Sept. 1, 2010).

⁷³ Charles M. Davidson & Bret T. Swanson, *Net Neutrality, Investment & Jobs: Assessing the Potential Impacts of the FCC's Proposed Net Neutrality Rules on the Broadband Ecosystem* § 2.2.1 (Advanced Communications Law & Policy Institute, New York Law School) (2010).

⁷⁴ *In re* Preserving the Open Internet; Broadband Industry Practices, *Comments of AT&T*, GN Docket No. 09-191, WC Docket No. 07-52, at 86-87 (Jan. 14, 2010).

⁷⁵ *In re* Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Servs., Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Servs.; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, Inquiring Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, *Policy Statement*, 20 F.C.C.R. 14986 (Aug. 5, 2005).

⁷⁶ See *Open Internet NPRM*, *supra* note 41, ¶ 13. The first indication that the majority was considering a return to the original policy came with the V-G Proposal. Following intense, multi-party private negotiations at the FCC, the former net neutrality adversaries jointly released a proposed legislative framework that specified different treatment for mobile broadband. As the V-G proposal noted, “Because of the unique technical and operational characteristics of wireless networks, and the competitive and still-developing nature of wireless broadband services, only the transparency principle would apply to wireless at this time.” See V-G Proposal, *supra* note 43.

⁷⁷ *Open Internet Order*, *supra* note 1, ¶ 68.

mobile providers.⁷⁸ However, applying the discrimination rule to mobile providers proved to be more contentious than applying the blocking rules and generated substantial opposition.⁷⁹ In the end, the FCC agreed with the Verizon-Google and Representative Waxman's proposals, which both excluded mobile broadband from the discrimination rule.⁸⁰

The second change involves a subtle but significant difference in terminology. The draft rule required that "a broadband Internet access service provider . . . treat lawful content, applications, and services in a nondiscriminatory manner."⁸¹ The key change is between "nondiscrimination" (draft), which prohibits all forms of differential network treatment, and "unreasonable discrimination" (final), which allows discrimination so long as it is not unreasonable.

The migration from a strict nondiscrimination rule subject to reasonable network management to a rule against "unreasonable" discrimination can also be traced through the proposed frameworks.⁸² According to the majority, the final Order agrees "with the diverse group of commenters who argue that any nondiscrimination rule should prohibit only unreasonable discrimination."⁸³ Though advocates for stronger rules complained that "unreasonable" is a nebulous term,⁸⁴ it should be noted that it is the only term of several proposed with understood legal meaning, particularly in the context of the FCC's long history of rulemaking and adjudication.⁸⁵

⁷⁸ See *Open Internet NPRM*, *supra* note 41, ¶ 13. See also Ensuring Competition on the Internet: Net Neutrality and Antitrust: Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary, 112th Cong. 112-13 (2011) (statement of Larry Downes, Senior Adjunct Fellow, TechFreedom).

⁷⁹ See, e.g., *In re Preserving the Open Internet; Broadband Industry*, *Comments of Massachusetts Institute of Technology*, GN Docket No. 09-191, WC Docket No. 07-52 (Jan. 14, 2010).

⁸⁰ V-G Proposal, *supra* note 43; Waxman Bill, *supra* note 44, § 12(b).

⁸¹ *Open Internet NPRM*, *supra* note 41, ¶ 16.

⁸² V-G Proposal, *supra* note 43 (captioning its version as a "Non-Discrimination Requirement," but actually banning only "undue discrimination against any lawful Internet content, application, or service in a manner that causes meaningful harm to competition or to users."); Waxman Bill, *supra* note 44, § 12(a)(2) (applying a somewhat different standard for wireline providers, who "shall not unjustly or unreasonably discriminate in transmitting lawful traffic over a consumer's wireline broadband Internet access service.").

⁸³ *Open Internet Order*, *supra* note 1, ¶ 77.

⁸⁴ *In re Preserving the Open Internet; Broadband Industry Practices*, *Comments of Google, Inc.*, GN Docket No. 09-191, WC Docket No. 07-52 (Jan. 14, 2010).

⁸⁵ For example, the earliest railroad regulations, closely linked to the origin of the FCC and its authority over communications industries, required "reasonable" rates of carriage, and empowered the Interstate Commerce Commission to intervene and eventually set the rates itself, much as the FCC later did with telephony. See Hepburn Act, 34 Stat. 584 (1906); Mann-Elkins Act, 36 Stat. 539 (1910). One lesson of the railroad and telephone examples, however, is the danger of turning over to regulators decisions about which behaviors are reasonable. Briefly, regulatory capture often ends up leaving the industry

Despite the negative connotations of the word in common use, not all discrimination is bad. Discrimination simply means affording different treatment to different things. As the Order makes clear, managing Internet access and network traffic requires many forms of discrimination that are entirely beneficial to overall network behavior and to the consumer's Internet experience.⁸⁶

The draft rule, as the FCC now acknowledges, was dangerously rigid.⁸⁷ For one thing, users may *want* some kinds of traffic—*e.g.*, voice and video—to receive higher priority than text and graphics, which do not suffer from latency problems.⁸⁸ Companies operating Virtual Private Networks for their employees may likewise want to limit Web access to selected sites and activities for workers while on the job.⁸⁹ These and other examples require discrimination in favor or against some traffic.

A strict nondiscrimination rule also would have discouraged, or perhaps banned, tiered pricing, harming consumers who do not need the fastest speeds and the highest volume of downloads to accomplish what they want to do online. Without tiered pricing, such consumers effectively subsidize power-users who, unsurprisingly, are the most vociferous objectors to pricing based on usage.⁹⁰ Discrimination may also be necessary to manage congestion during peak usage periods or when failing nodes put pressure on the backbone.⁹¹ Discrimination against spam, viruses and other malware, much of which is not “lawful,” is also permitted and indeed encouraged.⁹²

So what forms of discrimination are “unreasonable” in the context of the Open Internet? The Verizon-Google proposal gets to the heart of the problem by singling out only discrimination that “causes meaningful harm to competition or to users.”⁹³ This is essentially the consumer welfare standard at the heart of antitrust law, one that has long been proposed as the basis for meaningful regulation of the Open Internet.⁹⁴

unable to respond to new forms of competition from disruptive technologies, with disastrous consequences. See LARRY DOWNES, UNLEASHING THE KILLER APP: DIGITAL STRATEGIES FOR MARKET DOMINANCE 24-25 (1998); LARRY DOWNES, THE LAWS OF DISRUPTION: HARNESSING THE NEW FORCES THAT GOVERN LIFE AND BUSINESS IN THE DIGITAL AGE (2009); Timothy B. Lee, *The Durable Internet: Preserving Network Neutrality Without Regulation*, CATO POLICY ANALYSIS 625, at 2 (Nov. 12, 2008), <http://commcns.org/vTchNR>.

⁸⁶ *Open Internet Order*, *supra* note 1, ¶ 77.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* ¶ 89.

⁹⁰ *Id.* ¶ 72.

⁹¹ *Id.* ¶ 91.

⁹² *Open Internet Order*, *supra* note 1, ¶ 90.

⁹³ V-G Proposal, *supra* note 43.

⁹⁴ See Christopher S. Yoo, *What Can Antitrust Contribute to the Network Neutrality Debate?*, 1 INT'L J. COMM. 493 (2007).

The Order, however, rejected that understanding of “unreasonable,” and indeed, explicitly rejected any reliance on antitrust as a lodestone for discrimination. The majority believes that “meaningful harm to competition or to users” is simply too limited to protect their vision of the Open Internet.⁹⁵ Instead of offering an alternative definition for “unreasonable,” the majority simply notes three types of provider discrimination that are of particular “concern”:

1. Discrimination that harms actual or potential competitors (*e.g.*, VoIP providers of over-the-top telephone service, such as Skype or Vonage, that competes with the provider’s own telephone service);
2. “Inhibiting” end users from accessing content, services, and applications “of their choice” (but see the no-blocking rule, above, which already covers this); and
3. Discrimination that “impairs free expression,” including slowing or blocking access to a blog whose message the broadband provider does not approve.⁹⁶

On that last point, it is important to note that the FCC’s ability to police restrictions on “free expression” is greatly circumscribed. The passage of the Communications Decency Act in 1996 wisely gave enormous discretion to broadband Internet access providers and others to filter and otherwise curate content they do not approve of or which they believe their customers do not want to see.⁹⁷

The goal of the Act was to immunize early Internet providers like CompuServe and Prodigy from efforts to exercise editorial control over message boards whose content was provided by customers themselves.⁹⁸ The law as written, however, gives providers broad discretion in determining what types of content should be filtered. As long as the filtering is undertaken in “good faith,” there is no liability for the provider, who does not become a “publisher” for purposes of defamation law.⁹⁹ The FCC acknowledges that Section 230 limits the discrimination rule.¹⁰⁰

⁹⁵ *Open Internet Order*, *supra* note 1, ¶ 42 n.141 and ¶ 78.

⁹⁶ *Id.* ¶ 75.

⁹⁷ *See generally* The Communications Decency Act of 1996, 47 U.S.C. § 230 (1996). Specifically, § 230 of the Act states:

No provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that *the provider or user* considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.

47 U.S.C. 230(c)(2)(A) (emphasis added).

⁹⁸ *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

⁹⁹ 47 U.S.C. § 230(c)(1).

¹⁰⁰ *Open Internet Order*, *supra* note 1, ¶ 89 (“Our rule will not impose liability on a

There are also Constitutional constraints on the FCC's ability to police how providers narrow consumer access to content. The Constitution, after all, forbids the FCC, but not private parties, from regulating in ways that violate basic free speech principles.¹⁰¹ Indeed, a decision by a broadband Internet access provider to block specific content, so long as it is not motivated by anticompetitive objectives, is likely to be a form of protected speech *by the provider*.¹⁰²

The FCC has long tried to distinguish between protected speech by content providers and the practices of ISPs, which the agency describes as mere conduits for speech.¹⁰³ The latter, the majority implies, enjoy reduced First Amendment protections for their decisions to allow or forbid certain speech.¹⁰⁴

The distinction between speakers and conduits of the speech of others, however, may no longer be relevant. In *Brown v. EMA*, a case decided while the Open Internet proceeding was pending, the U.S. Supreme Court rejected a California statute that prohibited the sale of certain video games to minors on the basis of violent content. At the outset of the *Brown* case, the Court dismissed an attempt by Justice Alito to distinguish the statute as one that merely punished “the sale or rental rather than the ‘creation’ or ‘possession’ of violent depictions”—the former being entitled to lesser First Amendment scrutiny.

But that distinction, the majority notes, appears nowhere in earlier cases, “and for good reason: [i]t would make permissible the prohibition of printing or selling books—though not the writing of them. Whether government regulation applies to creating, distributing, or consuming speech,” the Court said, “makes no difference.”¹⁰⁵

broadband provider where such liability is prohibited by section 230(c)(2) of the Act.”).

¹⁰¹ U.S. CONST. amend. I.

¹⁰² For instance, local cable companies, which may be owned by individuals with strong religious or other moral convictions, can refuse to carry programming and channels the owner finds objectionable.

¹⁰³ *Open Internet Order*, *supra* note 1, ¶ 89. *But see id.* ¶ 141 (“Unlike cable television operators, broadband providers typically are best described not as ‘speakers,’ but rather as conduits for speech”). *Cf. id.* ¶ 143 (“Broadband providers are also free under this Order to offer a wide range of ‘edited’ services. If, for example, a broadband provider wanted to offer a service limited to ‘family friendly’ materials to end users who desire only such content, it could do so under the rules we promulgate today.”).

¹⁰⁴ *Id.* ¶ 89. *But see id.* ¶ 141 (“Unlike cable television operators, broadband providers typically are best described not as ‘speakers,’ but rather as conduits for speech”). *Cf. id.* ¶ 143 (“Broadband providers are also free under this Order to offer a wide range of ‘edited’ services. If, for example, a broadband provider wanted to offer a service limited to ‘family friendly’ materials to end users who desire only such content, it could do so under the rules we promulgate today.”).

¹⁰⁵ *Brown v. EMA*, No. 08–1448, slip op. at 4 n.1 (June 27, 2011). Randolph J. May has long argued that any net neutrality regulations would violate the First Amendment, a view that gains new support from the *Brown* case. *See* Randolph J. May, *Net Neutrality*

It is not yet clear how *Brown* will influence future First Amendment jurisprudence. But at least one leading proponent of the FCC's rulemaking believes the case will significantly constrain the agency's ability to apply this or any future nondiscrimination rule. The *Brown* decision, concludes Susan Crawford, "may further strengthen the carriers' arguments that any nondiscrimination requirement imposed on them should be struck down."¹⁰⁶

Though the discrimination rule was initially motivated by concerns about "pay for priority" arrangements between ISPs and content providers, the Order is unclear on whether that practice would actually violate the rule.¹⁰⁷ While a broadband provider's offering to prioritize the traffic of a particular source for a premium fee "would raise significant cause for concern," the majority also acknowledges that such a practice has thrived for years in the form of third party Content Delivery Networks ("CDNs").¹⁰⁸ CDNs replicate popular content on servers placed in strategic proximity to key hubs in the Internet, making it possible to speed such content to users when they request it.¹⁰⁹ The Order makes clear that CDNs, despite being "inconsistent" by design with the theory of an Open Internet, are allowed.¹¹⁰

In the end, the discrimination rule as written does not appear to add much to the blocking rule or to existing antitrust law. Discrimination against competing over-the-top voice and video providers would already violate antitrust law. Blocking or slowing access to disfavored content is subject to the blocking rule. And broadband Internet access providers have significant leeway in interfering with "free expression" rights of users both through Section 230 of the Communications Act and as an expression of their own First Amendment rights.

All this begs the question: what does the discrimination rule actually cover? Perhaps the answer is found in the majority's negative inference: the explicit rejection of the idea that the discrimination rule should be cabined by antitrust law and its economic foundations. At the same time, however, the majority fails to offer any alternative foundation that would direct its future enforcement of the rule. The Order says only that "[t]he rule rests on the general proposition that broadband providers should not pick winners and losers on the Internet,"

Mandates: Neutering the First Amendment in the Digital Age, 3 I/S: A JOURNAL OF LAW AND POLICY 198, 198 (2007). See also Larry Downes, *Brown v. EMA and Net Neutrality?*, TECH LIBERATION FRONT (June 28, 2011), <http://commcns.org/sTW0Fn>.

¹⁰⁶ Susan Crawford, *Reading Brown v. Entertainment Merchants Association* (June 27, 2011), <http://commcns.org/t8rGFo>.

¹⁰⁷ *Open Internet Order*, *supra* note 1, ¶ 76.

¹⁰⁸ *Id.* ¶ 76 n.235.

¹⁰⁹ *Akamai Techs, Inc., v. Mass. Inst. Tech.* 629 F.3d 1311, 1315 (Fed. Cir. 2010).

¹¹⁰ *Open Internet Order*, *supra* note 1, ¶ 76 n.235 ("We reject arguments that our approach to pay-for-priority arrangements is inconsistent with allowing content-delivery networks (CDNs).").

even when doing so is independent of competitive interests.¹¹¹ What exactly this “general proposition” means—and how “unreasonable” discrimination will be judged in the course of enforcing the rules—remains to be seen.

III. WHY NOW? THE NEED FOR “PROPHYLACTIC” RULES

The majority’s final rules, depending on how the FCC enforces them, may have a significant impact on the network management and business practices of broadband Internet service providers. Or, they may prove to be trivial, requiring only additional and largely unread disclosures. The uncertainty is a result of the agency’s failure to make clear any specific behaviors it finds dangerous to the Open Internet. Since the Commission did not perform an economic analysis to identify market failures in the Open Internet Order, actual prohibited conduct will be defined in future agency adjudications of consumer complaints. The Order, as a result, is purposefully vague.

Indeed, the majority actually refers to the Order as a set of “prophylactic rules,” a phrase that appears nine times in some form in the 87-page report.¹¹² As the phrase suggests, the FCC acknowledges that the problems to be solved by these new regulations do not yet exist. Rather, the majority worries that the lack of regulation and a rapidly changing competitive landscape *could* lead some ISPs to harm content providers, consumers, or both.¹¹³ By then, the majority fears, it will be too late for regulation to “preserve” the Open Internet.

Nothing so perilous has happened in the last ten years, as broadband Internet has become ubiquitous and increasingly feature-rich. But the Order notes that “broadband providers potentially face at least three types of incentives to reduce the current openness of the Internet.”¹¹⁴ These potential incentives

¹¹¹ *Id.* ¶ 78; Randolph May, *Infamous No. 78 (of the Net Neutrality Order)*, THE FREE STATE FOUNDATION (Jan. 5, 2011), <http://commcns.org/tHskZD> (“Paragraph No. 78 is so important because, by disclaiming reliance only on anticompetitive injury and consumer harm (generally present only when an Internet provider possesses market power), the Commission leaves itself largely at sea in enforcing its rules.”).

¹¹² *Open Internet Order*, *supra* note 1, ¶¶ 4, 11, 12, 23 n.60, 39, 41 & n.134, 85 n.266, 101.

¹¹³ Outside the scope of this article is the question of how much competition in consumer broadband Internet access advocates of FCC intervention would consider adequate for the market to police itself. The combination in the most populous regions of cable, DSL, satellite and mobile providers does not appear to be enough. Many advocates are nostalgic for the days of multiple dial-up ISPs created by the unbundling requirements of the 1996 Communications Act. But as all competitors were using the same infrastructure, it was a strange kind of competition, one that resulted in the destruction, not the awakening, of the communications industry. See Adam D. Thierer, *UNE-P and the Future of Telecom ‘Competition,’* TECHKNOWLEDGE (Feb. 1, 2003), <http://commcns.org/u13UIs>.

¹¹⁴ *Open Internet Order*, *supra* note 1, ¶ 21. These potential incentives include economic incentives, such as the temptation to disadvantage VoIP phone service providers who

involve degrading or blocking competing content, charging access fees for popular content providers, or slowing the connection to customers for content providers who do not pay premium fees to the ISP.

It appears that the majority's principal fear is that large, multi-service ISPs may exert increased control over their customers' use of the open Internet. Dominant broadband providers, for example, might one day block access for Web entertainment (e.g. Hulu, Netflix) or telephone services (e.g. Vonage, Skype, or Google Voice) that compete with services offered by the ISPs in their role as television and telephone service providers. Alternatively, ISPs could use their customers as hostages in negotiations with popular content providers, demanding access fees or other kinds of tribute in exchange for faster delivery, or perhaps any delivery at all.

Each of these "incentives" does not necessarily require FCC regulation. They would likely be policed by competitive pressures, consumer outrage, Congressional inquiries, or some combination of all three. Not surprisingly, there is a dearth of evidence that this kind of interference with the free Internet has ever occurred. Though the NPRM sought examples of non-neutral behavior,¹¹⁵ the sum total of the FCC's evidence, collected over the course of more than a year with the help of advocates who believe the "Internet as we know it" is at death's door,¹¹⁶ is nearly non-existent. Regardless, the majority weakly concluded that broadband providers will soon "face" "potential incentives" to destroy the technology that is the source of their revenue.

A. The Four Incidents

Exemplars of instances where broadband providers acted to "limit openness" should have been the heart of the Order. Instead, the Order confines four instances into just three paragraphs.¹¹⁷ To prove that these "dangers to Internet openness" are not "speculative or merely theoretical," these paragraphs describe four worrisome incidents between 2005 and 2010 that together could constitute enough evidence, according to the majority, that the Internet ecosystem is under siege. A close look at these incidents, however,

compete with similar services offered by the ISP or a parent company, incentives to increase revenues by charging "edge" application providers for access to the ISP's customers, and incentives to degrade the performance of edge providers who do not pay for priority. *Id.* ¶¶ 21-34. As the verb tense implies, all the supporting citations for these paragraphs are hypotheticals.

¹¹⁵ *Open Internet NPRM*, *supra* note 41, ¶ 50.

¹¹⁶ See, e.g., Megan Tady, *The End of the Internet as We Know it?*, IN THESE TIMES (Dec. 20, 2010), <http://commcns.org/rCpCO2>; Timothy Karr, *Obama FCC Caves on Net Neutrality—Tuesday Betrayal Assured*, THE HUFFINGTON POST (Dec. 20, 2010), <http://commcns.org/soMvoh>.

¹¹⁷ *Open Internet Order*, *supra* note 1, ¶¶ 35-37.

suggests that they prove precisely the opposite:

Madison River, a local ISP that was “a subsidiary of a telephone company” settled claims it had interfered with Voice over Internet Telephony (VoIP) applications used by its customers.

Comcast agreed to change its network management techniques after the company acknowledged slowing or blocking packets using the BitTorrent protocol.

After an unnamed “mobile wireless provider” contracted with an online payment service, the provider “allegedly” blocked customers from using competing services to pay for purchases made with mobile devices.

AT&T, at the demand of Apple, initially restricted the types of applications—prohibiting VoIP and video service Slingbox—that customers could download for their iPhones.¹¹⁸

Among these four *may* be evidence of broadband providers acting contrary to the spirit of the Open Internet, and in some cases violating the FCC’s 2005 Internet Policy Statement.¹¹⁹ Nonetheless, in the world of regulatory efficiency, focusing this much attention on just four incidents of potential or “alleged” market failures is a remarkable achievement indeed. Even assuming that these actors harbored the worst possible motives, these incidents do not amount to a pattern of any kind of behavior.

In reality, however, most of these purported instances have little or nothing to do with the kinds of potential “incentives” that motivated the rulemaking. Nor did any of the incidents require new regulations—all four were quickly and efficiently corrected. Madison River was resolved with a consent decree that explicitly eschewed any factual determinations.¹²⁰ Comcast was resolved quickly and privately long before the agency completed its adjudication.¹²¹ The

¹¹⁸ *Id.* ¶ 35.

¹¹⁹ See generally *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Servs., Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Servs.; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, Inquiring Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, *Policy Statement*, 20 F.C.C.R. 14986 (Aug. 5, 2005).

¹²⁰ *Open Internet Order*, *supra* note 1, ¶ 35; *In re Madison River Commc’ns LLC and Affiliated Cos.*, *Order*, 20 F.C.C.R. 4295, ¶ 10 (Mar. 3, 2005).

¹²¹ *Open Internet Order*, *supra* note 1, ¶ 35; *In re Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management,” *Memorandum Opinion and Order*, 23 F.C.C.R. 13028, ¶¶ 54-55 (Aug. 1, 2008) [hereinafter *Comcast Memorandum*].

case of the unnamed mobile wireless provider showed no actual harm, and apparently did not even lead to a complaint being filed with the FCC.¹²² Lastly, the iPhone incident was resolved quickly, as the FCC acknowledges, when customers put pressure on Apple to allow AT&T to permit the restricted applications.¹²³

Three of the four incidents may not even violate the final rules. For example, Comcast's actions involved blocking or slowing of packets using the BitTorrent protocol.¹²⁴ Despite the efforts by the company that markets BitTorrent to promote lawful uses of the standard, academic studies performed since the *Comcast* case was decided have found *that 90-99% of BitTorrent traffic still involves unlicensed copyright infringement.*¹²⁵ Given that the no-blocking rule prohibits blocking of "lawful content, applications, services or non-harmful devices,"¹²⁶ the vast majority of BitTorrent traffic is not subject to the FCC's new rules.

The majority's confusion over the specifics of the BitTorrent incident affected the entire proceeding. While the Order repeatedly cites the Comcast case as the leading justification for the rules,¹²⁷ the majority is equally adamant in encouraging network providers to move aggressively against customers who use the Internet to violate copyright law. The Order makes crystal clear that the new rules "do not prohibit broadband providers from making reasonable efforts to address the transfer of unlawful content or unlawful transfers of content" and that the "open Internet rules should not be invoked to protect copyright infringement"¹²⁸

¹²² *Open Internet Order*, *supra* note 1, ¶ 35. The FCC's footnote is to comments filed by the ACLU. It is unclear which mobile wireless provider is being referenced. *Id.* ¶ 35 n.106.

¹²³ *Id.* ¶ 35 n.107 (citing *In re Preserving the Open Internet*; Broadband Industry Practices, *Reply Comments of DISH Network L.L.C.*, GN Docket No. 09-191, WC Docket No. 07-52, at 7 (Nov. 4, 2010)).

¹²⁴ See generally *Comcast Memorandum*, *supra* note 121, ¶¶ 4-11.

¹²⁵ See Ed Felten, *Census of Files Available via BitTorrent*, PRINCETON CENTER FOR INFORMATION TECHNOLOGY POLICY (Jan. 29, 2010), <http://commcns.org/v0zG1i>; Mike Masnick, *Of Course Most Content Shared on BitTorrent Infringes, but that's Meaningless*, TECHDIRT (Feb. 2, 2010), <http://commcns.org/uRIYqN>; Renai LeMay, *89% of BitTorrent is Illegal: Study*, PC WORLD (July 23, 2010), <http://commcns.org/sunqq9>.

¹²⁶ *Open Internet Order*, *supra* note 1, app. A §§ 8.5, 8.9 (amending Part 8 of Title 47 of the Code of Federal Regulations). See also *A Review of the Verizon and Google Net Neutrality Proposal*, ELECTRONIC FRONTIER FOUNDATION (Aug. 10, 2010), <http://commcns.org/u3y4oD>. The nominal complainants in the *Comcast* case were using the protocol for legal file transfers, so the question of infringement and the meaning of "lawful" content under the FCC's earlier open Internet policy statements was not raised in either the adjudication or in the appeal. *Comcast Memorandum*, *supra* note 121, ¶ 42.

¹²⁷ *Open Internet Order*, *supra* note 1, ¶¶ 35, 36 n.111, 63 n.168, 75 n.227, 78 n.245.

¹²⁸ *Id.* ¶¶ 107, 111. See also *id.*, app. A § 8.9 (amending Part 8 of Title 47 of the Code of Federal Regulations) ("Nothing in this part prohibits reasonable efforts by a provider of broadband Internet access service to address copyright infringement or other unlawful

The vast majority of BitTorrent traffic can and indeed should—according to the Order—be blocked. Since some BitTorrent traffic is legal, however, Comcast’s response would appear to violate the “blocking” rule. In order to allow only the small percentage of lawful BitTorrent packets that cannot and should not be blocked, broadband access providers will need to develop sophisticated and invasive techniques that necessarily involve deep packet inspection of a great number of BitTorrent-related packets.¹²⁹ But that solution is also disfavored by the majority, and raises other concerns, including the privacy of innocent users whose packets would need to be opened and inspected.¹³⁰

Privacy concerns led the majority to discourage network management techniques that “examine Internet traffic.”¹³¹ Instead, the Commission expressed a preference that providers operate at a less intrusive level to implement the new rules.¹³² Ironically, the Commission’s preference for less intrusive network management methodologies would support exactly what the Commission chided Comcast for doing in the first place, *i.e.* to identify a particular file transfer protocol used almost exclusively for illegal transfers and, without investigating individual packets, block or at least disrupt its use on the network. While that practice would need to be disclosed under the new “transparency” rule,¹³³ the one incident the rules were intended to prevent remains not only legal, but actually encouraged.

activity.”). Perhaps the FCC, which continues to refer to BitTorrent as an “application” or believes it to be a website, simply doesn’t understand how the BitTorrent protocol actually works. *Cf. id.* ¶ 36 n.111 (applications); *id.* ¶ 78 n.245 (edge provider). BitTorrent is neither an application nor a website; it is a file sharing protocol, or as the company that develops it says, a set of “advanced, innovative technologies to efficiently deliver large files across the Internet.” See BITTORRENT, <http://commcns.org/v63iby> (last visited Nov. 18, 2011).

¹²⁹ Ben Jones, *Deep Packet Inspection and Your Privacy*, TORRENTFREAK (June 29, 2008), <http://commcns.org/w24z1W>.

¹³⁰ *In re A National Broadband Plan for Our Future, Comments of the Electronic Privacy Information Center*, GN Docket No. 09-51 at 7 (June 8, 2009) (stating that Deep Packet Inspection (DPI) will provide ISPs with access to the content of all unencrypted Internet traffic that ISP customers send or receive and that DPI can generate and preserve logs of users’ Internet activities).

¹³¹ *Open Internet Order*, *supra* note 1, ¶ 48.

¹³² *Id.* (“[O]pen Internet rules applicable to fixed broadband providers should protect all types of Internet traffic, not just voice or video Internet traffic. This reflects, among other things, our view that it is generally preferable to neither require nor encourage broadband providers to examine Internet traffic in order to discern which traffic is subject to the rules.”). Prior to the FCC’s adjudication of *Comcast*, the company voluntarily modified its practice to focus on managing high-bandwidth customers rather than particular protocols. See Arun Radhakrishnan, *Comcast and BitTorrent Collaborate on Network Traffic Management*, TECHREPUBLIC (Mar. 28, 2008), <http://commcns.org/tYd79r>. The majority approves of the new approach. See *Open Internet Order*, *supra* note 1, ¶ 56 n.177.

¹³³ *Open Internet Order*, *supra* note 1, ¶ 56 n.177 (stating Comcast’s congestion management practices likely satisfy the transparency rule).

Under the more limited rules for mobile broadband providers contained in the final Order, the incidents involving the unnamed mobile provider and the iPhone would also most likely not violate the new rules. While not enough is known about the unnamed mobile provider incident to really understand what is “alleged” to have happened, the no-blocking rule says only that mobile broadband Internet providers “shall not block consumers from accessing lawful websites, subject to reasonable network management; nor shall [providers] block applications that compete with the provider’s voice or video telephony service, subject to reasonable network management.”¹³⁴ Since a mobile payment application is neither a website nor a competing voice or video service, the unnamed mobile provider incident appears to be outside the new rules.

Similarly, in the fourth incident, it was Apple, not AT&T, that wanted to limit VoIP, arguing that it “alter[ed] the iPhone’s distinctive user experience by replacing the iPhone’s core mobile telephone functionality and Apple user interface with its own user interface.”¹³⁵ Given that Apple is not a “provider” of broadband Internet access, it is not subject to the rules. Moreover, even if mobile payment or VoIP was considered a competing “voice or video telephony service,” the wireless rule doesn’t apply to app stores.¹³⁶ In other words, if either of these incidents involved the rejection of proposed apps for a mobile device, there would be no violation of the new rules regardless of whether the device manufacturer or the broadband Internet access provider made the decision.

There is another basis on which the fourth incident remains legal: it is likely an example of “reasonable network management.” The rule says that a practice is “reasonable if it is appropriate and tailored to achieving a legitimate network purpose, taking into account the particular network architecture of the broadband Internet access service.”¹³⁷ Voice and video apps, depending on how they have been implemented, can put excessive strain on a mobile broadband network. Blocking particular VoIP services or apps like Slingbox, consequently, is likely to constitute reasonable network management.

B. Is the Real Problem a Lack of Competition?

The FCC has provided only four purported examples of non-neutral

¹³⁴ *Id.*, app. A § 8.5.

¹³⁵ *Apple Answers the FCC’s Questions*, APPLE INC., <http://commcns.org/vOK3kJ> (last visited Oct. 7, 2011).

¹³⁶ *Open Internet Order*, *supra* note 1, ¶ 102 (“The prohibition on blocking applications that compete with a broadband provider’s voice or video telephony services does not apply to a broadband provider’s operation of application stores or their functional equivalent.”).

¹³⁷ *Id.*, app. A § 8.11(d).

behavior by ISPs in ten years, and has adopted rules that would probably only apply, at best, to one of these instances. So perhaps these four incidents are not actually what drove the FCC to regulate. Many regulatory advocates propose an alternative: that the real problem is a lack of “competition” for broadband.¹³⁸ According to the 2010 National Broadband Plan, 5% of the U.S. population remains without access to any wireline broadband provider, while 2% do not have access to a mobile broadband provider.¹³⁹ In many parts of the country, only two Internet access providers are available and in others, the offered speeds of alternatives vary greatly, leaving users without high-speed alternatives.¹⁴⁰

If limited competition is the real source of concern, however, the FCC has historically proven itself the wrong agency to correct it. Since the first deployment of high-speed Internet, multiple technologies have been developed to deliver broadband access to consumers, including DSL (copper), coaxial cable (cable), satellite, mobile (3G and now 4G), wireless (WiFi and WiMax), and broadband-over-power-lines (BPL).¹⁴¹

Rather than promote these technologies, the FCC has done just the opposite. In many instances, for example, the agency has sided with state governments, who argued successfully that they can prohibit municipalities from offering telecommunications service that might compete with local franchising monopolies.¹⁴² The Commission has also dragged its feet on approving trials for BPL, contributing to continued setbacks in deploying the technology.¹⁴³

If ISPs engage in anti-competitive behavior now or in the future, existing antitrust law, enforceable by either the Department of Justice or the Federal Trade Commission, provides much more specifically targeted tools both to prosecute and remedy activities that genuinely harm consumers. To demonstrate a so-called “vertical exclusion,” for example, in which a dominant provider abuses its power over access to a key input to an upstream or downstream business, the Supreme Court has moved from a rule of *per se*

¹³⁸ *Id.* ¶ 32.

¹³⁹ FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 37 fig. 4-A, 40 fig. 4-E (2010), <http://commcns.org/sCCj9m>.

¹⁴⁰ *Id.*

¹⁴¹ CORNING, BROADBAND TECHNOLOGY OVERVIEW 2-7 (2005), <http://commcns.org/rOgg51>. BPL in particular is a promising technology for rural users, a group that is more likely than others to have no or limited broadband options today. THE NATIONAL BROADBAND PLAN, *supra* note 139, at 37, 39.

¹⁴² *See, e.g.*, *Nixon v. Missouri Mun. League*, 541 U.S. 125, 130-31, 140-41 (2004).

¹⁴³ *See American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 230-32 (D.C. Cir. 2008); *ARRL Comments on FCC's Proposed Establishment of Rural Broadband Plan*, ARRL (Mar. 30, 2009), <http://commcns.org/tJCryR> (quoting ARRL General Council Chris Imlay that “almost a year after the Court’s decision, the Commission has done ‘literally nothing’ to comply with the mandated instructions”).

illegality to one requiring proof of “demonstrable economic effect.”¹⁴⁴ Mere market dominance, in other words, is not enough to trigger antitrust remedies.

Even if limited competition in some areas of the country leads to genuine consumer harm, as may have been the case in *Madison River*, there is no reason to believe any version of net neutrality rules would correct it. As scholar Christopher Yoo has long argued, net neutrality regulations are not the solution to antitrust harms:

The imposition of network neutrality would not increase the number of last-mile options one iota and thus would not change the bargaining power between last-mile providers and end users. Given that network neutrality would, however, leave last-mile providers bargaining power vis-à-vis end users unaffected, one would not expect network neutrality to lead to any reduction in the prices charged to end users. Network neutrality would have a dramatic effect on the other side of the two-sided market by affecting how last-mile providers and content/applications providers divide up those rents. From this perspective, network neutrality has less to do with benefiting consumers and more to do with adjusting the bargaining power between the Verizons and the Googles of the world.¹⁴⁵

If lack of competition is motivating the net neutrality rules, in any event, the majority makes no effort to argue that case. Instead, the rules seem to rest on a general anxiety that ISPs will use access to their customers to shape competition in Internet content for many undefined reasons. The “broad purposes” of the discrimination rule, according to the majority, “cannot be achieved by preventing only those practices that are demonstrably anticompetitive or harmful to consumers.”¹⁴⁶ Instead, “the rule rests on the general proposition that broadband providers should not pick winners and losers on the Internet—even for reasons that may be independent of providers’ competitive interests or that may not immediately or demonstrably cause substantial consumer harm.”¹⁴⁷

This is at best a novel theory of protecting the “public interest”—one that does not require a showing of either anti-competitive behavior or harm to consumers before imposing sanctions on a broadband Internet access provider

¹⁴⁴ *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724, 726 (1988).

¹⁴⁵ Yoo, *supra* note 94, at 515.

¹⁴⁶ *Open Internet Order*, *supra* note 1, ¶ 78. See also *id.* ¶ 42 n.141 (stating that the FCC has a duty to “promote deployment of advanced telecommunications capability, ensure that charges in connection with telecommunications services are just and reasonable, ensure the orderly development of local television broadcasting, and promote the public interest through spectrum licensing”).

¹⁴⁷ *Id.* ¶ 78. See also *id.* ¶ 42 n.141; Randolph May, *Infamous No. 78 (of the Net Neutrality Order)*, FREE STATE FOUNDATION (Jan. 5, 2011), <http://commcns.org/tHskZD>; *Open Internet Order*, *supra* note 1, ¶ 78.

for “unreasonable discrimination.”

IV. “NOSTALGIA FOR THE PRESENT”—WHICH INTERNET IS BEING PRESERVED?

At best, one can only say that the majority recognizes there are no threats it can credibly point to today and reserves for future discretion the determination of practices it finds violate the spirit of the Open Internet.¹⁴⁸ But it is still unclear why the FCC believes it can “prophylactically” solve a problem dealing with an emerging, rapidly-evolving new technology that has thrived in the last decade in part because it was unregulated.

Given that evolution, a more fundamental question is whether the Internet the FCC is trying to “preserve” even exists anymore, or whether it ever did. The *idea* of the Open Internet is simple: consumers of broadband Internet access should have the ability to surf the web as they please and enjoy the content of their choice, without interference by access providers who may have financial, competitive, or other reasons to shape or limit that access.¹⁴⁹ Translating this idea into enforceable regulations, however, is difficult, not least because the “Internet” the majority refers to throughout the Order is very much a moving target.

The FCC, of course, has no authority over the actual protocols and standards that define the network—the true meaning of the “Internet” the Order refers to—and makes no pretense of trying to regulate them.¹⁵⁰ Instead, the majority is concerned with what they describe as the Internet ecosystem—a phrase that appears eight times in the Order.¹⁵¹ This ecosystem consists of broadband Internet access providers and their customers, as well as a remarkably varied range of public, private, for-profit and not-for-profit entities that offer devices, software, services and content. In particular, the new rules are addressed to providers of broadband Internet access service, a subset of the larger class of ISPs.¹⁵²

The rules proscribe general behaviors and network management techniques the majority believes would violate the spirit of the Open Internet.¹⁵³ In the ten

¹⁴⁸ Channeling Justice Stewart’s confidence if not his candor in confessing that whatever obscenity means, “I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

¹⁴⁹ Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOM. & HIGH TECH. L. 141, 147 (2003).

¹⁵⁰ Rob Frieden, *Assessing the Merits of Network Neutrality Obligations at Low, Medium and High Network Layers*, 115 PENN. ST. L. REV. 49, 50 (2010).

¹⁵¹ See, e.g., *Open Internet Order*, *supra* note 1, ¶ 53 (“Promoting competition throughout the Internet ecosystem is a central purpose of these rules.”).

¹⁵² *Id.*, app. A § 8.11(a).

¹⁵³ Julius Genachowski, Chairman, FCC, Remarks, Preserving a Free and Open Internet:

years during which broadband Internet access has evolved, however, many participants in the Internet ecosystem have long-deployed network management techniques that, on their face, are “inconsistent” (to use the majority’s word) with the idea of the Open Internet.

Examples of inconsistent techniques include unremarkable engineering features like backbones, peering, caching and content delivery networks, specialized services such as virtual private networks, IP-based television and telephone, and highly-limited broadband access offered by coffee shops and other public locations or through ancillary services such as Amazon’s Kindle network and video game consoles.¹⁵⁴ These techniques and services are essential in delivering broadband Internet that operates smoothly, both technically and economically. Yet many of these examples prioritize some content over others, offer premium access to content providers willing to pay for it, or limit customer access to competing content or services.¹⁵⁵

To preserve the basic premise of Open Internet regulations without condemning long-standing practices, the rules carve out a maze of exceptions and caveats that effectively grandfathers these techniques.¹⁵⁶ All the exemptions have in common is that together they represent a decade of innovation in network management and infrastructure optimization. Taken together, however, they render the final regulations largely incoherent. In translating the aspiration for an Open Internet into enforceable rules applied to the Internet as it really exists, the FCC has tied itself in Gordian knots.

1. *The Mythical Neutrality Principle*

The Internet’s defining feature is its basic protocols, known as TCP/IP.¹⁵⁷ Since they are non-proprietary, anyone can use them, any device can support them, and every node is a peer without having to pay royalties or licensing fees to network providers.¹⁵⁸ As the “lowest common denominator” standard, TCP/IP benefited from network effects to overtake several popular proprietary standards, including IBM’s System Network Architecture and Digital Equipment Corporation’s DECnet.¹⁵⁹ The Internet is now seen as a vehicle for

A Platform for Innovation, Opportunity, and Prosperity (Sept. 21, 2009), <http://commcns.org/sKqa0L>.

¹⁵⁴ *Open Internet Order*, *supra* note 1, ¶ 47.

¹⁵⁵ Cody Vitello, *Network Neutrality Generates a Contentious Debate Among Experts: Should Consumers be Worried?*, 22:4 LOY. CONSUMER L. REV. 513, 529 (2010).

¹⁵⁶ See discussion, *infra* Part IV.A.2.

¹⁵⁷ See Paul DiMaggio et al., *Social Implications of the Internet*, ANN. REV. SOC. 307, 308 (2001).

¹⁵⁸ Philip J. Weiser, *The Internet, Innovation, and Intellectual Property Policy*, COLUM. L. REV. 534, 542-543 (2003).

¹⁵⁹ Brian M Leiner et al., *A Brief History of the Internet*, INTERNET SOCIETY,

true collaboration and consciousness-raising, with intense innovation by content and application providers at the “edge” of the network.

The ideal of net neutrality—a level playing field among all websites, applications, and devices—is both a persistent and compelling myth. The concept evokes the heroism of an entrepreneur in his garage, striving to build the next Yahoo or Google, Facebook, or Groupon with a great idea, technical skills, willingness to sacrifice sleep and social life. These entrepreneurs work for the promise of a successful IPO, connecting people and information in new and unexpected ways.

If all goes well, the application also reaps the benefit of network effects, goes viral, and quickly becomes the next “killer app.” Human testing and general use of the application can begin without any government regulation or license or license applications process. No creativity-challenged corporations can stop the inventor. Internet access provider cannot limit the entrepreneur’s access to a global consumer market. No competing content provider can buy the available market channels and freeze the start-up.

That, at least, is the sense of an “Open Internet” as Chairman Genachowski defines it. That Internet, however, never existed.¹⁶⁰ A considerably more mundane version of that ideal did thrive the last half of the 1990s, but it was always subject to, and fueled by, a wide range of non-neutral innovations in network management. Few consumers may be aware of the existence or details of network optimization algorithms, content delivery networks, complex peering arrangements, caching and edge servers, peer-to-peer networking, mirror sites, specialized services, virtual private networks, packet prioritization based on media type, spam and other malware filters, or dynamic IP addresses or domain name redirection; but all of these elements are characteristics of today’s network infrastructure.

Each of these network elements speeds up delivery of the most bandwidth intensive content.¹⁶¹ At the same time, every one of these innovations arguably violate the neutrality principle. They treat packets with a certain file size, popularity, media characteristic, or recipient differently, prioritizing some and

<http://commcns.org/tdekMI> (last visited Oct. 23, 2011).

¹⁶⁰ Julius Genachowski, Chairman, FCC, Remarks, Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity (Sep. 21, 2009), <http://commcns.org/sKqa0L> (“This is not about government regulation of the Internet. It’s about fair rules of the road for companies that control access to the Internet. We will do as much as we need to do, and no more, to ensure that the Internet remains an unfettered platform for competition, creativity, and entrepreneurial activity.”).

¹⁶¹ See George Ou, *Managing Broadband Networks: A Policymaker’s Guide*, INFORMATION TECHNOLOGY AND INNOVATION FOUNDATION 10-11 (Dec. 2008), <http://commcns.org/swnJe8> (explaining the need for quality-of-service mechanisms to prioritize network traffic).

slowing others.¹⁶² For example, video often consists of very large files, and component packets must arrive without much latency to create a high-quality streaming display.¹⁶³

That reality is far removed from the heroic idealization of the Internet as a wide-open frontier, though the former remains a compelling myth. Consider Chairman Genachowski's vision of an Open Internet, part of his September 2009 announcement of the upcoming NPRM:

The Internet's creators didn't want the network architecture—or any single entity—to pick winners and losers. Because it might pick the wrong ones. Instead, the Internet's open architecture pushes decision-making and intelligence to the edge of the network—to end users, to the cloud, to businesses of every size and in every sector of the economy, to creators and speakers across the country and around the globe. In the words of Tim Berners-Lee, the Internet is a 'blank canvas'—allowing anyone to contribute and to innovate without permission.¹⁶⁴

2. *The Exceptions that Undo the Rules*

The Internet undoubtedly changed the trajectory of computing, upending giants and unleashing tremendous creativity. But the network itself was never a "blank canvas," with all its intelligence residing at the edge of the network. As the majority came to understand this over the course of the Open Internet proceeding, that knowledge was never internalized or reflected in the rules. Instead, the majority explained away the reality of modern network management in over a dozen exceptions, exemptions and exclusions to the final rules.

The most significant of these is the exception for "reasonable network management," which applied to all six of the draft rules.¹⁶⁵ The NPRM, in turn defined reasonable network management as all "reasonable practices" broadband Internet access providers undertook to "reduce or mitigate the effects of congestion on the network or to address quality-of-service

¹⁶² See Lee, *The Durable Internet*, *supra* note 85, at 7-9 (explaining quality-of-service mechanisms, the mechanism by which these innovations operate).

¹⁶³ Ou, *supra* note 161, at 3-4 (discussing latency and jitter tolerance for different types of applications).

¹⁶⁴ Chairman Julius Genachowski, Preserving a Free and Open Internet, *supra* note 160. Compare John Perry Barlow, *A Declaration of the Independence of Cyberspace* (Feb. 1996), <http://commcns.org/uB9RNx> ("We are creating a world that all may enter without privilege or prejudice accorded by race, economic power, military force, or station of birth. We are creating a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity.").

¹⁶⁵ See *Open Internet NPRM*, *supra* note 41, §§ 8.5-.15.

concerns.”¹⁶⁶

What were these practices and how extensive were their use? The Commissioners acknowledged that they did not know. Indeed, there was a great deal about broadband the FCC did not know in October 2009, largely because the agency had never been authorized to regulate it. Congress delegated minimal regulatory oversight over broadband access to the FCC in the Telecommunications Act of 1996.¹⁶⁷

That the Commission could not regulate broadband was not a controversial reading of the law. In the 2005 *Brand X* case, the agency itself argued that Internet access over cable was outside its regulatory powers.¹⁶⁸ Following *Brand X*, the agency ruled that DSL service was likewise outside its authority, leaving the FCC with substantive powers only over dial-up Internet access, a feature of its longstanding power over traditional telephone service.¹⁶⁹

It is little surprise, then, that the FCC began the Open Internet proceeding with an outdated and incomplete understanding of how the Internet operates. Throughout the NPRM, the Commission separately sought comments eighty times on everything from the current state of the Internet ecosystem, to the technologies of broadband access, network management principles already in place, and the competitive nature of the broadband access market.¹⁷⁰ In response, the Order lists over 450 sources of comments and replies, many of which addressed themselves to educating the FCC on the technologies it had undertaken to regulate.¹⁷¹

As a result of this feedback, the final rules added several additional exceptions that effectively authorize a wide range of practices allowing broadband Internet access providers to act “inconsistently” with neutrality principles yet still not violate the rules. The following is a list of exceptions

¹⁶⁶ See *id.*, app. A § 8.3.

¹⁶⁷ Telecommunications Act of 1996, Pub. L. No. 104-104, § 34(a)(2), 110 Stat. 56 (1996); Communications Act of 1934, 47 U.S.C. § 153(20) (1934); CHARLES B. GOLDFARB, TELECOMMUNICATIONS ACT: COMPETITION, INNOVATION, AND REFORM, CRS REPORT FOR CONGRESS, 1-4 (January 13, 2006).

¹⁶⁸ Nat’l Cable Telecomms. Ass’n. v. *Brand X* Internet Serv., 545 U.S. 967, 1002-03 (2005).

¹⁶⁹ *In re* Framework for Broadband Internet Service, *Notice of Inquiry*, 25 F.C.C.R. 7866, ¶ 1 (June 17, 2010).

¹⁷⁰ Larry Downes, *Preserving the Internet, But Which One? Reading the FCC’s Net Neutrality Order Part IV* (Jan. 12, 2011), <http://commcns.org/tyUcB7>.

¹⁷¹ See Larry Dignan, *FCC Seeks Comment on Two Key Elements of Google-Verizon Net Neutrality Proposal*, BETWEEN THE LINES (Sept. 1, 2010), <http://commcns.org/tRV73S>; *Open Internet Order*, *supra* note 1, app. C; Letter from Albert E. Dotson, Jr. et al., to Julius Genachowski, Chairman, FCC (Jan. 14, 2009), available at <http://commcns.org/snJRAf>; *In re* Preserving the Open Internet; Broadband Industry Practices, *Reply Comments of the Mobile Internet Content Coalition*, GN Docket No 09-191, WC Docket No. 07-52 (Apr. 26, 2010), <http://commcns.org/rx0zNw>.

delineated in the Report and Order, together offering a window into the FCC's education on the Internet and the difficulty of "preserving" its neutrality:

1. An exemption from many of the rules for providers of mobile broadband Internet access, including the "no unreasonable discrimination" rule and some of the "no blocking" rule.¹⁷²
2. An explicit exemption from the "no blocking" rule for app stores and other control mechanisms used by mobile broadband providers, device manufacturers, operating system developers, or some combination thereof.¹⁷³
3. A change from a strict "nondiscrimination" rule for wireline providers to a rule prohibiting only "unreasonable discrimination."¹⁷⁴
4. A definition of "broadband Internet access service" that limits application of the rules only to providers of a "mass market retail service" providing "the capability to transmit data to and receive data from all or substantially all Internet endpoints."¹⁷⁵ That change leaves out a range of relatively new Internet devices and services—including the Amazon Kindle, game consoles, cars, TVs and home appliances—that offer some form of web access incidental to their main purpose for communicating with the network.¹⁷⁶
5. A broader definition of "reasonable network management" that includes any practice that is "appropriate and tailored to achieving a legitimate network management purpose."¹⁷⁷
6. An exemption for virtual private networks, which use much of the same infrastructure as the public Internet.¹⁷⁸
7. An exemption for CDNs and co-located servers that put popular content in closer proximity to important network nodes and therefore speed its transmission to requesting users.¹⁷⁹
8. An exemption for multichannel video programming services (*e.g.*, AT&T's U-verse) that use TCP/IP protocols and existing Internet infrastructure to deliver television programming to customers.¹⁸⁰
9. An exemption for Internet backbone services.¹⁸¹
10. An exemption for hosting or data storage services.¹⁸²
11. Exemptions for "coffee shops, bookstores, airlines and other entities when they acquire Internet service from a broadband provider to

¹⁷² *Open Internet Order*, *supra* note 1, app. A §§ 8.5-8.7.

¹⁷³ *Id.* ¶ 102.

¹⁷⁴ *Id.*, app. A § 8.7.

¹⁷⁵ *Id.*, app. A § 8.11(a).

¹⁷⁶ *Id.* ¶ 47.

¹⁷⁷ *Id.*, app. A § 8.11(d) and ¶ 82.

¹⁷⁸ *Open Internet Order*, *supra* note 1, ¶ 47.

¹⁷⁹ *Id.* ¶ 47 and ¶ 76 n.235.

¹⁸⁰ *Id.* ¶ 47.

¹⁸¹ *Id.*

¹⁸² *Id.*

- enable their patrons to access the Internet from their establishments.”¹⁸³
12. An exemption from the discrimination rule for “existing arrangements for network interconnection, including existing peering arrangements.”¹⁸⁴
 13. An exemption for “specialized services,” including multichannel video programming (see above) or facilities-based VoIP (*e.g.*, Comcast Digital Voice), that “share capacity with broadband Internet access services over providers’ last-mile facilities.”¹⁸⁵
 14. A hedge on whether “paid priority” of some content, either that of the access provider or a third party, constitutes a *per se* violation of the “unreasonable discrimination” rule, and an explicit rejection of the argument that CDNs constitute illegal “pay for priority” even though they have the same effect on the consumer experience as prohibited prioritization schemes.¹⁸⁶
 15. Recognition that end-users may subscribe to Internet access services that limit their choice of content, including services that offer parental controls or which “allow end users to choose a service that provides access to the Internet but not to pornographic websites.”¹⁸⁷ Further, “[b]roadband providers are also free under this Order to offer a wide range of ‘edited’ services,” including a “service limited to ‘family friendly’ materials.”¹⁸⁸
 16. Recognition that existing federal law allows all Internet Service Providers to “restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.”¹⁸⁹

B. The Majority on the Precipice of Understanding

These exceptions, according to the majority, represent services, technologies, or service providers that appear to operate “inconsistently” with the neutrality principle, but which nonetheless provide crucial and valuable benefits to consumers. Each exception also reflects an important change to the Internet’s architecture and service models as they have evolved over the last

¹⁸³ *Id.* ¶ 52.

¹⁸⁴ *Open Internet Order*, *supra* note 1, ¶ 67 n.209. Note that this exception probably means the public fight between Comcast and Level 3 over their peering agreements probably does not violate the rules. See Marguerite Reardon and Elinor Mills, *Level 3 Takes Spat with Comcast Public*, CNET NEWS (Nov. 29, 2010), <http://commcns.org/vQg1iy>.

¹⁸⁵ *Open Internet Order*, *supra* note 1, ¶¶ 112-114.

¹⁸⁶ *Id.* ¶¶ 76-77.

¹⁸⁷ *Id.* ¶ 89.

¹⁸⁸ *Id.* ¶ 143. *But cf. id.* ¶ 141.

¹⁸⁹ *Id.* ¶ 89 n.279.

fifteen years. Together, they demonstrate that the Internet's core technologies are still in development and need continued freedom from detailed regulatory interference in order to evolve.

The mobile Internet is given special treatment, for example, because it is "evolving rapidly."¹⁹⁰ The fixed Internet, however, is also evolving rapidly, as many of these exemptions implicitly recognize. Paying a CDN to replicate your content and co-locate servers at key network access points is surely "paying for priority."¹⁹¹ The cached content will arrive at a user's computer faster than similar or even competing content that does not subscribe to a CDN. It puts a start-up without the funds for similar services at a competitive disadvantage. But for consumers, that feature is an improvement. It ensures the most popular and therefore most frequently accessed content is not slowed down by its popularity. Still, it is not "neutral."

As the exceptions piled up, the majority should have realized the futility of making rules for an ecosystem very much in transition. Instead, they remain fixated on maintaining an Open Internet even though they now had ample evidence that neutrality is a virtue more honored in the breach. The final Report uses the word "traditional" 25 times, the word "historical" or "historically" nine times, and the word "typical" or "typically" 21 times.¹⁹² These are the only justifications for the exceptions, and they undermine the purpose of the rules that remain. There is no neutral Internet to preserve. There is only one that works.

These innovations, in other words, were not created to destroy the principle of an Open Internet. Rather, each has played a vital role in transforming the Internet into the faster, cheaper, and better technology platform we are accustomed to today. The genius of a virtual infrastructure is that it can be redesigned and rebuilt without any interruption in service. The result, however, is that that users do not see these changes; consumers, as well as the FCC, fail to realize that we're now traveling on a multi-lane highway rather than the old dirt road. The technology is utterly changed, and the rules of the road have changed with it.

While advocacy groups that hoped for "pure" neutrality were incensed with these exceptions, particularly the measured approach to mobile broadband access and the provisional reprieve for specialized services,¹⁹³ the exceptions

¹⁹⁰ *Id.* ¶ 9.

¹⁹¹ *But see Open Internet Order*, *supra* note 1, ¶ 76 n.235.

¹⁹² Performing a keyword search in the *Open Internet Order* yielded these results.

¹⁹³ Sara Jerome, *FCC Chairman Told to Put on 'Man Pants'*, THE HILL (Oct. 27, 2010), <http://commens.org/rOmIRp>; Timothy Karr, *Obama FCC Caves on Net Neutrality—Tuesday Betrayal Assured*, THE HUFFINGTON POST (Dec. 20, 2010), <http://commens.org/soMvoh>.

will prevent the new rules from damaging the Internet ecosystem.¹⁹⁴ Each one is essential to the smooth operation of today's Internet. The majority, to its credit, came to understand that the Internet is far more complex than the simple slogan of "neutrality" that initiated this rulemaking. And the Internet will continue to improve, assuming future innovations do not violate the FCC's rules.

Unfortunately, the final rules, tempered by a list of "these and no more" exceptions suggest that the majority is still clinging to an idealized past. It came close to seeing the light, but in the end the majority couldn't accept that the Internet has evolved successfully, and continues to evolve, without FCC regulatory oversight. It is impossible to explain the exceptions for "inconsistent" and non-neutral innovations such as CDNs, specialized services, peering arrangements, e-readers, game consoles, and app stores any other way. The FCC learned not only that these component technologies are established in the network infrastructure, but also that they are the reason the Internet works so well.

While important developments in "non-neutral" network management are grandfathered into the rules, the long-term danger of the FCC's new rules will be disruption to future network management tools and inventions. The mischief of the rules, then, will not be to today's Internet, but to the unintended impact they may have on tomorrow's innovations. Many will be presumptively in violation of the rules—as many on the exceptions list would have been had they not been granted absolution. Future innovations will require FCC pre-approval.

If only the majority had taken a step back and recognized the deeper reality of that long list of exceptions. Allowing them will protect today's ecosystem, but by naming the exceptions individually the majority has left no room for many innovative future network management technologies to develop organically. Better to have acknowledged that the myth of a neutral network was nothing more, and allow Internet technologies to continue developing without the burden of regulatory oversight.

V. HIDDEN COSTS: COASE AND THE PROBLEMS OF ENFORCEMENT ERROR

Beyond a significant risk that the new rules will limit the development of future infrastructure innovations, there is also the more mundane but

¹⁹⁴ Cecilia Kang, *FCC Approves Net Neutrality Rule; Criticism is Immediate*, WASH. POST (Dec. 22, 2010), <http://commlaw.org/rY1aeG>; Niall Firth, *U.S. Media Watchdog Passes Net Neutrality Law That Paves Way for 'Two-Speed' Internet for Mobiles*, MAIL ONLINE (Dec. 23, 2010), <http://commlaw.org/ujm5Ne>.

immediate problem of financial cost. Though the majority “expect[s] the costs of compliance with our prophylactic rules to be small,” there is little analysis to support that assertion.¹⁹⁵ In a section hopefully titled, “The Benefits of Protecting the Internet’s Openness Exceed the Costs,” the FCC fails to calculate the regulations’ costs or benefits with any rigor.¹⁹⁶ Instead, the agency simply states that “[b]y comparison to the benefits of these prophylactic measures, the costs associated with the open Internet rules adopted here are likely small.”¹⁹⁷

The Order infers that undertaking a cost-benefit analysis for the new rules was unnecessary.¹⁹⁸ Indeed, the only compliance cost the FCC recognizes is for the new transparency rule, which will require Internet access providers to disclose network management practices to give consumers the opportunity to weigh these practices when deciding which broadband provider to choose.¹⁹⁹

The only authority cited for these economic conclusions is to comments filed by Free Press.²⁰⁰ However, Free Press does not employ any economists, nor did it perform any economic analysis of the rules’ benefits or costs.²⁰¹ In any case, the rules were not finalized until months after Free Press filed their comments.²⁰²

A. The Nature of Enforcement

Unfortunately, the transparency rule is not the only source of new costs associated with the Order. Most significantly, the FCC failed to account for its own costs in enforcing all the new rules, as well as the costs for broadband Internet access providers to defend any claims that they have violated them.

¹⁹⁵ *Open Internet Order*, *supra* note 1, ¶ 4. See also *id.* ¶ 39 (“In short, rules that reinforce the openness that has supported the growth of the Internet, and do not substantially change this highly successful status quo, should not entail significant compliance costs.”); *id.* ¶ 32 n.87.

¹⁹⁶ *Id.* ¶¶ 38-42.

¹⁹⁷ *Id.* ¶ 39.

¹⁹⁸ The *Open Internet Order* seems to infer that a traditional cost-benefit analysis—such as the one that would be performed in a merger—was not appropriate here because broadband providers were generally in agreement with the open Internet rules. See *id.* ¶ 39, 59 (“[b]roadband providers generally endorse openness norms—including the transparency and no blocking principles—as beneficial and in line with current and planned business practices”). But if so, what was the imperative to pass new rules?

¹⁹⁹ *Id.* ¶¶ 39, 43, 53-59.

²⁰⁰ *Id.* ¶ 39 n.124.

²⁰¹ *Who We Are*, FREE PRESS, <http://commcns.org/uKex52> (last visited Dec. 15, 2011). See generally *In re Preserving the Open Internet; Broadband Industry Practices*, *Comments of Free Press*, GN Docket No. 09-191, WC Docket No. 07-52 (Jan. 14, 2010).

²⁰² *In re Preserving the Open Internet; Broadband Industry Practices*, *Comments of Free Press*, GN Docket No. 09-191, WC Docket No. 07-52 at 1 (Jan. 14, 2010).

As an initial matter, it is worth noting that the procedural rules for enforcing the Order are longer than the substantive rules.²⁰³ Three types of actions may be taken to enforce the rules, and a set of procedures for complaints, discovery, hearings and appeals incorporate much of the protocols that govern actions and appeals in federal district courts and in the courts of appeal.²⁰⁴

First, any individual or organization may file an informal complaint through the FCC website without paying a fee.²⁰⁵ Though such complaints will not automatically lead to agency action, “the Enforcement Bureau will examine trends or patterns in complaints to identify potential targets for investigation and enforcement action.”²⁰⁶ Second, the agency itself may initiate actions, perhaps based on trends or patterns it notes in the informal complaints.²⁰⁷ The third avenue for enforcement, the filing of a formal complaint, is the most worrisome avenue for enforcement.²⁰⁸ Under the Order, “[a]ny person may file a formal complaint alleging a violation of the rules. . . .”²⁰⁹

Students of Nobel prize-winning economist Ronald Coase could quickly identify the uncalculated costs associated with enforcement. For Coase, the market is not a magic world of perfect efficiency that theoretical economists assume in their models. In reality, each transaction between a buyer and a seller has inefficiencies or transaction costs associated with it.²¹⁰

Of the numerous categories of transaction costs, the one that seems not to have penetrated the majority’s analysis is the cost of enforcing agreements.²¹¹ In the event the terms of a transaction are not met to the satisfaction of buyer or seller or both, various mechanisms—including arbitration, negotiation, regulators and/or the courts—must be invoked to ensure the bargain made is the bargain received.

These costs can be exorbitant; indeed, far greater than the value of the underlying transaction. To take a trivial example, a rational consumer won’t sue the maker of a rubber band that breaks the first time she uses it. The costs—time, effort, and out-of-pocket expenses for lawyers, filing fees, and the

²⁰³ *Open Internet Order*, *supra* note 1, app. B §§ 8.12-8.17.

²⁰⁴ *Id.*, app. B §§ 8.12-8.17.

²⁰⁵ *Id.* ¶ 153.

²⁰⁶ *Id.*

²⁰⁷ *Id.* ¶ 160.

²⁰⁸ *Id.*, app. B § 8.12 (emphasis added). *See also id.* ¶¶ 154-159.

²⁰⁹ *Id.*, app. B § 8.12.

²¹⁰ R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 394-397 (1937) (explaining how transaction costs—the costs incurred when purchasing goods or services from third parties—play a role in determining a firm’s growth). *See also* Michael I. Swygert and Katherine Earle Yanes, *A Primer on the Coase Theorem: Making Law in a World of Zero Transaction Costs*, *DEPAUL BUS. L.J.*, Fall-Winter 1998, at 20-22.

²¹¹ Swygert, *supra* note 210, at 20-22 (noting that “enforcement of agreements” falls into the broad category of transaction costs).

like—so obviously exceed the value of the best possible outcome (replacement of the broken item) that no one would bother.²¹²

But what if the consumer can transfer nearly all of the enforcement costs on someone else, such as the FCC, or their broadband Internet access provider? If “any person” who believes something is amiss can file a complaint and pay only a small filing fee to start the machinery of enforcement, why not bring a complaint for any perceived infraction, no matter how small or illusory?

The Order creates exactly this kind of incentive, allowing consumers to file formal complaints and pass on nearly all of the enforcement costs to the FCC or to broadband Internet access providers.²¹³ While the very existence of the rules may deter some of the prohibited behaviors, it is also likely that the FCC will be called upon to enforce the rules against broadband access providers accused of violating them, even when those complaints border on the frivolous.²¹⁴ The enforcement costs can be significant—including the costs to the agency itself and to the companies rightly or wrongly charged with violations. Given both the intentional vagueness of the final rules and the generous mechanisms available to make and resolve complaints, the rules as written are likely to introduce substantial enforcement costs.²¹⁵ Unfortunately, the Report fails to mention these costs or their potential impact on the Order’s cost-benefit analysis.

B. The Danger of a Private Right of Action

The ability of any individual to initiate an enforcement proceeding action is known as a private right of action.²¹⁶ Federal law grants very few such broadly

²¹² Why? The loss of value from the broken rubber band is a fraction of a penny. But the enforcement cost of initiating—let alone prosecuting—a lawsuit would exceed that price by several orders of magnitude. And, in most cases, all the consumer could hope to win would be the fraction of a cent. The cost of enforcing the implied promise of a working rubber band—and the seller’s cost of defending itself—are lost. They are inefficiencies of the market, *i.e.* transaction costs. Even without knowing exactly how much they are, no consumer would undertake them. *See id.*, at 2-4 (explaining that transaction costs shift the burden of performing an action from one party to another, causing the parties to expend additional resources to counterbalance that burden).

²¹³ *Open Internet Order*, *supra* note 1, ¶¶ 154-157, app. B § 8.12.

²¹⁴ Before the rules had even taken effect, Free Press had already filed its first complaint. They claimed that a new low-cost plan from mobile broadband provider MetroPCS, which forbid video streaming except for YouTube, constituted a violation of the new rules. MetroPCS responded by filing suit to challenge the rules themselves, one of two premature complaints filed before the publication of the rules in the *Federal Register*. *See* Thomas W. Hazlett, *FCC Net Neutrality Rules and Efficiency*, *FINANCIAL TIMES* (Mar. 29, 2011), <http://commens.org/sKmENN>.

²¹⁵ *Open Internet Order*, *supra* note 1, ¶¶ 151-160.

²¹⁶ *Ballentine’s Law Dictionary* 1119 (3d ed. 1969).

written rights, for a simple reason. Giving each of the hundreds of millions of American consumers the right to initiate a formal proceeding that the government and the complained-of party must address would generate enormous costs.

That, however, is precisely what the Open Internet rules allow. Regardless of the merits or specifics of a complaint alleging a violation of the rules, “the defendant must submit an answer.”²¹⁷ In cases where the “facts” are disputed, “a thorough analysis of the challenged conduct might require further factual development and briefing.”²¹⁸ Moreover, “the broadband provider must answer each claim with particularity and furnish facts, supported by documentation or affidavit, demonstrating reasonableness of the challenged practice.”²¹⁹

In resolving formal complaints, “the Commission will draw on resources from across the agency—including engineering, economic, and legal experts—to resolve open Internet complaints in a timely manner.”²²⁰ Specific “pleading requirements” laid out in the Order govern the procedures for filing complaints, answers and replies, conducting discovery, developing and supporting legal arguments, verifying facts and documents submitted, and more.²²¹ Moreover, the FCC “may specify other procedures,” including hearings and oral arguments, and “may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceedings, including copies of all contracts and documents reflecting arrangements and understandings alleged to violate” the rules.²²²

Any person or organization can file a formal complaint so long as they have a good faith belief that the broadband provider has violated the rules.²²³ However, since consumers are unlikely to know with any certainty whether the behaviors they observe are in fact violations of the rules, any slow-down, hiccup, temporary outage, or other network artifact that appears to suggest interference will constitute a good faith belief that a violation has occurred. As a result, they will be free to file a complaint, burdening others—the provider for the most part and the FCC to a lesser, but still substantial, degree—with all the costs, even if no violation of the rules occurred.

²¹⁷ *Open Internet Order*, *supra* note 1, ¶ 156.

²¹⁸ *Id.*

²¹⁹ *Id.* ¶ 157.

²²⁰ *Id.* ¶ 159.

²²¹ *Id.*, app. B §§ 8.13-8.17 (for example, any broadband provider served with a complaint must respond within 20 days. Its answer must respond to each fact referenced in the complaint, supported with documentation including affidavits, legal authority, and other evidence).

²²² *Id.*

²²³ *Id.* ¶ 156; 47 C.F.R. § 8.12.

VI. THE FCC'S AUTHORITY: "BADGES? WE DON'T NEED NO STINKING BADGES!"²²⁴

The uncalculated costs of the rules may or may not become apparent in practice, however. The new rules may be short-lived, given that the majority has built its new broadband Internet access regulations on a questionable legal foundation. This problem is discussed only briefly here, largely because FCC Commissioner Robert McDowell has thoroughly detailed the legal analysis already. His dissent calmly and systematically dismantles the majority's asserted legal authority.²²⁵

It also is important to note that this is not a theoretical discussion of statutory interpretation. Even before the rules were published in the Federal Register, two broadband providers—Verizon and then MetroPCS—filed lawsuits in the D.C. Circuit challenging the FCC's authority to regulate.²²⁶ Verizon's suit, initially dismissed as premature, has now been refiled, and the case will be heard in the D.C. Circuit.²²⁷ The arguments sketched out in Commissioner McDowell's dissent are likely to mirror the complainants' briefs in its Petition.

A. The Need for Authority

Why does authority matter? Put simply, Congress alone has the power to legislate, and the FCC can only regulate if Congress delegates power to it; any rulemaking undertaken without statutory authority is considered unconstitutional.²²⁸ Unfortunately for the FCC, Congress has not delegated to it the authority to regulate broadband Internet access.²²⁹ More than the rules themselves, Verizon and others, including net neutrality-sympathizers like the Electronic Frontier Foundation, worry that allowing the FCC to pass rules without authorization will establish a dangerous precedent.²³⁰ Any time in the

²²⁴ The Treasure of the Sierra Madre (Warner Brothers 1948). See Tim Dirks, *The Treasure of the Sierra Madre* (1948), AMC FILMSITE MOVIE REVIEW (last visited Dec. 15, 2011), <http://commens.org/v1Gs8p> (the 1974 comedy "Blazing Saddles" actually popularized this exact phrasing of the dialogue).

²²⁵ See generally *Open Internet Order*, *supra* note 1, ¶¶ 115-150.

²²⁶ On Verizon's effort to secure exclusive jurisdiction for the D.C. Circuit, see James DeLong, *Which Court Gets to Hear the Net Neutrality Appeal?*, DIGITAL SOCIETY (Jan. 21, 2011), <http://commens.org/uH87fl>.

²²⁷ Marguerite Reardon, *Verizon Sues Again to Block Net Neutrality Rules*, CNET NEWS (Sept. 30, 2011), <http://commens.org/rUI2hG>.

²²⁸ *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 968 (D.C. Cir. 1999).

²²⁹ Edward Wyatt, *F.C.C. Chairman Outlines Broadband Framework*, N.Y. TIMES (Dec. 1, 2010), <http://commens.org/sIhV08>.

²³⁰ See, e.g., Fred von Lohmann, *Net Neutrality: FCC Trojan Horse Redux*, EFF DEEPLINKS BLOG (May 3, 2010), <http://commens.org/voZnlv>; Corynne McSherry, *Is Net*

future that the FCC wants to extend its power, it need only deputize itself.

This feature of the Order is the one that has most alarmed the communications industry, members of Congress, and advocates of limited government.²³¹ It is the primary reason that Members of Congress attempted to reverse the ruling, even as Verizon and others challenge it in court.²³²

B. Regulatory Overreach is Not a New Problem

Regardless of perceived market failures, the agency cannot take action without explicit regulatory powers delegated by Congress.²³³ The FCC's rulemaking and adjudicatory powers are strictly limited by implementing statutes passed by Congress, notably the Communications Act of 1934 and its revisions.²³⁴ If the FCC does act, the courts are the final determinants of whether Congress has delegated the necessary powers.²³⁵

While the FCC wants to regulate broadband Internet providers to ensure a "level playing field" and believes regulation is essential to preserve the Internet, Congress has not given the agency the authority to do so.²³⁶ In fact, members of Congress have introduced several "net neutrality" bills within the past ten years that would grant rulemaking authority to the FCC; none have ever been voted out of committee.²³⁷

If anything, the FCC's authority over broadband became even more clouded in the course of the rulemaking. The NPRM simply assumed the needed power was there; after all, the rulemaking was largely just a formalization of the agency's existing Internet Policy Statement:

The *Internet Policy Statement* has helped preserve the openness of the Internet over the past four years, but the time has now come to build on past efforts and to provide greater clarity regarding the Commission's approach to these issues through a notice-and-comment rulemaking.²³⁸

The policy statements, however, were already under siege. A few months

Neutrality a FCC Trojan Horse?, EFF DEEPLINKS BLOG (Oct. 21, 2009), <http://commcns.org/ugorZO>.

²³¹ *Net Neutrality, Back in Court*, N.Y. TIMES (Mar. 6, 2011), <http://commcns.org/tnOlSa>; *Blackburn to Introduce Anti-Net Neutrality Bill*, THE HILL (Dec. 5, 2010), <http://commcns.org/vgfYub>.

²³² Downes, *Tech Priorities for New Congress: From Old to New*, *supra* note 29.

²³³ *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706-09, 99 (1979) (holding that rules relating to cable television were not within the FCC's statutorily defined jurisdiction).

²³⁴ See 47 U.S.C. § 151 (2006).

²³⁵ *Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

²³⁶ Declan McCullagh, *Court: FCC Has No Power to Regulate Net Neutrality*, CNET NEWS (Apr. 6, 2010), <http://commcns.org/toDSRb>.

²³⁷ *Id.*

²³⁸ *Open Internet NPRM*, *supra* note 41, ¶ 6.

after the NPRM was issued, Comcast successfully challenged the FCC's authority to enforce the policy statement in the D.C. Circuit. The court in *Comcast* held that whether Comcast had violated the policy statement or not did not matter because the policy itself had no legal basis; the FCC could not regulate broadband Internet access because it lacked statutory authority.²³⁹ The court agreed with Comcast that while the Communications Act gave the agency broad authority over common carrier services such as telephone service, Congress had delegated almost no authority over information services such as broadband Internet access.²⁴⁰

This was no surprise. The *Comcast* case, as well as several earlier D.C. Circuit and Supreme Court cases, makes clear that Congress did not delegate authority over broadband access under Title I of the Communications Act.²⁴¹ While the FCC argued that Title I included "ancillary jurisdiction" to regulate information services, the court found the connection between network management techniques and the agency's statutory authority over telephone and cable networks too attenuated.²⁴² The Commission's Open Internet policy was simply not "ancillary" to any regulatory provision in the Communications Act.

There was nothing new in the logic of the *Comcast* decision. The FCC is frequently unsuccessful in efforts to defend its regulations by attaching otherwise unauthorized rules to its ancillary authority. For example, in 2005 the D.C. Circuit rejected regulations that would have required manufacturers to include "broadcast flag" technology in any device capable of receiving a television signal and limit recording of broadcast content based on the contents of the flag.²⁴³ The new regulations were grounded, the agency argued, in the FCC's ancillary jurisdiction over broadcast television. But while the agency had unquestioned authority over broadcasters, the court held they could not require non-broadcasters to comply with rules aimed at helping the broadcasters control unauthorized home taping.²⁴⁴

²³⁹ *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010).

²⁴⁰ *Id.* at 645. The one exception was Internet access provided by dial-up modems, no longer a significant source of access. Howard W. Waltzman, *Federal Communications Commission Lacks the Authority to Reclassify Broadband Services as Telecommunications Services*, MAYER BROWN, <http://commcns.org/s31FCC> (last visited Dec. 15, 2011).

²⁴¹ *Comcast*, 600 F.3d at 644-45; *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 973-74, 980-81 (2005).

²⁴² *Comcast*, 600 F.3d at 644.

²⁴³ *Am. Library Ass'n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005).

²⁴⁴ *Id.* at 691-92. At oral argument, the judges were highly critical of the FCC. "You're out there in the whole world, regulating. Are washing machines next?" asked Judge Harry Edwards. Judge David Sentelle added, "You can't regulate washing machines. You can't rule the world." See Declan McCullagh, *Court Questions FCC's Broadcast Flag Rules*, CNET NEWS (Feb. 22, 2005), <http://commcns.org/sN4X79>.

The logic of the *Comcast* case was much the same. After reviewing and rejecting over a dozen sections of the Communications Act that the FCC offered as ancillary to the Internet Policy Statement, the Court vacated the order against Comcast without any review of the merits. The Commission, the court concluded, “has failed to tie its assertion of ancillary authority over Comcast’s Internet service to any ‘statutorily mandated responsibility.’”²⁴⁵

C. The FCC’s “Very Smart Lawyers” Try Again . . . and Again

In October, 2009, the NPRM based its authority on a legal theory identical to the one rejected in the *Comcast* case a few months later.²⁴⁶ Midway through the Open Internet proceeding, then, the agency was suddenly left without authority for its proposed rulemaking. With Congress unlikely to move on any of the proposed net neutrality authorization bills, and ancillary authority essentially foreclosed to the agency, Chairman Genachowski was forced to consider unorthodox alternatives.

One option he considered was to “reclassify” broadband Internet service as a Title II telecommunications service, subjecting it to the same section of the law that regulated the former telephone monopoly.²⁴⁷ A wide range of industry and consumer groups, along with a bi-partisan majority of Congress, strongly opposed this idea.²⁴⁸ If attempted, this effort would have been subject to substantial legal challenges and would likely have failed.

Next, the Chairman offered a modified Title II proposal in May 2010, which he termed the “third way”—neither Title I nor full Title II.²⁴⁹ Broadband Internet access would be reclassified as a Title II telecommunications service, but the Commission would exercise its authority under § 10 of the Communications Act to forbear from applying a number of unnecessary provisions.²⁵⁰ Objections to this proposal were equally vocal, however, and the Chairman backed off again.²⁵¹

²⁴⁵ *Comcast*, 600 F.3d at 661.

²⁴⁶ *Open Internet NPRM*, *supra* note 41, ¶¶ 83-87.

²⁴⁷ Statement of Julius Genachowski, Chairman, FCC, *The Third Way: A Narrowly Tailored Broadband Framework* (May 6, 2010), <http://commcns.org/uxdndv>.

²⁴⁸ See Marguerite Reardon, *Lawmakers Oppose FCC Plan to Reassert Net Authority*, CNET NEWS (May 28, 2010), <http://commcns.org/vZ4IKh>; Cecilia Kang, *FCC Reclassification Would Face Political, Legal Opposition, Analysts Say*, WASH. POST (May 4, 2010), <http://commcns.org/vdYIhi>.

²⁴⁹ Chairman Julius Genachowski, *supra* note 247. The “third way,” strangely, was grounded in Justice Scalia’s solitary dissent in the *Brand X* case. *FCC Statement: ‘Third Way’ Legal Framework*, CNET NEWS (May 6, 2010), <http://commcns.org/t0Sws7>.

²⁵⁰ Chairman Julius Genachowski, *supra* note 247.

²⁵¹ Spencer Dalziel, *FCC ‘Third Way’ Attracts Criticism: ISPs Fear Net Neutrality Regulation*, THE INQUIRER (May 7, 2010), <http://commcns.org/rETFYY>; Chloe Albanesius,

After efforts at developing a compromise solution failed over the summer of 2010, in November, Chairman Genachowski announced that the FCC's "very smart lawyers" had discovered still another legal theory that would save the rules, this time without any reliance on Title II.²⁵² That theory appears in the final Order passed a little more than a month later. But it was largely a rerun of the arguments rejected in *Comcast*, albeit with some minor tweaks.²⁵³

The new argument relies on a slightly different reading of Section 706 of the Communications Act. Section 706 was one of the provisions advanced and rejected in *Comcast* as the basis of ancillary jurisdiction.²⁵⁴ In the Order, however, the FCC offers a new reading of Section 706, arguing that the provision provides independent, explicit authority over broadband Internet access providers sufficient to implement the Open Internet rules.²⁵⁵

This is an odd theory at best. On its face, Section 706 does not authorize the FCC to regulate anything. The goal of Section 706(a) is to encourage the FCC to promote broadband adoption by "regulating methods that remove barriers to infrastructure investment," including forbearance from its existing powers.²⁵⁶ This provision was aimed, in other words, at *removing regulations* that hindered the ability of telephone carriers to provide advanced telecommunications capability.²⁵⁷ Similarly, Section 706(b) requires the FCC to issue a regular report on broadband deployment and immediately act to *remove* investment barriers (such as regulations) if it finds such deployment is not taking place in a "reasonable and timely fashion."²⁵⁸

Even if 706(b) authorized new regulations, as Commissioner McDowell noted, the 706(b) reports consistently found broadband deployment to be proceeding rapidly.²⁵⁹ That is, however, until a few months after the *Comcast* decision. In July 2010, the 706(b) Report for the first time found that "broadband deployment to *all* Americans is not reasonable and timely," despite the fact that broadband availability grew from 15% of Americans in 2003 to

FCC's Clyburn Defends 'Third Way' Plan, PCMag (June 4, 2010), <http://commcns.org/v2ibq4>; W. David Gardner, *Net Neutrality Battle Lines Form Over FCC 'Third Way' Plan*, INFORMATION WEEK (May 10, 2010), <http://commcns.org/vhmfef>.

²⁵² Sara Jerome, *FCC Chairman Genachowski Knocks Google, Verizon for Slowing Net-Neutrality Efforts*, THE HILL (Nov. 17, 2010), <http://commcns.org/vxpc1Y>.

²⁵³ *Open Internet Order*, *supra* note 1, ¶¶ 115-150 (McDowell, Comm'r, dissenting) (McDowell dissents only explaining the weakness of the argument without the need for much added commentary).

²⁵⁴ *Comcast*, 600 F.3d at 658-59. See *Open Internet Order*, *supra* note 1, ¶¶ 120-122 and n.380.

²⁵⁵ *Open Internet Order*, *supra* note 1, ¶¶ 117-122 (McDowell, Comm'r, dissenting).

²⁵⁶ *Id.* ¶ 117 (McDowell, Comm'r, dissenting).

²⁵⁷ *Id.* at 18061 (McDowell, Comm'r, dissenting).

²⁵⁸ 47 U.S.C. § 1302(b) (2006 & Supp. 2009).

²⁵⁹ *Open Internet Order*, *supra* note 1, at 18062 (McDowell, Comm'r, dissenting).

95% in 2010.²⁶⁰ This negative report was clearly a pretext to give the agency the ability to trigger the “immediate action” language of the 706(b), but even then, the action the FCC is supposed to take is to deregulate broadband, not increase regulations. Despite this apparent paradox, the majority now argues that “Section 706(b) provides express authority for the pro-investment, pro-competition rules we adopt today.”²⁶¹

The Section 706 argument is weak to begin with, but the FCC faces another problem: the agency itself has already rejected the new interpretation. As the D.C. Circuit noted in *Comcast*, “[i]n an earlier, still-binding order, the Commission ruled that section 706 ‘does not constitute an independent grant of authority.’ Instead, the Commission held, section 706 ‘directs the Commission to use the authority granted in other provisions . . . to encourage the deployment of advanced services.’”²⁶² Section 706 does not grant the FCC any regulatory authority; rather, it provides only guidance on whether to apply other statutory provisions of the Communications Act. That has been the FCC’s own understanding of the law, a view courts will give considerable deference.²⁶³

Can the FCC simply change its mind? While agencies have broad discretion to overrule earlier decisions, there must be some rational basis or changed circumstances for doing so.²⁶⁴ Assuming the FCC faces a legal challenge to its authority to pass the Open Internet rules, a reviewing court will at least look for external data that justifies a reversal of the agency’s prior interpretation of Section 706. Nothing here appears to meet even that minimal standard. The only changed circumstance is the agency’s lost battle in the *Comcast* case; that is no basis to justify this surprising new understanding of a 15 year-old

²⁶⁰ Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, *Sixth Broadband Deployment Report*, 25 F.C.C.R. 9556, ¶ 2 (July 16, 2010). See also THE NATIONAL BROADBAND PLAN, *supra* note 139, at 20; *Open Internet Order*, *supra* note 1, at 18062 (McDowell, Comm’r, dissenting).

²⁶¹ *Open Internet Order*, *supra* note 1, ¶ 123.

²⁶² *Comcast*, 600 F.3d at 658.

²⁶³ See, e.g., *id.* at 659 (asserting that “because the Commission has never questioned, let alone overruled, that understanding of section 706, and because agencies ‘may not . . . depart from a prior policy *sub silentio*,’ the Commission remains bound by its earlier conclusion that section 706 grants no regulatory authority”). See *Open Internet Order*, *supra* note 1, ¶ 122 (presumably, the FCC understood the D.C. Circuit’s statement as an invitation to explicitly depart from its prior policy as set out in the *Comcast* decision and, it’s possible to read the Order as doing just that).

²⁶⁴ See, e.g., *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 797 (1978) (concluding that the Commission ban on new licensing of co-located newspaper-broadcast combination was a reasonable administrative response to changed circumstances in the broadcasting industry).

provision in the FCC's implementing statute. To quote Commissioner McDowell, "[t]his move is arbitrary and capricious and is not supported by the evidence in the record or a change of law."²⁶⁵

The remainder of the section of the Order detailing the FCC's authority offers a number of provisions of the Communications Act that the FCC did not offer in *Comcast*.²⁶⁶ Most are even more disconnected from broadband Internet than those already rejected. The connection between the Open Internet rules and the agency's regulatory powers over telephone service, television and radio broadcasting, cable TV, and spectrum management—all provisions proposed in the Order—is too tenuous to be convincing to a reviewing court. If that authority is close enough to support net neutrality, it would be close enough to support anything, including, for example, the broadcast flag rules already overturned.

VII. CONCLUSION: PRESERVING *WHICH* INTERNET, AGAIN?

The majority's effort to find authority for the new rules exposes more than just the clear intent of Congress not to provide any. It actually undermines the FCC's legal position and brings into sharp focus the reality behind the agency's true dilemma. Since Congress last updated the Communications Act in 1996, a technological revolution has utterly transformed the industries the FCC regulates. The Internet's packet-switching protocols have quickly and unexpectedly taken over as the dominant technology for all communications.

Even the "Internet" as we knew it in 1996 looks nothing like the thriving ecosystem of digital life enjoyed today by so many. In 1996, the communications, computing and entertainment industries operated in silos with little overlap. Each had its own established leaders and long histories of regulatory intervention. Today, however, the worlds of television, radio, and computing have converged, leaving little left of the world the 1996 Act authorized the FCC to regulate. These industries have undergone nearly complete transformation in the intervening years, largely outside the FCC's authority to intervene; indeed, perhaps in significant part because the agency was left out of the equation.

The remaining bits of the communications industry still under FCC control—including Plain Old Telephone Service (POTS), broadcast television, and radio—have declined. Businesses in these industries—in some cases parts of companies whose unregulated operations are thriving—are simply unable to respond quickly to emerging new technologies, applications, and consumer

²⁶⁵ *Open Internet Order*, *supra* note 1, at 18052 (McDowell, Comm'r, dissenting).

²⁶⁶ *See id.* ¶¶ 117-123; *Comcast*, 600 F.3d at 658-59.

demands because of the regulatory environment in which they operate. They suffer from a regulatory disease closely related to what Harvard's Clayton Christensen famously termed the Innovator's Dilemma: they cannot adapt to new technologies, even if they had the will to do so.²⁶⁷ The slow pace of regulatory change prevents them from innovating.

Repeated efforts, including the Open Internet Order, to fit square regulations into round statutory pegs underscore not only the FCC's lack of authority, but also the agency's unintentional habit of exposing its growing obsolescence.²⁶⁸ The majority's incantations of obsolete and inapplicable provisions of the old communications law highlights just how much progress has been made during the period when the FCC has been unable or unwilling to interfere in the evolution of the Internet ecosystem.

At best, the new Open Internet rules will have little impact on the evolution of the Internet ecosystem, either because Congress or the courts will nullify them or because technology will simply innovate around them. At worst, the rules will stunt future growth of this now-essential network in unintended and catastrophic ways. While neither is the result the FCC was hoping for after a year of genuinely hard labor and thousands of pages of filings and proceedings, that, unfortunately, is the result they got.

²⁶⁷ Clayton M. Christensen, *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail* 20 (Harvard Business School Press, 1997).

²⁶⁸ *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).