The FCC's Authority to Regulate Net Neutrality after *Comcast v. FCC*

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Summary

In 2007, through various experiments by the media, most notably the Associated Press, it became clear that Comcast was intermittently blocking the use of an application called BitTorrent™ and, possibly, other peer-to-peer (P2P) file sharing programs on its network. Comcast eventually admitted to the practice and agreed to cease blocking the use of the P2P applications on its network. However, Comcast maintains that its actions were reasonable network management and not in violation of the Federal Communications Commission's ("FCC" or "Commission") policy.

In response to a petition from Free Press for a declaratory ruling that Comcast's blocking of P2P applications was not "reasonable network management," the FCC conducted an investigation into Comcast's network management practices. The FCC determined that Comcast had violated the agency's Internet Policy Statement when it blocked certain applications on its network and that the practice at issue in this case was not "reasonable network management." The FCC declined to fine Comcast, because its Internet Policy Statement had never previously been the basis for enforcement forfeitures. Comcast appealed this decision to the U.S. Court of Appeals for the D.C. Circuit, as did other public interest groups.

The D.C. Circuit ruled on April 6, 2010, that the FCC could not base ancillary authority to regulate cable Internet services solely upon broad policy goals contained elsewhere in the Communications Act. Whatever the merits of other jurisdictional arguments the FCC may advance, the court found that the FCC did not have jurisdiction to enforce its network management principles on the basis it had advanced in that case. The court did not address the other questions posed by the case, including whether the FCC could proceed via adjudication.

On October 22, 2009, the FCC issued a notice of proposed rulemaking that would codify the four network management principles into regulations and would add two additional principles. The fifth principle would be one of non-discrimination and the sixth principle would be one of transparency. The period for public comment was open until January 14, 2010, with reply comments due in March of 2010. In light of the decision issued by the D.C. Circuit, the FCC may craft its jurisdictional argument for the adoption of the rules differently. It is possible that the agency could advance an argument that would satisfy the standard for its use of ancillary authority. Any new rules announced pursuant to this rulemaking will likely result in a court challenge.

Congress could act to grant the FCC the authority necessary to adopt network management rules. If a law were enacted, the FCC would not have to rely on its ancillary jurisdiction to enforce network management rules.

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Introduction

Some degree of Internet traffic management is necessary for networks to function effectively. For example, in order for voice conversations to occur over the Internet, the data packets encoding the communications must arrive in rapid sequence. Long delays between the arrival of voice data packets would make voice conversations over the Internet impossible to conduct. Prioritization of voice data packets over other packets traveling simultaneously over the same network ensures clear voice transmissions, while minimally delaying other network traffic. Logically, if network managers have the power to prioritize data packets, they also have the power to subordinate them. This means network managers have the power to render the applications that depend on packet-prioritization (like voice or video applications) useless. Accordingly, there must be a line between network management that is necessary for the Internet to provide quality service to users, and network management that is anti-competitive or otherwise harmful to the free exchange of information. Questions have arisen regarding where that line is and who has the ability to draw it. For more information see CRS Report RS22444, *Net Neutrality: Background and Issues*, by Angele A. Gilroy.

In an attempt to separate the unnecessary network management practices from the necessary, the Federal Communications Commission (FCC) issued an Internet Policy Statement. The Internet Policy Statement endeavored to ensure that broadband consumers would have access to all lawful content on the Internet and that all lawful applications could be used on networks. These rights may be limited by the needs of broadband providers to reasonably manage their networks. The Policy Statement was not a regulation carrying the force of law; therefore, violation of the Policy Statement presumably would not result in liability.

In 2007, through various experiments by the media, most notably the Associated Press, it became clear that Comcast Corporation (Comcast) was intermittently interfering actively with the use of an application called BitTorrent™ and, possibly, other peer-to-peer (P2P) file sharing programs on its network, as a method of traffic management. While initially denying the accusations, Comcast eventually admitted to the practice and agreed to cease blocking the use of the P2P applications on its network. However, Comcast maintains that its actions in relation to P2P programs were reasonable network management and not in violation of the FCC's policy.

In response to a petition from Free Press for a declaratory ruling that Comcast's blocking of P2P applications was not "reasonable network management," the FCC conducted an investigation into Comcast's network management practices. The FCC determined that Comcast had violated the agency's Internet Policy Statement when it blocked certain applications on its network and that the practice at issue in this case was not "reasonable network management." Comcast disputes the FCC's authority to issue such a ruling and appealed the decision to the U.S. Court of Appeals for the D.C. Circuit. The court held that the FCC did not make a proper argument for asserting ancillary jurisdiction over network management practices. This report will discuss these events and their legal implications in greater detail.

Proceedings at the FCC

FCC's Network Management Principles

Federal policy towards the Internet, as embodied in Section 240(b) of the Communications Act of 1934, as amended, is "to preserve the vibrant and competitive free market that presently exists for the Internet" and "to promote the continued development of the Internet."[1] In Section 706 of the Communications Act, Congress instructs the FCC to encourage "the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[2]

Basing its authority on these two provisions, the FCC issued a policy statement intended to offer guidance to network owners regarding the rights of consumers accessing the Internet through their networks.[3] The FCC acknowledged that information service providers (those who provide access to the Internet) are not governed by stringent Title II common carrier regulations, but asserted that it had jurisdiction to issue the Policy Statement pursuant to its Title I ancillary jurisdiction.[4] Title I ancillary jurisdiction permits the Commission to issue additional regulatory obligations in order to regulate interstate and foreign communications in furtherance of the Communications Act. In the FCC's assessment, Title I ancillary jurisdiction granted the FCC ample authority to take steps to ensure that broadband networks are widely deployed, open, affordable and accessible to all and to ensure that Internet services are operated in a neutral manner. Accordingly, the FCC adopted the following principles to encourage broadband deployment and to preserve and promote the open and interconnected nature of the public Internet:

- consumers are entitled to access the lawful Internet content of their choice;
- consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement;
- consumers are entitled to connect their choice of legal devices that do not harm the network; and
- consumers are entitled to competition among network providers, application and service providers, and content providers.[5]

It is also important to note that upon adopting these precepts the FCC expressly stated that it was "not adopting rules in this policy statement" and that the principles adopted were "subject to

[1] 47 U.S.C. § 230(b)(2).

[2] 47 U.S.C. § 157 (incorporating section 706 of the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (1996)).

[3] In the Matters of the Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Inquiry 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, 20 FCC Rcd 14986 (2005) [hereinafter FCC's Network Management Principles].

[4] *Id.* at 14988.

[5] *Id.*

reasonable network management."[6] The Commission termed the Policy Statement to be guidance and insight into its approach to the Internet that was intended to be consistent with Congressional directives. The Commission did not put the network management principles out for public comment, nor did it publish the principles in the Code of Federal Regulations.

The Ruling Against Comcast

In 2007, the Associated Press reported the results of various tests it had conducted to investigate whether Comcast was blocking P2P applications on its network.[7] The AP concluded that Comcast "actively interfere[d] with attempts by some of its high-speed Internet subscribers to share files online."[8] The AP alleged that Comcast was specifically targeting P2P applications, such as Gnutella and BitTorrent™, preventing anyone who wished to use these applications from being able to do so in an effective way. The Electronic Frontier Foundation conducted similar tests with similar results. Comcast admitted to interfering with P2P applications on occasions of high volume traffic, but maintained that its interferences were a reasonable network management practice.[9]

As a result, Free Press, a non-profit organization that advocates for media reform, filed a complaint against Comcast with the FCC. The complaint asked the FCC to declare "that an Internet service provider violates the [Commission's] Internet Policy Statement when it intentionally degrades a targeted Internet application."[10] Free Press also filed a petition with the Commission requesting that the agency issue a declaratory ruling that would clarify that any Internet service provider that intentionally degrades or blocks particular applications would be in violation of the FCC's Internet Policy Statement. The Commission put the petition out for public comment.[11]

After hearing comments from the public and from industry participants, the Commission determined that Comcast had violated its Internet Policy Statement, because its practice of degrading usage of P2P applications prevents consumers from using the lawful application of their choice and does not fall under the exception for reasonable network management.[12] The Commission was particularly troubled by what it determined to be Comcast's lack of transparency regarding the company's network management practices.[13] The Commission found that Comcast was less than forthcoming about its network management practices and that only

[6] *Id.* at n. 15.

[7] Peter Svensson, Comcast Blocks Some Internet Traffic, AP Testing Shows, Associated Press, Oct. 19, 2007.

[8] *Id.*

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

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

[11] 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, WC Docket No. 07-52, Public Notice, 23 FCC Rcd 343 (WCB 2008).

[12] In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications and 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," 23 FCC Rcd 13028 (2008) [hereinafter Comcast Decision].

[13] *Id.* at para. 52.

after independent evidence emerged that Comcast was not being truthful did the corporation admit to its true methods of traffic management related to P2P programs.[14] The Commission noted that "[a] hallmark of whether something is reasonable is whether a provider is willing to disclose to its customers what it is doing."[15] Since Comcast, evidently, was not disclosing its practices, the Commission viewed its actions as suspect. Furthermore, the Commission found there were other effective methods for managing the heavy traffic generated by P2P programs that fell short of interfering with the applications' ability to function.[16]

Despite determining in its adjudication that Comcast had violated its Internet Policy Statement, the Commission did not issue a forfeiture order against the company.[17] The Commission also declined to issue an injunction or a cease-and-desist order against the company. The company had already agreed to cease its objectionable practices and the Commission determined that a reasonable transition period was necessary.[18] To monitor Comcast's compliance, the Commission required Comcast submit to the Commission, within 30 days of the order: (1) the precise contours of its previous network management practices; (2) a compliance plan "with interim benchmarks that describe[d] how it intend[ed] to transition from discriminatory to nondiscriminatory network management practices [by the end of 2008]; and (3) publicly disclose its newly implemented and protocol-agnostic network management practices.[19]

Comcast filed the requested documents with the FCC on September 19, 2008.[20] Comcast also filed a certification with the FCC on January 5, 2009, affirming that the company had fulfilled its promise to move to protocol-agnostic network management practices.[21] The Commission sent a letter to Comcast on January 18, 2009 asking the company to clarify its treatment of VoIP services.[22] The Commission expressed concern that Comcast made no distinction between VoIP

[14] *Id.* at para. 53.

[15] *Id.*

[16] *Id.* at para. 49.

[17] *Id.* at para. 54. Because the Commission was enforcing a policy statement that had never previously been enforced, the agency did not issue a forfeiture order in this particular case. The Commission reserved the right to proceed by adjudication in the future, and believed it could issue forfeiture orders for future violations of the network management principles.

[18] *Id.*

[19] *Id.* Failure to submit the required documents and / or failure to complete its transition to protocol-agnostic network management would have resulted in further enforcement action by the Commission. *Id.* at para. 55.

[20] Letter from Kathryn A. Zachem, Vice President, Regulatory and State Legislative Affairs, Comcast to Marlene H. Dortch, Secretary, FCC, Re: In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation 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," File No. EB-08-IH-1518, WC Docket No. 07-52 (September 19, 2008).

[21] Letter from Kathryn A. Zachem, Vice President, Regulatory and State Legislative Affairs, Comcast to Marelene Dortch, Secretary, FCC, Re: In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation 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," File No. EB-08-IH-1518, WC Docket No. 07-52 (January 5, 2009).

[22] Letter from Dana R. Shaffer, Chief, Wireline Competition Bureau, and Matthew Berry, General Counsel, FCC, to Katherine A. Zachem, Vice President, Regulatory Affairs, Comcast Corporation, Re: In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation 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 (continued...)

services in its filing, but, apparently, treats its own VoIP service offering differently than it treats other VoIP services. Furthermore, the Commission noted that if Comcast's VoIP service is a separate offering of a telephone service (distinct from the broadband offering), then it is possible that it should be classified as a "telecommunications service." Telecommunications services are subject to more stringent regulations under Title II of the Communications. The Commission, therefore, asked Comcast to explain why it omitted the effects its new network management practices would have on Comcast's VoIP service from its required filings and why Comcast's VoIP service should not be treated as a telecommunications service under Title II.

Comcast filed its answer with the Commission on January 30, 2009.[23] The company argued that Comcast's voice service is a separate service from its broadband offering. In the company's opinion, it, therefore, was not part of the ongoing discussions about Comcast's broadband network management practices and is not affected by the newly implemented management regime. Comcast also argued that the question of whether Comcast's voice service should be treated as a telecommunications service is irrelevant to the current proceedings, but, nonetheless, asserted that Comcast's voice offering is not a telecommunications service. The Commission has yet to take any action in response to Comcast's letter.

Though Comcast voluntarily ceased the network management practices that the Commission found objectionable, Comcast appealed the decision of the Commission to the D.C. Circuit.[24]

Court Opinion in Comcast v. FCC

On April 6, 2010, the D.C. Circuit vacated the FCC's order against Comcast because the FCC had failed to tie its assertion of ancillary authority to any "statutorily mandated responsibility."[25] After dispensing with the FCC's preliminary arguments against the court's jurisdiction, the panel applied the test for ancillary jurisdiction it had announced in *American Library Assn. v. FCC*,[26] and found the FCC's argument insufficient to satisfy the standards.

The Supreme Court recognizes that the FCC has so-called "ancillary authority" to regulate services that it has not been granted express authority to regulate.[27] The FCC did not claim that it had express authority to regulate cable Internet service. Rather, the agency argued that regulation

(...continued)

Network Management," File No. EB-08-IH-1518, WC Docket No. 07-52 (January 19, 2009).

[23] Letter from Kathryn A. Zachem, Vice President, Regulatory and State Legislative Affairs, Comcast to Dana R. Shaffer, Chief, Wireline Competition Bureau, and Matthew Berry, General Counsel, FCC Re: In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation 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," File No. EB-08-IH-1518, WC Docket No. 07-52 (January 30, 2009).

[24] Petition for Review and, in the Alternative, Notice of Appeal, Comcast Corporation v. Federal Communications Commission, (No. 08-____) (D.C. Cir. 2008).

[25] Comcast v. Federal Communications Commission, No. 08-1291, 2010 U.S. App. LEXIS 7039 (D.C. Cir. April 6, 2010). The court did not address the question of whether the FCC acted appropriately in attempting to enforce the policy statement through an adjudication because the FCC did not clear its jurisdictional hurdle.

[26] 403 F. 3d 689, 691-92 (D.C. Cir. 2005).

[27] *See* United States v. Southwestern Cable Co., 392 U.S. 157 (1968), United States v. Midwest Video Corp., 406 U.S. 649 (1972), FCC v. Midwest Video Corp., 440 U.S. 589 (1979).

of Internet services was "reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities."[28] The FCC relied primarily upon Section 230(b) of the Communications Act, which states that "it is the policy of the United States ... to promote the continued development of the Internet and other interactive computer services [and] to encourage the development of technologies which maximize user control over what information is received by individuals families and schools who use the Internet."[29] The FCC argued that this statement of policy, along with the general rulemaking authority in Title I, was sufficient to assert ancillary jurisdiction over cable Internet network management.

In *American Library Assn. v. FCC*, the D.C. Circuit recently held that the FCC may assert its ancillary authority when two conditions are met: (1) the Commission's general jurisdiction grant under Title I covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its *statutorily mandated responsibilities*.[30] The court agreed that condition one had been met. Cable Internet services falls within the general jurisdiction granted to the Commission under Title I. The court held, however, that the FCC had failed to satisfy the second condition because statements of policy could not be considered to be statutorily mandated responsibilities under the Communications Act.[31]

The court detailed each case heard by the Supreme Court and by the D.C. Circuit where ancillary jurisdiction was the basis for the FCC's authority to act in the case. In each case, the court found that where the FCC had ancillary authority to exercise jurisdiction, the FCC's argument for jurisdiction related to a specific grant of authority to regulate in a related area and did not rely solely on a policy statement, as the Commission had done here. The court expressed concern that if it had adopted the FCC's argument and allowed ancillary authority to rest on statements of policy in the Communications Act, the FCC's authority to regulate would have been nearly boundless and the agency could find reason to regulate in many new areas where Congress had not granted specific authority to do so.

The court also addressed the other statutory provisions upon which the FCC claimed to rely for jurisdiction.[32] Some of these statutory provisions, such as Section 706 of the Communications Act,[33] arguably might grant the FCC specific authority to regulate in an area reasonably related to the regulation of cable Internet services. In each case, however, the court found the FCC had failed in some way to properly advance the argument for jurisdiction on the basis of these other statutory provisions. Therefore, the court found that it could not hold that the FCC had ancillary

[28] Comcast v. Federal Communications Commission, No. 08-1291, 2010 U.S. App. LEXIS 7039, at *2 (D.C. Cir. April 6, 2010).

[29] *Id.* at *17.

[30] *Id.* at *7.

[31] *Id.* at *29 - 30.

[32] *Id.* at *30 – 36.

[33] Section 706 of the Communications Act states that "the Commission ... shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." The court agreed that this could be a direct mandate to regulate. The Commission, however, is legally bound by its previous interpretation of Section 706. The Commission had previously found that Section 706 did not constitute an independent grant of authority. In the court's opinion, the Commission could not rely on Section 706 as an independent grant of statutory authority in this case, because it had previously held that Section 706 was not an independent grant of authority and it is bound by its own interpretation of the section. *Id.* at *30 – 31. The Commission does have the option of conducting a rulemaking to reinterpret Section 706 as an independent grant of regulatory authority. The Commission would have to complete that rulemaking before asserting Section 706 as a source of ancillary authority. *See* FCC v. Fox Television Stations, Inc., 129 S.Ct. 1800, 1811 (2009).

authority to regulate cable Internet services based upon any of these specific grants of regulatory authority.

Network Management Rulemaking

On October 22, 2009, the FCC issued a notice of proposed rulemaking that would codify the four network management principles into regulations and would add two additional principles.[34] The fifth principle would be one of non-discrimination and the sixth principle would be one of transparency. The period for public comment was open until January 14, 2010, with reply comments due in March of 2010.

Following the D.C. Circuit's decision in *Comcast v. FCC*, the FCC may not rely solely on the statements of policy in Title II and rulemaking authority in Title I to exercise jurisdiction over cable Internet services. Therefore, the FCC may not rely on the reasoning in its order against Comcast to justify its authority to promulgate the regulations the agency is proposing. Notably, the arguments the FCC has made for asserting ancillary authority in the notice of proposed rulemaking were somewhat different than those advanced in the Comcast order.

The FCC placed more emphasis on grounding its ancillary authority to promulgate Internet network management rules in statutory provisions that granted the agency some specific authority to regulate, and that the FCC argues are "reasonably ancillary to the effective performance" of the statutory obligations identified. Rather than relying solely on the policy statement in Section 230(b), for its ancillary authority to regulate cable Internet management, the FCC placed more emphasis on Section 201(b) of the act as a source of authority.

Section 201(b), according to the FCC, gives the FCC specific authority "to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [the] Act."[35] The grant of rulemaking authority in Section 201(b) has been interpreted broadly by the U.S. Court of Appeals for the Sixth Circuit.[36] In *Alliance for Community Media*, the Sixth Circuit held that the FCC had authority under Section 201(b) to promulgate rules under Section 621 of the Telecommunications Act of 1996,[37] which addresses franchising requirements for cable companies. Section 201(b) was part of the Communications Act of 1934. Section 621 was added to the Communications Act by the Telecommunications Act of 1996 and no grant of regulatory authority is mentioned within Section 621. Despite the lack of explicit authority to promulgate regulations under Section 621, the court found that Section 201(b) provided the agency with the requisite authority. The Supreme Court has also adopted a rather expansive reading of the

[34] Federal Communications Commission, In the Matter of Preserving the Open Internet, Broadband Industry Practices, FCC 09-93, released October 22, 2009, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-93A1.pdf.

[35] *See* 47 U.S.C. § 201(b). Federal Communications Commission, In the Matter of Preserving the Open Internet, Broadband Industry Practices, FCC 09-93, para. 84, released October 22, 2009, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-93A1.pdf.

[36] *See* Alliance for Community Media v. FCC, 529 F. 3d 763, 772-74 (6th Cir. 2008) (holding that Section 201(b) grants the FCC the authority to issue rules implementing 47 U.S.C. § 541).

[37] Codified at 47 U.S.C. §541.

authority granted by Section 201(b), saying "We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act.'"[38]

Section 201(b), while it may grant the FCC broad authority to promulgate regulations to implement the provisions of the Communications Act, does not appear to grant the FCC the authority to regulate services that are not specifically regulated by the Communications Act. In order to assert ancillary jurisdiction, the FCC must show that the proposed regulations are reasonably ancillary to the FCC's effective performance of its *statutorily mandated responsibilities*.[39] It is unclear whether a broad authorization to create regulations to implement the Communications Act, such as the authorization contained in Section 201(b), would be the equivalent of a statutorily mandated responsibility. The D.C. Circuit emphasized that ancillary jurisdiction, in that court's opinion, requires that the regulations be closely tied to the FCC's ability to achieve a specific statutory directive.[40] For example, when the FCC successfully asserted ancillary jurisdiction over cable services, the assertion of jurisdiction was closely tied to the FCC's Title III "'obligation of providing a widely dispersed radio and television service,' with a 'fair, efficient, and equitable distribution' of service among the several states and communities."[41]

It remains to be seen whether the FCC can advance a satisfactory jurisdictional argument for exercising ancillary authority over the provision of cable Internet services. The FCC may craft its argument for ancillary authority to regulate in its upcoming rulemaking in a similar fashion to those outlined by the D.C. Circuit in its opinion in *Comcast v. FCC*, discussed above. It is conceivable that, when the FCC releases its final order in this rulemaking procedure, the agency's arguments for asserting ancillary authority over cable Internet services may change significantly.

The FCC asserts a different statutory basis for asserting ancillary authority over Internet access via spectrum-based facilities. The FCC has authority under Title III of the Communications Act to allocate spectrum and to license spectrum.[42] The agency also has broad rulemaking authority related to spectrum management.[43] The FCC argues that the agency may use this authority to regulate services provided by wireless carriers, and seems to seek to add wireless Internet services to the list of services provided by wireless carriers that the agency can regulate in this fashion.[44]

[38] AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 378 (1999).

[39] *American Library*, 403 F. 3d at 691-92 (emphasis added).

[40] Comcast v. Federal Communications Commission, No. 08-1291, 2010 U.S. App. LEXIS 7039, at *17-19 (D.C. Cir. April 6, 2010).

[41] *Southwestern Cable*, 392 U.S. at 173-74.

[42] 47 U.S.C. §§ 301, 303, 307, 308, 309(i).

[43] 47 U.S.C. § 303(r).

[44] Federal Communications Commission, In the Matter of Preserving the Open Internet, Broadband Industry Practices, FCC 09-93, para. 86, released October 22, 2009, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-93A1.pdf.

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