Fast Lanes without Slow Lanes:  
**The FCC is Involved in a Never Ending Fight to Ensure Net Neutrality as a Law**

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1. Introduction

The overall purpose of this work is to discuss the current state of net neutrality. Given Federal Communication Commission (“FCC”) Chairman Tom Wheeler’s most recent proposal to pass net neutrality into law, net neutrality is ripe for discussion.\(^1\) The court ruling striking down the infrastructure of the Open Internet Order in *Verizon v. F.C.C.*, and the devaluation of Title I regulatory authority exhibited in the decision made in *Comcast Corp. v. F.C.C.* bring about an appropriate point to stop and reflect concerning the options the FCC has to instill net neutrality regulation.\(^2\) Part II of this work will be dedicated to explaining net neutrality and addressing the overall question of whether net neutrality needs to be enacted into law. Part III will be dedicated to discussing *Verizon v. F.C.C.* and *Comcast Corp. v. F.C.C.* as well as other applicable case law concerning net neutrality violations. Part IV will address FCC Chairman Tom Wheeler’s most recent net neutrality proposal, now law. Part V will consider the authoritative options that the FCC has in regulating net neutrality violations.

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\(^2\) Congress vested the Commission with the statutory authority to carry out those necessarily acts. Indeed, the relevant Senate Report explained that the provisions of Section 706 are “intended to ensure that one of the primary objectives of the [1996 Act]--to accelerate deployment of advanced telecommunications capability--is achieved,” and stressed that these provisions are “a necessary fail-safe” to guarantee that Congress’s objective is reached. *In the Matter of Preserving the Open Internet Broadband Indus. Practices*, 25 F.C.C. Red. 17905, 17969 (2010).
2. Net Neutrality

2.1 Past Net Neutrality Proposals Have Not Become Law:

An individual accessing the internet may be headed to their blog to insert a YouTube video they saw on Facebook, or they may be accessing Netflix to watch the newest Brad Pitt movie, but it is unlikely that they are considering whether the access being provided to their blog was the same access they were provided when they watched that Netflix movie. Nor is it likely that the individual internet user is aware that Netflix, YouTube and Facebook account for a majority of the downstream Internet traffic in North America. Most individual internet users do not fathom the idea that the companies hosting their blogs did not have to consult with anyone, or pay an Internet Service Provider (“ISP”) to generate their product over the internet. These subtleties that make the internet all-encompassing are taken for granted by its users because they are extremely complex. We leave net neutrality to the experts to decide whether the fact that downstream internet is dominated by Netflix and YouTube, but has ameliorated peer to peer video piracy is due to the openness of the internet itself, or the free market economy which the internet was created under.

3 “All of the major content owners have negotiated direct business relationships with multiple ISPs for their CDN. Some ISPs in the U.S. have dozens of paid interconnect deals in place. Historically companies like Netflix have always paid for their transit connectivity, or Internet delivery costs.” Dan Rayburn, Chart Shows Which Content Owners Have Direct Interconnect Deals With ISPs, Streaming Media, (May 21, 2014), http://blog.streamingmedia.com/2014/05/chart-shows-which-content-owners-have-direct-interconnect-deals-with-isps.html.

4 Netflix and YouTube now make up more than 50% of downstream internet traffic. Downstream traffic is data that goes from a source to a computer, and Netflix’s share of that is 31.6%. YouTube comes in second at about 18.7%, up 9% from the first half of this year. BitTorrent accounts for around 4% of North American downstream Internet traffic, compared with 31% five years ago. Colin Daileda, Netflix and YouTube Account for Half of Internet’s Traffic, MASHABLE, (Nov. 2, 2013), http://mashable.com/2013/11/12/internet-traffic-downstream/ (last accessed 29 May 2015).

5 “ISP’s have something that companies like Facebook and Google don’t: direct control over your connections to the Internet and the devices you use to connect to it.” As of November 2014, ISPs have not directly exercised this control in the form of a tax or toll. Freepress, Net Neutrality: What You Need to Know Now, Save the Internet, http://www.savetheinternet.com/net-neutrality-what-you-need-know-now.

6 “When Mark Zuckerberg created Facebook in his Harvard dorm room, he didn’t need to ask Comcast, Verizon, or other internet service providers to add Facebook to their networks. He also didn’t have to pay these companies extra fees to ensure that Facebook would work as well as the websites of established companies. Instead, as soon as he created the Facebook website, it was automatically available from any internet-connected computer in the world.” Timothy B. Lee, Everything You Need to Know about Net Neutrality, Vox Conversations, (May 21, 2014, 2:53P), http://www.vox.com/cards/network-neutrality/whats-the-argument-for-network-neutrality (last accessed 29 May 2015).

7 Internet users rely on net neutrality experts such as the FCC to decide what constitutes discrimination. Some instances of discrimination are more egregious than others, which is why internet users leave the topic to agencies such as the FCC to decide when litigation is necessary. The FCC receives its authority from the organic statute of the Communications Act of 1934. 47 U.S.C.A. § 151.
Net Neutrality is not a current law; it is an idea that has evolved beyond its original topic matter. Net neutrality is controversial, not always for the appropriate reasons, but it is controversial because it forces individual telecom users to acknowledge that something they have taken for granted needs to be regulated by law. Although the concept of net neutrality dates back to the late 1800s and the telegraph, it has actually come to fruition in the last few decades. For the purpose of this work, I am choosing to include a definition of net neutrality as stated by Tim Wu, a renowned ambassador of net neutrality and current professor at Columbia University:

“Network neutrality is best defined as a network design principle. The idea is that a maximally useful public information network aspires to treat all content, sites, and platforms equally. This allows the network to carry every form of information and support every kind of application. The principle suggests that information networks are often more valuable when they are less specialized – when they are a platform for multiple uses, present and future.”

Net Neutrality is also defined in the dictionary: “The principle that ISPs should enable access to all content and applications regardless of the source, and without favoring or blocking particular products or websites.”

Proponents of net neutrality believe that at this very moment, someone, somewhere is utilizing the openness of the internet to accomplish something that they would not be able to accomplish without net neutrality inculcating low barriers to entry. Further, that one of the main reasons that great internet entrepreneurs such as Mark Zuckerberg of Facebook, and Eric Schmidt of Google were able to rollout their products with such success was because residential broadband treated all internet activity equally. Net neutrality stands for the fact that

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9 Christopher R. Steffe, Why We Need Net Neutrality Legislation Now or: How I Learned to Stop Worrying and Trust the Fcc, 58 Drake L. Rev. 1149, 1154 (2010).
10 Tim Wu is one of the most important figures in the current net neutrality discussion.
14 Id.
Zuckerberg did not have to ask an ISP to treat Facebook traffic on their networks equal to all other internet traffic. On the other hand, critics of net neutrality would argue that companies like Facebook were able to flourish because of the lack of regulation surrounding the internet. These same critics argue that regulation of the internet should be decided by the market for regulation, and that enacting net neutrality into law could actually stifle internet related innovation. No matter which side of the net neutrality argument an individual positions themselves, it is clear that the openness of the internet has evolved into uncharted water, and it is unclear whether net neutrality or the FCC has the authority to regulate the most prevalent issues.

2.2 The FCC Wants Net Neutrality To Be The Law:

The internet has come a long way without net neutrality being sustained as a law. What once required a telephone jack to operate has recognized the benefit of billions of dollars of network roll outs on a per company basis. Although net neutrality has not been upheld as a law, there “exists a de facto ban [on] termination fees”— which assures content providers that they will not have to pay an additional fee to ISPs for the delivery of their content to consumers. In other words, although net neutrality has never gone through the agency rulemaking process without being successfully challenged by ISPs, it has been used as a form of regulation.

The FCC wants to establish express authority to regulate the internet and to explicitly inaugurate net neutrality as a law. Recent litigation has generated debate as to whether the FCC

16 Its possible that the lack of regulation surrounding the internet was what allowed for companies like Facebook to flourish. The internet was not coerced or shaped, it just evolved; it is possible that net neutrality could actually stifle the innovation that it is meant to protect. Katherine Walkenhorst, The Invasive Nature of “Net Neutrality”, CITIZENS AGAINST GOVERNMENT WASTE, (Apr. 1, 2006), http://cagw.org/media/wastewatcher/invasive-nature-%E2%80%9Cnet-neutrality%E2%80%9D (last accessed 29 May 2015).
17 Id.
20 Net Neutrality laws were passed on February 26th, 2015. It is yet to be seen which ISP will challenge the laws and when. In the past, the FCC has attempted to utilize proposals for rule making to impose regulations on network discrimination, but as of November 2014, none of these attempts have been successful. Emily R. Roxberg, Fcc Authority Post-Comcast: Finding A Happy Medium in the Net Neutrality Debate, 37 J. CORP. L. 223, 229 (2011).
has actual authority to adopt and enforce net neutrality rules. In late 2004 and early 2005 the FCC proposed the Internet Policy Statement of 2005 which put ISPs on notice that net neutrality rules were in the process of becoming law. The 2005 Policy Statement was also referred to as the four pillars of net neutrality. The Internet Policy Statement of 2005 regulated on a de jure basis until 2008 when Comcast began throttling BitTorrent in violation of the FCC’s proposed rules. The FCC took Comcast to court and lost, enduring D.C. Circuit court Judge Tatel’s dialogue concerning their lack of authority to regulate. The court determined that the Internet Policy Statement of 2005 was not actual regulatory authority, which meant that Comcast was in violation of mere proposals for rulemaking, and not actual law. This issue raises important questions about the FCC’s statutory authority to regulate in areas where the Commission lacks explicit authority in the Communications Act.

Determined to enact net neutrality into law, the FCC countered the Comcast Corp. v. F.C.C. ruling with the Open Internet Order of 2010. The Open Internet Order of 2010 was similar to Internet Policy Statement of 2005, but relied more heavily on Section 706 Authority. Although it seemed as if net neutrality was finally set in stone, Verizon capitalized on the momentum of the Comcast ruling, challenged the Open Internet Order in court, and won. Verizon successfully convinced the D.C. Circuit court that the Open Internet Order was attempting to apply Title II common carrier regulations to ISPs. Further, in 2014 the D.C. Circuit court ruled that ISPs were distinct from common carriers, and that the Open Internet

22 Id.
23 “[F]our principles to encourage broadband deployment and preserve and promote the open and interconnected nature of public Internet: (1) consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement; (3) consumers are entitled to choose their choice of legal devices that do not harm the network; and (4) consumers are entitled to competition among network providers, application and service providers, and content providers. Although the Commission did not adopt rules in this regard, it will incorporate these principles into its ongoing policymaking activities. In the Matters of Appropriate Framework for Broadband Access to the Internet, 20 F.C.C. Rcd. 14986, 14988 (2005).
24 Id.
25 Comcast Corporation
27 Comcast Corp. v. F.C.C., 600 F.3d 642, 661 (D.C. Cir. 2010).
28 Id. at 652
31 Id. at 17936.
33 Id.
Order was an attempt to regulate ISPs as common carriers without reclassifying ISPs under Title II regulatory authority. The Open Internet Order turned out to be the FCC’s second failed attempt at enacting net neutrality into law. Based on the failed attempts at enacting net neutrality, the FCC is unsure of their legal authority to palliate network discrimination. Net neutrality adversaries argue that the market for quality internet connection will dictate the changes that internet service providers make to their networks to satisfy demand. After all, it is the consumer who decides whether they are satisfied with the product. If an individual internet user feels as if their content is not reaching them at a fast enough speed, they are free to seek out another provider whose network works to their liking. An obvious counter argument exists where internet users have only one option for competent internet service.

Advocates of net neutrality believe that the internet is at a decisive point in time where service providers have become so powerful that only the application of law can control their actions. Companies like Verizon and Comcast are present day examples of how powerful

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34 Id. at 655.
36 Emily R. Roxberg, Fcc Authority Post-Comcast: Finding A Happy Medium in the Net Neutrality Debate, 37 J. CORP. L. 223, 228 (2011); See Also, Comcast Corp. v. FCC, 600 F.3d 642, 645 (D.C. Cir. 2010). (“[T]he Commission does not claim that Congress has given it express authority to regulate Comcast's Internet service.”).
37 If the transaction volume flowing through an internet business to business marketplace represents only a small share of all transaction volume in a market, it is unlikely that the organization of the internet market would result in a restraint of competition. Still, if the participants in a B2B Internet market as a group have substantial market share in the bricks-and-mortar world, then antitrust enforcement agencies are likely to inquire into whether the collaborative operation of the Internet market by those businesses would tend to have an anti-competitive effect on the market overall. § 15.04 B2B MARKETS AND STANDARD SETTING ORGANIZATIONS, 2013 WL 4285605.
38 § 2.02 NETWORK ACCESS, LOTIN s 2.02; § 43:101. The telecommunication law and the competition.
39 Id.
40 Comcast Corporation is America’s biggest cable company, its biggest internet-service provider, and its third-biggest home-telephone provider. As the owner of NBCUniversal, it’s also one of the largest producers of programming for film, cable, and television; on NBC’s networks, it is currently showing the Olympics. It’s not just big by American standards. It’s the largest media company in the world. In 2013, it took in $64.67 billion, generating $13.6 billion in operating income and $7.1 billion in net profits. When one corporation is this large, it really does reduce the number of comparable choices, sometimes limiting consumer of a certain geographic area to one option. John Cassidy, We Need Real Competition, Not a Cable-Internet Monopoly, THE NEW YORKER, (Feb. 13, 2014), http://www.newyorker.com/news/daily-comment/we-need-real-competition-not-a-cable-internet-monopoly (last accessed 29 May 2015).
telecommunications companies have become. Present day telecommunication companies bundle cable television, telephone, and internet services together so as to provide everything the consumer needs into one contract, only increasing their power over the consumer. For example, Comcast is one of the largest internet service providers in the United States. While being one of the largest internet service providers, Comcast also provides cable television and home telephone services. It is undeniable that Comcast faces competition to their cable television services from organic internet companies like Hulu. Similarly, Comcast faces competition to their home telephone service from organic internet companies like Skype. Net neutrality would like to stand in the way of Comcast if they were to degrade access to Hulu and Skype. If a company like Comcast were to degrade their internet users access to Hulu because it competes with their cable television services, or degrade their internet users access to Skype because it competes with their home telephone services, there should be a recognized problem. At this point in the evolution of telecommunications, many net neutrality proponents believe that it is necessary for the FCC to regulate through the authority bestowed upon them by the Communications Act of 1934.

Although net neutrality was not passed into law until February 26th of 2015, it is unclear whether the FCC has the proper authority to regulate the internet, and net neutrality remains one of the most tenuous modern debates of the 21st century. Net Neutrality has attracted the attention for President Obama, and discussions have begun to formulate concerning whether or not net neutrality should be considered a fundamental right or regulated as a violation of human rights. The idea net neutrality itself is enshrined in our culture and is a topic beyond our borders.

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42 Hiawatha Bray, Comcast, Verizon battle it out for market share. BOSTON.COM, (Feb. 7, 2010), http://www.boston.com/business/technology/articles/2010/02/07/comcast_verizon_battle_for_market_share/ (last accessed 29 May 2015); § 2.02 NETWORK ACCESS, LOTIN s 2.02.
43 Id.; § 2.02 NETWORK ACCESS, LOTIN s 2.02.
44 For the purposes of this paper, an “organic” internet company is one which relies solely on internet service to conduct its business. Google and Facebook are other examples of “organic” internet companies.
46 Id.
47 The Communications Act of 1934 gave the FCC multifaceted authority to adequately regulate telecommunications. The FCC needs to put past regulatory failures behind them and find a way to effectively regulate. 47 U.S.C.A. § 151.
49 Id.
2.3 Alternative Forms of Regulation:

Not everyone believes that instilling net neutrality rules through FCC rulemaking is the appropriate way to tackle the issues at hand. Barry Szoka, a critic of net neutrality principles believes that “[t]he FCC should stop trying to ban prioritization outright and focus only on actual abuses of market power.”50 While writing for TechFreedom, Szoka elaborated on his opinion: "[t]his entire enterprise of prophylactic regulation is a mistake"; he prefers using existing laws, including antitrust and consumer protection, to intervene in cases of ISP misconduct.51

Some opponents of net neutrality believe in the concept of the “Law of the Horse,” a published paper by Judge Frank Easterbrook.52 Judge Easterbrook’s paper was titled: CYBERSPACE AND THE LAW OF THE HORSE, and stood for generalizing the cyberspace law discussion:

“[T]he best way to learn the law applicable to specialized endeavors is to study general rules. Lots of cases deal with sales of horses; others deal with people kicked by horses; still more deal with the licensing and racing of horses, or with the care veterinarians give to horses, or with prizes at horse shows. Any effort to collect these strands into a course on ‘The Law of the Horse’ is doomed to be shallow and to miss unifying principles.”53

Judge Easterbrook’s paper sheds light on the growing number of scholars who are pushing for net neutrality regulation through antitrust and consumer protection laws. “Antitrust law preserves the process of competition across all industries by condemning anticompetitive conduct when it occurs.”54 Antitrust and consumer protection laws have solid standing in preserving economic interest and it is undeniable that antitrust law could play an active role in

http://apps.fcc.gov/ecfs/document/view;jsessionid=vyL4ThDBcvvm6ryPChChGJsXbm1BqLQg2J6BNnD2D6zTIG4MCy2d!1675925370!1281169505?id=7021748087 (last accessed 29 May 2015).
51 Id.
54 Babette Boliek, FCC Regulation Versus Antitrust: How Net Neutrality is Defining the Boundaries, PEPPERDINE LAW MAGAZINE, (Fall 2011), http://lawmagazine.pepperdine.edu/index.php/2011/10/fcc-regulation-versus-antitrust (last accessed 29 May 2015); As use of the Internet expands, antitrust conflicts associated with these topics are likely to become substantially more visible than they are today. § 4.06 ACCESS, EQUIPMENT, CONTENT, AND COMMERCIAL TRADING HUBS, 2013 WL 3924138.
regulating telecommunication issues.55 “In addition to [spectrum] licenses, the FCC shares oversight responsibilities with antitrust authorities with respect to any merger involving a regulated, communication company and can dictate onerous terms that the parties must accede to in order to close the deal.”56 It is possible that recent court rulings such as Comcast Corp. v. F.C.C. signify that it is time to consider net neutrality issues on a case by case basis while applying common law principles.57

In a recent House Judiciary Subcommittee Meeting on net neutrality, net neutrality activists such as House Representative Bob Goodlatte, Columbia Law School professor Tim Wu, FTC Commissioner Joshua Wright, and former FCC Chairman Robert McDowell debated whether antitrust laws are equipped to tackle net neutrality issues.58 The FCC has had the most major regulatory impact on internet service market while overseeing the barriers of entry and encouraging growth and innovation.59 Advocates of antitrust laws are quick to point out that the most recent court decisions concerning net neutrality hampers60 706 authority61, and severely

55 § 4.06 ACCESS, EQUIPMENT, CONTENT, AND COMMERCIAL TRADING HUBS, 2013 WL 3924138.
60 “The FCC does have authority to use Section 706 to promote broadband deployment.” “But the court states that Section 706 authority won’t help the FCC prevent blocking or other abuses because ISPs are not common carriers, and it cannot impose common-carriage obligations on them using Section 706 authority” Derek Turner, Wonkblog Gets It Wrong: The FCC’s Shrinking Authority Isn’t Enough to Save Net Neutrality, FREEPRESS, (Jan. 16, 2014), http://www.freepress.net/blog/2014/01/16/wonkblog-gets-it-wrong-fcc%E2%80%99s-shrinking-authority-isn%E2%80%99t-enough-save-net-neutrality (last accessed 29 May 2015).
61 “Even though section 706 grants the Commission authority to promote broadband deployment by regulating how broadband providers treat edge providers, the Commission may not utilize that power in a manner that contravenes any specific prohibition contained in the Communications Act. ... We think it’s obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers. Given the Commission’s still-binding decision to classify broadband providers not as providers of "telecommunications services" but instead as providers of “information services,” such treatment would run afoul of section 153(51).” Matt Wood and Derek Turn, Wonkblog Gets It Wrong The FCC’s Shrinking Authority Isn’t Enough To Save Net Neutrality, FREEPRESS – SAVE THE INTERNET, http://www.savetheinternet.com/blog/2014/01/16/wonkblog-gets-it-wrong-fcc%E2%80%99s-shrinking-authority-isn%E2%80%99t-enough-save-net-neutrality (last accessed 29 May 2015); See Also, http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0115/DOC-325150A1.pdf (last accessed 29 May 2015).
limits the FCC’s overall authority in the space.\textsuperscript{62} Further, the dialogue from D.C. Circuit Judge Tatel’s opinion suggesting that the FCC’s path to ancillary jurisdiction is through reclassifying ISPs as common carriers regulated under Title II, highlights the fact that antitrust laws can be implied “uniformly on all market participants, not just internet service providers,” and can accomplish their regulations without any sort of reclassification.\textsuperscript{63} Mr. Goodlatte, a common adversary of the FCC, stated: “I believe [in] vigorous application of the antitrust laws to prevent dominant ISPs from discriminating against competitor's content, or engaging in anticompetitive pricing practices.”\textsuperscript{64} FTC Chairman Joshua Wright backed up Mr. Goodlatte’s rhetoric by pointing out that antitrust laws encompass a consumer welfare analysis, which determines what forms of competition are appropriate and what forms are violations of antitrust.\textsuperscript{65} The consumer welfare analysis creates informed competition policy, making antitrust law ripe to tackle current issues surrounding the net neutrality debate.\textsuperscript{66} The antitrust analysis employs the rule of reason analytical framework to differentiate between broadband business practices “which increase consumer welfare” and those “which make consumers worse off.”\textsuperscript{67}

Proponents of the FCC as the regulatory body in charge of the internet do not believe that antitrust laws are qualified to handle all of the values embraced by the internet. Tim Wu, responded to the suggestion that antitrust laws, and not the FCC, should be in charge of regulating the internet by testifying that:

I simply don't think they [antitrust laws] are equipped to handle the broad range of values and policies which are implicated by net

\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} Id.
neutrality and the open internet.\textsuperscript{68} When we consider internet policy what we are really considering is not merely economic policy, not merely competition policy, but media policy, social policy, oversight of the political process [and] issues of free speech.\textsuperscript{69}

There are a wide range of non-economic values, which the antitrust laws do not capture.\textsuperscript{70} Tim Wu gave an example of a non-economic value of the internet which could not be calculated in an antitrust analysis: extended families sharing pictures over the internet.\textsuperscript{71} Presently, the FCC is the regulatory authority in charge of the internet, but the issue of whether the internet should be managed by the FCC or the FTC, and net neutrality regulations or common law antitrust and consumer protection laws has become a more relevant discussion.

\subsection*{2.4 Approaches Beyond Common Law Solutions:}

Not everyone believes that the current regulation is the answer to our net neutrality issues. One alternative strategy which has been discussed is “unbundling.”\textsuperscript{72} The issue concerning unbundling is whether the benefits of multifaceted telecommunications companies such as infrastructure investment outweigh the potential monetary benefits the consumer would see by requiring telecommunications companies to share their networks.\textsuperscript{73}

Proponents of unbundling believe that net neutrality issues can be tackled by enforcing anticompetitive measures on bundled service providers.\textsuperscript{74} This approach was utilized during the

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\begin{itemize}
\item \textsuperscript{69} Id. Wu at 49:00.
\item \textsuperscript{70} Id.
\item \textsuperscript{71} Tim Wu considers extended families sharing pictures over the internet to be a non economic value of the internet. He does not believe that an antitrust analysis could embrace this type of non economic value. For example, if ISPs were to discriminate against content on Facebook, a common means to share pictures, antitrust laws would have difficulty utilizing their analysis to diagnose and render a solution. It is hard to imagine that an antitrust analysis could encompass the enjoyment a marine in Afghanistan receives from seeing Facebook pictures of his children. Id. Wu at 49:00.
\item \textsuperscript{72} “Unbundling is a policy that forces companies that have already built cables in a neighborhood — usually your local phone or cable company — to lease this part of their network to competitors at regulated rates. That dramatically lowers the barrier for entry for new ISPs because they don’t have to lay nearly as many new cables.” Timothy B. Lee, \textit{Everything You Need To Know About Net Neutrality}, VOX CONVERSATIONS, (May 21, 2014), http://www.vox.com/cards/network-neutrality/what-are-some-alternatives-to-network-neutrality-regulation (last accessed 29 May 2015).
\item \textsuperscript{73} \S 11.4 \textit{COMMON CARRIAGE: BACKGROUND}, 2014 WL 2531813.
\item \textsuperscript{74} “Unbundling proponents argue that if the infrastructure provider does not offer retail services or is only one of many retailers offering service over its infrastructure it will have less incentive to discriminate in favor of or against particular content.” Scott J. Wallsten and Stephanie Hausladen, \textit{Net Neutrality, Unbundling, And Their Effects On}
\end{itemize}
Clinton Administration, then abandoned during the Bush administration, and is a popular approach outside of the United States. Proponents of unbundling tend to be proponents of greater government intervention. Proponents of greater regulation reference the approach taken in Europe, requiring unbundling of the transmission portion of ISP service so that different ISPs could operate on the last mile (the approach taken to DSL prior to its reclassification). Another strategy which has taking form, is the idea of the “third pipe.” Instead of unbundling, which attempts to force established companies to share their goodwill, why not encourage companies to build an entire network for themselves. Google is on the forefront of the “third pipe” discussion by expanding its fiber network into Kansas City. Although Google plans to expand its fiber network into other cities, most companies do not have the resources to undertake such large scale projects.

It is unlikely that any alternative forms of regulation pose an actual threat to the FCC’s reign over net neutrality, but each idea adds the relevancy of the discussion.

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75 Id.


78 The “third pipe” utilizes 700 MHz spectrum to create an alternative to cable and DSL. The third broadband pipe is meant to bring high speed internet access to urban and rural homes, targeting those who have the fewest competitive internet service options. The “third pipe” is legally unclear, and faces opposition from Verizon.


80 When a company like AT&T is forced to “unbundle” it is analogous to asking AT&T to share their goodwill to promote competition amongst market participants.

81 Robert A. Penchuk, Unleashing the Open Mobile Internet, 13 J. INTERNET L. 1, 21 (2010).

82 Id.

83 Google is considering expanding its fiber network to almost a dozen other metropolitan areas. But building residential broadband networks is still extremely expensive. Few companies have the resources to undertake such projects on a large scale, and so far Google is the only major company to do it. That means that most cities won't have a competitor like Google shaking up their broadband markets any time soon. Marcus Wohlsen, Why Your City Still Won’t Be Getting Google Fiber, (April 10, 2014), http://www.wired.com/2013/04/google-fiber-not-in-your-town/ (last accessed 29 May 2015).
3. Net Neutrality As Legal Authority

3.1 The Authority Which The FCC May Or May Not Have

Throughout this entire discussion and as a part of most of the accusations of net neutrality violations there is a great deal of technical terminology used to discuss the regulation of the internet. In this work and throughout the opinions of the cases discussed in later parts of this work, language such as the Communications Act of 1934, Title I regulatory authority and Title II regulatory authority are thrown around as if the average person can actually identify with this terminology. Although some of this language has already been stated in the beginning portions of this work, Part III will attempt to clarify the technological jargon surrounding net neutrality.

3.2 How The Digital Millennium Copyright Act And The Telecommunications Act Of 1996 Affect The Current Discussion

Net Neutrality is a relevant topic of discussion because it's is unclear whether the FCC has the authority to regulate net neutrality violations. In the past two decades, the FCC has unsuccessfully attempted to implement net neutrality rules into law. The court rulings in Comcast Corp. v. F.C.C. and Verizon v. F.C.C. severely hamper the FCC’s options in regulating violations of net neutrality. For the last several decades, broadband service providers have enjoyed protection from the Telecommunications Act of 1996, and the Digital Millennium Copyright Act (“DMCA”). ISP’s built their business on the idea that they are common carriers, while conveniently shielding themselves from common carrier regulations. Current internet users remember that ISPs advertised their services as if they were common carriers, all the while convincing courts that they should actually be classified as information services. In 1998 the DMCA gave broadband service providers the legal protection of telecommunication services by relieving them from liability for the content which moves through their networks. The DMCA also gave broadband service providers protection from liability for their user’s actions while utilizing data on their networks. Without intention, the DMCA and Communications Decency

85 GUIDE TO COMPUTER LAW LETTER NO. 345, 2010 WL 3093271.; § 2.02 NETWORK ACCESS, LOTIN s 2.02.
86 Id.
88 Id.
Act provisions have evolved into a loophole for broadband service providers allowing them to control content without being liable for the content.\footnote{The DMCA protections for ISPs extend to content that is stored on the ISP servers and storage devices. The Communications Decency Act “immunizes ISPs and other service providers from torts committed by users over their systems, unless the provider fails to take action after actual notice, or is itself involved in the process of creation or development of the content in a typical slander/defamation case, an ISP is able to escape liability where a print newspaper would be charged.” This is yet another example of Broadband Services being given an advantage. 47 U.S.C. §230 (1996). 255-DEC N.J. Law. 49, New Jersey Lawyer, The Magazine, December, 2008} The Telecommunications Act of 1996 helped ISPs expand their business and bundle their services while not being classified as a common carrier telecommunication services.\footnote{Robert McMillan, The Case for Net Neutrality’s Nuclear Option, WIRED, (Jun. 27, 2014), http://www.wired.com/2014/06/common-carrier/ (last accessed 29 May 2015).} ISPs convinced the public and the court systems that even though the internet is a telecommunication service, ISPs provide additional services, and therefore should be classified as information services.\footnote{The FCC knew that broadband should have been classified a telecommunication service, but they let ISPs and their lobbyists convince the court systems that they should fall into a less regulated category. Although a valid argument can be made concerning the incentives of lower regulations, ISPs have developed an advantageous position of the entire telecommunications market. Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs., 545 U.S. 967, 968, 125 S. Ct. 2688, 2691, 162 L. Ed. 2d 820 (2005).} The Telecommunications Act of 1996 intended to classify ISPs as common carriers, but their policy was vague concerning whether they had to be classified as common carriers if they also provided other services.\footnote{Id.;} The evolution of the internet calls for many different forms of regulation, some of which are relevant while others may be outdated.

### 3.3 Is Title I Enough Regulatory Authority For Broadband?

Broadband services have evolved into a paradox where Title I regulations are too equivocal to manage net neutrality violations, but Title II regulations are too comprehensive to manage broadband services.\footnote{Tim Wu, The Solution to the F.C.C.’s Net-Neutrality Problems, THE NEW YORKER, (May 9, 2014), http://www.newyorker.com/tech/elements/the-solution-to-the-f-c-c-s-net-neutrality-problems (last accessed 29 May 2015).} The current proposal to make net neutrality into law follows past proposals by sidestepping the issue of whether the FCC should reclassify broadband services under Title II authority. This common theme of sidestepping reclassification from Title I to Title II has led to a flurry of official comments by the public to the FCC encouraging reclassification.

Title I authority comes from the Communications Act of 1934, the same congressional act which empowers the FCC.\footnote{Communications Act of 1934. http://transition.fcc.gov/Reports/1934new.pdf (last accessed 29 May 2015).} The FCC initially believed that Title I was the appropriate authority to regulate broadband internet service. With the support of ISPs, the FCC classified
broadband providers as “information services “instead of “telecommunications services.” The FCC made this classification because the regulation involved in Title II seemed overly burdensome considering the contemporary aspects of internet services. The overall problem with Title I authority is that it requires the FCC to piecemeal together individual sections of authority (such as 706 Authority) in order to overcome a rigorous test found in American Library Ass'n v. FCC case. In American Library Ass'n v. FCC, it was decided that “The Commission … may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission's general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities.” The FCC “draws on a variety of cable, broadcast, interconnection, wireless, and deregulation provisions of the Communications Act to tether its claim to Title I “ancillary” authority over the Internet. In other words, it is rarely clear whether the Commission’s general jurisdiction covers the issue and it is arduous to prove that the regulations are reasonably ancillary to the commission’s responsibilities. “Ancillary” jurisdiction is an approach which reviewing courts have used to sustain authority over new technologies.”

95 “[C]able networks had never been common carriers, and when they started offering Internet access, the FCC made a momentous decision: this access was not a “telecommunications service” but instead an “information service.” DSL was also placed in the same category, which removed the “common carrier” designation.” Nate Anderson, Making ISPs common carriers: just a simple “error correction,” ARS TECHNICA, Making ISPs common carriers: just a simple “error correction”, (Apr. 19, 2010), http://arstechnica.com/tech-policy/2010/04/making-isps-common-carriers-just-a-simple-error-correction/ (last accessed 29 May 2015).
98 49, 933 COMCAST CORPORATION, PETITIONER V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS, NBC UNIVERSAL, ET AL., INTERVENORS. 2010 WL 1555005.
overcome the second, reasonably ancillary prong of the test.\textsuperscript{102} The \textit{Comcast Corp. v. F.C.C.} ruling put a thorn in the side of Title I by casting doubt on whether the FCC could muster the appropriate authority to attach ancillary jurisdiction. The \textit{Verizon v. F.C.C.} case reopened the Title I discussion by suggesting that although Judge Tatel rejected Section 706 authority in \textit{Comcast Corp. v. F.C.C.}, 706 authority was still a viable way for the FCC to exercise ancillary jurisdiction.\textsuperscript{103} In terms of hierarchy and for the purposes of this paper, it is important to point out that Section 706 authority is within the purview of Title I regulations, which is within the purview of the Communications Act of 1934. Title I authority is still alive in the minds of the FCC; present and future litigation will likely decide whether Title I authority is enough to manage internet discrimination.

After the \textit{Comcast Corp. v. F.C.C.} case, many net neutrality experts believed that Section 706 authority was dead in consideration of it being used to attach to ancillary jurisdiction.\textsuperscript{104} The \textit{Verizon v. F.C.C.} case reopened the discussion concerning Section 706 authority being used to advance the FCC’s regulatory authority.\textsuperscript{105} The court ruled that section 706 of the Telecommunications Act of 1996 "vests the FCC with affirmative authority to enact measures encouraging the deployment of broadband infrastructure."\textsuperscript{106} The court mostly agreed with the FCC’s interpretation of section 706 of the Telecommunications Act of 1996.\textsuperscript{107} In the four years between \textit{Comcast Corp. v. F.C.C.} and \textit{Verizon v. F.C.C.} cases, D.C. Circuit court Judge Tatel decided that Section 706 was an ambiguous statute, of which the FCC should be given deference when considering a reasonable interpretation.\textsuperscript{108} Based on the D.C. Circuit court’s change of tone, it is no surprise that current FCC Chairman Tom Wheeler is attempting to utilize Section 706 authority in order to pass new net neutrality laws, while leaving open the door to reclassify under Title II.\textsuperscript{109} Although the D.C. Circuit courts seem to have changed their tone concerning

\textsuperscript{102} \textit{Comcast Corp. v. F.C.C.}, 600 F.3d 642, 659 (D.C. Cir. 2010).

\textsuperscript{103} Section 706 authority is within Title I regulations, which is within the Communications Act of 1934. \textit{Verizon v. F.C.C.}, 740 F.3d 623, 633 (D.C. Cir. 2014).

\textsuperscript{104} \textit{Comcast Corp. v. F.C.C.}, 600 F.3d 642, 658 (D.C. Cir. 2010).

\textsuperscript{105} \textit{Verizon v. F.C.C.}, 740 F.3d 623, 637 (D.C. Cir. 2014).

\textsuperscript{106} Id.

\textsuperscript{107} Id.

\textsuperscript{108} Id.

\textsuperscript{109} Id. In Mr. Wheeler’s initial proposal for net neutrality laws there was reliance on Section 706 authority. His latest move which was brought down on February 26\textsuperscript{th}, 2015 reclassifies rather than relying on Section 706. Although the reclassification is outright, this will not be the last we hear about Section 706 authority. Bill Chappell, \textit{FCC Approves Net Neutrality Rules For Open Internet}. NPR, (Feb. 26, 2015), http://www.npr.org/blogs/thetwo-way/2015/02/26/389259382/net-neutrality-up-for-vote-today-by-fcc-board (last accessed 29 May 2015).
Section 706, it still has not been successfully utilized to pass net neutrality into law.\footnote{110} The language of Section 706, as interpreted through the Telecommunications Act of 1996, is not a perfect fit to regulate internet discrimination.\footnote{111} Based on the language, Section 706 would be ineffective in enforcing that ISPs with plans to prioritize data charge the same price to similarly situated services.\footnote{112} On the other hand, Section 706 would be effective in regulating a situation where an ISP prioritizes data to favor an affiliate.\footnote{113} Effectiveness of the regulations is not the only problem facing Section 706; the recent change of mind concerning Section 706 comes from the D.C. Circuit courts deference to the FCC as an agency.\footnote{114} Judge Tatel gave the FCC deference based on their reasonable interpretation of an ambiguous statute, which is another way of saying we are unsure which way to rule, so we are going to side with the agency.\footnote{115} This is a problem because it is possible that the D.C. Circuit courts will reexamine whether the FCC reasonably interpreted the statute. In other words, the FCC is relying on ambiguous authority granted to them by the D.C. Circuit courts even though the reasonableness of the FCC’s interpretation of this authority could be subject to reexamination.\footnote{116} The FCC unsuccessfully attempted to utilize Section 706 authority in both the 
\textit{Comcast Corp. v. F.C.C.} and 
\textit{Verizon v. F.C.C.} cases, only time can tell whether their current attempt to utilize Section 706 to pass current net neutrality rules will prove successful.

\section*{3.4 Is Title II Too Much Regulatory Authority For Broadband?}

Title II authority also comes from the Telecommunications Act of 1934.\footnote{117} Title II applies regulations to common carriers.\footnote{118} Common carriers include telephone lines, aircraft,
even amusement parks. All of the talk about “reclassification” concerns the call to reclassify broadband internet under Title II authority, and apply common carrier regulations. Some net neutrality pundits frame the issue as:

“The time is now for the FCC to classify broadband as Title II: without this step, we are playing fast-and-loose with the most opportunity-creating technology in all of communications history. Without this step, we are guaranteeing an Internet future of toll-booths, gatekeepers, and preferential carriage. Without this step, we stifle innovation, put consumers under the thumb of special interests, and pull the props from under the kind of rich civic dialogue that only open and non-discriminatory communications can provide.”

Reclassification is easier discussed than actually done; Title II reclassification requires forbearance, an arduous legal process, which seems to be forgotten in the reclassification discussion. Some telecom scholars consider Title II reclassification to be legally challenging and burdensome on the current broadband structure. When the FCC “last considered reclassification proposals, industry analysts warned that such proposals, even when accompanied by forbearance and portrayed as “third way” alternatives to maximal dominant-carrier regulation, would create enormous investment-deterring regulatory uncertainty.” The FCC originally decided that broadband was too novel a concept for Title II, and instead designated broadband as an information services to protect growth from regulation. It is undeniable that the FCC was successful in protecting growth from regulation, but the question is whether broadband should be

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120 Forbearance allows the FCC to refrain from doing something that one has a legal right to do.” If the FCC was able to successfully reclassify, the Commission could use its forbearance authority under Section 160 to exempt broadband from most of the Title II regulations it would face due to the classification. One of the concerns raised in consideration of reclassification is that broadband would be hampered by unnecessary regulations. Forbearance allows the FCC to reclassify, utilize the regulatory aspects of Title II which make sense, and forbear from applying the regulatory aspects which could disrupt the overall broadband structure. 47 U.S.C.A. § 160. Julius Genachowski, The Third Way: A Narrowly Tailored Broadband Framework, BROADBAND.GOV (May 6, 2010), http://www.broadband.gov/the-third-way-narrowly-tailored-broadband-framework-chairman-julius-genachowski.html (last accessed 29 May 2015).
121 Scott Cleland, Read AT&T’s FCC Filing that Totally Debunks Title II Reclassification, HEARTLAND.ORG, (May 12, 2014), http://news.heartland.org/editorial/2014/05/12/read Atts fcc filing totally debunks title ii reclassification (last accessed 29 May 2015).
regulated under Title II at this stage of its existence. As of February 26th, 2015, the FCC is going to go forward with reclassification under Title II.

3.5 Forbearance Provides A Middle Ground

Now that the FCC has solidified plans to reclassify broadband internet from Title I to Title II, it is clear that "forbearance" will be an integral aspect of the process. This reclassification will bring about numerous lawsuits against the FCC, the first of which was filed on March 23rd, 2015. The companies that have threatened to file lawsuits against the FCC believe that a reclassification from Title I to Title II would impose too much regulation on broadband internet. Another common argument made by entities planning to sue over the reclassification is that forbearance is a complicated process which requires a market by market analysis. For better or for worse, forbearance provides a middle ground.

The FCC argues that Title I does not impose regulations which are stringent enough to handle current net neutrality violations. On the other hand, ISPs assert that the reason why the FCC has been unable to impose their legal authority is because the proposed violations of net neutrality were not actual violations of the current regulatory scheme. The FCC believes that if broadband internet were to be regulated under Title II, the proposed violations which slipped through the cracks under Title I regulations would trigger regulatory authority under Title II.

By classifying broadband as information services released monetary incentives in network developmental funding.


By relying on its Section 706 authority, the Commission is forced to choose between two options: create strong open internet rules that are likely to be struck down in court, or settle for weak net neutrality rules that may survive court challenge but will not actually protect an open internet. Neither of these options will work. That is why relying on Title II authority is so important. Public Knowledge, What’s Net Neutrality, PUBLIC KNOWLEDGE, (Feb. 2, 2015), https://www.publicknowledge.org/issues/net-neutrality (last accessed 29 May 2015).

Comcast Corp. v. F.C.C., 600 F.3d 642, 652 (D.C. Cir. 2010).

The FCC’s misstep in classifying broadband as an information service, combined with the difficulty of overcoming the ancillary jurisdiction prong of Title I authority has put the FCC in a place where they are unable to effectively regulate. On the other hand, making the jump from Title I to Title II might tip the balance of power into the hands of the FCC without walking through the appropriate checks and balances.\textsuperscript{130} It is possible that forbearance is the checks an balance necessary to equalize the shift of power but also force the FCC, the telecommunications industry, the government, and the consumers to test drive the effect of reclassification before any major changes go into effect.\textsuperscript{131}

Forbearance is the process by which the FCC expressly commits not to apply certain regulations.\textsuperscript{132} In the case of net neutrality, many net neutrality adversaries believe that reclassification would force the FCC to apply language in Title II pertaining to telephone services.\textsuperscript{133} For example, there is language in Title II concerning obscene phone calls, rate schedules and carrier reporting requirements which have no place in the discussion of internet freedom.\textsuperscript{134} While some individuals believe that Title II opens the door to unnecessary regulations, other take their concerns a step further by presupposing that the FCC wants to reclassify so as to provide themselves with a treasure trove of regulations to test on broadband internet.\textsuperscript{135} with eventual plans to make themselves the gatekeepers of the internet.\textsuperscript{136} Although this argument is conducive for making headlines, anyone that takes the time to look up past cases of forbearance such as \textit{EarthLink, Inc. v. FCC}\textsuperscript{137}, and \textit{Ad Hoc Telecom. Users Committee v.}

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\textsuperscript{132} Id.;§ 3.15 FORBEARANCE: THE AUTHORITY NOT TO REGULATE, 2013 WL 7855638.

\textsuperscript{133} Id.;§ 3.15 FORBEARANCE: THE AUTHORITY NOT TO REGULATE, 2013 WL 7855638.

\textsuperscript{134} Don’t Break The Net Coalition, TECH FREEDOM, (February 2, 2015), http://dontbreakthe.net/ (last accessed 29 May 2015).


\textsuperscript{136} EarthLink, Inc. v. F.C.C., 462 F.3d 1 (D.C. Cir. 2006).
FCC\textsuperscript{138} knows that forbearance is actually fairly simple. As the D.C. Circuit explained in \textit{Orloff} \textit{v. FCC}, forbearance renders the statute being forborne upon obsolete.\textsuperscript{139}

The most specific argument concerning Title II and forbearance is it will empower the FCC to regulate rates under 47 U.S.C. 203.\textsuperscript{140} This is another headline grabbing argument that lacks substance or precedent. In actuality, the FCC does not intend to regulate rates; in fact they plan to forbear from the rate regulating aspects of 47 U.S.C 203 as they did when they forborne from exercising section 203 on mobile phone services.\textsuperscript{141} Further, any telecommunications entity which disputes the actions of the FCC may file a petition under 47 U.S.C. 160, which allows the entity to prove their case and suggest further forbearance.\textsuperscript{142}

Forbearance limits the FCC's authority by parsing the language in Title II and ensuring that we use the appropriate aspects of the Communications Act to regulate and nothing more.\textsuperscript{143} Normally the FCC forbears in response to a specific petition from a service provider but it can also do so on its own.\textsuperscript{144}

Based on the decade and a half of net neutrality related litigation, there is a great deal of distrust between the FCC and the telecommunication companies. Forbearance allows the FCC to ensure reasonable and discriminatory practices while also prohibiting the FCC from applying language which could stifle innovation.\textsuperscript{145} In actuality, forbearance does not supply the FCC with the language which the telecommunications companies oppose. Once the stakeholders decide

\textsuperscript{139} \textit{Orloff v. F.C.C.}, 352 F.3d 415 (D.C. Cir. 2003); 47 U.S.C. 160; 47 U.S.C. 1302
\textsuperscript{141} That’s right, mobile phone services are regulated under Title II and they have without any problems. Harold Feld, \textit{Title II Forbearance Is Actually So Easy It Makes Me Want To Puke}, \textit{WETMACHINE} (Jul. 14, 2014), http://www.wetmachine.com/tales-of-the-sausage-factory/title-ii-forbearance-is-actually-so-easy-it-makes-me-want-to-puke/ (last accessed 29 May 2015).
\textsuperscript{144} Id.; § 3.15 FORBEARANCE: THE AUTHORITY NOT TO REGULATE, 2013 WL 7855638.
what language in Title II is necessary and what language in Title II is unnecessary, the FCC would have to subject all changes to a public comment period.\footnote{146}

As of February 4th, 2015, the FCC has laid out the specifics of how forbearance will apply to the reclassification from Title I to Title II. These specifics were voted upon February 26th, 2015,\footnote{147} and are available in their entirety as of March 12, 2015.\footnote{148} “The Order applies some key provisions of Title II, and forbears from most others.”\footnote{149} The following sections of Title II will be included and applied: Sections 201 and 202, which discourage unjust and unreasonable practices.; Section 208, which allows investigations based on consumer complaints; Section 222, which protects consumer privacy; Section 224, which ensures fair access to poles and conduits, helping to encourage broadband network innovations and Section 254, which boosts universal fund support for broadband service.\footnote{150} Also included are Sections 206, 207, 209, 216 and 217, which provide support for investigations under Section 208.\footnote{151} The following will not be included because they will be subject to forbearance: Mr. Wheeler makes clear that broadband providers shall not be forced to unbundle or pay tolls in the form of rate approval.\footnote{152} Further, the proposal “does not require broadband providers to contribute to the Universal Service Fund under Section 254.”\footnote{153} Lastly, there will be no imposition of any new taxes or fees in the form of automatic Universal Service fees.\footnote{154} This explanatory revelation by the FCC is new and it is unclear whether it will be enough to satisfy stakeholders on both sides of the equation.

The internet is evolving at a pace where current regulation becomes outdated by one violation. Those opposed to reclassification believe that the FCC has not done enough with


\footnote{150}Id.

\footnote{151}Id.

\footnote{152}Id.

\footnote{153}Id.

\footnote{154}Id.
the power bestowed upon them by Title I, and therefore should not be given the regulatory authority entailed in Title II. The FCC believes that reclassification is necessary because Title I has never provided enough authority to regulate broadband internet. As long as all parties remain involved in the discussion, forbearance provides a middle ground where the FCC could regulate without stifling innovation.

4. Net Neutrality Violations

Although internet discrimination is a potent topic of discussion, there have been very few actual net neutrality violations since the existence of the Communications Act of 1934. This is not to say that net neutrality is a non-issue, but it is prudent to point out that the media tends to exacerbate the few instances of discrimination in order to properly cover the topic.

4.1 The Cases That Matter - Actual Net Neutrality Violations:

_In the Matter of Madison River Commc'ns, LLC & Affiliated Companies:_

In the Matter of Madison River is a case which detailed an investigation made by the FCC under § 201(b)\(^{155}\) of the Communications Act of 1934.\(^{156}\) Madison River Communications, a rural broadband provider, paid to settle a FCC investigation into whether they had blocked Vonage, a rival Voice Over Internet Protocol (“VOIP”) service, to favor their own services.\(^{157}\) Madison River Communications blocked Vonage’s voice-over-IP service because it did not appreciate the competition that it was posing upon their telephone and internet services.\(^{158}\) In 2005, the FCC investigated and eventually fined Madison River Communications $15,000.\(^{159}\) Madison River Communications stipulated that it would cease and desist blocking VOIP for 35 months.\(^{160}\)

The penalty imposed by the FCC was seen as weak, and a mere slap on the wrist, after all, “[f]or those customers who had disconnected their traditional phone lines and were relying solely on Vonage, the blocking meant they had no ability to make calls, even to emergency 911 services.”\(^{161}\) Although the FCC’s regulations we considered soft, the ruling was necessary to

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\(^{156}\) _In the Matter of Madison River Commc'ns, LLC & Affiliated Companies_, 20 F.C.C. Red. 4295, 4296 (2005).

\(^{157}\) _Id._

\(^{158}\) § 11.4 COMMON CARRIAGE: BACKGROUND, 2013 WL 4302419.

\(^{159}\) _In the Matter of Madison River Commc'ns, LLC & Affiliated Companies_, 20 F.C.C. Red. 4295, 4297 (2005).

\(^{160}\) § 11.4 COMMON CARRIAGE: BACKGROUND, 2013 WL 4302419.

support the FCC’s Internet Policy Statement of 2005.\textsuperscript{162} Had the FCC been shot down in its attempt to regulate this instance of content discrimination, the Internet Policy Statement would have been difficult to advance as a proposal.

\textit{Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs:}

The \textit{Brand X} case represents the idea that current internet access has evolved outside of its recognized form.\textsuperscript{163} The \textit{Brand X} case incited an important present day issue concerning whether the FCC designated broadband DSL as a common carrier telecommunications service regulated under Title II or an information service regulated under Title I.\textsuperscript{164} \textit{Brand X} is a pivotal decision in the field of telecommunications because it determined that cable companies were information services and in turn, did not have to provide competitors with access to their connections.\textsuperscript{165} The court made clear that the FCC’s decision is given deference through the \textit{Chevron} case.\textsuperscript{166} The case acknowledged that the FCC had the power to classify broadband as an “information service” and suggested that the evolution of the internet could require the FCC to reclassify broadband as a “telecommunications service.”\textsuperscript{167} This was a win for the FCC because it established that they are the governing body in charge of classifying whether broadband would be regulated under Title I, and not Title II. Future FCC investigations eventually shed light on whether Title I ancillary jurisdiction provides enough regulation for broadband internet access.\textsuperscript{168}

\textsuperscript{162} § 11.4 COMMON CARRIAGE: BACKGROUND, 2013 WL 4302419.
\textsuperscript{163} 7 West’s Fed. Admin. Prac. ‘§ 7555.
\textsuperscript{164} \textit{Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.}, 545 U.S. 967, 968, 125 S. Ct. 2688, 2691, 162 L. Ed. 2d 820 (2005).
\textsuperscript{165} Id. at 2693.
\textsuperscript{166} The Chevron case set guidelines for how courts should treat agency interpretations of statutes. The Supreme Court held that courts should defer to agency interpretations of such statutes unless they are unreasonable. Chevron is premised on the idea that agencies should be allowed to interpret the rules laid down in their organic statutes and the courts should not be used to fill any gaps left by Congress. \textit{Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.}, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).
\textsuperscript{167} \textit{Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.}, 545 U.S. 967, 968, 125 S. Ct. 2688, 2690, 162 L. Ed. 2d 820 (2005).
\textsuperscript{168} 1 Information Law ‘§ 7:16.
**Comcast Corp. v. F.C.C.:**

**Introduction to Comcast Corp. v. F.C.C.:**

In 2007, Comcast got caught red handed using tactics similar to experienced hackers, to ameliorate the burdens of peer-to-peer file sharing applications (Bittorrent). Comcast did not appreciate the amount of network that such file sharing applications were taking up, so they countered by sending fake reset packets to their own subscribers, which tricked each peer into believing the other peer was having a bad connection. Initially, Comcast did not back down from their tactics. Comcast defended its interference with peer-to-peer programs as necessary to manage scarce network capacity. Comcast was quick to point out that their purported violation was different from other net neutrality violations because there was no actual “blocking.” They also pointed out that “[they] handled traffic management, and it has already transitioned” to an approach which defends their network capacity.

On November 1, 2007 Free Press, filed a series of complaints alleging that Comcast was in violation of the Internet Policy Statement of 2005. Free Press also sought a declaratory judgment to determine that the Internet Policy Statement of 2005 was the proper regulatory instrument to respond to Comcast’s discriminatory actions. The Internet Policy Statement of 2005 was not put through the FCC’s rulemaking process, but it attempts to guarantee for consumers the freedom to use their internet connections to access any content, use any applications, and attach any devices, that they choose. It also relates to limitations upon these

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

173 *Id.* 1303.


175 *Comcast Corp. v. F.C.C.*, 600 F.3d 642, 645 (D.C. Cir. 2010).

176 See http://www.freepress.net/about (last accessed 29 May 2015).


178 *Id.*

freedoms, imposed by their service providers, or by the government. Finally, it contains language regarding competition in a variety of industry sectors, and hints at the possibility of a broadening the FCC’s exercise of antitrust authority."\textsuperscript{180}

In 2008, believing that they had a prima facie case, the FCC issued its own response to Comcast by declaring adjudicatory review of their actions and issuing an order. The agency decided, “the record evidence overwhelmingly demonstrates that Comcast's conduct poses a substantial threat to both the open character and efficient operation of the Internet, and is not reasonable.”\textsuperscript{181} The Commission believed that Comcast was unreasonable because their actions “contravene the established expectations of users and software developers across the Internet.”\textsuperscript{182}

Further, Comcast failed to carefully tailor its policy to its interests.\textsuperscript{183} The commission pointedly noted: Comcast’s violations affect customers no matter how much bandwidth they are using merely because they used a certain type of application.\textsuperscript{184} Second, Comcast’s utilization of their policies were applied at any time, “regardless of the level of overall network congestion at that time, and regardless of the time of day.”\textsuperscript{185} Third, Comcast’s policies affected more than just congested points; in actuality they targeted all connection points. Although dissatisfied with the implications of the order, Comcast complied with the FCC's demands while simultaneously appealing.\textsuperscript{186}

Comcast understood that it needed a better argument than implying that they gave the public fair warning, or that throttling was delaying, and not blocking. On the other hand, the FCC seemed overly confident in their choice to utilize a policy statement to regulate Comcast’s actions. Comcast petitioned for review of the order, challenging the FCC’s jurisdiction, its circumvention of rulemaking requirements and its alleged violation of notice requirements of the due-process clause.\textsuperscript{187} Comcast believed that the FCC did not have the appropriate authority to implement the order because the rules the FCC were citing in order to undertake their regulations were actually just proposals for rulemaking.\textsuperscript{188}

\textsuperscript{180} Id.
\textsuperscript{182} Id.; 7 Bus. & Com. Litig. Fed. Cts. § 85:20 (3d ed.).
\textsuperscript{183} Id.; 7 Bus. & Com. Litig. Fed. Cts. § 85:20 (3d ed.).
\textsuperscript{184} Id at 10056.; 7 Bus. & Com. Litig. Fed. Cts. § 85:20 (3d ed.).
\textsuperscript{185} Comcast Corp. v. F.C.C., 600 F.3d 642, 645 (D.C. Cir. 2010); 7 Bus. & Com. Litig. Fed. Cts. § 85:20 (3d ed.).
\textsuperscript{186} Comcast Corp. v. F.C.C., 600 F.3d 642, 645 (D.C. Cir. 2010); 7 Bus. & Com. Litig. Fed. Cts. § 85:20 (3d ed.).
\textsuperscript{187} Comcast Corp. v. F.C.C., 600 F.3d 642, 645 (D.C. Cir. 2010); 7 Bus. & Com. Litig. Fed. Cts. § 85:20 (3d ed.).
\textsuperscript{188} Id. at 661; 7 Bus. & Com. Litig. Fed. Cts. § 85:20 (3d ed.).
The Battle Over Jurisdiction:

Comcast’s most influential argument was that the FCC did not have ancillary jurisdiction necessary to regulate the matter.\(^{189}\) This argument was devastating because the FCC was relatively sure of its ancillary jurisdiction based on the ruling in the Brand X case.\(^{190}\) The FCC had the burden of proving to the court that they had ancillary jurisdiction before their regulations could be argued.\(^{191}\) The FCC cited the Brand X case in their order: “[FCC] has jurisdiction to impose additional regulatory obligations [on ISPs] under its Title I ancillary jurisdiction to regulate interstate and foreign communication.”\(^{192}\) Although the FCC did not conduct an ancillary jurisdiction analysis because of their confidence in the Brand X case, The FCC considered 47 U.S.C. §152, and Section §230(b) to be adequate authority to attach ancillary jurisdiction.\(^{193}\) The FCC added to their position by referring to sections §1, §201, §706, §256, §257 and §601(4) of the Telecommunications Act.\(^{194}\) Lastly, the FCC implied that Comcast should be estopped from challenging ancillary jurisdiction “over its network management practices” because Comcast admitted “in litigation before the U.S. District Court for the Northern District of California” that the FCC presides over it network management practices.\(^{195}\) Comcast believed that the FCC’s claim of ancillary jurisdiction was frivolous because the “authority must be “ancillary” to something, and in this instance the authority is attenuated.”\(^{196}\) Comcast was prudent in objecting to jurisdiction because of the organic nature of the issue at hand.


\(^{190}\) Comcast Corp. v. F.C.C., 600 F.3d 642, 647 (D.C. Cir. 2010); National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967, 125 S.Ct. 2688, 162 L.Ed.2d 820.

\(^{191}\) In American Library Ass'n v. FCC, we wrote: “The Commission ... may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission's general jurisdictional grant under Title I of the Communications Act covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities.” Comcast concedes that the Commission's action here satisfies the first requirement because the company's Internet service qualifies as “interstate and foreign communication by wire” within the meaning of Title I of the Communications Act. 47 U.S.C. § 152(a). Whether the Commission's action satisfies American Library's second requirement is the central issue in this case. Guide to Computer Law, 49, 933 COMCAST CORPORATION, PETITIONER V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS, NBC UNIVERSAL, ET. (April 06, 2010).


\(^{193}\) Id. at 646; 7 Bus. & Com. Litig. Fed. Cts. § 85:20 (3d ed.).


Rules, Or Proposals For Rulemaking:

Other than challenging ancillary jurisdiction, Comcast challenged the FCC’s decision to adjudicate, believing that the proposed violations were being regulated by rules which had not gone through the formal agency rulemaking process.\textsuperscript{197} The FCC proposed to adjudicate, rather than seek regulation through rulemaking because of the novelty of the issue commanded a case by case adjudication.\textsuperscript{198} The FCC cited the classic Chenery case to demonstrate that agencies are given a great deal of latitude in determining the means to their ends.\textsuperscript{199} Comcast’s overall position was concisely described by Nate Anderson of ARS Technica:

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“The Internet Policy Statement of 2005 provided “four freedoms”\textsuperscript{200} to Internet users, including freedom from traffic discrimination apart from reasonable network management. The FCC decided that Comcast’s actions had not been "reasonable network management," but Comcast took the agency to court, arguing that the FCC had no right to regulate its network management practices at all.”
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The FCC claimed that they did not want to prescribe rules to a young issue with broad implications, but, in essence, Comcast utilized the FCC’s own proposed rules against them by pointing out that Comcast was only violating rulemaking proposals.\textsuperscript{201}

The Court Rules For Comcast:

The issue at hand was more than just a violation of the Internet Policy Statement of 2005, it was a matter of network discrimination, and a violation of the specific public policies which the FCC defends.\textsuperscript{202} Believing that Comcast’s actions were “invasive and outright

\textsuperscript{197} Comcast Corp. v. F.C.C., 600 F.3d 642, 645 (D.C. Cir. 2010); 7 Bus. & Com. Litig. Fed. Cts. § 85:20 (3d ed.).
\textsuperscript{199} Id. at 13,045.; 7 Bus. & Com. Litig. Fed. Cts. § 85:20 (3d ed.).
\textsuperscript{200} The policy statement broadly proclaims that consumers are entitled to 1) access the lawful Internet content of their choice; 2) run applications and use services of their choice; 3) connect their choice of legal devices that do not harm the network; and 4) competition among network providers, application and service providers, and content providers. In a footnote, the Commission provided a qualification that “[t]he principles we adopt are subject to reasonable network management.” In the Matters of Appropriate Framework for Broadband Access to the Internet, 20 F.C.C. Rcd. 14986, 14988 (2005).
discriminatory”, the FCC felt they were legally well positioned and that they justified all of their regulations with viable authority.\textsuperscript{203} The actual issue in front of the D.C. Circuit courts was whether the FCC had the legal authority to decide whether certain network management practices by Comcast were reasonable, but the court only needed to address the ancillary jurisdiction aspect of the issue to dash the FCC’s hope.\textsuperscript{204} The D.C. Circuit Court which heard the appeal decided the case in favor of Comcast, laying down multiple daggers to the heart of the FCC in its discussion. The proceeding did not go well for the FCC from the beginning.\textsuperscript{205} The judges quipped about the FCC’s arguments; describing them as “aspiration, not operations.”\textsuperscript{206} The judges were concerned that the FCC had not identified a specific statute on which ancillary jurisdiction could be anchored upon.\textsuperscript{207}

Judge Tatel immediately threw out the FCC’s estoppel argument, denying that Comcast waived its challenge to jurisdiction.\textsuperscript{208} After throwing out the threshold estoppel claim, the court laid down the most decisive blow in the history of net neutrality by declaring that the FCC lacked ancillary jurisdiction.\textsuperscript{209} The FCC did not produce an ancillary jurisdiction analysis because they believed that the \textit{Brand X} case established their ancillary jurisdiction.\textsuperscript{210} The court acknowledged the \textit{Brand X} case as a foundation for ancillary jurisdiction, but thwarted the FCC’s argument that they did not have to conduct their own ancillary jurisdiction analysis due to the precedent set in the \textit{Brand X} case.\textsuperscript{211}

The D.C. Circuit ruling has become prominent for more than just sweeping the legs out from under the FCC.\textsuperscript{212} Once the dust settled and the FCC began to pick up the pieces, a path appeared that some now refer to as Judge Tatel’s path to ancillary jurisdiction. Judge Tatel explicitly portrayed to the FCC that ancillary jurisdiction over Comcast’s network management practices requires attachment through Title II, III, IV of the Communications Act.\textsuperscript{213} Judge

\begin{itemize}
\item \textsuperscript{203} Comcast Corp. v. F.C.C., 600 F.3d 642, 658 (D.C. Cir. 2010); 7 Bus. & Com. Litig. Fed. Cts. § 85:20 (3d ed.).
\item \textsuperscript{204} Id. at 644; 7 Bus. & Com. Litig. Fed. Cts. § 85:20 (3d ed.).
\item \textsuperscript{206} Id.
\item \textsuperscript{207} Comcast Corp. v. F.C.C., 600 F.3d 642, 652 (D.C. Cir. 2010); 7 Bus. & Com. Litig. Fed. Cts. § 85:20 (3d ed.).
\item \textsuperscript{208} Id. at 647; 7 Bus. & Com. Litig. Fed. Cts. § 85:20 (3d ed.).
\item \textsuperscript{209} Id. at 651; 7 Bus. & Com. Litig. Fed. Cts. § 85:20 (3d ed.).
\item \textsuperscript{210} Comcast Corp. v. F.C.C., 600 F.3d 642, 652 (D.C. Cir. 2010).
\item \textsuperscript{211} Id.
\item \textsuperscript{212} 7 Bus. & Com. Litig. Fed. Cts. § 85:20 (3d ed.).
\item \textsuperscript{213} Comcast Corp. v. F.C.C., 600 F.3d 642, 654 (D.C. Cir. 2010).
\end{itemize}
Tatel’s path to ancillary jurisdiction was the first of its kind because it dampened Title I as viable authority in an ancillary jurisdiction analysis while suggesting Title II as the proper authority to handle instances of internet discrimination.\textsuperscript{214} The media was convinced that the FCC’s choice of words unraveled their ancillary jurisdiction argument:

\begin{quote}
\textit{\textquotesingle\textquotesingle You used the wrong words. The court even agreed with the FCC\textquotesingle s policy goals — after a bitterly fought lawsuit and thousands of pages of high-priced arguments, Judge Tatel was convinced that \textquotesingle\textquotesingle broadband providers represent a threat to internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment. Too bad [they] used the wrong words. \textquotesingle\textquotesingle}\textsuperscript{215}
\end{quote}

After being so kind as to prescribe a path for the FCC to move forward, Judge Tatel went on to pick apart every section mentioned by the FCC to support Title I as the appropriate authority for ancillary jurisdiction. Even though the largest blow was the overall lack of justification for ancillary jurisdiction, the FCC couldn't help but look foolish in light of the courts dismantling every section of the Communication Act cited in support of their ancillary jurisdiction.\textsuperscript{216} The D.C. Circuit court’s language highlights a growing misunderstanding between the FCC and the United States court system as to whether Title I can be used to regulate ISPs. The overall stance of the court was that Section 706, 257 and 623 were weak authority, which was not capable of being used to attach ancillary jurisdiction to an issue.\textsuperscript{217} The court reasoned that Section 706 was precluded by a 1998 FCC ruling which is good law and applies to this situation.\textsuperscript{218} Section 256 was not applicable because there was explicit language in the policy disallowing its use to expand the FCC’s authority.\textsuperscript{219} Section 257 failed because it was a time consuming process which could not be undertaken at this stage of the litigation.\textsuperscript{220} Section 201 was waived and Section 623 failed because the authority in and of itself needed to attach to

\begin{footnotes}
\footnotecite{7} `Id.
\footnotecite{7} Comcast Corp. v. F.C.C., 600 F.3d 642, 658 (D.C. Cir. 2010); 7 Bus. & Com. Litig. Fed. Cts. \textsection 85:20 (3d ed.).
\footnotecite{7} Comcast Corp. v. F.C.C., 600 F.3d 642, 659 (D.C. Cir. 2010); 7 Bus. & Com. Litig. Fed. Cts. \textsection 85:20 (3d ed.).
\footnotecite{7} Id. at 658.; 7 Bus. & Com. Litig. Fed. Cts. \textsection 85:20 (3d ed.).
\footnotecite{7} Id. at 660.; 7 Bus. & Com. Litig. Fed. Cts. \textsection 85:20 (3d ed.).
\footnotecite{7} Id.; 7 Bus. & Com. Litig. Fed. Cts. \textsection 85:20 (3d ed.).
\end{footnotes}
something in order to satisfy ancillary jurisdiction. The irony of the courts dismantling of the FCC’s attempt to attach ancillary jurisdiction is that the FCC was confident in their position, maybe even blind to their burden of proving ancillary jurisdiction because they believed that they can de facto regulate with laws that were merely proposed policy.

Despite the ruling, Comcast eventually agreed to follow the rules as a condition of its purchase of NBCUniversal.\(^{221}\) Comcast said that this agreement would extend to its purchase of Time Warner Cable.\(^{222}\) This ruling is not the last exclamation point that Judge Tatel lays down on net neutrality. Judge Tatel’s ruling is necessary to the eventual procurement of laws which could eventually guide the telecommunications industry. Although it is clear that Comcast was acting in a nefarious manner, the FCC failed to employ actual laws which can be looked to in order to decisively point out what is wrong, how the problem can be solved, and what the appropriate punishment is for the violators.\(^{223}\) Agencies provide a great service to the United States and the niches which they are instructed to guide, but sometimes the egos of their personnel create a haze of assumption which gets in the way of the necessary steps towards regulation. In other words, when climbing a set of stairs, there are only so many stairs an individual can skip before tripping themselves up. The FCC attempted to skip to many stairs in their pursuit of regulatory action against the FCC in the Comcast case. The FCC attempted to regulate Comcast with an unofficial policy statement. Had the FCC taken the time to enact the policy statement through agency rulemaking procedures, they may have had a more solid leg to stand on when challenging the actions of Comcast. Had the FCC conducted an ancillary jurisdiction analysis rather than presupposing that they were not required to adhere to this step in the process their argument may have been more convincing to the courts.

**Open Internet Order (Verizon v. F.C.C.):**

The Open Internet Order was an attempt by Julius Genachowski, to solidify Barack Obama’s campaigned on ideas for net neutrality.\(^ {224}\) After the Comcast Corp. v. F.C.C. case, the FCC was looking to right the ship and clarify their attempt at instilling net neutrality rules. In


2010, Genachowski announced an Open Internet Order requiring ISPs to be clearer about their policies and specifically disallowing ISPs from blocking online content.\footnote{In the Matter of Preserving the Open Internet Broadband Industry Practices, 25 F.C.C. Rcd. 17905 (2010).} Verizon challenged the order as being outside the power Congress bestowed upon the FCC.\footnote{Verizon v. F.C.C., 740 F.3d 623, 633 (D.C. Cir. 2014).} Network providers in general questioned the “reasonable/unreasonable” language which the FCC was attempting to use to classify network discrimination.\footnote{Verizon v. F.C.C., 740 F.3d 623, 633 (D.C. Cir. 2014).} Verizon’s lawyers highlighted the similarities between the proposed order and Title II regulations for common carriers.\footnote{Id. at 659.}

In early 2014, Verizon was victorious in an appellate court, officially striking down the Open Internet Order.\footnote{7 Bus. & Com. Litig. Fed. Cts. ʒ § 85:20 (3d ed.).} For the foregoing reasons, although the D.C. appellate court reject[s] Verizon’s challenge to the Open Internet Order’s disclosure rules, they vacated both the anti-discrimination and the anti-blocking rules.\footnote{Id. at 659.} Judge Tatel vacated significant portions of the F.C.C.’s “Open Internet” order, deciding that the F.C.C. could “not impose common carrier requirements on broadband providers, and striking down the F.C.C.’s anti-discrimination and anti-blocking policies.”\footnote{In the Matter of Preserving the Open Internet Broadband Industry Practices, 25 F.C.C.R. 17905, 2010 WL 5281676 (F.C.C. 2010), vacated and remanded, 740 F.3d 623 (D.C. Cir. 2014).} All in all the ruling allows broadband carriers to give preferential treatment to certain internet users by constraining/blocking services or offering faster speeds to users willing to pay a few for a higher speed of access.\footnote{Id.} This was contrary to F.C.C. policy objectives in the Open Internet Order, and was another shot to the FCC’s self esteem delivered by Judge Tatel.\footnote{Id. at 659.} The D.C. Court remanded the case to the Commission for further proceedings.\footnote{Id.} The D.C. Circuit Court of Appeals, upheld the FCC’s statutory authority to adopt net neutrality rules while vacating both the anti-blocking and anti-discrimination rules.\footnote{Id.} In the court opinion, Judge Tatel exhibited a more supportive tone concerning Sec. 706 than he had in the Comcast appeal.\footnote{Id. at 635.} In Comcast Corp. v. F.C.C., the D.C. Circuit courts relied on a 1998
ruling to strip section 706 of its authority to adopt newfound regulation.\textsuperscript{237} The 2014 ruling on the Open Internet Order reached a different conclusion, “finding that Sections 706(a) and (b) did confer authority to enact rules, and the court found that the FCC’s revised understanding of these sections amounted to a reasonable interpretation of an ambiguous statute.”\textsuperscript{238} Not only did the court strike a different tone in rejecting the FCC’s attempt to regulate, they shot down Verizon’s argument that the FCC’s proposed rules “fail to accomplish the goal of increasing broadband deployment.”\textsuperscript{239} The court went on to acknowledge that the FCC’s evidence of the “virtuous cycle” effectively demonstrated that without regulations broadband providers could and would discriminate against edge competition.\textsuperscript{240}

The running theme when attacking FCC action is alleging that the agency misinterpreted or exceeded the statutory authority granted to the agency in the Communications Act and therefore the FCC lacks jurisdiction.\textsuperscript{241} “Where the language of the Communication Act has created boundaries, the FCC cannot go beyond it; but where the language of the statute is ambiguous, the court decides whether the FCC’s actions a reasonable interpretation of the ambiguous language.”\textsuperscript{242} In the Verizon case, the FCC lacked express authority from the Communications Act of 1934 (the Organic Statute created by Congress), therefore it needed to rely on ancillary jurisdiction which involved the interpretation of an ambiguous statute.\textsuperscript{243} Although the court decided that the FCC’s interpretation was reasonable, the authority, as well as the path to regulation is undermined.\textsuperscript{244}

The D.C. Circuit court ruling reiterated the language from the opinion in the Brand X case, further establishing that the FCC is the governing body which classifies the regulatory

\textsuperscript{237} In the Advanced Services Order, Deployment of Wireline Services Offering, Advanced Telecommunications Capability, 13 F.C.C.R. 24012, 13 FCC Rcd. 24012, 1998 WL 458500 (1998). (the FCC concluded that Sec. 706(a) “does not constitute an independent grant of authority”)

\textsuperscript{238} Verizon v. F.C.C., 740 F.3d 623, 637 (D.C. Cir. 2014).

\textsuperscript{239} Id. at 644 Edge Providers are cloud service providers, website operators and application developers.

\textsuperscript{240} Id.


\textsuperscript{244} Verizon v. F.C.C., 740 F.3d 623, 635 (D.C. Cir. 2014).
category broadband falls into.\textsuperscript{245} Although the ruling was not a complete loss for the FCC, the court opinion solidified the obstacles standing between the FCC and viable rules:

\textbf{\textit{"[E]ven though the Commission has general authority to regulate in this arena, it may not impose requirements that contravene express statutory mandates. Given that the Commission has chosen to classify broadband providers in a manner that exempts them from treatment as common carriers, the Communications Act expressly prohibits the Commission from nonetheless regulating them as such. Because the Commission has failed to establish that the anti-discrimination and anti-blocking rules do not impose per se common carrier obligations, we vacate those portions of the Order."}}\textsuperscript{246}

After the repeal of the 1996 Telecommunications Act, the FCC could only chose from “telecommunications services” and “information services”; they chose “information services”, but left the door open concerning a reclassification in the future.\textsuperscript{247} Based on the court's decision it seems that the FCC chose the wrong classification, and further that the process involved in reclassifying was long and arduous.\textsuperscript{248} This is a problem for the FCC because in order to regulate broadband as it sees fit, broadband may need to be classified as a “telecommunications service.”\textsuperscript{249} As we can see from the court’s ruling, the FCC must do more than reference the 1996 Telecommunications Act to muster the power to reclassify broadband internet. Net Neutrality has been treading water since this ruling.

Judge Tatel’s decision in \textit{Verizon v. F.C.C.} is considered another loss for net neutrality, but the ruling provides a building block that the FCC can use to eventually procure laws with regulatory effect.\textsuperscript{250} In \textit{Verizon v. F.C.C.}, Judge Tatel stuck a different tone concerning Section 706 authority.\textsuperscript{251} Judge Tatel left the door open for 706 authority to be used in the future, but acknowledged that the FCC would need to make an appropriate argument.\textsuperscript{252} Further, The D.C.

\begin{thebibliography}{99}
\bibitem{245} \textit{Verizon v. F.C.C.}, 740 F.3d 623, 630 (D.C. Cir. 2014).
\bibitem{246} \textit{Verizon v. F.C.C.}, 740 F.3d 623, 628 (D.C. Cir. 2014).
\bibitem{247} \textit{Verizon v. F.C.C.}, 740 F.3d 623, 635 (D.C. Cir. 2014).
\bibitem{248} \textsection 11.4 COMMON CARRIAGE: BACKGROUND, 2014 WL 2531813.
\bibitem{250} \textit{Verizon v. F.C.C.}, 740 F.3d 623, 656 (D.C. Cir. 2014).
\bibitem{251} \textit{Id.}
\bibitem{252} \textit{Id.}
\end{thebibliography}
courts refused to allow Verizon to make an overall declaration concerning the FCC’s regulatory viability.\(^{253}\)

**Present And Future Issues With Edge Providers, Peering and Transit:**

The current debate over peering\(^{254}\), transit\(^{255}\) and the net neutrality implications surrounding the issues are worthy of discussion. Peering and Transit are business decisions that companies make to ensure that traffic makes it to the homes of its customers. When an individual enters into a contract with an ISP they expect to receive unabridged internet access to whatever content they choose. These customers are not thinking about the speed they receive the content, but they do realize when they are unable to load their YouTube video, or their Netflix movie is not running smoothly.\(^{256}\) The technical details rarely matter to the customer, but “[w]hen Internet providers refuse to upgrade peering connections, traffic gets congested. When ISPs refuse to use the caching services offered by the likes of Google and Netflix, video has to travel farther across the Internet to get to”\(^{257}\) the customer’s home.

From 2010-2013, Netflix, an edge provider and one of the most popular content providers on the internet had so much problems with their services that they were forced to utilize a third party internet backbone in order to effectively service their customers.\(^{258}\) They initially complained to the ISPs and FCC, but it was clear that ISPs were only looking for more money, and the FCC did not have the legal authority to act.\(^{259}\) Although there was never litigation concerning the subject, the resolution of the issue (Netflix seeking a third party to carry their

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\(^{253}\) Verizn v. F.C.C., 740 F.3d 623, 664 (D.C. Cir. 2014).

\(^{254}\) “Peering: when two or more autonomous networks interconnect directly with each other to exchange traffic. This is often done without charging for the interconnection or the traffic.” But in some instances peering contracts are paid for. Rudolph van der Berg, *How the ‘Net works: an introduction to peering and transit*, ARS TECHNICA, September 2, 2008, http://arstechnica.com/features/2008/09/peering-and-transit/ (last accessed 29 May 2015).

\(^{255}\) “Transit: when one autonomous network agrees to carry the traffic that flows between another autonomous network and all other networks. Since no network connects directly to all other networks, a network that provides transit will deliver some of the traffic indirectly via one or more other transit networks. A transit provider’s routers will announce to other networks that they can carry traffic to the network that has bought transit. The transit provider receives a “transit fee” for the service.” Rudolph van der Berg, *How the ‘Net works: an introduction to peering and transit*, ARS TECHNICA, September 2, 2008, http://arstechnica.com/features/2008/09/peering-and-transit/ (last accessed 29 May 2015).


\(^{257}\) *Id.*

\(^{258}\) *Id.*

traffic) is important because rather than providing the services which ISPs are in contract to provide, ISPs played chicken with Netflix and forced Netflix to pay a third party to effectively provide its content.\textsuperscript{260} The issue is extremely technical, but net neutrality violations are clear. ISPs are contractually obligated to provide the internet to its customers without “net neutrality rules in place, ISPs can prevent users from visiting some websites; provide slower speeds for services like Netflix.” \textsuperscript{261} Is it really fair for ISPs to advertise their gigantic capacity and their high quality fiber network to gain customers, and then act as if companies like Netflix are too large for them to handle. This issue is not going away.\textsuperscript{262}

**Non Litigated Issues:**

Not every purported violation of net neutrality is prescribed FCC sanctions. In the cases discussed below in this section the FCC likely does not take action because currently proposed net neutrality rules exempted wireless networks from FCC regulation.\textsuperscript{263} In some instances it is clear that one company is limiting access to the service of another company, but it is unclear if there is a violation of net neutrality. Further, given the most recent court rulings, it is unsettled what options the FCC has in regulating such obscure instances.

In 2009, Apple attempted to preserve bandwidth on its cellular networks by allowing Skype to be used only when connected to a wireless network.\textsuperscript{264} In this case the net neutrality issue was clouded by the fact that allowing Skype to use Apple’s networks to perform a service directly competitive with their own services was a win for the consumer in and of itself.\textsuperscript{265}


\textsuperscript{264} On the iPhone, Skype will be limited to checking online status or for text chat over a cellular data connection. Voice calls can only be placed over WiFi connections, in deference to many carriers’ limitations. Chris Foresman, *Skype for iPhone to launch on App Store this week*, ARS TECHNICA, (Mar. 30, 2009, 12:43pm), http://arstechnica.com/apple/2009/03/skype-for-iphone-to-launch-on-app-store-this-week/ (last accessed 29 May 2015).

\textsuperscript{265} Id.
Apple’s attempt to preserve bandwidth by deciding when VOIP is and is not allowed on their networks could very well be the next net neutrality issue discussed by the FCC.

In 2012, AT&T followed suit, disallowing Apple’s video chat product for the iPhone from it wireless networks because of its exorbitant bandwidth usage. Future FCC reclassifications could impact regulations on wireless networks propelling the issues discussed into the legal forefront for the FCC.

5. Fast Lanes Without Slow Lanes
5.1 Where The FCC Goes From Here:

Julius Genachowski ended up stepping down from the FCC before the Open Internet Order was struck down. On November 4th, 2013, Tom Wheeler took over as Chairman of the FCC. Mr. Wheeler was appointed by President Barack Obama even though he had obvious lobbying ties with cable service providers. Mr. Wheeler acted quickly providing a proposal which has currently been passed onto traditional agency comment period. Mr. Wheeler’s original proposal attempted to permit internet service fast lanes while prohibiting internet service slow lane(s). The idea of permitting a prioritized service fast lane was enough to stir up media outrage. The proposal raised eyebrows amongst activists because it is inevitable that Mr. Wheeler’s ties to cable service providers would bring about questions to any proposal made, but

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266 Id. Again, users were free to use the app on wifi networks. AT&T gradually relaxed the restriction.
268 Id.
269 In order for the agency to create a rule which becomes a law they must follow guidelines prescribed by the Administrative Procedure Act. The proposal set forth by Mr. Wheeler and the FCC is currently through the public comment period of the Administrative Procedure process. An agency first decides that there is a need for a rule. The agency then prepares the language/text to be published into the federal register. Once the rule is published in the federal register it enters a public comment period. Public comment period allows anyone from experts to the general public to express their opinion and provide feedback on the rule before it is finalized. “Comments received and the results of any hearing (when applicable) are put into a "rulemaking record," also known as the agency docket. The record should also include all the information collected in the course of agency research and investigation. The existence and organization of such a record is important if a court reviews the final agency decision and tries to determine the basis for the decision.” After the sixty day comment period, the agencies prepare the final rule and publish the rule into the Federal Register. Tom Wheeler’s proposal received over 3.7 million comments during the sixty day period. Center For Effective Government, Notice-and-Comment Rulemaking, CENTER FOR EFFECTIVE GOVERNMENT, http://www.foreffectivegov.org/node/3463 (last assessed 29 May 205); 1B Fed. Proc. Forms § 2:6.
271 The media does a great job of playing both sides of net neutrality. Many of the media outlets which cover net neutrality publish equally enthraling stories concerning net neutrality, which although informative, can confuse the public and blur the issues. Id.
also because many net neutrality activists believe that the appropriate move is to reclassify broadband as a telecommunications service. At the same time, Mr. Wheeler’s proposal acknowledges the recent court challenges brought out by the precedent of the Open Internet Order and the Comcast Corp. v. F.C.C. ruling. It is indisputable that rules protecting net neutrality will face difficulty in light of the recent court decisions, but proponents of net neutrality did not expect the FCC to lay down so quickly.

Mr. Wheeler's proposal was passed by a 3-2 vote, with all three affirmative votes coming from democrats, and the remaining two votes against coming from republicans. The proposal was far from becoming law, and there was ample opportunity for net neutrality stakeholders to critique what had been proposed during the agency comment procedure period. The most exclamatory aspect of the proposal was that it allowed for an internet service fast lane while disallowing an internet service slow lane. The proposal seemed to allow ISPs to offer “prioritized service” to a company like Netflix as long as doing so is considered “commercially reasonable”. The “commercially reasonable” language is undefined in the context of internet discrimination, having only been signaled as acceptable by the D.C. Circuit court's ruling which struck down the Open Internet Order. Critics of the proposal worry that such undefined language will allow ISPs to make their own rules. Although it is portrayed in the media that the only proponents of this proposal are the FCC, scholars such as Christopher Yoo make the argument that the “commercially reasonable” language will provide the FCC with the flexibility to govern.

275 Id.
276 Id.
278 Id.
This concept is much more vast than fast and slow, but to the average person there is obvious incongruity in this profound change in stance by the FCC. It remains unseen whether ISPs can pull off the concept of creating a prioritized service (fast lane) without creating an unprioritized service (slow lane). The proposal used the “unreasonable discrimination” language they have always included in their proposals, citing the same authority which had been rejected by past courts, to prohibit service providers from creating a slow lane for individual users unable to pay for prioritized service.281

The proposal left open the opportunity for the FCC to reclassify broadband as a “telecommunications service” but as time passes this idea seems to become harder to fathom.282 Reclassification is becoming a widely considered “nuclear option” with legal opposition aligning itself on all sides of the issue.283 The list of companies and interested groups claiming that they will be filing a lawsuit against the FCC if the proposed rules take effect is growing. Mr. Wheeler’s rules may not encompass the strong net neutrality regulations that tough nosed advocates have sought in the past, but after the most recent ruling by the D.C. Circuit courts, this proposal may actually be proactive given the legal position the FCC is in.

5.2 The Effect Of The Public Comment Period

The Public Comment Period of the FCC’s most recent proposal to make net neutrality rules into law has conjured over 3.7 million comments.284 Although it is unrealistic to think that all 3.7 million comments will be given individual thought285 by the FCC, an overall theme has

283 Id.
285 Although it is generally more complicated than implying a standard, the standard for when an agency proposal for rulemaking becomes a law is the substantial-evidence standard. The substantial-evidence standard has never been taken to mean that agency rule-making is a democratic process by which the majority of commenters prevail by sheer weight of numbers. Regardless of majority sentiment within the community of commenters, the issue is whether the rules are supported by substantial evidence in the record. The number and length of comments, without more, is not germane to a court's substantial-evidence inquiry. Environmental Law Reporter, Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency, ENVIRONMENTAL LAW REPORTER, http://elr.info/sites/default/files/litigation/17.21043.htm (last accessed 29 May 2015).
emerged opposing fast lanes, and opposing multiple tiers of internet service.\textsuperscript{286} The general public, as well as the usual net neutrality pundits agree that the internet is predicated on some form of neutral network.\textsuperscript{287} At this point in time the public comment period has ended, and the FCC has voted to publish Mr. Wheeler’s proposal to the Federal Register.\textsuperscript{288} As of November 2014, the FCC is expected to utilize the public comments to demonstrate clarity and scope. As of March 12, 2015, the FCC has published net neutrality into law.\textsuperscript{289}

\textbf{5.3 Some Comments Carry More Weight Than Others}

After Judge Tatel and the DC Courts struck down the Open Internet Order, Tom Wheeler was quick to respond; but his response was not what many net neutrality pundits were looking for. Gordon Smith, of the National Association of Broadcasters, blasted the FCC for imposing rules “as if the world is stuck in the 1970s.”\textsuperscript{290} Haim Saban labeled the agency the “Friendly Cable Commission.”\textsuperscript{291} Although Mr. Wheeler’s proposal for net neutrality rules seemed to permit paid prioritization, individualized harsh criticism wasn’t going to make the proposal go away. That being said, even the most level headed, steadfast and meaningful comment submitted to the FCC will not force Mr. Wheeler to change the proposal either.

Comments and opinions from organizations which specialize in net neutrality through expert personnel are given more deference than individual commenters. An organization like Mozilla\textsuperscript{292}, which has been enlightening the public about net neutrality issues for over a decade was one of the first organizations to express disappointment in the courts decisions concerning

\begin{flushleft}
\textsuperscript{291} Id.
\textsuperscript{292} At Mozilla, we’re a global community of technologists, thinkers and builders working together to keep the Internet alive and accessible, so people worldwide can be informed contributors and creators of the Web. We believe this act of human collaboration across an open platform is essential to individual growth and our collective future. MOZILLA, https://www.mozilla.org/en-US/mission/ (last accessed 29 May 2015).
\end{flushleft}
the Open Internet Order and Mr. Wheeler’s most recent proposal.293 Mozilla has since proposed their own rules via an official FCC petition, and have also asserted their opinions through the FCC’s public comment period.294 Mozilla takes the stance that “Nondiscriminatory access to content is what created the miracle of the Internet. It must be preserved.”295 Mozilla’s petition to the FCC focuses on “adopting clear rules prohibiting blocking and discrimination online.”296 Mozilla considers the authority aspect of the process to be debilitating to the issue.297 The organization proposes that the FCC should modernize the commercial relationships which connect the end user and the internet as a whole.298 Currently, internet routing only recognizes the relationship between ISPs and end users, but internet routing has evolved into a second type of relationship which Mozilla describes as remote delivery services.299 According to Mozilla, “remote delivery” service offered by an ISP to an edge provider (Netflix), connecting the provider to all of the ISP’s end users should be considered another form of recognized connection. Mozilla ask[s] the FCC to designate, but not reclassify, remote delivery services as telecommunications services under Title II of the Communications Act.300 The organization believes their proposal is possible without any major reclassifications, something that has plagued past attempts at making net neutrality into a law.301 Mozilla is not the only organization proposing new rules, nor will they be the last, but their proposal will undoubtedly be taken into consideration by the FCC.

293 Chris Riley, Net neutrality decision is alarming for all Internet Users, MOZILLA, https://blog.mozilla.org/netpolicy/2014/01/21/net-neutrality-decision-is-alarming-for-all-internet-users/ (last accessed 29 May 2015).
296 Id.
297 Id.
298 Id.
299 Id.
5.4 Update, The FCC Has Passed Net Neutrality Into Law

While writing I was well aware that the proposed law which inspired this paper in early 2014 could change completely by the time the paper is complete. That being said, on February 26th, 2015, the FCC and Tom Wheeler approved net neutrality by a 3-2 vote.\(^{302}\) As of March 12, 2015, the official Order is available to viewed by the public.\(^{303}\) “The new policy would replace a prior version adopted in 2010 — but that was put on hold following a legal challenge by Verizon.”\(^{304}\) The FCC will now consider ISPs as common carriers under Title II of the Telecommunications Act, and regulate them as public utilities.\(^{305}\) The rules will apply to the internet as a whole, which includes mobile internet access.\(^{306}\)

The Open Internet policy has been officially released to the public, so as to allow for it to be appropriately scrutinized.\(^{307}\) It is clear that the FCC has changed its direction from reliance on Title I to reclassification under Title II.\(^{308}\) Further it is clear that the FCC is concentrating on prohibiting blocking, throttling, and paid prioritization.\(^{309}\) Tom Wheeler spoke in support of the newfound rules: "The action that we take today is an irrefutable reflection of the principle that no one, whether government or corporate, should control free and open access to the Internet," Wheeler said. "The Internet is the most powerful and pervasive platform on the planet. It is simply too important to be left without rules and without a referee on the field."\(^{310}\) FCC Chairman Tom Wheeler is scheduled to appear before Congress on March 17th, at which time the

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\(^{304}\) Id.

\(^{305}\) Id.

\(^{306}\) Id.


\(^{308}\) Id.


\(^{310}\) Id.
policy will be fleshed out. On March 23rd, two different trade groups filed lawsuits against the FCC over the newfound net neutrality rules.\(^{311}\) Although I applaud the FCC for taking the bold approach that they have, one thing is for certain, the opposition will challenge the law in the DC Circuit courts.

6. Conclusion

Net Neutrality is now a law, but it is questionable as to whether it will remain in law once it is challenged in the DC District Court. The original net neutrality proposal, which was recently reviewed in the agency comment process, was a much weaker version of the rules proposed in the Internet Policy Statement of 2005 and the Open Internet Order of 2010. It is clear that original proposal which entered the FCC’s agency comment process has been drastically changed. This is a good thing and it shows that the FCC is listening, and that the FCC really does mean business in terms of net neutrality. It is ironic to think that Tom Wheeler, the current FCC Chairman, and also a former cable lobbyist, believes that the FCC can regulate network fast lanes, while prohibiting network slow lanes. The irony exists when one considers that the FCC has had problems regulating anything; the Internet Policy Statement of 2005 failed, the FCC did not justify ancillary jurisdiction to regulate Comcast’s discrimination of peer to peer file sharing, and the Open Internet Order demonstrated that the FCC will have difficulty implementing its own proposals for rules. The courts in *Comcast Corp. v. F.C.C.* and *Verizon v. F.C.C.* made clear that Title I regulations require the FCC to piecemeal together authority to achieve ancillary jurisdiction. Further, the courts have yet to explicitly state which authority is viable for attaching ancillary jurisdiction.

On February 26\(^{th}\), 2015 the FCC approved the Open Internet Policy, which moved the current policy from the comment and review process to applicable law. The FCC’s original proposal relied on Section 706 authority, but the FCC had yet to demonstrate that Section 706 authority is the appropriate means to achieving ancillary jurisdiction. The February 26\(^{th}\) proposal takes a different path, one which involves reclassifying the internet as a common carrier and regulating under Title II authority. This is a bolder approach than what was proposed and what was reviewed and commented upon. In the past the FCC has sidestepped the issue of

reclassifying broadband internet as a Title II telecommunications service because reclassification is an arduous legal process. Now the FCC has reclassified from Title I to Title II but it is unclear whether the policy will hold up in court when it is challenged.

Although it may seem as if the FCC will have difficulties surviving a DC Circuit court challenge, forbearance is the key to the modern discussion. Forbearance allows for the best of both worlds. It will give the FCC a leg to stand on, but also force the current stakeholders to parse Title II regulations and decide which language is reasonable and which language would be overbearing and unsuited to guide the debate. Forbearance allows the FCC to save face while including the opposition in the discussion. In reality, if each side feels that they are being fairly included in the discussion there will be fewer preliminary issues to bog down progress.

It is very possible that the Communications Act of 1934 is outdated, and that Title I and Title II authority are unable to regulate the current version of the internet. That being said, common law antitrust and consumer protection laws are not yet equipped to tackle the non-economic issues surrounding the internet. The FCC is not in a good position to regulate internet discrimination or enact net neutrality into law, but it is undeniable that they encompass the appropriate expertise to ameliorate the present day net neutrality issues. The free market economy is a pivotal aspect of our society, but it should not instill the authority to regulate the internet into the hands of entities which make the most money off of the internet as a whole. Although the largest and most monetarily prevalent entities should have a say in the debate, it has become clear that these entities manipulate the discussion to create a firewall between themselves and the FCC rather than promoting a logical conversation. The internet involves so many different aspects of life as well as law, and the United States as well as the rest of the world has entered uncharted territory with any attempt at applying all encompassing regulations. Only time can tell whether net neutrality overcomes present legal challenges and becomes more than just an idea.