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CASE NO. 08-1291

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMCAST CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF AMICUS CURIAE OF PROFESSORS JAMES B. SPETA AND GLEN O. ROBINSON AND THE PROGRESS AND FREEDOM FOUNDATION IN SUPPORT OF PETITIONER COMCAST CORPORATION AND URGING THAT THE FCC'S ORDER BE VACATED

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici. All parties, intervenors, and amici appearing in this Court are listed in the Brief for Petitioner Comcast Corporation.

1. Disclosure Statement Pursuant to D.C. Circuit Rule 26.1.

Pursuant to Circuit Rule 26.1, amicus curiae The Progress & Freedom Foundation (PFF) states that it is a non-profit research and educational institution, as defined by Section 501(c)(3) of the Internal Revenue Code. Founded in 1993, PFF's principal mission is to study the impact of the digital and electronic revolution and its implications for public policy. Petitioner Comcast Corporation is among over two dozen companies, trade associations and foundations that provide general support for PFF's research and educational work. No parent company, and no publicly held company holds 10% or more of its stock.

2. Authority to File.

A statement of consent was filed on November 3, 2008, for Professor Speta and PFF's participation; on July 1, 2009, this Court entered an order granting Professor Robinson's consented-to motion to participate.

(B) Rulings Under Review. References to the Ruling at issue appears in the Brief for Petitioner Comcast Corporation.

(C) Related Cases.

In addition to the instant case, petitions for review of the FCC's *Order* were filed in the Second, Third, and Ninth Circuits. Pursuant to an order of the Judicial Panel on Multidistrict Litigation dated September 8, 2008, those three petitions were transferred to this Court for consolidation with this case and docketed as follows:

PennPIRG v. FCC, No. 08-1302;

Consumers Union of the United States, Inc. v. FCC, No. 08-1318; and

Vuze, Inc. v. FCC, No. 08-1320.

On December 16, 2008, this Court consolidated those three cases with this case. This Court then granted Comcast's motion to dismiss those three petitions for lack of jurisdiction and issued an order on April 1, 2009 terminating the consolidation. *See* Order, *Comcast Corp. v. FCC*, No. 08-1291 (D.C. Cir. Apr. 1, 2009).

Amici are not aware of any other related cases pending in this Court or any other court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

* - Authorities upon which we chiefly rely are marked with asterisks.

STATUTES

OTHER AUTHORITIES

AGENCY DECISIONS

INTERESTS OF AMICI

Amici are two law professors and a think tank with long-standing interests in communications policy and in the powers of the Federal Communications Commission (FCC or Commission) to regulate information services and the Internet.

James B. Speta is a professor at the Northwestern University School of Law. Professor Speta has written a number of articles concerning the FCC's current lack of legal authority to regulate the Internet, an optimal set of FCC regulatory powers over the Internet, and network neutrality. *See, e.g.*, *FCC Authority To Regulate The Internet: Creating It and Limiting It*, 35 LOY. U. CHI. L.J. 15 (2003); *Modeling an Antitrust Regulator for Telecoms*, in BALANCING ANTITRUST AND REGULATION IN NETWORK INDUSTRIES (forthcoming 2009).[1]

Glen O. Robinson is the David and Mary Harrison Distinguished Professor of Law Emeritus at the University of Virginia Law School. From 1974-1976, Professor Robinson was a Commissioner of the FCC; in 1979, he was Ambassador and U.S. Representative to the World Administrative Radio Conference. He is a co-author of COMMUNICATIONS REGULATION (West 2008), as well as many articles on FCC regulation.[2]

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1 *See http://www.law.northwestern.edu/faculty/profiles/JamesSpeta/.*

2 *See http://www.law.virginia.edu/lawweb/faculty.nsf/FHPbI/3342.*

The Progress & Freedom Foundation is a non-profit research and educational institution, as defined by Section 501(c)(3) of the Internal Revenue Code. Founded in 1993, PFF's principal mission is to study the impact of the digital and electronic revolution and its implications for public policy.[3]

Our interest in the FCC's Order transcends the immediate controversy.[4] We offer no opinion on the reasonableness of Comcast's practices. Our concern is with the larger implications of the FCC's actions. That concern is twofold. One, we are troubled by the FCC's regulating Internet services, a domain that the agency as well as Congress have hitherto concluded should remain largely unregulated. The immediate regulation is an open invitation to further ventures that, like the Sorcerer's Apprentice, the FCC itself may be unable to halt. Two, we are disturbed by the fact that the FCC's assertion of ancillary jurisdiction in this case violates one of the most elementary principles of political responsibility, that administrative action must find a solid basis in legislative authority and direction. We do not challenge the general idea of ancillary jurisdiction. But it must not be allowed to expand to the point that it undermines Congress's power and duty to provide authority, guidance, and most importantly, limits for agency action. The

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[3] *See http://www.pff.org.*

[4] *See In re Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, 23 F.C.C.R. 13028 (2008) (JA____) (*"Order"*).

grounds argued by the Commission in support of its assertion of ancillary jurisdiction in this case are, in effect, grounds for conferring on it a free-roaming mandate to cure any and all ills it discovers in the domain of "communications by wire and radio," in the absence of any indication that Congress intended such a result.

INTRODUCTION AND SUMMARY OF ARGUMENT

The FCC's assertion of authority to regulate an Internet service is unprecedented. Before this decision, both the agency and the courts had established that the Commission had only limited authority, if any, over communications services that were not common carrier telecommunications services, licensed-spectrum services (especially broadcast), or cable services. The FCC has classified cable Internet service as an "information service" for the purpose of placing it in a "minimal regulatory" framework outside the scope of common carrier, broadcast, or cable service – in a decision that it took to (and won before) the Supreme Court. In this brief, we place the FCC's current decision within this broader context, to show that the *Order*, and the theory of regulatory authority on which it rests, upsets well-settled law in two ways.

First, the FCC's regulation greatly expands the Commission's authority by regulating a communications service that is not an adjunct to and therefore closely connected to services that the Communications Act (Act) explicitly places within the agency's regulatory powers. The Supreme Court's precedents do give the FCC some authority over "communication[s] by wire or radio" (47 U.S.C. §§ 151, 152(a)), even if a service is not specifically regulated by the Act, if the regulation is reasonably ancillary to a specific regulatory duty of the agency's. But, in every case where this "ancillary jurisdiction" was affirmed, the FCC exercised it over an

adjunct to a service over which the agency had clear and explicit authority. Thus, at the time before cable service was brought into the Act, the Supreme Court allowed FCC authority because cable television principally carried an otherwise regulated service – broadcast television. Similarly, court of appeals precedents allowed the FCC ancillary jurisdiction to regulate telephone equipment – but that very equipment was used for common carrier services. Here, the FCC is regulating an Internet service, and no similar close connection to a regulated service exists. The regulation thus is not "ancillary" to anything.

Second, the FCC's theory of ancillary authority grants to itself completely discretionary and yet completely unlimited regulatory powers over information services (including Internet services). The FCC adopted a theory of its ancillary powers that allows it to impose any condition on information services so long as the agency says that the regulation will enhance "efficiency," decrease consumer costs, or enhance consumer service quality. This surprisingly broad reach would allow the FCC, under its ancillary authority, to impose any form of regulation, even public-utility type regulation. Such standardless discretion is contrary to the Act, as well as the foundational principle that agencies only have that authority conferred by Congress, which ensures accountability. This theory also eliminates the regulatory consequences of the agency's classification decision (*i.e.*, is the service an "information service" or a common carrier "telecommunications

service"). This Court's decisions, and even the FCC in its best moments, have considered the FCC's ancillary powers (where it has any) to be less than its extensive powers over the rates, terms, and conditions of common carrier services. And classifying a service as an "information service" has always been a deregulatory move. The FCC seems to have ignored the foundation of the Act and its past actions, that the non-regulation of Internet services is based upon that market's dynamic, non-monopoly characteristics.

ARGUMENT

We begin with the obvious: "The Commission 'has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.'" *Am. Library Ass'n v. FCC*, 406 F.3d 689, 698 (D.C. Cir. 2005) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)). Congress has not in fact delegated to the FCC any *express* authority to regulate Internet services. If it had, there would be no need for the Commission to strain the principle of ancillary jurisdiction to support its *Order*. And its assertion of ancillary jurisdiction is untenable, exceeding any previously recognized scope and boundaries.

I. THE FCC HAS NO STATUTORY AUTHORITY TO GENERALLY REGULATE INTERNET SERVICES.

The Act grants the FCC expansive authority over a number of interstate radio and wire communications services, each addressed in substantive titles that

include both general and specific grants of lawmaking power.[5] Beginning in the mid-1960s the FCC, rather creatively, found an additional source of regulatory power in the concept of "ancillary jurisdiction" to regulate certain "communications by wire or radio," even where those communications are not within the explicit grant of regulatory authority from Congress. The Commission grounded this ancillary jurisdiction on sections 1 and 2 of the Act, the former providing that, "[f]or the purpose of regulating interstate and foreign commerce in communication by wire or radio," the Act "creates" the FCC (47 U.S.C. § 151), and the latter providing that "[t]he provisions of this chapter shall apply to all interstate and foreign communication by wire or radio" (*id.* § 152 (a)). In addition to these general statements, section 4 – which describes the Commission's organization and structure – says that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." *Id.* § 154(i).

The description of the FCC's ancillary jurisdiction has varied to a limited extent, but it has always included two elements: first, the FCC only has subject-matter jurisdiction over "communications"; and second, the FCC's substantive regulatory power over communications for which Congress has not explicitly provided regulatory directives is limited to that authority essential to advance or

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5 *See* 47 U.S.C. §§ 201(b), 301(h), 544.

protect the FCC's explicit regulatory authority.[6] Thus, in *Southwestern Cable*, the Court authorized an FCC action that was "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *United States v Sw. Cable Co.*, 392 U.S. 157, 178 (1968). In *Midwest Video II*, the Court stated more strongly that ancillary jurisdiction existed only where "necessary to ensure the achievement of the Commission's statutory responsibilities." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979) ("*Midwest Video II*"). "[W]ithout reference to the provisions of the Act directly governing broadcasting, the Commission's jurisdiction under 2(a) would be unbounded. Though afforded wide latitude in its supervision over communication by wire, the Commission was not delegated unrestrained authority." *Id*. at 706 (internal citation omitted).

Given the Supreme Court's recognition of ancillary jurisdiction, we do not challenge it as a general principle. However, the Court should take note of just what an extraordinary notion it is. As one leading commentator has put it, the ancillary jurisdiction cases are "spectacular breaches" of the principle that courts

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[6] The first prong might more properly be called the "jurisdiction" issue and the second the "authority" issue, *see* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2169 (2004), but courts have included both under the test for "ancillary jurisdiction."

should closely cabin agency power to that granted by Congress.[7] This should caution courts to review carefully the uses to which it is put. And indeed, that is just what this Court has done in the past. *See Am. Lib. Ass'n*, 406 F.3d at 702 ("[i]n each of these decisions, the Court followed a very cautious approach in deciding whether the Commission had validly invoked its ancillary jurisdiction"). The Seventh Circuit similarly remarked that "[t]he Court [in *Southwestern Cable*] appeared to be treading lightly even where the activity at issue easily falls within" the general category of communications by wire. *Illinois Citizens Comm. for Broad. v. FCC*, 467 F.2d 1397, 1400 (7th Cir. 1972). This caution is particularly warranted because, as this Court knows, the FCC frequently invokes its ancillary authority, sometimes where it is not necessary but also to support expansions of its authority. *E.g.*, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1241 (D.C. Cir. 2007) (FCC assertion of ancillary authority unnecessary); *Am. Lib. Ass'n*, 406 F.3d 689 (D.C. Cir. 2005) (reversing FCC assertion of ancillary jurisdiction); *MPAA v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) (same).

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[7] Merrill, *supra* note 6, at 2169-70; *see also* James B. Speta, *FCC Authority to Regulate the Internet: Creating It and Limiting It*, 35 LOY. U. CHI. L.J. 15, 25 & n.56 (2003) (the ancillary jurisdiction cases are inconsistent with recent Supreme Court cases policing agency powers more strictly); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 518 (2002) (concluding that section 4(i) of the Act grants "only procedural rulemaking powers" and not substantive authority to act with the force of law).

Below, the parties framed the debate as whether the FCC's ancillary authority can be used only to further its substantive powers over regulated services or whether it can also be used to further goals that are more generally-stated in the Act – including the very general goals in section 1. The former position is indisputably correct. The Commission does not have common law authority but must trace its authority to a Congressional grant of regulatory power. Therefore, ancillary jurisdiction must be confined to matters that have been delegated to the Commission by *substantive* Titles of the Act. *See, e.g.*, *Am. Lib. Ass'n*, 406 F.3d at 700 (regulation must be "reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities"); *Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1479 (D.C. Cir. 1994) (ancillary authority is "'restricted to that reasonably ancillary to the effective performance of [its] various responsibilities' under Titles II and III of the Act") (*id.*, quoting *United States v. Sw. Cable Co.*, 392 U.S. 157, 178 (1968)); *NARUC v. FCC*, 533 F.2d 601, 614 n.77 (D.C. Cir. 1976) ("*NARUC II*") (Title I is "not … a general grant of power to take any action necessary and proper" to fulfill the Act's goals).

Even in the cases cited by the *Order* in support of its exercise of ancillary jurisdiction, the facts and context of these cases reveal that ancillary jurisdiction has been and must be confined to matters that are so entwined with a service over which the Commission has been given explicit regulatory power that it may be

reasonably inferred that Congress intended to confer regulatory authority over those matters as part of its explicit grant of power. In other words, whatever the courts may have said in trying to describe ancillary jurisdiction, the actual cases show that it has been approved only where the FCC regulation was *an adjunct* to its regulation of a service falling under Title II or III. In no instance has a court upheld the FCC's exercise of ancillary jurisdiction based solely on the provisions contained in Title I of the Act.[8]

A. Every Prior Recognition of FCC Ancillary Authority Was Over an Adjunct To a Service Within the Agency's Explicit Regulatory Reach.

In each case in which the courts affirmed an FCC exercise of ancillary jurisdiction, the FCC regulation was over an adjunct to a regulated service. The FCC invented the concept of ancillary jurisdiction to support cable television regulation at a time when there was no explicit statutory authority for it. Crucial to the FCC's justification was the fact that in those early days cable was completely dependent on the retransmission of *broadcast television signals*, a regulated

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[8] *See* Barbara Esbin & Adam Marcus, *"The Law is Whatever the Nobles Do": Undue Process at the FCC*, 17 COMMLAW CONSPECTUS *1, 62-72 (2009) *http://commlaw.cua.edu//articles/v17/17.2/Esbin-Marcus-Revised.pdf* ("The Commission's position that Title I may satisfy both prongs of the test for ancillary jurisdiction is untenable because Title I is considered the source of ancillary jurisdiction; the position, thus, is akin to saying that the FCC can regulate if its actions are *ancillary to its ancillary* jurisdiction, and that is one *ancillary* too many."); Speta, *supra* note 7, at 25-27 (arguing that no general theory of ancillary jurisdiction could support Internet regulation).

service. The FCC viewed cable television as a purely auxiliary service that performed a function similar to radio translators, which are licensed to rebroadcast the signals of conventional stations in order to bring service to areas that could not otherwise receive them. As the Supreme Court explained in *Southwestern Cable*, "CATV systems receive the signals of television broadcasting stations, amplify them, transmit them by cable or microwave, and ultimately distribute them by wire to the receivers of their subscribers. CATV systems characteristically do not produce their own programming, and do not recompense producers or broadcasters for use of the programming which they receive and redistribute." *United States v. Sw. Cable Co.*, 392 U.S. at 161-62. Chief Justice Burger's concurring – and controlling – opinion in *Midwest Video I* makes the same point: "CATV is dependent totally on broadcast signals and is a significant link in the system as a whole and therefore must be seen as within the jurisdiction of the Act." *United States v. Midwest Video Corp.*, 406 U.S. 649, 675 (1972) (Burger, C.J., concurring); *see also id.* at 676 ("Those who exploit the existing broadcast signals for private commercial surface transmission by CATV – to which they make no contribution – are not exactly strangers to the stream of broadcasting. The essence of the matter is that when they interrupt the signal and put it to their own use for profit, they take on burdens, one of which is regulation by the Commission.").

The court of appeals cases that have affirmed exercises of ancillary jurisdiction have also done so only where they concerned adjuncts to a service that Congress explicitly authorized the agency to regulate. For example, a few cases have affirmed ancillary jurisdiction to regulate broadcast networks, but the Commission's rules of course covered its regulated broadcast station licensee's offering of broadcasting programming. *See Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 479-82 (2d Cir. 1971) (prime time access and financial and syndication regulations); *CBS, Inc. v. FCC*, 629 F.2d 1, 25-27 (D.C. Cir. 1980) (applying equal time rules to networks).[9] Similarly, the Fifth Circuit allowed ancillary jurisdiction over a telephone company's provision of cable television service, which of course involved retransmission of broadcast station signals. *General Tel. Co. v. United States*, 449 F.2d 846, 854 (5th Cir. 1971); *see also id.* (also concluding that § 214 gave the FCC express authority to regulate).

The only other cases in which the courts of appeals have expressly affirmed an exercise of ancillary jurisdiction (and there are only four) are similarly limited. In *Computer & Communications Industry Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), this Court affirmed the preemption of state regulation of customer

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[9] Networks are arguably within the text of the Act, for several sections speak of "chain broadcasting." *See Mt. Mansfield Television, Inc.*, 442 F.2d. at 481; *CBS, Inc.*, 629 F.2d at 27; *see also generally* Thomas G. Krattenmaker & A. Richard Metzger, Jr., *FCC Regulatory Authority over Commercial Television Networks: The Role of Ancillary Jurisdiction*, 77 NW. U. L. REV. 403 (1982).

premises equipment (CPE), which the FCC had just deregulated. CPE had previously been treated as a Title II service, was physically connected to the Title II telephone network, and FCC preemption was designed to prevent "any misallocation of costs between an entity's competitive and monopoly services [which] would allow the carrier to justify higher rates for its monopoly services." *Id*. at 213. Ancillary authority to create a universal service fund was also affirmed, but was probably unnecessary, as funding universal service had long been an element of Title II ratemaking. *See Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988). Last, in *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 730-31 (2d Cir. 1973), where the FCC ordered common carriers that provide enhanced services to do so through a separate subsidiary, the common carriers' own enhanced services were clearly adjunct to their Title II services.[10]

To be sure, FCC regulation of "adjuncts" must still be tied, with the necessary closeness, to its explicit powers over the regulated services. That all of the ancillary jurisdiction cases do involve such adjuncts shows, however, just how close a connection is required between any purported exercise of ancillary jurisdiction and the FCC's authority over regulated services. Or, as this Court has observed, "substantial attention [must be devoted] to establishing the requisite

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[10] The Seventh Circuit affirmed the FCC's requirement that the Regional Holding Companies submit capitalization plans to ensure that the separate subsidiary requirements were followed upon divestiture. *North Am. Tel. Ass'n v. FCC*, 772 F.2d 1282, 1292-93 (7th Cir. 1985).

'ancillariness' between the Commission's authority over [the regulated service] and the particular regulation" imposed pursuant to its ancillary jurisdiction. *See NARUC II*, 533 F.2d at 613 (D.C. Cir. 1976). Only when a service is adjunct to a directly regulated service could the exercise of regulatory authority be "ancillary," much less "reasonably" so, to the effective implementation of the agency's statutory duties.

B. Congress Has Not Conferred General Regulatory Authority Over the Internet or Internet Services.

The Act demonstrates no Congressional purpose to delegate to the agency authority to regulate Internet services. If anything, its history indicates Congress's affirmative desire to keep such services unregulated.

The Telecommunications Act of 1996 (1996 Act) was added to the Act at the very beginning of the commercial Internet era, and, as has been extensively noted, the 1996 Act contains very little that anticipated or included the Internet. *E.g.*, John C. Roberts, *The Sources of Statutory Meaning: An Archaeological Case Study of the 1996 Telecommunications Act*, 53 SMU L. REV. 143, 149 (2000) ("the 1996 Act … almost completely failed to anticipate the Internet and the impact that Internet-based telecommunications services would have"). In fact, apart from provisions on service provider blocking of "offensive," "objectionable or inappropriate online material" and universal service, the Internet makes almost no appearance in the Act. The FCC's attempt to derive a Congressional intent to

delegate regulatory power over it is entirely artificial. To sustain such a reading of the Act would be to sustain the most extreme form of standardless delegation of lawmaking power. Whether or not the Constitution permits it (under the nondelegation doctrine), a sensible exercise of statutory interpretation does not.

The FCC claims that section 230(b) of the Act (added in 1996) articulates a "national Internet policy" which the Commission has ancillary authority to implement. *Order* ¶ 13 (JA____). But the five policy statements in Section 203(b) are just that – mere statements of policy and not law. Even then, they are so vague as to be purely atmospheric if not altogether meaningless as guides for affirmative regulatory action. The last three express the desire to limit offensive online content and do not mention the FCC at all. *See* 47 U.S.C. § 230(b)(3)-(5). The first generally states the policy to promote the Internet, but gives no indication that the FCC should act at all, much less what the agency should do. *See id.* § 230(b)(1) (policy "to promote the continued development of the Internet and other interactive computer services and other interactive media"). And the second positively contradicts the FCC's assertion that it gives authority to regulate for it states that "[i]t is the policy of the United States to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." *Id.* § 230(b)(2). Moreover, no part of section 230 creates anything but the most minimal legal

requirement – that Internet access providers notify their subscribers that parental control protections "are commercially available." *Id.* § 230(d). Instead, the main thrust of the section is to eliminate civil liability that websites might have faced from the posting of user-generated content, such as defamatory user-postings. *Id.* § 230(c).

Disregarding the ancient adage, *ex nihilo nihil fit*, the Commission has asserted jurisdiction over a hitherto unregulated domain of services based on a few lines of precatory language that are devoid of pertinent substantive direction or standards for regulatory action. While the Supreme Court has given Congress wide *constitutional* latitude to delegate power without detailed substantive standards, it has never said that an agency can just make up its regulatory authority as it goes along. And whatever the constitutional implications there is no reason to think that Congress intended to create such a potentially far-reaching power based on some throw-away phrases in an incidental provision inserted into the 1996 Act. "Congress," the Supreme Court has said, "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

Although it principally relied on section 230(b), the Commission also cited no fewer than six additional provisions of the Act as supporting its ancillary

jurisdiction, including sections 1, 201, 256, 257, 601(4), and 706. *Order* ¶ 16 (JA____). The exercise itself – of looking for hints of authority scattered through the Act – should have convinced the Commission that Congress did not actually delegate it authority to make law for Internet services. Congress would have been clear had it intended to do so. "[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). "The importance of the issue . . . makes the oblique form of the claimed delegation all the more suspect." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006). In all events, these sections, individually or together, fail to provide the requisite jurisdictional basis for its action. Sections 1, 706(a), and 601(4) cannot serve as a means for enforcing behavioral norms because a private party cannot violate Congressional policies or purposes which, like these, consist of no more than hortatory exclamations or statements of broad purpose. Nor can sections 201, 256 or 257 provide the necessary reference as they concern solely common carrier services, bear no reasonable relationship to the network management practices at issue, and delegate to the FCC no power over broadband information services.[11]

[11] *See* Esbin & Marcus, *supra* note 8, at *52

To be clear, we do not maintain that the FCC has *no* ancillary authority over information services or the Internet. The Supreme Court has approved the general notion of an ancillary jurisdiction. This might extend to some Internet-enabled communications services, but only if they operate as mere adjuncts or are auxiliary to a common carrier, broadcast, or cable service, such that they could possibly satisfy this Court's "reasonably ancillary" prong of the ancillary authority test. But the FCC has not said – nor could it – that Internet service is such an adjunct. In fact, the FCC strongly rejected the position that Internet access service included *any* regulated component, when it said that Internet access providers "do not 'offe[r] telecommunications service to the end user, but rather ... merely us[e] telecommunications to provide end users with cable modem service.'" *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 979 (2005) (quoting FCC).[12] And, more

[12] The *Order* asserts that a *dicta* from *Brand X* supports its decision, but the language from *Brand X* is actually more consistent with the more-limited scope for ancillary jurisdiction that we describe. In *Brand X*, the parties in favor of open-access regulation compared it to the FCC's *Computer II* regulations. *Id*. at 995. The Court rejected the analogy, saying that the *Computer II* rules grew out of "the concern that local telephone companies would abuse the monopoly power they possessed by virtue of the 'bottleneck' local telephone facilities they owned." *Id.* at 996. Thus, when the Court said that "the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction" *(id.*), it was referring to this history of the interaction between regulated and nonregulated services. There is, of course, no such interaction at all in this case, for Comcast's practices were not alleged to have any effect on broadcast or cable television service, and bear no plausible relationship to the provision of a common carrier service. *Compare also* Esbin & Marcus, *supra* note 8, at *46-51 (discussing why *Brand X* statement was *dicta*).

specifically, the FCC did not directly connect Comcast's specific practices to any regulated common carrier, broadcast, or cable service. (The FCC attempted to connect its *Order* to common carrier services, by saying that Comcast's practices could drive traffic to Internet service providers that offered their services on a common carrier basis. *See Order* ¶ 17 (JA____). The FCC cited no evidence for this speculation. In all events, this "everything-affects-everything" argument is far broader than the connections previously made between ancillary regulation and the regulated services.)

II. THE FCC'S THEORY RESULTS IN LIMITLESS AUTHORITY OVER INTERNET SERVICES, CONTRARY TO THE ACT AND ITS OWN PRIOR UNDERSTANDING OF INFORMATION SERVICES REGULATION.

The FCC's untenable construction of its powers is revealed in a second manner: how much regulatory discretion and power the FCC had to claim to make any strained connection between its *Order* and the Act. The FCC expounded a theory of its own powers that allows it to take any action that promotes "efficiency" in any "communications by wire or radio" – and the FCC said that this could include rate regulation, quality of service regulation, and nondiscrimination rules. This breadth is not only impossible to find in the Act, but it is contrary to what all have usually understood to be the best interpretation of ancillary powers. Even in circumstances where ancillary jurisdiction exists (and we reiterate that we do not believe that it exists here), the FCC has regulatory powers that fall far short

of its more robust powers over common carriers, broadcasters or cable service providers.

A. The *Order* Articulates Unbounded FCC Discretion and Power.

In an attempt to link its *Order* to a purpose of the Act, the FCC articulated a theory that would allow it unbounded discretion and powers over Internet services. The FCC did not recognize this as the radical departure it was or explain it, but, in all events, it is so contrary to history that it would be an untenable reading of the Act to think the FCC had this much authority.

The *Order* was prompted by Comcast's managing certain peer-to-peer traffic, but the Commission went beyond particular practices to impose a broad nondiscrimination requirement apparently applicable to all Internet service providers: It said that the Commission will be "vigilant" and subject "to a searching inquiry" any practice not "application or content neutral," and rule it illegal unless it is the least restrictive means of meeting network management needs. *Order* ¶ 50 (JA____). Indeed, the FCC described its action as "prohibiting unreasonable network discrimination." *Id.* ¶ 16 (JA____). Moreover, the FCC's theory of statutory authority suggests that it could order rate and service regulation as well. For example, the FCC said that it could regulate Comcast's challenged practices because to do so would "mak[e] broadband Internet access service both 'rapid' and 'efficient,'" which it was entitled to do because section 1 refers to a

"rapid, efficient" communications network. *Id*. The FCC's examples were of controls that affect service prices, such as its statement that its *Order* would make "available a source of video programming (much of it free) … [that] should result in downward pressure on cable television prices." *Id*.

Similarly, the FCC said that it had authority over Internet network management practices in order to "'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.'" *Id*. ¶ 18 (JA____) (quoting § 706 of the 1996 Act). But the FCC linked its regulation to this goal by saying that it was enhancing "consumer access to desirable content and applications on-line" which would "lead to increased adoption of broadband Internet access, as well as consumer demand for network upgrades that would result in higher speeds that would allow such content to be accessed more quickly." *Id*.

In other words, the FCC gave itself authority to take any step that affects the "efficiency," the price, or the quality of Internet service – or that in any other way increases consumer demand for Internet service. This theory surely knows no boundaries – and it is entirely discretionary. The FCC says it may, but does not say it must, do any of these things.

B. Such Discretionary and Limitless Power Is Contrary To the Act.

The Supreme Court has already held that the Act does not give the FCC authority to either regulate or not regulate and to decide – on its own – just how much to regulate. In *MCI Telecomms. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218 (1994), the Commission claimed that its statutory authority to "modify" tariff-filing requirements also allowed it to entirely eliminate the tariffing system. The Court held that the definition of "modify" did not include "eliminate." *Id*. at 225-29. The Court also, however, supported its decision with a simple common-sense inference of Congressional intent: "It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion …." *Id*. at 231. The 1996 Act did give the FCC new authority to forbear from statutory requirements, but this forbearance authority is subject to specific statutory requirements. *See* 47 U.S.C. § 160(a)(1-3). It is not a matter of "agency discretion" but of agency application of a statute. Indeed, as already noted (*supra*, pp. 7-8), the Supreme Court has said that ancillary jurisdiction must not result in the Commission having "unbounded" jurisdiction for "the Commission was not delegated unrestrained authority." *Midwest Video II*, 440 U.S. at 706.

Not only is the amount of FCC discretion contrary to the Act, but so is the extent of the powers that the FCC claims. Communications law precedents draw a

line between the Commission's Title II powers over common carriers – which are extensive and include rate and service regulation – and the Commission's powers over information services under its ancillary jurisdiction – which, while uncertain, are less than its powers under Title II. As noted, the *Order* itself imposes a nondiscrimination requirement, and the FCC's theory gives it power to regulate rates and service quality. These powers would allow the FCC to re-create in its entirety the economic regulation of Title II[13] under Title I, which would eliminate the previously-settled consequences of the Commission classifying a service as an "information service," render Title II largely superfluous, and contravene express provisions that Congress added to the Act in 1996.

This distinction in the FCC's regulatory powers is clear in those cases distinguishing between common carrier services and private carrier services and striking down FCC efforts to impose Title II regulation on non-common-carrier services. *Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994), is emblematic. There, the FCC attempted to subject local exchange carriers' private dark-fiber service to Title II. *Id*. at 1478-79. This Court reversed, saying that Title II regulation could only be imposed where the entity was, in fact, providing a

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[13] *See, e.g.*, Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1329-31 (1998) (the hallmarks of regulated industries statutes, including Title II of the Communications Act, are nondiscrimination, just and reasonable rates, and service requirements).

common carrier service. If an "entity is a private carrier for that particular service … the Commission is not at liberty to subject the entity to regulation as a common carrier." *Id*. at 1481. In fact, this Court acknowledged that the FCC would have "ancillary jurisdiction over private offerings of common carriers," but clearly held that this is a lesser form of regulatory power: "only common carrier activity falls within the Commission's regulatory powers under title II." *Id*. at 1483.

Southwestern Bell follows a long line of cases denying the FCC the ability to impose Title II regulation based simply on its notions of good policy. "While the Commission may look to the public interest in fine-tuning its regulatory approach, it may not impose common carrier status upon any given entity on the basis of the desired policy goal the Commission seeks to advance." *Id.* at 1481; *see also NARUC v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1975) ("we reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve. The common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities."); *MCI*, 512 U.S. at 234 ("the Commission's estimations[] of desirable policy cannot alter the meaning of the federal Communications Act").

The FCC and the courts have similarly understood whatever regulatory power the agency has over information services to be short of common carrier regulation. In the foundational *Computer II* decision, the FCC articulated the legal consequences of its classification scheme: "In defining the difference between basic and enhanced services, we have concluded that basic transmission services are traditional common carrier services and that enhanced services are not. Thus, while those who provide basic services would continue to be regulated, enhanced service vendors would not be subject to rate and service provisions of Title II of the Communications Act."[14] The Commission, of course, stated that it had ancillary jurisdiction over enhanced services,[15] but it acknowledged that "[e]ven though an activity falls within our subject matter jurisdiction, our ability to subject it to regulation is not without limits."[16] This Court recognized that the FCC had defined an "alternative regulatory scheme" for enhanced services. *Computer & Commc'ns Indus. Ass'n*, 693 F.2d at 212.

The FCC's most important Internet decisions also reflect that Title I regulation of information and Internet services is different and, at most, very light, further evidencing the chasm between the Act and the *Order*. For example, in the

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14 *In re Second Computer Inquiry*, Final Decision, 77 F.C.C.2d 384, 430 (1980).

15 *Id.* at 432.

16 *Id.* at 432-33.

IP-enabled services rulemaking notice, the FCC noted "its established policy of minimal regulation of the Internet and the services provided over it."[17] Similarly, the Commission noted the difference between common carrier regulation and the alternative of ancillary-regulation: "Various regulatory obligations and entitlements set forth in the Act – including a prohibition on unjust or unreasonable discrimination among similarly situated customers and the requirement that all charges, practices, classifications, and regulations applied to common carrier service be 'just and reasonable' – attach *only* to entities meeting this [common carrier] definition."[18]

The *Vonage* order, in which the FCC preempted state regulation of Voice over Internet Protocol services, noted "the Commission's long-standing national policy of nonregulation of information services, particularly regarding economic regulation."[19] The Commission recalled its history: "In a series of proceedings beginning in the 1960s, the Commission issued orders finding that economic regulation of information services would disserve the public interest because those

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17 *In re IP-Enabled Services*, Notice of Proposed Rulemaking, 19 F.C.C.R. 4863, 4865 (2004).

18 *Id*. at 4879 (emphasis added); *see also id*. at 4892 ("The Act distinguishes between 'telecommunications service[s]' and 'information service[s],' and applies particularly regulatory entitlements and obligations to the former class but not the latter.").

19 *In re Vonage Holdings Corporation*, Memorandum Opinion and Order, 19 F.C.C.R. 22,404, 22,416-17 (2004).

services lacked the monopoly characteristics that led to such regulation of common carrier services historically."[20]

These themes were also echoed when the FCC classified all Internet services as "information services," which the agency said "establishes a minimal regulatory environment for wireline broadband Internet access services to benefit American consumers and promote innovative and efficient communications."[21] In so doing, the FCC noted that "a wide variety of competitive and potentially competitive providers and offerings are emerging in this marketplace."[22] Finally, the FCC thought that Congress itself was pushing policy in the direction of "light" regulation: "[W]e must consider the broadband objectives Congress established in section 706. Those objectives make clear that the Commission must encourage the deployment of advanced telecommunications capability to all Americans by removing barriers to infrastructure investment."[23]

Congress's actions in the 1996 Act confirm that "information services" regulation entails far less Commission authority than common carrier regulation. The 1996 Act codified definitions of information services and telecommunications

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20 *Id*. at 22,417.

21 *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 F.C.C.R. 14,853, 14,855 (2005).

22 *Id*. at 14,880.

23 *Id*. at 14,894-95.

services. 47 U.S.C. § 153(20), (43)-(46). But the 1996 Act granted the FCC no regulatory powers over information services. Moreover, the 1996 Act limited common carrier regulation to "telecommunications services" – *i.e.*, to common carrier (and *not* information) services. The new definition of "telecommunications carrier" stated that a telecommunications carrier "shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services." *Id.* § 153(44). This further indicates that the FCC may not simply re-create a common-carrier regime of regulation for "information services." *Compare Midwest Video II*, 440 U.S. 689 (1979) (FCC may not use ancillary authority in a manner *contrary* to the Act).

C. The *Order* Ignores a Competition Analysis.

In distinguishing between Title I and Title II services, the FCC has previously attended to the dynamic nature of information services markets. In the *Computer II* order, the competitive nature of enhanced services in large part justified their being placed outside of Title II and subject to "nonregulation."[24] Similarly, in the *Wireline Broadband Order*, the FCC lifted the *Computer II* rules' application to telephone companies' DSL services, saying that "[u]nlike narrowband services provided over traditional circuit-switched networks, broadband Internet access services have never been restricted to a single network

[24] *See* 77 F.C.C.2d at 433-34.

platform," that "many consumers have a competitive choice," and that "competitive pressures" come even from smaller platforms.[25] In short, the level of competition (or not) has been a significant factor in classification and extent of regulation.

The *Order* ignores this history as well. Although the FCC told something resembling a competition story when it said that Comcast might interrupt peer-to-peer sessions to protect its own video services (*see Order* ¶ 5, JA ____), the Commission did nothing resembling the competition analysis in its earlier opinions. The *Order* provides no information about the state of competition in the market, and it does not even cite any economics theory or evidence. It is basic antitrust economics, however, that the sort of foreclosure story that the FCC hinted at would require (at least) a finding of market power being leveraged or maintained. *See Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 46 (2006) (tying and foreclosure case depends on proof of market power). In this regard as well, the Commission has departed from settled understanding of the Act's basic structure.

[25] 20 F.C.C.R. at 14,879, 14,883.

CONCLUSION

The *Order* significantly departs from prior understandings of the FCC's limited ancillary authority, its powers over Internet and information services, and the analysis necessary to support an exercise of regulatory power. The Act does not grant to the FCC general regulatory authority over the Internet, despite the Commission's claims in this case. The *Order* should be vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rules 29(d) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 7,000 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 32(a)(1).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2003 version of Microsoft Word in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that, on August 10, 2009, I caused true and accurate copies of the foregoing *Brief Amicus Curiae of Professors James B. Speta and Glen O. Robinson and The Progress and Freedom Foundation In Support of Petitioner Comcast Corporation and Urging That the FCC's Order Be Vacated* to be served on the following persons electronically via this Court's Case Management/Electronic Case Filing system, as appropriate, and by first class U.S. mail, postage prepaid:

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