



"The Law is Whatever the Nobles Do:" Undue Process at the FCC

by Barbara S. Esbin*

Our laws are not generally known; they are kept secret by the small group of nobles who rule us. We are convinced that these ancient laws are scrupulously administered; nevertheless it is an extremely painful thing to be ruled by laws that one does not know.¹

Introduction

Franz Kafka's parable "*The Problem of Our Laws*," describes the problem of living under laws, the "very existence" of which "is at most a matter of presumption." The problem is not that of discrepancies in interpretation of the law, but conflicting views of its very existence, and how to orient one's behavior in such an uncertain atmosphere. In Kafka's tale, one tradition holds that the laws "exist and that they are a mystery confided to the nobility." But this tradition cannot be proven because "the essence of a secret code is that it should remain a mystery." Adherents of this tradition, although unable to directly know the law, study the actions of the nobles in order to conform their behavior, and "have attentively scrutinized the doings of the nobility since the earliest times," trying to discern main tendencies and draw logically ordered conclusions, only to find "that everything becomes uncertain, and our work seems only an intellectual game, for perhaps these laws that we are trying to unravel do not exist at all."

Others hold this opinion and "try to show that, if any law exists, it can only be this: *The Law is whatever the nobles do*" (emphasis added). "This party see everywhere only the arbitrary acts of the nobility" and reject the popular tradition as giving a false sense of security for confronting coming events. Paradoxically, the party believing there is no law remains small, because such beliefs would also mean unacceptable repudiation of both the law and the nobility. The parable concludes:

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¹ Franz Kafka, "*The Problem of Our Laws*." Translation by Willa and Edwin Muir from *The complete short stories of Franz Kafka*, edited by Nathum N Glazer (1971). The parable was written between 1917 and 1924 and first published in *Beim Bau der Chinesischen Mauer* (1931; pp 29-32), edited by Max Brod and Hans Joachim Schoeps, available at <http://www.philosophyblog.com.au/the-problem-of-our-laws-by-franz-kafka/>

The sole visible and indubitable law that is imposed upon us is the nobility, and must we ourselves deprive ourselves of that one law?

What does this have to do with the recent decision of the Federal Communication Commission (FCC) to extend regulatory authority over the broadband network management practices of Comcast Corporation and “adjudicate” its behavior against a set of policy principles? Plenty. The FCC’s means of asserting regulatory authority over broadband Internet service providers’ network management practices is unprecedented, sweeping in its breadth, and seemingly unconstrained by conventional rules of interpretation and procedures. We should all be concerned, for apparently what we have on our hands is a runaway agency, unconstrained in its vision of its powers.

Background

In a sharply divided ruling, a majority of the FCC has found that Comcast Corporation’s management of its broadband Internet networks contravenes Federal policies aimed at protecting “the vibrant and open nature of the Internet.”² Ruling on a self-styled “Formal Complaint” by Free Press and Public Knowledge³ as well as a related petition for declaratory ruling⁴, the Commission concluded that Comcast had “unduly interfered with Internet users’ right to access the lawful Internet content and to

² Press Release, Federal Communications Commission, *Commission Orders Comcast to End Discriminatory Network Management Practices* (Aug. 1, 2008), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284286A1.pdf

³ Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation For Secretly Degrading Peer-to-Peer Applications (Nov. 1, 2007) (Free Press Complaint), available at www.freepress.net/files/fp_pk_comcast_complaint.pdf. The complaint alleged that Comcast blocks innovative applications and that its methods are “deliberatively secretive.” The complaint further alleges, as a general matter, that “degrading applications violates the Commission’s Internet Policy Statement, which the FCC has vowed to enforce.” Free Press argues that Comcast’s actions with respect to its cable modem subscribers who utilize “peer-to-peer protocols” (particularly the BitTorrent application) violate three out of four of the FCC’s Internet principles (regarding consumers rights to run applications and use services of their choice; access lawful content of their choice; and enjoy competition among network providers, application and service providers, and content providers). In addition, it is alleged that “secretly degrading applications constitutes a deceptive practice.” Free Press requests that, *before ruling on the merits*, the FCC “immediately issue a preliminary injunction,” forbidding “Comcast from degrading any application until this Complaint has been resolved.” Free Press Complaint at 24. And, when ruling on the merits, the FCC impose permanent injunction, and “the maximum forfeitures,” under section 503(b) (2) (D). *Id.* at 33-35.

⁴ Free Press, *et al.* Nov. 1, 2007 Petition Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management” (CC Docket No. 02-33; CC Docket No. 01-337; CC Docket Nos. 95-20, 98-10; GN Docket No. 00-185; CS Docket No. 02-52; WC Docket No. 07-52); Public Notice, DA 08-91, Comment Sought on Petition for Declaratory Ruling Regarding Internet Management Policies, WC Docket 07-52 (released Jan. 14, 2008) (“The Wireline Competition Bureau seeks comment on a petition filed by Free Press *et al.* (Petitioners), seeking a declaratory ruling ‘that the practice by broadband service providers of degrading peer-to-peer traffic violates the FCC’s Internet Policy Statement’ and that such practices do not meet the Commission’s exception for reasonable network management;” the matter was designated “permit but disclose” and parties were instructed to file comments on the petition by referencing WC Docket No. 07-52).

use the applications of their choice by deploying ‘equipment throughout its network to monitor the content of its customers’ Internet connections and selectively block specific types of connections known as peer-to-peer connections.’”⁵ Although the Memorandum Opinion and Order (MO&O) adopted at the August 1 Commission meeting is not yet available, public statements and available documents give a fair idea of what we can expect when it is released: Comcast has been adjudged guilty of violating a FCC *policy* (not a rule) regarding the rights of consumers of Internet access or Internet-Protocol-enabled (IP-enabled) services as previously articulated by the FCC in an “*Internet Policy Statement*.”⁶ Inasmuch as no “Notice of Proposed Rulemaking” or “Declaratory Ruling” has been issued in the docket housing the Commission’s action⁷, the exact source of the rule of behavior transgressed will remain unknown until the document is released. It must surely be a painful thing for Comcast to be ruled by *laws* that it did not know existed, for a rule of behavior – a law – can only be enforced through agency “adjudication.”

Reaction to the FCC’s action has largely focused on the merits or drawbacks of the decision to initiate regulation of the network management practices of the nation’s broadband Internet service providers. In other words, whether enforcing the network neutrality principles against Comcast is a good or bad policy decision. And, from a policy perspective, most experts seem to agree that we want our “bandwidth providers”⁸ to (1) deliver the services they have contracted to deliver; (2) adequately inform their subscribers about the services they have purchased; (3) not impede consumer access to or use of lawful content, applications and devices; and (4) generally behave in a “neutral” manner with respect to transmission of bits to the greatest extent possible.⁹ But that is not to say that consumers will invariably benefit if non-technical government

⁵ *Id.*

⁶ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review — Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CC Docket Nos. 02-33, 01-337, 98-10, 95-20, GN Docket No. 00-185, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986 (2005) (*Internet Policy Statement*), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf.

⁷ Parties seeking an FCC ruling with regard to the consistency of specific industry practices with the Communications Act may file either a “Petition for Declaratory Ruling” or “Petition for Rulemaking.” Both types of proceedings are treated as “notice and comment” rulemaking dockets and are ordinarily used to resolve issues of prospective, industry-wide application. Usually, following action upon a “Petition for Declaratory Ruling,” the FCC will issue a document entitled “Declaratory Ruling,” as it did in the case of the *Cable Modem Declaratory Ruling* establishing the appropriate regulatory classification of broadband Internet access services provided over cable systems. See, e.g., *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798 (2002) (*Cable Modem Declaratory Ruling*), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-77A1.pdf.

⁸ Tim Wu, *OPEC 2.0*, New York Times, Opinion (July 30, 2008), available at <http://www.nytimes.com/2008/07/30/opinion/30wu.html>

⁹ Tim Wu, *Network Neutrality: Competition, Innovation, and Nondiscriminatory Access* (April 24, 2006), available at SSRN: <http://ssrn.com/abstract=903118>

officials are making decisions, on a case-by-case basis, about what is and what is not “reasonable network management” of the networks connecting us to the Internet.

More importantly, the truly innovative (but likely unsustainable) character of the procedures employed by the FCC should be examined. It is beyond argument, as the FCC majority has stated, that the agency, in carrying out its statutory obligations under the Communications Act,¹⁰ has discretion to choose to proceed by either “adjudication” -- via enforcement actions directed at specific past behaviors -- or by means of a prospective notice and comment “rulemaking” to establish industry-wide rules of behavior.¹¹ But the Commission broke new ground from a legal and procedural perspective when it decided to combine these forms and find that one industry participant, Comcast, has violated a set of policy principles the FCC itself had heretofore declared “unenforceable.”¹² Dissenting Commissioner Robert McDowell called it “rulemaking by adjudication.”¹³ Or, one might think of the Commission’s action as “adjudi-making.”

¹⁰ The Communications Act of 1934, as amended (Communications Act or Act). 47 U.S.C. §§ 151, et seq.

¹¹ See *SEC v. Chenery Corp.*, 332 U.S. 194 (1947)

¹² Chairman Martin stated that “policy statements do not establish rules nor are they enforceable documents.” FCC, News Release, *Chairman Kevin J. Martin Comments on Commission Policy Statement* (Aug. 5, 2005) (Martin Statement), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260435A2.pdf. Commissioner Copps, referring to the policy statement, wrote “While I would have preferred a rule that we could use to bring enforcement action, this is a critical step.” Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review — Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with regard to Broadband Services Provided via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Consumer Protection in the Broadband Era, WC Docket Nos. 04-242, 05-271, CC Docket Nos. 95-20, 98-10, 01-337, 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005), Statement of Michael J. Copps, Concurring, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260433A4.doc. Thomas Navin, then-Wireline Competition Bureau Chief, explained in a press conference immediately following adoption of the *Policy Statement* that the principles it set forth “are not enforceable.” *FCC Adopts a Policy Statement Regarding Network Neutrality*, TechLawJournal.com, Aug. 5, 2005, available at <http://www.techlawjournal.com/topstories/2005/20050805.asp>.

¹³ *Dissenting Statement of Commissioner Robert M. McDowell RE: Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices, Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management,” File No. EB-08-IH-1518, WC Docket No. 07-52, Memorandum Opinion and Order* (released Aug. 1, 2008) (McDowell Dissent), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284286A6.pdf

Undue Process: "Rulemaking by Adjudication"

Whatever we call this innovative legal form, it appears to have resulted in factual findings that a single industry participant violated rules of behavior articulated for the first time in the very proceeding in which the accused was found guilty as charged. More troubling still, the adjudication was wholly lacking the protections afforded the subjects of more traditional administrative adjudications, such as the need for sworn testimony, adherence to the rules of evidence, and the other procedural safeguards of a "restricted" adjudication.¹⁴ Instead, Comcast appears to have been tried by the FCC in an open docket, through a series of *en banc* public hearings, found wanting, and is to be subjected to various "compliance" obligations while being threatened with additional regulatory punishments if it fails to adhere.

The 2005 Internet Policy Statement is Not a Rule

The *Internet Policy Statement* cited as the basis for the FCC's authority was just that: a statement of broad policy principles that the Commission vowed to incorporate in *future* policymaking activities. It was not a binding rule of law. The Commissioners themselves recognized at the time they were introduced that the policy principles, standing alone, were unenforceable.¹⁵ This is consistent with settled legal authority on the distinction between "policy" and "rules." "The real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations, which the statute authorizes to contain only documents 'having general applicability and legal effect.'"¹⁶ It is undisputed that the four "principles" embodied in the FCC's *Internet Policy Statement* have never been the subject of an agency rulemaking, let alone published in the Code of Federal Regulations.

The FCC majority also justified its decision to enforce the *Internet Policy Statement* through adjudication by pointing out that courts have recognized agencies have discretion to choose between proceeding by adjudication or rulemaking in carrying out their statutory responsibilities.¹⁷ As a general matter, that is indisputably true, but

¹⁴ In a "restricted" proceeding, decision makers cannot be lobbied outside the presence of other parties. 47 C.F.R. 1.1208. See also 5 U.S.C. 554(d).

¹⁵ See note 12 *supra*.

¹⁶ *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986), quoting 44 U.S.C. § 1510 (1982). See also the Administrative Procedure Act, 5 U.S.C. § 552(a)(1)(D).

¹⁷ "Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular unforeseeable situations." *SEC v. Chenery Corp.*, *supra* note 11 at 202. But "there may be situations where the [agency's] reliance on adjudication would amount to an abuse of discretion." *Bell Aerospace*, 416 U.S. 267, 295. "Such a situation may present itself where the new standard, adopted by adjudication, departs radically from the agency's previous interpretation of the law, where the public has relied substantially and in good faith on the previous interpretation, where fines or damages are involved, and where the new standard is very broad and general in scope and prospective application." *Pfaff v. U.S. Dept. of Housing and Urban Development*, 88 F.3d 739, 748 (1996), citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 at 295 (1974); *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009-10 (9th Cir. 1981); *Patel v. INS*, 638 F.2d 1199, 1203-05 (9th Cir. 1980); *Ruangswang v. INS*, 591 F.2d 39, 44 (9th Cir. 1978).

only in a much more limited sense than that relied upon by the Commission. Although an agency is free to “announce new principals in an adjudicative proceeding,” it is improper to do so when the adverse consequences of reliance on past agency decisions are “substantial,” liability is imposed for past actions taken in good faith reliance on prior agency pronouncements, the affected party has not had a full opportunity to be heard before the agency makes its determination, or fines or damages are involved.¹⁸ Comcast believed that its network management practices complied with the FCC’s exception for “reasonable network management.”¹⁹ “In order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose.”²⁰ Among other problems, it is not at all clear how adjudication of unpublished rules that force broadband providers to change their business plans²¹ serves the congressional purpose of section 230(b), which unequivocally declares it to be the policy of the United States that the Internet remain “unfettered by Federal or state regulation.”²²

FCC’s Jurisdiction to Regulate Internet Network Management Practices is Questionable

Many commentators have noted the shaky jurisdictional basis for the FCC’s action.²³ The FCC majority, citing various precedents, apparently rests its action against Comcast on its “subject matter jurisdiction” over interstate communications in wire and radio and its ability to use “ancillary jurisdiction” under various provisions of the Act to make “policy” through adjudication.²⁴ But ancillary jurisdiction is just that: derivative and not generative.²⁵

¹⁸ *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

¹⁹ *Internet Policy Statement*, supra note 6 at 3 fn. 15. See also Comments of Comcast Corporation (Feb. 12, 2008) at 24, available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519840991.

²⁰ *Morton v. Ruiz*, 415 U.S. 199, 237 (1974).

²¹ Craig Moffett, *Weekend Media Blast: Be Careful What You Wish For* (Aug. 1, 2008); CommDaily, FCC Comcast Order May Prompt Broadband Usage Caps, p. 3 (Aug. 5, 2008).

²² 47 U.S.C. 230(b).

²³ David Sohn, *FCC “Enforcement” Against Comcast?*, Center for Democracy & Technology PolicyBeta (July 16, 2008), available at <http://blog.cdt.org/2008/07/16/fcc-enforcement-against-comcast/>. Robert Poe, *FCC’s Comcast Ruling No Great Victory for Network Neutrality*, VOIP-NEWS (Aug. 4, 2008), available at <http://www.voip-news.com/feature/fcc-comcast-ruling-080408/>.

²⁴ See Statement Of Commissioner Jonathan S. Adelstein Re: Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management”, Memorandum Opinion and Order, File No. EB-08-IH-1518, WC Docket No. 07-52 (Aug. 1, 2008), p. 3, (Adelstein Statement) available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284286A4.pdf, citing *National Cable & Telecomm. Ass’n v. Brand X Internet Services*, 545 U.S. 967, 996 (2005) (Brand X). See also the cases cited in McDowell Dissent, supra note 15.

²⁵ W. Kenneth Ferree, *Elephants Do Not Hide in Mouse Holes*, Progress & Freedom Foundation Progress Snapshot Release 4.16 (Aug. 2008), available at <http://www.pff.org/issues-pubs/ps/2008/ps4.16wholesalealacarte.html>

In its *Internet Policy Statement*, the FCC cites the Supreme Court's *Brand X* decision that it "has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications."²⁶ In other words, the Commission claimed it "has jurisdiction necessary to ensure that providers of telecommunications for Internet access or Internet Protocol-enabled (IP-enabled) services are operated in a neutral manner."²⁷ But the question of the nature or scope of the FCC's ancillary jurisdiction to impose specific rules on providers of information services was neither the subject of the FCC's Cable Modem Declaratory Ruling nor the Supreme Court's grant of certiorari to review that decision. In other words, the language cited from the *Brand X* decision is dicta. The sole question before the Supreme Court concerned the FCC's decision to classify "cable modem services" as "information services" under Title I as opposed to either "telecommunications services" under Title II, or "cable services" under Title VI.²⁸ In fact, the FCC released a notice of proposed rulemaking seeking comment on the need for, and Commission's jurisdiction to impose, inter alia, "open access" type requirements on cable modem service providers.²⁹ The cable modem rulemaking is still pending before the Commission. The *Internet Policy Statement* was not an *implementation* of specific provisions of the Communications Act, and its premise, that the FCC has ancillary jurisdiction to regulate the network management practices of broadband Internet service providers, is as yet untested in court.

Suffice it to say, for present purposes, that if the FCC is correct in its analysis of its "Title I" ancillary jurisdiction, the remaining Titles of the Communications Act are just so much surplus usage. For among the FCC's latest gambits is the notion that the FCC may regulate behavior "ancillary" to its Title I jurisdiction. As Commissioner Adelstein stated: "[T]he Order sets out the Commission's legal authority under Title I of the Act, explaining that preventing unreasonable network discrimination directly furthers the goal of making broadband Internet access both "rapid" and "efficient."³⁰ This appears to be a paraphrase of Section 1 of the Act, which recites the Act's purposes and the reason for creation of the FCC, including "regulating interstate and foreign commerce in communication by wire and radio so as to make available . . . a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges . . ."³¹ But because Title I is also considered the source of "ancillary jurisdiction,"³² that 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.

²⁶ Internet Policy Statement, *supra* note 6 ¶4 n.12, citing *Brand X*.

²⁷ *Id.* ¶4.

²⁸ *Brand X*, *supra* note 24 at 974.

²⁹ In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, GN Docket No. 00-185, CS Docket No. 02-52 (March 14, 2002), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-77A1.doc

³⁰ Adelstein Statement, *supra* note 24 at 3.

³¹ 47 U.S.C. § 151.

³² *Brand X*, *supra* note 24 at 976. ("Information-service providers, by contrast, are not subject to mandatory common-carrier regulation under Title II, though the Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign

The FCC's alternative theory, that, in enforcing the *Internet Policy Statement* it is in fact enforcing a potpourri of other Communications Act policy provisions – including Sections 201, 230, 256, 257, 601 and 706³³ – is no more sound due to the obvious lack of any previously-articulated relationship between those provisions in a *rulemaking proceeding* and the behavior complained of. Furthermore, not one of them specifically authorizes or directs the FCC to establish rules of conduct for providers of information services such as broadband Internet access.³⁴

Procedural Flaws

What we know of the “undue process” used to resolve the Free Press allegations concerning Comcast's network management practices is not reassuring. We know from the caption of the action, Free Press' website³⁵, the separate statements of some of the Commissioners, and filings within the referenced docket, that Free Press filed something titled a “Formal Complaint.” But Comcast is not acting as a common carrier in its provision of Internet services,³⁶ so the FCC's Section 208 formal complaint rules, with their strict set of procedural protections,³⁷ were neither applicable nor complied

communications.”) See also 47 U.S.C. 154(i), considered to be the FCC's “necessary and proper” clause, allowing the agency to fill in the gaps under other Titles.

³³ Adelstein Statement, *supra* note 24 at 2 (“As the Order correctly concludes, taking action against discriminatory practices advances federal law by encouraging the efficiency of the public Internet, ensuring reasonable charges, and promoting competition, pursuant to Section 1. It encourages the deployment of advanced services, pursuant to Section 706. It ensures the reasonableness of charges incurred by preventing providers from shifting costs to customers who purchase DSL as a common carrier service, pursuant to Section 201. It promotes the flow of information across public telecommunications networks, pursuant to Section 256. It eliminates barriers to entry for entrepreneurs, pursuant to Section 257. And, it improves individuals' ability to access a diverse array of content over the Internet, pursuant to Sections 257 and 601”).

³⁴ Communications Act of 1934, as amended by the 1996 Act, codified at 47 U.S.C. 151, 201, 230, 256, 257, 521, 606, available at <http://www.fcc.gov/Reports/1934new.pdf>. The majority of these statutory provisions are contained within Title II of the Act, the Title applying to “common carriers.” The Commission, in its *Cable Modem Declaratory Ruling*, consciously declined to classify cable modem service, the service at issue in this case, as either a Title II common carrier “telecommunications service,” or a Title VI “cable service,” finding instead that the attributes of the service placed it within the category of “information services” contained within Title I of the Act. It is hard to imagine how the FCC can justify its actions as ancillary to provisions of the Act contained in Titles II and VI that it has previously ruled inapplicable to the particular broadband “information service” at issue. Even more difficult to imagine is how the agency's decision to regulate the network management practices of broadband Internet service providers can be consistent with section 230(b), which unequivocally declares it to be the policy of the United States that the Internet remain “unfettered by Federal or state regulation,” or its charge under Section 706 to promote the deployment “of advanced telecommunications capability to all Americans.”

³⁵ Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation For Secretly Degrading Peer-to-Peer Applications (Nov. 1, 2007), available at http://www.freepress.net/files/fp_pk_comcast_complaint.pdf.

³⁶ *Cable Modem Declaratory Ruling*, *supra* note 12, and *Brand X*, *supra* note 24. See also the discussion in note 34, *supra*.

³⁷ Under section 208 of the Act, the Enforcement Bureau adjudicates formal complaints against common carriers. Formal Complaints filed pursuant to section 208 are governed by a strict set of procedures contained in sections 1.720, *et seq.* of the Commission's rules. 47 C.F.R. §§ 1.720, *et. seq.* In non-

with. Commissioner McDowell, in his Dissenting Statement, observes that even if the FCC's formal complaint rules were applicable to Comcast, they would require *dismissal* of the complaint because of its numerous defects, especially its failure to cite the specific provisions of the Communications Act alleged to be violated.³⁸ There has also not been a restricted complaint resolution proceeding between the complainant and defendant.³⁹ Instead, the FCC touts the fact that it conducted "two public hearings," as opposed to a restricted factual investigation of the allegations, before rendering its decision.⁴⁰

Ordinarily, when the agency is considering adoption of a rule that is prospective in nature and applicable to an entire industry, either by rulemaking or declaratory ruling, the matter is handled by one of its "policy" bureaus, such as the Wireline Competition Bureau.⁴¹ In such cases, "WC" docket numbers are used. When the FCC's Enforcement Bureau is resolving a formal complaint filed against a common carrier, its "Market Disputes Resolution Division" handles the matter and a "MD" file number is assigned.⁴² In some cases, the Enforcement Bureau's "Investigations and Hearings

technical terms, proceedings initiated under these rules are "adjudications" in which facts are found and conclusions of law are reached by agency staff and/or the full Commission. Where disputes cannot be resolved upon a paper record, they may be referred for hearing before an Administrative Law Judge (ALJ) pursuant to a "Hearing Designation Order." Consistent with the Administrative Procedures Act, among the many protections afforded litigants before an ALJ is the separation of agency "trial" and "decisional" staff. 5 U.S.C. 554(d), 47 C.F.R. 1.1202(c). Once a matter is sent for hearing before an ALJ, the Enforcement Bureau must designate "trial staff" and keep them from communicating with the ultimate agency decision-makers who will receive the recommendations of the ALJ. The Commission has also adopted rules that allow the section 208 complaint rules to be used to settle disability complaints under section 255 of the Act. *In re Implementation of Section 255 of the Telecommunications Act of 1996; Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment By Persons with Disabilities*, WT Docket No. 96-198 (2002), available at <http://www.fcc.gov/Bureaus/Wireless/Notices/fcc96382.txt>. Those complaints, which are very rare, could involve equipment manufacturers. That is the only exception to the requirement that complaints pursuant to Title II of the Act involve only common carriers.

³⁸ Complaints must contain a "[c]itation to the section of the Communications Act and/or order and/or regulation of the Commission alleged to have been violated." 47 C.F.R. 1.721(a)(4).

³⁹ Compare *Bright House Networks, LLC, et al., Verizon California, et al.*, Memorandum Opinion and Order, File No. EB-08-MD-002 (released June 23, 2008)(granting "in part a formal complaint filed against defendants (collectively 'Verizon') pursuant to section 208 of the Communications Act of 1934, as amended").

⁴⁰ Press Release, *supra* note 2 at 1.

⁴¹ See <http://www.fcc.gov/wcb/>

⁴² Within the FCC's Enforcement Bureau, the Market Disputes Resolution Division generally handles formal complaints against common carriers. According to the Commission's website, "The Market Disputes Resolution Division ("MDRD") is responsible for resolving complaints by market participants, entities or organizations against common carriers (wireline, wireless or international) for alleged violations of the Communications Act that are filed pursuant to Section 208 of the Act. The division also resolves complaints filed by cable operators, telecommunications carriers, utilities and other parties pursuant to Section 224 of the Communications Act relating to the reasonableness of rates, terms, and conditions for pole attachments." See <http://www.fcc.gov/eb/mdrd/>. Another division within the Enforcement Bureau, the Telecommunications Consumers Division (TCD), is charged with protecting consumers from fraudulent, misleading and other harmful practices involving telecommunications. The functions performed within the Division include: "Investigating the practices of companies engaged in various telecommunications-related activities, including common carriers, manufacturers of

Division” investigates complaints are filed against non-common carriers and assigned an “IH”⁴³ file number. The title of the item in the July 25, 2008 Notice announcing the items for consideration at the August 1, 2008 meeting was “Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices (WC Docket No. 07-52)” and the summary stated: “The Commission will consider a Memorandum Opinion and Order *addressing a complaint and other filings* concerning Comcast’s network management practices.” Although the FCC’s notice referenced only a “WC” Docket number, it appears from the captions of the various separate and dissenting statements⁴⁴ that an IHD investigatory file had been opened for the Free Press “Formal Complaint” and was being directly acted upon by the full Commission. It remains unclear how the agency purports to be acting upon this IH file *within* the WC docket, the sole docket noticed in conjunction with the August 1 Commission meeting. WC Docket No. 07-52 was initiated by the Wireline Competition Bureau upon the Commission’s adoption of its *Notice of Inquiry* (not a Notice of Proposed Rulemaking) into Broadband Network Management Practices.⁴⁵ Two petitions were later added to the docket: Free Press and others filed a Petition for Declaratory Ruling⁴⁶ and Vuze, Inc. filed a Petition for Rulemaking.⁴⁷

telecommunications equipment, telemarketers and other companies utilizing telecommunications equipment for unsolicited advertisements” and processing formal complaints arising from such activities. See <http://www.fcc.gov/eb/tcd/>.

⁴³ Investigations and Hearing Division. According to the FCC’s website, “The Investigations & Hearings Division is responsible for resolution of complaints against broadcast stations and other Title III licensees and on non-technical matters such as indecency, enhanced underwriting, unauthorized transfer of control and misrepresentation. In addition, with regard to wireless licensees, the Division is responsible for enforcement of rules regarding auction collusion and misrepresentation. The Division also investigates industry allegations of violations of Title II of the Communications Act, as amended, and FCC rules and policies pertaining to common carriers. In addition, the Division conducts, or assists in, various other investigations being conducted by the Bureau and serves as trial staff in formal Commission hearings.” <http://www.fcc.gov/eb/ihd/>.

⁴⁴ The full title of the unreleased MO&O, as it appears on the separate statements of Commissioners Cops and Adelstein, and the dissenting statement of Commissioner McDowell, is: “*Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices, Petition of Free Press et al. for Declaratory Ruling that Degrading Internet Applications Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management,”* File No. EB-08-IH-1518, WC Docket No. 07-52, Memorandum Opinion and Order.”

⁴⁵ The NOI states its purpose was to better inform the Commission about broadband industry practices and whether there is a need for “net neutrality” regulations. In other words, it was solely an information gathering exercise.

⁴⁶ Free Press, Public Knowledge, Media Access Project, Consumer Federation of America, Consumers Union, Information Society Project at Yale Law School, Professor Charles Nesson, Co-Director of the Berkman Center for Internet & Society, Harvard Law School, Professor Barbara van Schewick, Center for Internet & Society, Stanford Law School, Petition for Declaratory Ruling, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52, WC Docket No. 07-52 (filed Nov. 1, 2007)

⁴⁷ Vuze, Inc. Petition for Rulemaking to Establish Rules Governing Network Management Practices By Broadband Network Operators, WC Docket No. 07-52 (filed Nov. 14, 2007). It appears that the separate issues raised by Vuze remain pending before the FCC. In addition, a related Public Knowledge 01/14/08 Petition for Declaratory Ruling that Text Messages and Short Codes are Title II Services or a Title II Services Subject to Section 202 Nondiscrimination Rules was given a Wireless Telecommunications Bureau docket number and, although listed as a related petition on the FCC’s

What WC Docket No. 07-52 lacks, as noted by Commissioner McDowell, is a “Notice of Proposed Rulemaking” proposing specific rules of conduct for broadband network operators and seeking public comment on its proposals. That is, even assuming for the sake of argument that the FCC has ancillary jurisdiction to adopt network management or other net neutrality rules, it has not yet done so. It is, however, quite evident that the FCC has declared that Comcast has violated a norm of behavior for network operators in contravention of the FCC’s *Internet Policy Statement*, the very declaration sought by Free Press in both its Petition and Complaint.⁴⁸ Using the cover of a public rulemaking docket to gather evidence for use in what might ordinarily be a restricted investigation into the identical allegations against the same party would be unorthodox, to say the least.

Another seeming pre-requisite to an enforcement action against Comcast for its network management practices is issuance of a “Notice of Apparent Liability” or “Order to Show Cause” bearing the IH file number referenced in the caption of this item, which would afford Comcast a vehicle for defending against the allegations of violations of the Act or the FCC’s rules. The FCC’s enforcement powers are set forth in Titles I and IV of the Act.⁴⁹ Typically, investigations, whether initiated by a complaint or by the Commission on its own motion, proceed in set stages.⁵⁰ None of these interim steps on the path of enforcement appear to have been taken in the case of Comcast, leaving the precise path of the Free Press “Formal Complaint” through the Commission uncertain.

Fundamental Unfairness

Companies should be able to expect some type of consistency and fairness in how matters are handled by the FCC. If the agency proceeds by rulemaking, the Administrative Procedures Act requires certain procedures and the Commission’s conclusions are prospective and apply to an entire industry.⁵¹ If the agency is resolving a formal complaint, the adjudication needs to be fair and follow its established rules of procedure. What is so unusual about the action against Comcast, and so grossly unfair, is that it appears to be an enforcement action arising out of a rulemaking-type proceeding without the benefit of even of a notice of proposed rulemaking, and has apparently been conducted almost entirely by a policy group rather than the agency’s enforcement staff. Such apparently arbitrary actions by the nation’s top

“Broadband Network Management Practice” webpage, does not appear to have been the subject of the FCC’s August 1 vote.

⁴⁸ It will be interesting to see how the FCC transmutes violations of the policy principles announced in the “unenforceable” *Internet Policy Statement* into violations of the Communications Act when the MO&O is released.

⁴⁹ See 47 U.S.C. 151, 154(i), 154(j), 208, and 218.

⁵⁰ The stages are: a staff investigation; issuance of a “Letter of Inquiry” requesting the respondent to answer questions concerning its activities; and evaluation of the responses. Subpoenas may also be issued in appropriate cases. If violations of the Act, the Commission’s rules or a Commission order are found, the Commission has a range of enforcement options, from monetary forfeitures to license revocation.

⁵¹ See 5 U.S.C. 551(4).

communications regulator can hardly assure either industry, their investors, the financial markets generally, or the people of the nation that the laws are being faithfully carried out in their interest.

Even if the FCC were correct in its claims that it can make policy decisions in the context of adjudications, it does not appear to have conducted a proper adjudication in this instance. *En banc* public hearings, with *unsworn* “presenters” or “participants” *selected by the adjudicator* are not adequate substitutes for the sort of formal hearing one would anticipate in a matter of this magnitude.⁵²

Although the FCC majority repeatedly cites the voluminous record before it, one must remember that the record in a public notice and comment rulemaking proceeding is far less rigorous, from an evidentiary standpoint, than the record created in a formal adjudication, with its requirement of sworn testimony and opportunities for cross-examination. As Commissioner McDowell stated:

Even if the complaint was not procedurally deficient and we had rules to enforce, the next step would be to look at the strength of the evidence. The truth is, the FCC does not know what Comcast did or did not do. The evidence of record is thin and conflicting. All we have to rely on are the apparently unsigned declarations of three individuals representing the complainant’s view, some press reports, and the conflicting declaration of a Comcast employee. The rest of the record consists purely of differing opinions and conjecture. As the majority embarks on a regulatory journey into the realm of the unknowable, the evidentiary basis of its starting point is tremendously weak, to the point of being almost non-existent. In a proceeding of this magnitude, I do not understand why, in the absence of strong evidence, *the Commission did not conduct its own factual investigation under its enforcement powers*. The Commission regularly takes such steps in other contexts that, while important, do not have the sweeping effect of today’s decision (footnotes omitted).⁵³

This does not reflect simply a difference of opinion over regulatory policy. Given the FCC’s compliance plan ordering Comcast to “Disclose the details of its discriminatory network management practices to the Commission,”⁵⁴ it is *confirmation*, if any more were needed, that the FCC did not conduct a factual investigation under its enforcement powers. Rather, the FCC appears to have engaged in a process suitable to the production of legislative findings capable of supporting only prospective, industry-

⁵² A formal adjudication via hearing involves a hearing before an ALJ, pursuant to a Commission-adopted “Hearing Designation Order,” conducted in accordance with recognized rules of evidence and procedure.

⁵³ McDowell Dissent, *supra* note 13.

⁵⁴ Press Release, *supra* note 2 at 3.

wide rules of behavior, but wholly insufficient to support an adjudication against a single company under our Constitution and system of law.

Yet, the FCC majority implied that, with respect to Internet network management issues, it is desirable to proceed via adjudication rather than rulemaking because setting broadband network policy through adjudication would target only the “bad actors” avoiding problems of over-breadth.⁵⁵ In other words, the FCC took the most targeted and least regulatory means of protecting the open nature of the Internet.

Why is this so alarming? Because what the FCC has done is to proceed neither entirely by adjudication or rulemaking, but by some unholy combination of the two – “adjudi-making” or “rule-ication” -- where the rather loose world of legislative fact finding is used to convict a leading industry participant in the court of public opinion. And it was done prior to the announcement of either rules of behavior or a factual investigation conducted under the agency’s enforcement powers in accordance with due process of law and the Administrative Procedure Act.

One can only hope that both the Congress and the Courts will take a long, hard look at *exactly how* the FCC went about saving the democratic medium of the Internet from the grasping clutches of private network operators and *whether* in fact it has done so. The ink was barely dry on the FCC’s August 1 News Release when stories indicating that “bandwidth caps,” “metered” and/or “tiered” bandwidth pricing was almost inevitable⁵⁶ in the wake of the FCC’s apparent ruling that “deep packet inspection” and “RST Injection” network management tools are not “acceptable behavior.”⁵⁷ Unfortunately, rather than save the Internet, the FCC appears to have both sacrificed the rule of law that truly keeps us free and imperiled the “unfettered” Internet in contravention of long-standing federal Internet policy.

It is an understatement to say that serious flaws exist in the legal and procedural means the FCC employed to find Comcast guilty of violating its *Internet Policy Statement* establishing Internet users’ rights to access lawful Internet content and utilize the applications of their choice. It boils down to this: The FCC majority claims to be acting under its “ancillary jurisdiction” and has stitched together a patchwork quilt of regulatory jurisdiction to “adjudicate” on a case-by-case basis. The procedural vehicle chosen is a self-styled “Formal Complaint”⁵⁸ filed against a non-common carrier,

⁵⁵ Martin Statement, *supra* note 15 at 3, Adelstein Statement, *supra* note 24 at 4.

⁵⁶ Craig Moffett, *Weekend Media Blast: Be Careful What You Wish For* (Aug. 1, 2008); CommDaily, FCC Comcast Order May Prompt Broadband Usage Caps, p. 3 (Aug. 5, 2008).

⁵⁷ Press Release, *supra* note 2 at 2.

⁵⁸ Companies from time to time may send the FCC what they term to be a “Formal Complaint” against non-common carriers. It is standard practice to advise such entities that formal complaints may only be filed against common carriers and that the document that they have filed (often in the form of a letter) will not be treated as a formal complaint. They may also be told that the Commission might investigate the matter raised in their “complaint”, but that they will not be a “party” to that investigation, will not be informed if such an investigation has been undertaken, and will not be advised as to status and/or disposition of any investigation. The Investigations & Hearings Division (“IHD”) within the Enforcement Bureau handles informal complaints filed against common carriers, broadcast licensees and other

alleging acts of unreasonable network “discrimination” in contravention of an unenforceable *Internet Policy Statement*. This “Formal Complaint” was, at some point, mysteriously (or mystically) housed within a public “notice and comment” proceeding initiated by a *Notice of Inquiry* concerning industry-wide practices,⁵⁹ that lacks a “notice of proposed rulemaking” informing the public of the nature of the rules under consideration. Nonetheless the FCC majority claims that the defendant, Comcast, had adequate notice that the FCC would entertain complaints concerning its network management practices because the FCC so stated in the unchallenged 2006 order approving the transfer of Adelphia’s FCC licenses to Comcast and Time Warner (in which the FCC *declined* to impose specific network neutrality or network management license conditions),⁶⁰ and that by consummating the underlying transaction, Comcast has “waived” its right to challenge the warning.⁶¹ Further, the FCC majority claim that Comcast had an “opportunity to be heard” along with the other FCC-selected “presenters” at the two *en banc* public hearings hosted by the FCC on network management in Cambridge, MA and Palo Alto, CA. The FCC majority appears to believe that this was adequate process upon which to adjudicate the Free Press Complaint.⁶² To the contrary -- it was both far too much “undue process” and far too little “due process” to satisfy even the most basic legal requirements for government action.

Not only did the FCC lack rules to interpret in its “adjudication” of the Free Press Complaint, it lacked established procedures for adjudicating “formal complaints” against non-common carriers like Comcast.⁶³ It appears to have both created a new set of

entities within the jurisdiction of the FCC, as well as initiates its own investigations. *Informal* complaints against common carriers are generally governed by sections 1.716-1.719 of the Commission’s rules.

⁵⁹ *Broadband Industry Practices*, Notice of Inquiry, WC Docket No. 07-52, 22 FCC Rcd 7894 (2007) (*Broadband Practices NOI*).

⁶⁰ *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, (and Subsidiaries, Debtors-In-Possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees, Adelphia Communications Corporation, (and Subsidiaries, Debtors-In-Possession), Assignors and Transferors, to Comcast Corporation (Subsidiaries), Assignees and Transferees, Comcast Corporation, Transferor, to Time Warner Inc., Transferee, Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Rcd 8203 (2006) (*Adelphia Order*).

⁶¹ See *McDowell Dissent*, *supra* note 13 at 5 (“For the same reasons, the majority’s arguments that the *Adelphia/Time Warner/Comcast Order* somehow constituted notice of the Commission’s intent to adjudicate the Policy Statement, and that Comcast’s consummation of the merger approved in the *Adelphia/Time Warner/Comcast Order* constituted a waiver of its right to challenge such an adjudication, fail. *The Commission can not possibly be seen to have given notice to Comcast (or any other party) of a preference to adjudicate the Policy Statement because the Commission lacks the authority to adjudicate the matter in the absence of rules.*” (emphasis added; footnotes omitted).

⁶² Statement of Commissioner Michael J. Copps, Approving, at 2 (rel. Aug. 1, 2008) (“Surely no one can credibly claim that this process has not provided the parties ample opportunity to present their cases.”)

⁶³ In 2002 the FCC initiated a rulemaking seeking comments on proposals to establish a unified, streamlined process for the intake and resolution of both informal and formal complaints filed by consumers against non-common carrier entities regulated by the Commission. *Establishment of Rules Governing Procedures to Be Followed When Informal Complaints are Filed by Consumers Against Entities Regulated by the Commission; Amendment of Subpart E of Chapter 1 of the Commission’s Rules Governing Procedures to Be Followed When Informal Complaints are Filed Against Common Carriers; 2000 Biennial Review*, Memorandum Opinion and Order and Notice of Proposed Rule Making,

such procedures at the same time it applied them to Comcast, and established a new framework for adjudicating similar complaints in the future.⁶⁴ As if that were not enough, the FCC has essentially *deputized* the complainant, Free Press, and the rest of the populace of the nation to keep an eye on Comcast and report any new violations. It sure seems Kafka-esque when we either cannot know the law or we can only know the “law” by observing the actions of the nobles. Or have we merely gone “Through the Looking Glass” into a parallel world where, to paraphrase Humpty Dumpty,⁶⁵ words mean only what the FCC says they do, and for enforcement purposes, “policy” and “rule,” mean the same thing, as do “subject matter jurisdiction,” “ancillary jurisdiction” and “regulatory authority.”

Conclusion

The FCC’s action highlights a greater problem. Now that the FCC has asserted its authority to regulate Internet provider broadband network management practices, the question arises, “who will regulate the regulator?” This is not an idle inquiry, but rather an urgent problem. For apparently what we have on our hands is a runaway agency, unconstrained in its vision of its powers and unconcerned about the serious reservations expressed by the current Administration and members of Congress.⁶⁶ As dissenting Commissioner McDowell stated: “Under the analysis set forth in the order, the Commission apparently can do *anything* so long as it frames its actions in terms of promoting the Internet or broadband deployment.”⁶⁷

Previously, one could presume that the FCC, like any administrative agency, was constrained in its ability to regulate the behavior of entities subject to its jurisdiction under the Communications Act. These limitations are both substantive and procedural, and have themselves been added to by the FCC over its 74 years of existence. Much has already been written and will be written about the FCC’s claimed “subject matter”

CI Docket No. 02-32, CC Docket No. 94-93, CC Docket No. 00-175 (2002), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-46A1.pdf, (“Currently, the rules contain no procedures for filing a “formal” complaint in the non-common carrier context. We propose to establish a formal complaint process that is similar to that which applies to common carriers.”) (emphasis added).

This rulemaking is still pending before the FCC; no rules concerning procedures for adjudicating formal complaints against non-common carriers have been adopted or published.

⁶⁴ See Martin Statement, *supra* note 15. Commissioner Martin states that the Commission has adopted a “framework” in which if the Commission determines that legal content has been arbitrarily degraded or blocked and the broadband operator claims “network management” as its defense, the burden shifts to the broadband operator to show that its network management practices are reasonable.

⁶⁵ Lewis Carroll, *Through the Looking-Glass, and What Alice Found There* (1871).

⁶⁶ See Press Release, John Boehner, *Boehner to FCC: Government Should Keep Its Hands Off the Internet* (July 31, 2008), available at

<http://republicanleader.house.gov/news/DocumentSingle.aspx?DocumentID=99181>, and Jim Puzzanghera, *FCC chastises Comcast for blocking Internet users’ file sharing*, Los Angeles Times, Business News (Aug. 2, 2008) (Meredith A. Baker, head of the National Telecommunications and Information Administration, was quoted as saying “I’m concerned about anything that would appear to reverse the decade-old, bipartisan commitment we have against government regulation of the Internet.”), available at http://www.latimes.com/business/la-fi-comcast2-2008aug02_0,7253725.story.

⁶⁷ McDowell Dissent, *supra* note 13 at 4.

and “ancillary” jurisdiction over the network management practices of broadband Internet service providers. But one should not overlook the importance of the procedural limits imposed by Congress aimed at ensuring that administrative agencies employ fair and predictable procedures and processes when taking action against individual or corporate members of the public. These procedures are designed to protect the integrity of the Commission’s decision-making processes and the rights of the litigants before it. These are as or perhaps *more* important than the substantive limits themselves.

Policy choices and goals will differ over time – the desirability of regulation will wax and wane depending on economic conditions and the technological capabilities of networks – but the desirability of fair and predictable legal procedures for implementing and enforcing policy goals is a constant. That is, whether one believes that government-mandated norms of behavior for “bandwidth providers”⁶⁸ are good or bad policy, the only acceptable means by which government may impose such mandates is through scrupulous compliance with its own procedures. Unlike the nobles in Kafka’s parable, in our system of government, government officials do not “stand above the laws.” If the government fails to comply with the rules constraining its behavior, how can it reasonably expect compliance with its mandates by regulated entities? After all, if, as some of the people in the Kafka parable believe, the one indisputable law is that “the law is what the nobles do,” and we are dependent upon the nobles to “know the law,” then we must demand that their behavior is, like Caesar’s wife, “beyond reproach.”

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⁶⁸ Wu, *supra* note 9.