2009 WL 3557932 (C.A.D.C.) (Appellate Brief)
United States Court of Appeals, District of Columbia Circuit.

COMCAST CORPORATION, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, and United States of America, Respondents.

No. 08-1291.
October 26, 2009.

On Petition for Review of an Order of the Federal Communications Commission

Reply Brief for Petitioner Comcast Corporation

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*VIII *GLOSSARY*

Adelphia Order	FCC Order released July 21, 2006, approving with certain conditions merger of Comcast and Adelphia Communications Corp.
Comcast July 24 *Ex Parte*	*Ex Parte* letter of Comcast filed on July 24, 2008 in WC Dkt No. 07-52
Complaint	Formal Complaint filed by Free Press and Public Knowledge against Comcast on November 1, 2007
ISPs	Internet service providers, including those providing high-speed cable modem service, wireline (telephone) or wireless broadband, and broadband over power lines

NPRM	Notice of Proposed Rulemaking released by FCC on October 22, 2009, inviting comment on proposal to establish the *Policy Statement* and additional principles including non-discrimination as enforceable rules
Order	Order released by FCC on August 20, 2008, finding Comcast violated "federal Internet policy" and requiring Comcast to cease certain broadband network management practices
Policy Statement	Statement of policy relating to broadband Internet service released by FCC on September 23, 2005

***1** *SUMMARY OF THE ARGUMENT*

As shown in Comcast's opening brief, the *Order* is unlawful because it enforced mere *policy* -- not any provision of federal *law* -- against Comcast. In addition to this fatal flaw, the Commission's action was procedurally improper and violated bedrock principles of fair notice. Besides these legal errors, the *Order* failed to justify the exercise of ancillary authority for the imposition of the *Policy Statement,* as well as an anti-discrimination mandate and "strict scrutiny" standard, upon Comcast. In response, the agency bobs and weaves but ultimately never denies and indeed audaciously embraces the critical point that nothing more than policy underlies the *Order.*

Foremost, the FCC attempts to duck the threshold issue - Comcast's core argument - regarding the unenforceability of the *Policy Statement.* The Commission does not dispute that policy statements are not law. Instead, the agency tries to change the subject by arguing that it has statutory authority to enforce "federal Internet policy," burying discussion of the *Policy Statement* in the final paragraphs of its brief. This only begs the question whether federal agencies may lawfully enforce policy, and the answer to that question, quite apart from statutory authority, is no. The FCC effectively conceded this error last week by adopting a Notice of Proposed Rulemaking to begin to establish the *Policy Statement* (and additional principles including non-discrimination) as enforceable ***2** rules; the plan to do so was announced on the same day the Commission's response was filed in this Court - an important development that none of the opposition briefs mention. And, although the agency's position here is that the *Order* did not enforce the *Policy Statement,* earlier this year a formal FCC decision described the *Order* as doing just that. Even if this Court accepts the agency's characterization of the *Order* as enforcing Section 230(b), the *Order* was still based solely on policy. In short, the FCC erred by enforcing mere policy, whether in the form of the *Policy Statement* or Section 230(b), and this Court can and should dispose of this case on that ground alone.

The Commission's effort to dispel the fair notice problem by downplaying the *Order* as "modest" - an exercise in revisionist history, given the *Order's* historic legal significance and plain terms - also fails. Regardless of Comcast's voluntary proffer to discontinue the challenged practices, the facts remain that the *Order* held that Comcast violated "federal Internet policy," mandated that the company cease the challenged practices by December 31, 2008, asserted continuing jurisdiction over the company's network management practices, and threatened further sanctions for failure to comply. Because the FCC took this action with respect to conduct that, at the time it was undertaken, was not subject to any binding legal norm, the *Order* violated basic rules of fair notice.

***3** Finally, the agency's resort to post hoc rationalization to support its exercise of ancillary authority must be disregarded. The Commission has abandoned several of the specific statutory bases relied upon in the *Order* and now points to virtually the entire Communications Act to justify its action. Judicial approval of this expansive theory would free the agency of any meaningful statutory limits on its power, restrict Congress' role to *prohibiting* agency action

rather than, as present law establishes, *authorizing* such action, and render all but Section 1 of the Communications Act superfluous.

The FCC attempts to distract from these legal problems by describing the challenged practices in pejorative terms. As Comcast explained, these practices were designed in good faith to manage high volumes of traffic to ensure that all customers could use and enjoy their High-Speed Internet services. [1] Nonetheless, the agency's rhetoric regarding the merits of the practices cannot solve the lack of any pre-existing binding legal norm governing those practices or the related legal ***4** questions presented in this Court. Because the Commission sanctioned Comcast for violating pure policy, contravened applicable procedural requirements, and exceeded its statutory authority, the *Order* should be vacated.

ARGUMENT

I. STANDARD OF REVIEW

Whether the FCC unlawfully enforced policy against Comcast, violated the procedural requirements of the APA, and failed to provide fair notice are subject to *de novo* review. Br. 18. The Commission's assertion that its decision to choose between adjudication and rulemaking is reviewed for abuse of discretion, FCC Br. 24-25, is inapt. When, as here, there was no pre-existing legal norm that could be interpreted and enforced in an adjudication, the question is not one of agency choice. Br. 18. [2]

The FCC's exercise of ancillary authority is likewise subject to *de novo* review. *Id.* at 18-19. Contrary to the assertions of the Commission and Opposing Intervenors, FCC Br. 23-24; Opp. Intervenors' Br. 20-25, the agency is not entitled to *Chevron* deference on this question. "The agency's self-serving invocation of *Chevron* leaves out a crucial threshold consideration, *i.e.,* whether the agency acted ***5** pursuant to delegated authority." *Am. Library Ass'n v. FCC,* 406 F.3d 689, 699 (D.C. Cir. 2005). [3] Even under *Chevron* deference, the FCC's construction of its authority as virtually limitless is unreasonable.

II. THE FCC FAILS TO REBUT THE ARGUMENT THAT THE *ORDER* UNLAWFULLY ENFORCED AGAINST COMCAST EITHER THE *POLICY STATEMENT* OR STATUTORY STATEMENTS OF POLICY.

The *Order* can and should be vacated because it unlawfully enforced the *Policy Statement* against Comcast. Br. 20-30, 56-68. It is a basic tenet of administrative law that an agency "cannot apply or rely upon a general statement of policy as law" because such statements "do[] not establish ... 'binding norm[s].' " *Pac. Gas & Elec. Co. v. Fed. Power Comm'n,* 506 F.2d 33, 38 (D.C. Cir. 1974); *see Gen. Elec. Co. v. EPA,* 290 F.3d 377, 381-85 (D.C. Cir. 2002); Br. 21-27. Thus, this Court has deemed agency enforcement of policy statements to constitute legal errors serious enough to warrant vacatur on first review. Br. 56-57.

Confronted with this clear violation of hornbook administrative law, the Commission attempts to bury the matter. The agency ignores the issue in its statement of questions presented (although Comcast clearly raised it, Br. 1), and offers no response at all until the last three paragraphs of its brief. FCC Br. 59-61. ***6** The FCC's effort to avoid this issue by asserting that the question of statutory authority is "[l]ogically" antecedent, *id.* at 25, is contrary to well-established precedent and appellate practice. In *Syncor International Corp. v. Shalala,* for example, this Court found it "prudent" to determine first whether the agency had complied with the APA's procedural requirements before turning, if still necessary, to agency authority. 127 F.3d 90, 93 (D.C. Cir. 1997). If this Court determines that the Commission unlawfully enforced the *Policy Statement* or Section 230(b) against Comcast, that would be a sufficient basis for resolving this dispute in its entirety; there would be no need for this Court to address the broader question of statutory authority, which could affect matters beyond this case. As in *Syncor,* "[i]t better serves the general interest of the administration of justice if the court

limits its resources to the determination of those questions and cases that must be decided." *United States v. Hooper,* 432 F.2d 604, 606 (D.C. Cir. 1970).

The agency's attempt to avoid the question of the enforceability of the *Policy Statement* is unsurprising, as it cannot and does not deny that this document, which was never subject to notice and comment, lacked binding legal effect. This is true as a matter of law and by the plain terms of the *Policy Statement;* contemporaneous statements by key agency officials support this reality. Br. 22-23. Here, the FCC concedes that it "did not amend its codified rules to incorporate ***7** the [] *Policy Statement"* and suggests the statement was not "directly enforceable." FCC Br. 8, 60.

Moreover, the unenforceability of the *Policy Statement* has now been confirmed by the initiation of a rulemaking to establish the *Policy Statement* (and two new principles, including non-discrimination) as enforceable regulations. *See Preserving the Open Internet,* Notice of Proposed Rulemaking, FCC 09-93 (Oct. 22, 2009) ("NPRM"), http:// hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-93A1.pdf. The FCC Chairman previously announced the plan to take such action. Press Release, FCC, *FCC Chairman Julius Genachowski Outlines Actions To Preserve the Free and Open Internet* (Sept. 21, 2009), http:// hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293567A1.pdf; Press Release, FCC, *Joint Statement of Commissioners Robert M. McDowell and Meredith A. Baker on Chairman Genachowski's Speech on Net Neutrality* (Sept. 21, 2009), http:// hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293574A1.pdf ("Curiously, today's speech appears to admit that the Commission did not have enforceable rules at the time of [the *Order]* while the Commission simultaneously files its appellate brief defending that decision.").

The Commission's effort to maintain in this Court that it did not enforce the *Policy Statement* against Comcast, while at the same time moving to establish that document as law (if only prospectively), should be rejected. As the FCC admits, ***8** the *"Order* (as well as the parties' pleadings) discusse[d] and quote[d] from the policy statement and assesse[d] Comcast's conduct with reference to the standards analyzed in the statement." FCC Br. 60-61; *see* Br. 24-27. Similarly, Opposing Intervenors describe their pleadings below as seeking a ruling that Comcast's conduct "violat[ed] the principles elucidated in the [] *Policy Statement."* Opp. Intervenors' Br. 5. Even in its brief, the agency states that the "standards of the [] *Policy Statement* [were] applied to" Comcast and that Comcast's practices were "assessed under the [] *Policy Statement."* FCC Br. 58; *see also* NPRM (Genachowski Statement) (referencing "enforce[ment] by the Commission" of "principles" of "the *Internet Policy Statement"* against Comcast).

Significantly, the FCC earlier this year described the *Order* as having "clarif [ied]" and "assert[ed] the Commission's authority to enforce the [] *Policy Statement." A National Broadband Plan for Our Future,* Notice of Inquiry, 24 F.C.C.R. 4342, 4357-58 & n.67 (¶ 47 & n.67) (2009); *see also* NPRM ¶ 88 & n. 207 (explaining that "activities" pursuant to "the four Internet principles" included "an enforcement action" against Comcast). The contradictory and self-serving characterization of the *Order* that agency counsel now offers cannot trump this unequivocal statement of the Commission in a duly promulgated order. *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 213 (1988) ("Deference to what appears to ***9** be nothing more than an agency's convenient litigating position would be entirely inappropriate.").

Although the FCC claims that a few select phrases in the *Order* "state[] that [the Commission] was enforcing 'federal Internet policy' as stated in [S]ection 230(b)," FCC Br. 59, none of that language actually says that. And, as Comcast noted, "it is the substance of what the [agency] has purported to do and has done which is decisive," Br. 24 (internal quotation marks omitted), not "the Commission's own description of its action," FCC Br. 60.

The *Order* plainly applied the unenforceable principles of the *Policy Statement* to Comcast's past conduct as enforceable standards of law - something no rational person with a basic understanding of administrative law would have thought permissible. This Court recently reiterated that it will not abide this sort of administrative law bait-and-switch. *Cohen v. United States,* 578 F.3d 1, 11 (D.C. Cir. 2009) (noting IRS "chutzpah" in conflating policy statements with enforceable standards).

Even if this Court were to accept the FCC's contention that it only enforced Section 230(b) against Comcast, the *Order* is still unlawful because that provision does not create any binding legal norms either. To this, the agency has no answer at all. It cites no authority that suggests a congressional expression of policy can create binding standards of conduct, and it fails to address Comcast's showing that ***10** nothing in Section 230(b) establishes mandatory standards of conduct governing network management. Br. 28. [4]

Ultimately, although the Commission is vague about precisely *what* policy the *Order* enforced, it does not disclaim that *nothing more than* policy underlies the *Order.* To the contrary, the FCC boldly embraces the proposition that it can and did enforce pure policy against Comcast, referring consistently to its ruling that Comcast "violated federal policy," *e.g.,* FCC Br. 19, and its "authority to enforce federal Internet policy," *id.* at 27. However, while the agency and its supporters spill much ink arguing that a variety of policy reasons justified enforcement action against Comcast, [5] the agency may only enforce *law.* In short, the Commission erred by enforcing mere policy, whether in the form of the *Policy Statement* or Section 230(b), and this Court can and should vacate the *Order* on this ground alone. [6]

***11 III. THE FCC FAILS TO REBUT COMCAST'S ARGUMENT THAT THE *ORDER* VIOLATED THE PROCEDURAL REQUIREMENTS OF THE APA AND FUNDAMENTAL PRINCIPLES OF DUE PROCESS.**

As Comcast showed, to the extent the *Order* invented and applied new legal standards by adjudication, it also violated the procedural requirements of the APA and fundamental principles of due process. The Commission does not deny that the non-discrimination mandate and the strict scrutiny standard, most notably, were entirely new norms, or that enforcement of the mere policies of the *Policy Statement* or Section 230(b) would necessarily involve the creation of new legal standards. The FCC's defense of the imposition of such standards on Comcast as an exercise of its discretion to elect adjudication over rulemaking fails in light of the absence of any pre-existing binding legal norm. Further, none of the grounds upon which the agency relies for the provision of fair notice are adequate to solve the due process problems presented, and the *Order* sanctioned Comcast.

A. *The Order Violated the Procedural Requirements of the APA.*

The cases recognizing an agency's discretion to choose between adjudication and rulemaking make clear that an agency has freedom to exercise that choice only where there are pre-existing binding legal norms for the agency to interpret and apply. Br. 30-35 (discussing *SEC v. Chenery Corp.,* 332 U.S. 194 (1947) (*"Chenery II"*), and ***12** *NLRB v. Bell Aerospace Co. Div. of Textron Inc.,* 416 U.S. 267 (1974)). Thus, where there is no such norm, the "choice" under *Chenery II* and its progeny is irrelevant.

The Commission does not dispute this but points to Section 230(b) and the *Policy Statement* as the necessary "existing norm[s]." FCC Br. 52. Tellingly, the FCC omits the words "binding" and "legal" when discussing those "norms." *Id.* But only *binding legal* norms can be interpreted and applied against parties to an adjudication (here, an enforcement proceeding). The agency offers no authority to support its novel proposition that, in the absence of pre-existing law, either a statutory statement of policy or agency policy statement providing "guidance and insight" on statutory policy, Br. 5, may serve as the basis for legal standards invented and applied by adjudication. The Commission's examples concern the construction and application of *existing* statutory standards of conduct. FCC Br. 53-54. *Carterfone* involved the direct enforcement of Sections 201(b) and 202(a) of the Communications Act, which set forth binding standards of conduct. Br. 34 n.13. Similarly, the FCC's actions regarding broadcast indecency, including its indecency policy statement, are premised on an express statutory proscription. 18 U.S.C. § 1464; *see* Letter from Kathryn A. Zachem, Comcast, to Marlene H. Dortch, FCC, WC Dkt No. 07-52, at 14 (July 24, 2008) ("Comcast July 24 *Ex Parte"*) (JA__).

***13** The FCC also fails to explain why the cases that Comcast cites, which consistently limit agency discretion to announce new principles by adjudication to circumstances involving pre-existing legal norms, are not operative here.

The Commission offers no real answer, for example, to the fact that in *Chenery I* the Supreme Court *reversed* the SEC for announcing and applying a new principle by adjudication without reasoning from "some *standard[ ] of conduct* prescribed by an agency or government authorized to prescribe such standards." *SEC v. Chenery Corp.,* 318 U.S. 80, 92-93 (1943) (*"Chenery I"*) (emphasis added); *see* Br. 31-32. [7] Nor does the agency offer a convincing response to the Supreme Court's explanation in *Chenery II* that adjudications are the "place for the case-by-case evolution of *statutory standards."* 332 U.S. at 203 (emphasis added). [8]

The Commission's argument amounts to the claim that Comcast has not identified any cases expressly *rejecting* the procedural approach employed in the *Order.* Far from supporting the FCC's position, the lack of any directly controlling ***14** authority only underscores the aberrant nature of its approach; to the best of our knowledge, no federal agency has ever attempted such a procedure. Again, the adoption of the NPRM on the *Policy Statement* undercuts the agency's position; that action effectively acknowledges the procedural impropriety of the *Order,* wherein the Commission bypassed several pending rulemakings in order to take immediate enforcement action against Comcast. Br. 36-37.

Whatever the FCC's motives for doing so, *see* FCC Br. 55, the fact is that by proceeding in this manner the agency attempted to excuse itself from the requirements of the rulemaking process, including the basic limit of prospectivity. That action violated the APA.

B. *The Order Violated Fundamental Principles of Due Process.*

The absence of a pre-existing legal norm in this case also raises a basic issue of fair notice. Br. 37-41. Where an agency has enacted a regulation to govern certain conduct, it provides fair notice only if the standards of conduct are set forth with "ascertainable certainty." *Trinity Broad. of Fla., Inc. v. FCC,* 211 F.3d 618, 631 (D.C. Cir. 2000). Because there was no pre-existing legal norm here, there cannot possibly have been fair notice of any governing standards.

Again, the Commission does not deny that there was no prior law that could have provided "ascertainable certainty" regarding the standards for network management. Rather, it argues that Comcast received "company-specific notice ***15** that the standards of the [] *Policy Statement* would be applied to" the company and that Section 230(b) and the *Policy Statement* themselves provided general notice. FCC Br. 58. These arguments fail.

First, none of the brand new legal norms applied in the *Order,* such as the non-discrimination requirement or the strict scrutiny standard, can be discerned from either the *Policy Statement* or the FCC's alleged specific notice (which simply referenced the *Policy Statement*). Br. 38-40. They were not "in[] [the statement] itself, or ... referenced ... in [the statement]." *Trinity Broad.,* 211 F.3d at 631 (internal quotation omitted). In fact, these new standards applied to Comcast had never been articulated anywhere before they appeared in the *Order.* [9]

Second, to the extent the Commission means that Section 230(b), the *Policy Statement,* or any statements the agency made suggested that Section 230(b) or the *Policy Statement* would be enforced directly against Comcast, which would necessarily involve an attempt to create new legal standards, fair notice was still lacking. As Comcast explained, any such suggestion would not amount to fair notice of anything because Section 230(b) and the *Policy Statement* are ***16** unenforceable as a matter of law. Br. 40-41. [10] Reasonable people would have expected some intermediate agency action prior to enforcement action.

The FCC offers no response to these arguments. It falls back on the assertion that Comcast was not penalized "in any legally cognizable way" and therefore notice was unnecessary. FCC Br. 56-57; *id.* at 19 (arguing that *Order* took only "modest minor remedial steps"). In addition to rewriting history and the *Order,* the Commission construes the concept of legal penalty far too narrowly. Although the agency "declined to impose a forfeiture," *id.* at 56, this Court has made clear that due process principles incorporated into administrative law require fair notice anytime the agency imposes a

"sanction," which encompasses more than financial penalties. *Gen. Elec. Co. v. EPA,* 53 F.3d 1324, 1329 (D.C. Cir. 1995). Indeed, the APA defines "sanction" to include any "prohibition, requirement, limitation, or other condition affecting the freedom of a person" and "other compulsory or restrictive action." 5 U.S.C. § 551(10).

The *Order* sanctioned Comcast, as the Commission loudly proclaimed at the time. Although Comcast voluntarily proffered in March 2008 to transition away from its contested network management practices, the fact is that, as of August 20, ***17** 2008 (the date the *Order,* which took immediate effect, was issued), Comcast was subject to a federal regulatory *mandate* to cease those practices before December 31, 2008. *Order* ¶¶ 54-55 (JA__). The FCC made clear that the *Order* "institute[d] a plan that w[ould] bring Comcast's unreasonable conduct to an end." *Id.* ¶ 1 (JA__). The *Order's* "overriding aim [was] to end Comcast's use of unreasonable network management practices" and to "send[] the unmistakable message that Comcast's conduct must stop." *Id.* ¶ 54 (JA__-__). When announcing the *Order,* the agency declared that it was "order[ing] Comcast to end discriminatory network management." Press Release, FCC, *Commission Orders Comcast To End Discriminatory Network Management Practices* 1 (Aug. 1, 2008) (JA__). This mandate plainly "affect[ed] the freedom" of Comcast. 5 U.S.C. § 551(10). [11] The *Order* further provided that, in the event Comcast failed to comply, an immediate injunction, issuance of a show cause order, and hearing would follow. *Order* ¶ 55 (JA__).

The Commission also took the extraordinary step of asserting continuing jurisdiction over Comcast's network management practices and inviting public oversight, an on-going limitation on Comcast. *Id.* ¶ 56 (JA__). Moreover, the ***18** predicate finding that Comcast "violated" federal policy carries with it a "black mark" that causes reputational harm and potential adverse effects in subsequent enforcement, licensing, and other legal proceedings. *Straus Commc'ns, Inc. v. FCC,* 530 F.2d 1001, 1006 (D.C. Cir. 2006) (noting that finding of an infraction by the FCC may result in harsher treatment in the future); *see* 47 U.S.C. § 310(d) (granting FCC "public interest" authority over license transfers); 47 C.F.R. § 1.80(b)(4) (providing that in assessing forfeitures, the Commission will consider "any history of prior offenses").

Accordingly, Comcast was not on fair notice, at the time it undertook the challenged practices, that its conduct was regulated by any provision of federal law. Because the Commission nonetheless sanctioned Comcast for that conduct, the *Order* violated fundamental principles of due process and is subject to reversal on this independent ground, as well.

IV. THE FCC FAILS TO REBUT COMCAST'S ARGUMENT THAT THE *ORDER* DOES NOT JUSTIFY THE EXERCISE OF ANCILLARY AUTHORITY.

Although the Court can resolve this case based on the foregoing grounds, the *Order* is unlawful for the additional reason that it failed to justify the exercise of ancillary authority. Br. 41-51. The exercise of ancillary authority is only appropriate when: "(1) the Commission's general jurisdictional grant under Title I covers the subject of the regulations; and (2) the regulations are *reasonably* ***19** *ancillary* to the Commission's effective performance of its statutorily *mandated responsibilities." Am. Library Ass'n,* 406 F.3d at 700 (emphases added). Comcast showed in its opening brief that the *Order* fails the second part of the test.

In response, the FCC asserts, at an exceedingly high level of generality, that it must "keep pace with rapidly evolving communications technologies" and, because this case involves an important new technology (the Internet), it had ancillary authority to adopt the *Order.* FCC Br. 19. The agency has not articulated any logical stopping point to its breathtakingly broad theory which, if accepted, would result in virtually limitless regulatory power for the Commission, relegate Congress to the role of prohibiting agency action rather than affirmatively authorizing it, and render all but Section 1 of the Communications Act superfluous.

As to the specifics of the question that matters under this Court's precedent - whether the regulation imposed by the *Order* is "reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities" - the FCC rests its case primarily on statutory policies that confer no substantive regulatory duties on the agency, abandons

other statutory provisions cited in the *Order,* and engages in impermissible post hoc rationalizations such as reliance on practically the entire Communications Act.

*20 A. *The Commission Fails To Show That the Policy and Purpose Provisions Cited by the Order Support the Exercise of Ancillary Authority.*

As Comcast noted, four of the seven statutory provisions upon which the *Order* relied are merely statements of federal policy or purpose, and thus cannot support the exercise of ancillary authority. Br. 42-48. In response, the Commission drops one of those provisions (Section 601(4) of the Communications Act) and weakly defends the remaining three (Sections 1 and 230(b) of the Communications Act and 706 of the 1996 Act).

Section 1 is a statement of "purpose" and establishes the FCC's subject matter jurisdiction over "wire ... communication," 47 U.S.C. § 151, but nothing more. It is not a general grant of power to the agency, Br. 43, nor does it set forth any "statutorily mandated responsibilities," *id.* at 45. Although the *Order* cited numerous decisions in support of its Section 1 argument, none approved the exercise of ancillary authority based upon that provision alone. *Id.* at 43-44.

To support its reliance on Section 1, the Commission rehashes the cases that the *Order* cited and Comcast already addressed. FCC Br. 46-48. The FCC cannot and does not dispute that, in each case, the exercise of ancillary authority was not *21 based solely on Section 1 but was also tied to a specific statutory mandate in Title II. [12]

The agency also cannot deny that Section 1 fails to set forth any "statutorily mandated responsibilities" and thus resorts to challenging the articulation of that requirement in *American Library. Id.* at 49-50. This Court's statement there is clear, however, and it is binding. To the extent the Commission believes that *American Library* "contradict[ed] the precedents" cited in that case, *id.* at 49, that is not for a panel of this Court to consider. [13] Even if the language in *American Library* were deemed to be *dicta,* FCC Br. 49, the limitation of ancillary authority to "statutorily mandated responsibilities" is compelled by Section 4(i) of the Act, from which the doctrine of ancillary authority is derived. Section 4(i) only permits the FCC to perform such "acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of *22 *its functions,"* 47 U.S.C. § 154(i) (emphasis added), not to implement a general statement of purpose.

As for Sections 230(b) of the Communications Act and 706 of the 1996 Act, those provisions do not support the exercise of ancillary authority because they are merely congressional expressions of policy. Br. 46-48. Neither provision is an operative part of the statute and thus neither constitutes a "statutorily mandated responsibility." *Id.* at 47. [14] There also was no credible suggestion in the *Order,* let alone any record evidence, to support the conclusion that the Commission's action against Comcast was actually related to the effective implementation of either Section 230(b) or 706. *Id.* at 48.

The agency's effort to justify the *Order's* reliance on Section 230(b) as a basis for ancillary authority, FCC Br. 36-40, is unavailing. As a threshold matter, this argument cannot be reconciled with the FCC's assertions elsewhere in its brief that it *directly* enforced Section 230(b) against Comcast. Further, the Commission fails to establish that a statutory statement of policy, which it freely concedes Section 230(b) to be, can support the exercise of ancillary authority. The agency offers no answer to Comcast's argument that statutory statements of policy are *23 modern-day "preambles," and therefore are not operative parts of statutes. [15] Br. 47. The FCC's response lies in its challenge to this Court's clear requirement that ancillary authority be based on "statutorily mandated responsibilities," but, as discussed, that cannot succeed.

The Commission's attempt to support the *Order's* reliance on Section 706, FCC Br. 36-40, fares no better. Contrary to the agency's contention, this Court did not recently hold that Section 706 imposes responsibilities on the agency. *Id.* at 41. The case at issue involved a petition for review of an FCC forbearance order - a decision *not* to require compliance with statutory mandates. *Ad Hoc Telecomms. Users Comm. v. FCC,* 572 F.3d 903, 906-07 (D.C. Cir. 2009). This Court

had no reason to make any determination regarding whether Section 706 imposes a substantive duty on the FCC for purposes of ancillary authority.

B. *The FCC Fails To Show That the Other Provisions Cited in the Order Support the Exercise of Ancillary Authority.*

As Comcast demonstrated, the remaining three provisions cited in the *Order* - Sections 257(b), 201(b), and 256 of the Communications Act - do not support ***24** the exercise of ancillary authority. Br. 48-51. The Commission now abandons any pretense of defending its reliance on those individual provisions. On the theory that "peer-to-peer applications make possible video distribution and voice services that pose a competitive threat to the services offered by broadcasters, cable television operators, and telephone companies," the agency now asserts that it has ancillary authority simply "by virtue of its regulatory authority over telephony (Title II of the Act), broadcast radio and television (Title III), and cable service (Title VI)." FCC Br. 43. This argument fails for a number of reasons.

First, the FCC here engages in classic "post hoc rationalization[]" by counsel that this Court may not consider. *Sudbrink Broad., Inc. of Fla. v. FCC,* 509 F.2d 418, 423 n.7 (D.C. Cir. 1974). "[A]rgument by counsel cannot take the place of an agency's statement of reasons or findings." *WAIT Radio v. FCC,* 418 F.2d 1153, 1158 (D.C. Cir. 1969). This omnibus theory of ancillary authority - based on Titles II, III, and VI *en masse* - appears nowhere in the *Order.* The reliance on Title III is particularly egregious, as no Title III provision was even included in the seven statutory provisions presented in the *Order.* Nor did the FCC ever before cite 47 U.S.C. § 543, which it now lists as the only specific Title VI provision authorizing its action. FCC Br. 44; *see* Opp. Intervenors' Br. 26.

Second, this formulation of ancillary authority would permit the Commission to do *anything* regarding any service within its subject matter ***25** jurisdiction under the Communications Act. To accept this argument would eviscerate the test for ancillary authority, as set forth in *American Library* and decisions of the Supreme Court. It would also turn agency delegation completely on its head. Congress would be relegated to prohibiting, not authorizing, FCC action, a scenario that this Court has rejected as "entirely untenable." *MPAA,* 309 F.3d at 805-06 (citing numerous cases); *see, e.g., Ry. Labor Executives Ass'n v. Nat'l Mediation Bd.,* 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) ("Were courts to presume a delegation of *power* absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.") (emphasis in original)).

Third, this argument contravenes bedrock principles of statutory interpretation. "It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews,* 534 U.S. 19, 31 (2001) (internal quotation marks omitted). This theory of ancillary authority would render every operative provision of Titles II, III, and VI superfluous.

Fourth, the Commission points to no record evidence showing that the *Order* was a response to the specific broadcast and cable issues that it now ***26** identifies. The agency cites nothing that suggests the actual concern here was the effect of video distribution over the Internet on broadcast television or cable rates. FCC Br. 43-44.

C. *The Commission Fails To Show That the Exercise of Ancillary Authority Does Not Contravene Other Provisions of the Communications Act.*

The exercise of ancillary authority also must comport with other provisions of the Act. As Comcast explained, the FCC's use of ancillary authority contravened other provisions of the Communications Act because the agency extended quintessential common carrier regulation to Comcast's information services. Br. 52-53; 47 U.S.C. § 153(44).

As an initial matter, Comcast exhausted this argument. Specifically, Comcast argued below both that ancillary authority cannot be exercised in a manner that contravenes other provisions of the Act, Response of Comcast Corporation, WC

Dkt No. 07-52, at 34 (July 10, 2008) (JA__), and that "ancillary authority may not be used to impose common carrier regulation ... on entities that, like Comcast, are not common carriers," Comcast July 24 *Ex Parte* at 7 (JA__). And the Commission addressed the point. *Order* ¶ 16 n.76 (JA__) (noting that *Midwest Video II* "struck down [a] regulation because it effectively imposed a common carrier regime on cable systems"); *see id.* (McDowell Statement) (JA__) (noting that classification of cable modem service as an information service means ***27** that "the rules of Title II" do not apply). The agency was clearly afforded an "opportunity to pass," 47 U.S.C. § 405, on this issue.

The Commission's substantive response to this argument, FCC Br. 41-42, lacks merit. The FCC's assertion that it did not "come close to treating Comcast as a common carrier," *id.* at 42, is belied by the plain language of the *Order,* which repeatedly finds that Comcast's behavior was improperly discriminatory. Non-discrimination obligations are the hallmark of common carrier regulation. Br. 52. The agency's further contention that the Act does not envision a strict divide between common carrier regulation and information services, FCC Br. 42, is contradicted by the agency's previous statements, *e.g., Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks,* 22 F.C.C.R. 5901, 5916 (¶ 41) (2007) (noting "Congressional intent to maintain a regime in which information service providers are not subject to Title II regulations as common carriers"). Contrary to the Commission's contention, FCC Br. 42, it does not have free rein to treat information service providers as common carriers; Section 153(44) and the common carrier provisions of Title II make clear that those provisions apply only to "common carrier[s]," *e.g.,* 47 U.S.C. § 202(a).

As previously shown, there is no merit to the assertions in the *Order* that the *Adelphia Order* or the Supreme Court's *Brand X* decision preclude Comcast from ***28** challenging the FCC's exercise of ancillary authority. The Commission has abandoned its argument based on the *Adelphia Order,* and now presses a different estoppel point in addition to *Brand X.*

The agency's assertion that Comcast is estopped by certain statements made in the *Hart* proceedings, FCC Br. 27-30, is meritless. Judicial estoppel is inapplicable here because the doctrine is "limit[ed] to cases in which a party ... assert[s] *facts* at odds with those advanced before the first court." *Am. Methyl Corp. v. EPA,* 749 F.2d 826, 833 n.44 (D.C. Cir. 1984) (emphasis added); *see Kaiser v. Bowlen,* 455 F.3d 1197, 1204 (10th Cir. 2006); *Lowery v. Stovall,* 92 F.3d 219, 224 (4th Cir. 1996); *Bates v. Long Island R.R.,* 997 F.2d 1028, 1037 (2d Cir. 1993). The question of the FCC's statutory authority is a question of *law.* Moreover, courts retain discretion to determine whether to apply the doctrine, *see New Hampshire v. Maine,* 532 U.S. 742, 760 (2001), which this Court has historically disfavored, *see, e.g., Konstantinidis v. Chen,* 626 F.2d 933, 938 (D.C. Cir. 1980). [16]

Even where the doctrine applies, it is limited to cases where "a party's later position [is] 'clearly inconsistent' with its earlier position," ***29** *New Hampshire,* 532 U.S. at 750, but the positions taken by Comcast are not contradictory, let alone "clearly" so. Although the Commission contends that "Comcast prevailed before another court on the theory that the FCC has authority to regulate cable modem blocking practices," FCC Br. 30, Comcast never made that argument. The agency's assertion that Comcast "assured the [*Hart*] court" of the FCC's "expertise and authority," *id.* at 28, is based on a case quotation taken out of context. At no point did Comcast assert or concede that the Commission had substantive regulatory authority to take the action here. In fact, Comcast argued quite the opposite. Comcast Reply Mem. In Supp. of Mot. for J. on the Pleadings, *Hart v. Comcast,* No. 07-6350, at 5 (N.D. Cal. May 28, 2008) (noting that Comcast "does not believe th[e] FCC should act"); Comcast Mem. of Law in Supp. of Mot. for J. on the Pleadings, *Hart v. Comcast,* No. 07-6350, at 2 (N.D. Cal. Mar. 14, 2008) (arguing that "regulation of network management by Internet Service Providers ... is unnecessary and unwarranted"). As the FCC admits, Comcast stated only that the matters at issue were within the agency's "subject matter jurisdiction." FCC Br. 28. That assertion is no different from the position Comcast has taken here in disputing only whether the *Order* satisfied the second part of the ancillary authority test. Br. 42 n.21.

The Commission's continued reliance on *Brand X,* FCC Br. 30-34, is also unavailing. The agency has failed to rebut any of Comcast's arguments - that the ***30** Court's statement regarding Title I ancillary authority is *dicta,* at most the statement can be understood as concerning the first prong of the ancillary authority test, and *Brand X* in any event cannot

excuse the FCC from satisfying the legal test for ancillary authority in a particular case or controversy. Br. 53-54. Even assuming that *Brand X* and its "antecedents," FCC Br. 30-34, approved a particular exercise of ancillary authority, none approved the specific action taken here (nor could they, consistent with Article III) and thus cannot give the agency the free pass to which it claims it is entitled in this case. [17]

V. THE FCC DOES NOT CONTEST THAT VACATUR IS THE APPROPRIATE REMEDY.

As demonstrated, vacatur is amply warranted here. Br. 56-58. The Commission does not even address the question of remedies, thus failing to contest that, if Comcast prevails on any ground, vacatur is appropriate. Further, the issuance of the NPRM to adopt the principles in the *Order, see supra* p. 7, confirms that vacatur would cause no disruption.

*31 *CONCLUSION*

Comcast respectfully requests that the Court grant its petition for review and reverse and vacate the *Order.*

Footnotes

* Counsel of Record.

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

1 In particular, the contested practices affected less than 10% of peer-to-peer uploads (without affecting any downloads), and any delay lasted less than one minute in 80% of cases. Letter from Kathryn A. Zachem, Comcast, to Marlene H. Dortch, FCC, WC Dkt No. 07-52, at 3 (July 10, 2008) (JA__). Comcast also comprehensively disclosed the practices to customers by January 2008. Comments of Comcast Corporation, WC Dkt No. 07-52, at 39-42 & att. A-C (Feb. 12, 2008) (JA__,__). Many other ISPs, including universities with no commercial motive, likewise managed bandwidth-intensive traffic, with some prohibiting peer-to-peer protocols. Letter from Daniel J. Brenner, NCTA, to Marlene H. Dortch, FCC, WC Dkt No. 07-52 (July 24, 2008) (JA__).

2 *LaRouche v. FEC,* 28 F.3d 137 (D.C. Cir. 1994), *see* FCC Br. 24, does not hold otherwise. *LaRouche* recognizes that agencies generally have discretion to choose adjudication over rulemaking, but does not address the standard of review applicable to an agency decision reflecting that choice.

3 The "jurisdictional" cases that the FCC and Opposing Intervenors cite, *see, e.g., Me. Pub. Util. Comm'n v. FERC,* 520 F.3d 464, 479 (D.C. Cir. 2008), did not involve the exercise of ancillary authority.

4 To the contrary, Section 230(b)(2) indicates that Internet services should be "unfettered by Federal or State regulation," 47 U.S.C. § 230(b), language the FCC and its supporters never mention.

5 FCC Br. 11-13, 19; Opp. Amici Br. 10-38; Opp. Intervenors' Br. 30-31.

6 In response to Comcast's contention that the Commission arbitrarily and capriciously construed the Complaint, Br. 54-55, the FCC simply asserts that its interpretation was reasonable, FCC Br. 60 n.11. But practically the entire proceeding was conducted on the basis of an alleged violation of the *Policy Statement,* and the agency's construction of the Complaint as alleging otherwise was a transparent effort to sidestep the unenforceability of that document.

7 The FCC musters only the truism that "the Court reversed the agency's decision ... because it was not supported by the reasoning provided by the agency." FCC Br. 53 n.6.

8 The Commission's only reply is a quotation from *Chenery II* presented out of context. FCC Br. 53 n.6. Properly read, it states nothing more than that new principles - never before "spelled out" - may be announced and applied by adjudication. The language in no way suggests that those new principles may be promulgated absent pre-existing law. Nor could it, because *Chenery II* involved an extant statutory standard of conduct.

9 The FCC has now disavowed the strict scrutiny standard. NPRM ¶ 137.

10 By contrast, the agency statements of policy that Opposing Intervenors describe, Opp. Intervenors' Br. 33, "represent[] an agency position with respect to how it will treat - typically enforce - *the governing legal norm," Syncor,* 127 F.3d at 94 (emphasis added).

11 The Commission's half-hearted attempt to deny the retroactivity of the *Order* based on Comcast's proffer thus must fail; indeed, the FCC goes on to acknowledge that the *Order* operated retroactively. *See* FCC Br. 56.

12 The FCC's contention that if Section 1 were insufficient ever to support ancillary jurisdiction this Court would have said so in *MPAA v. FCC,* 309 F.3d 796 (D.C. Cir. 2002), FCC Br. 49, is wrong. *MPAA* was properly limited to the question whether the rules on review were statutorily authorized.

13 In any event, *Midwest Video Corp. v. FCC,* 406 U.S. 649 (1972) (*"Midwest Video I"*), does not suggest that ancillary authority may be based on anything other than "statutorily mandated responsibilities." *Midwest Video I* upheld the exercise of ancillary authority based upon the Commission's statutory duty under Section 307(b). Br. 45.

14 *See supra* note 4 (explaining that Section 230(b)(2) establishes a deregulatory policy for the Internet).

15 That Comcast has argued that Section 230(b) supports preemption does not suggest that the provision imparts substantive authority to the Commission. A federal agency can preempt state law even where it opts not to regulate. *E.g., Sprietsma v. Mercury Marine,* 537 U.S. 51, 66 (2002) (recognizing that "a federal decision to forgo regulation ... would have as much pre-emptive force as a decision to regulate"); *see* Br. 47 n.27 (explaining distinction between the second prong of ancillary authority test and test for conflict preemption).

16 Although *New Hampshire* arguably established that courts may not *categorically* refuse to apply the doctrine, *see* FCC Br. 28 n.1, it did not *forbid* courts from doing so in any particular case.

17 Finally, while Comcast argued that the FCC arbitrarily and capriciously departed from past precedent, Br. 55, the Commission offers no explanation for that departure, *see* FCC Br. 58 n.10. And in response to the charge that the agency failed *meaningfully* to consider copyright infringement issues, Br. 55, the FCC points only to the conclusory statement in the *Order, see* FCC Br. 37 n.2.

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