

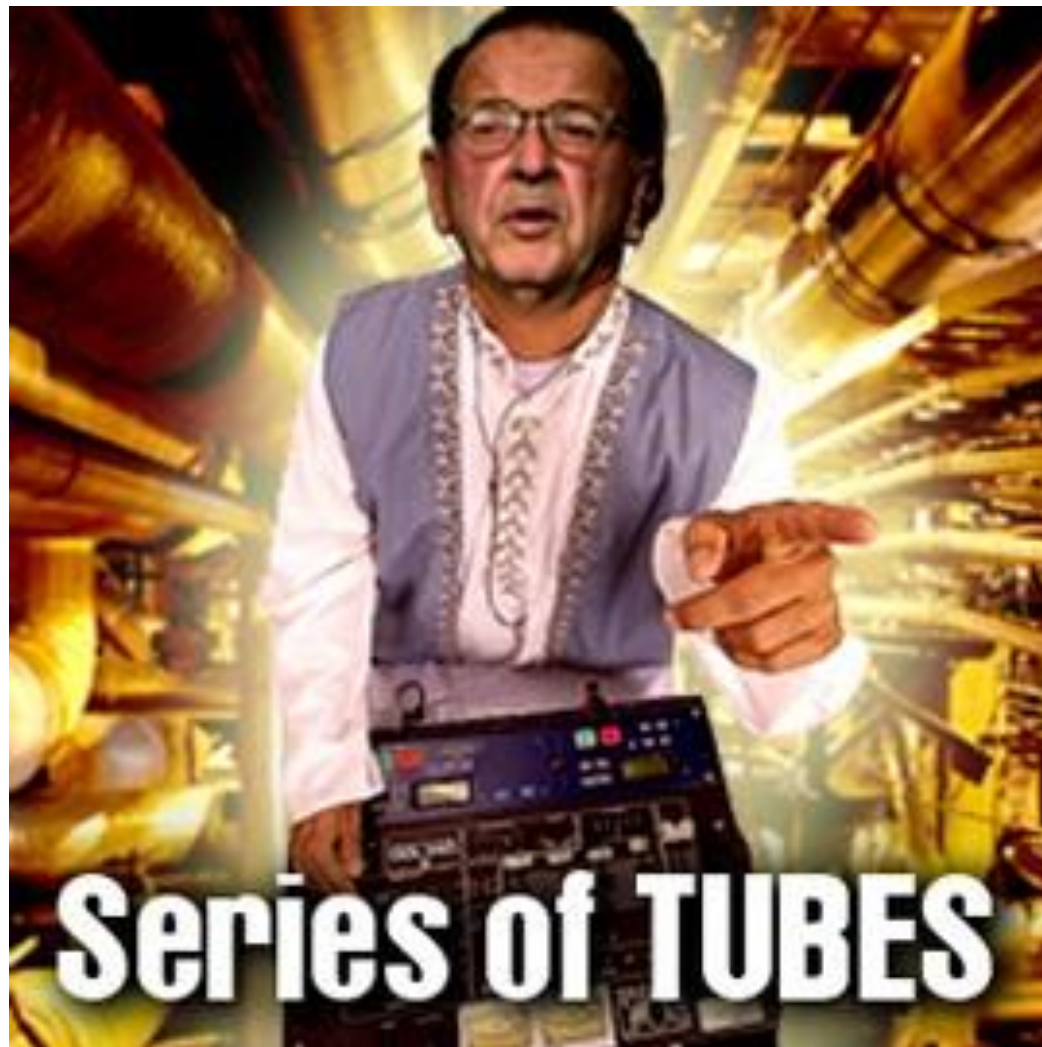
# Net Neutrality and Game Development

# GDC Online

Game Developers Conference® Online  
**October 5-8, 2010 | Austin, TX**

Visit [www.GDCOnline.com](http://www.GDCOnline.com) for more information

Back in 2007 ...



## FCC Goal

- ⊕ “[W]e seek to preserve the open, safe, and secure Internet and to promote and protect the legitimate business needs of broadband Internet access service providers and broader public interests such as innovation, investment, research and development, competition, consumer protection, speech, and democratic engagement.”

*Open Internet NPRM (October 2009)*

# The Core Distinction

## ⊕ Telecommunications services

The offering of telecommunications for a fee directly to the public.

“Telecommunications” is the transmission of information of the user’s choosing, without change in the form or content of the information as sent and received.

## ⊕ Information services

The offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.

# FCC Classification Decisions



- ⊕ Conclusion: Broadband Internet Access Service is an information service. The transmission element is not a separate component that must be offered to others. “Telecommunications service” obligations do not apply.

## 2005 FCC Policy Statement

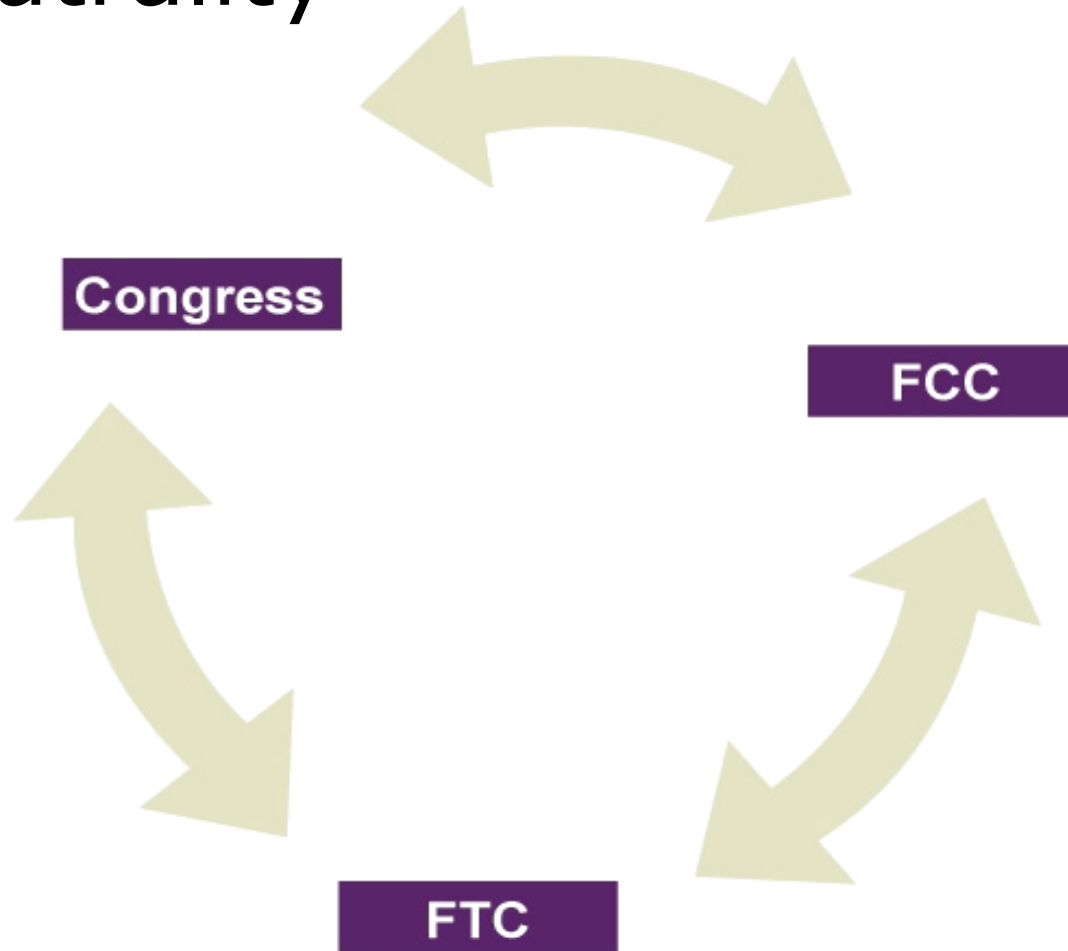
Consumers are entitled to access the lawful Internet content of their choice;

Consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement;

Consumers are entitled to connect their choice of legal devices that do not harm the network; and

Consumers are entitled to competition among network providers, application and service providers, and content providers.

# Net Neutrality



# Comcast – BitTorrent Blocking

- ⊕ 2007 Formal Complaint that Comcast was “secretly blocking” BitTorrent traffic
- ⊕ First application of FCC’s 2005 *Internet Policy Statement*
- ⊕ *Central Allegation: When networks became congested, Comcast sent “reset packets” to P2P sessions, thereby interrupting data transfers*



# Comcast – BitTorrent Blocking

## ⊕ Actions violated the *Internet Policy Statement*

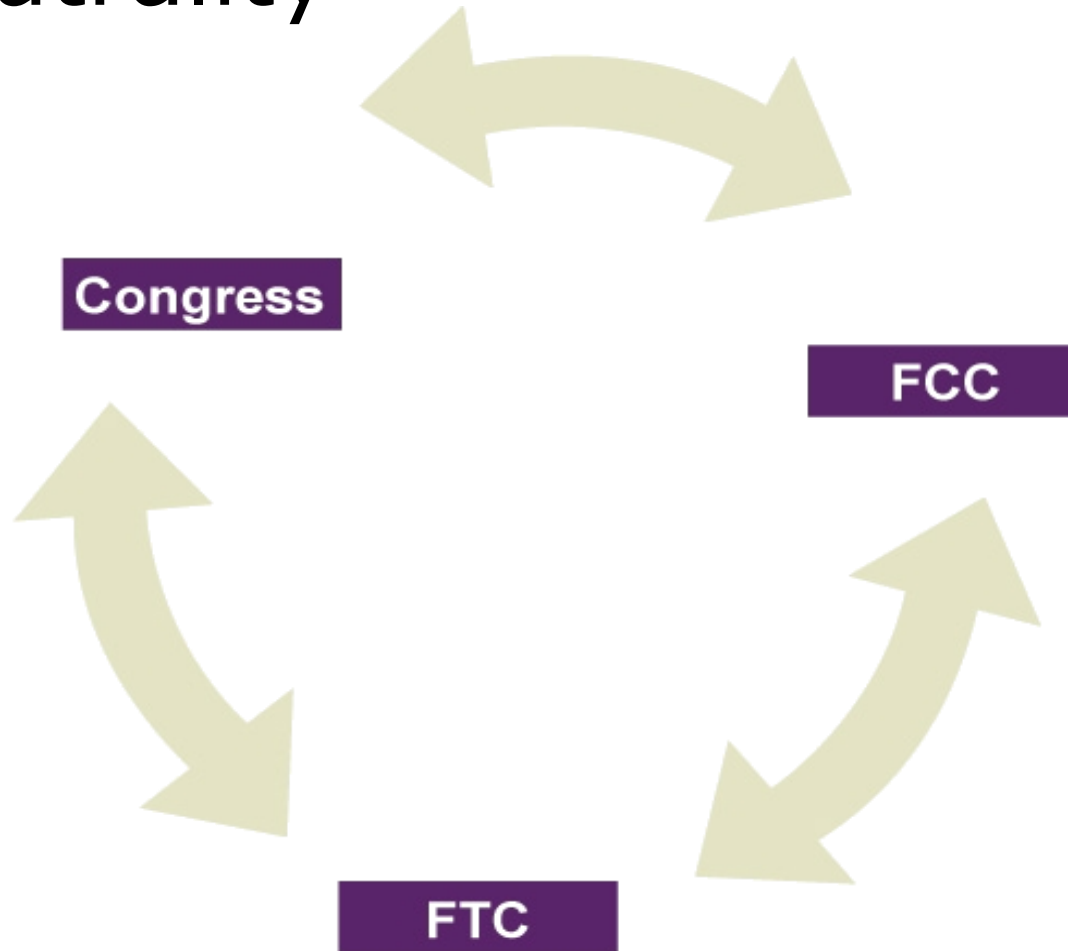
“the evidence reviewed above shows that Comcast selectively targeted and terminated the upload connections of its customers’ peer-to-peer applications and that this conduct significantly impeded consumers’ ability to access the content and use the applications of their choice.”

## ⊕ Actions were not “reasonable network management”

# Comcast v. FCC (April 2010)

- ⊕ Court of Appeals concluded that the FCC had not justified its authority to regulate Comcast's network management practices
  - So-called "ancillary authority" not sufficient because FCC had not tied authority to statutorily mandated duties
- ⊕ *Comcast* places almost all of the FCC's Internet actions in doubt

# Net Neutrality



# FCC

## ⊕ *Framework for Broadband Internet Service* (June 2010)

Seeks comment on post-*Comcast* approaches, including “third way”

## ⊕ Over 1,400 comments and replies filed

### **But not:**

ESA, Microsoft, Sony, Nintendo, Activision/Blizzard, OnLive, etc

# FCC

- ④ Further Inquiry into “under-developed” issues (September 2010)

## **Specialized Services**

- ④ Used to bypass Internet protections?
- ④ Stunt growth of the public Internet?
- ④ Used to engage in anti-competitive conduct?

## **Wireless Networks**

- ④ Should disclosure be required?
- ④ Attachment of non-harmful devices
- ④ May providers restrict apps that use network capacity?

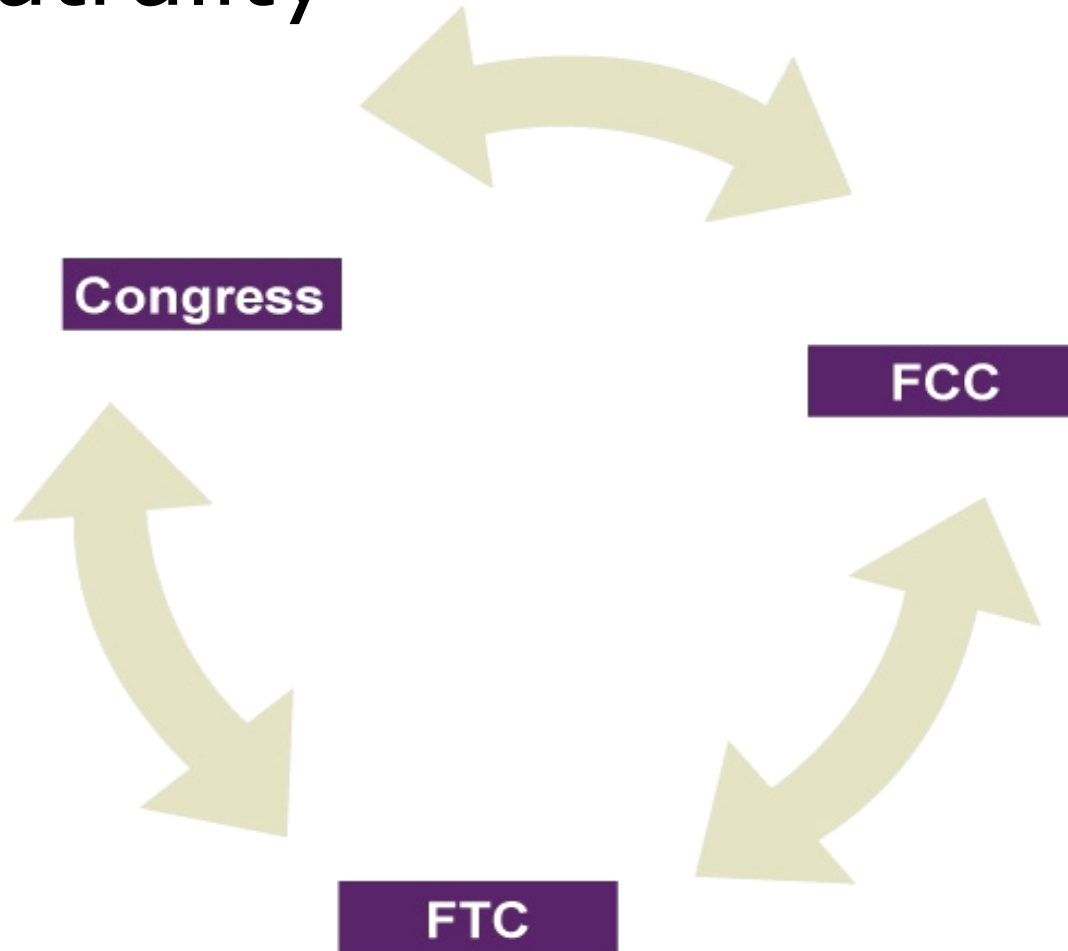
# Verizon-Google “Legislative Framework” (August 2010)

- ⊕ Agree on 4 principles in Internet Policy Statement
- ⊕ Add non-discrimination and transparency
  - May not engage in “undue discrimination” against lawful content “in a manner that causes meaningful harm to competition or users”
  - Must “disclose accurate and relevant information in plain language”
- ⊕ Further defines network management

# Verizon-Google “Legislative Framework”

- ⊕ Permits “other additional or differentiated services” not subject to rules
- ⊕ Excludes wireless services
- ⊕ FCC limited to case-by-case authority
  - Non-governmental dispute resolution preferred
  - FTC denied any authority over Broadband Internet Access Service

# Net Neutrality





# Net Neutrality – Implications for Game Developers

- ⊕ Advocates currently frame the question as a choice between “preserving Internet freedom” and “avoiding regulation of the Internet”
- ⊕ Real Issue: Where is the line between mutually beneficial bilateral arrangements and gatekeeper actions that limit competition or consumer choice?

# Net Neutrality – Implications for Game Developers (cont'd)

## ⊕ Benefits of individualized arrangements

Greater QoS

Risk-sharing

Promotions/marketing

## ⊕ Risks

Increased cost

Discriminatory treatment

Replicates mobile environment?

# Net Neutrality – Implications for Game Developers (cont'd)

- ④ Will network providers compete with CDN providers?
- ④ Will traffic prioritization impact online gaming?
- ④ Transparency/Disclosures
  - SDKs for broadband networks?
- ④ Are rules needed for wireless networks?
  - Real-time gaming is non-existent, but can that change?
    - ④ Handhelds, tablet gaming?

Steve Augustino  
Kelley Drye & Warren LLP  
saugustino@kelleydrye.com

# GDC Online

Game Developers Conference® Online  
**October 5-8, 2010 | Austin, TX**

Visit [www.GDCOnline.com](http://www.GDCOnline.com) for more information