



International Center
for Law & Economics

"TechFreedom & ICLE Legal Comments"

Comments of

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Protecting and Promoting the Open Internet
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Framework for Broadband Internet Service
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EXECUTIVE SUMMARY

In its proposed rules, the FCC is essentially proposing to do what can only properly be done by Congress: invent a new legal regime for broadband. Each of the options the FCC proposes to justify this – common carrier reclassification, and Section 706 of the Telecommunications Act – is deeply problematic. If the FCC believes regulation is necessary, it should better develop its case through more careful economic analysis, and then make that case to Congress in a request for new legislation. In the meantime, the FCC could play a valuable role in helping to convene a multistakeholder process to produce a code of conduct that would be enforceable—if not by the FCC, then by the Federal Trade Commission—above and beyond enforcement of existing antitrust and consumer protection laws.

Reclassification

“Should the FCC reclassify broadband?” is not the right question. The FCC does not simply classify services into the regulatory silos of the Act. Instead, “classification” is the result of the FCC’s interpretation of the complex language of the Act. The question the FCC has now posed – in fact, been forced to pose by a political feeding frenzy – is whether the FCC should re-open the difficult questions of how to interpret the terms “telecommunications” and “transmission.” Doing so would reverse the bipartisan consensus that has driven the flourishing of the Internet and massive investment in the infrastructure needed to power the countless services that many Americans have come to take for granted.

It is unlikely the FCC could reinterpret “telecommunications service” so narrowly as to avoid sweeping up other Internet services. A fundamental truth about broadband Internet access services is that they all involve telecommunications services. There is no bright line to limit the effects of “reclassification” to last-mile ISP connections in particular, or even to broadband more generally. Not only net neutrality regulations, but also the rest of Title II,

would then be extended to cover interconnection/peering arrangements, as well as many of the services now offered by edge providers that also utilize a transmission component that could logically be defined as a telecommunications service.

Faced with a lightly-regulated communications medium that's become successful beyond wildest imagination, the Commission now considers a radical shift: switching the default assumption to one of heavy regulation, with a promise that it would reverse most of that change through forbearance. If the FCC reclassifies, it must account for the significant reliance of broadband providers that made capital investments on an unprecedented scale. Changing course now without properly accounting for those serious reliance interests would be arbitrary and capricious, as recent Supreme Court precedence has made clear.

The FCC is proposing to adopt the Title II regime wholesale – yet promising to undo most of it. But calls for regulatory restraint through forbearance are sadly naïve: The forbearance process is so fraught with complexity that the FCC won't be able to forbear its way back to a regulatory regime that resembles the Title I light-touch. The FCC itself has made forbearance extremely difficult, and it will be difficult, if not impossible, for the Commission to walk back from that approach without being arbitrary and capricious. This is especially true if it wants to avoid allowing a future, more deregulatory-minded Commission to gut the Act through forbearance. And if the FCC gets discretion under *Chevron* to read unforbearance into Section 10, then the more deference the agency gets on how to use Section 10, the easier it will be to undo any forbearance decision in the future, because it would be arbitrary and capricious for the FCC to apply inconsistent methodologies in the two cases. The prospect of easy unforbearance means that forbearance decisions will be, at best, temporary reprieves – hardly a sound basis for continued broadband investment.

Even under Title II, the FCC can't ban prioritization. As the NPRM notes, the Commission and the courts have consistently interpreted Title II to allow carriers to charge difference prices for different services. It has been a principle of common carrier regulation for over 100 years that common carriers are only bound to give the same terms to *like parties*; any difference in circumstance justifies a different charge. If broadband Internet access services were made subject to Title II, ISPs could still charge certain parties higher prices for transmission across their network, so long as those charges are reasonable and those offerings are provided to all similarly situated parties. Title II would allow the FCC to impose significant restrictions on paid prioritization – but not ban it altogether.

Section 706

The FCC's interpretation of Section 706 as an independent grant of authority would allow the FCC to regulate any form of communications, not just broadband but "edge" providers, too, in any way it sees fit – provided only that the FCC does not violate some specific provision of the Act and that the FCC can claim, however tenuously, that its regulation would somehow promote broadband. While Section 706 thus does not "trump" the rest of the Act, it does effectively allow the FCC to invent a new regulatory regime out of whole cloth within – or around – existing law. The text and history of Section 706 and the 1996 Act in general render such a reading unreasonable.

Regulatory agencies are meant to be a creature of statute, having only those powers expressly granted by Congress, or included by necessary implication from the Congressional grant. Section 706, as worded, is not even ambiguous; its plain meaning has simply been misunderstood by an agency that won't take "no" for an answer – and it has not yet been seriously analyzed by a court. The FCC's broad interpretation of its Section 706 powers opens the door to FCC regulation far beyond Net neutrality, runs contrary to a more careful reading of the statute, and contradicts basic common sense about what Congress really intended. Congress knew how to write an independent grant of authority when it wanted to do so. Indeed, Congress considered giving the FCC something like the power the FCC now claims, in unambiguous terms, but ultimately removed that provision from the version of the 1996 Telecommunications Act passed by the Senate.

Perhaps the most remarkable thing about the FCC's newfound power under Section 706, besides its breadth, is how scant the analysis of this section has been. The FCC failed to address a host of difficult questions about whether Section 706 was really ambiguous, or if it is, whether the FCC's construction of it was reasonable.

The Solution

Both of the FCC's proposed legal options also raise a host of difficult practical and constitutional problems. But the FCC's hands aren't tied. It can and should ask Congress for whatever authority it believes it needs to protect the broadly supported principles of Internet freedom. If the FCC believes regulation is necessary, it could make that case to Congress – bolstered by economic analysis – in a request for new legislation. In the meantime, the FCC could encourage a multistakeholder process to produce an enforceable

code of conduct. The FCC can also rest assured that proven antitrust and consumer protection laws will continue to ensure a thriving Internet ecosystem.

Meanwhile, the FCC should focus on doing what Section 706 actually demands: clearing barriers to broadband deployment and competition. Unleashing more investment and competition, not writing more regulation, is the best way to keep the Internet open, innovative and free.^[00]

I. Introduction & Summary

On May 15, 2014, the Federal Communications Commission ("FCC" or "Commission") released a Notice of Proposed Rulemaking in the matter of Protecting and Promoting the Open Internet.³ This represents the third time the Commission has attempted to impose enforceable rules upon the Internet ecosystem, after having been rebuffed by the courts in both 2010⁴ and 2014.⁵ Following the decision in *Verizon*, only the transparency rule from the Commission's 2010 Open Internet Order remains in effect.⁶

In the NPRM, the Commission proposes not only to strengthen the transparency rule upheld in *Verizon*,⁷ but also to re-issue the same no-blocking rule⁸ and a modified rule governing discrimination by broadband carriers in their treatment of Internet traffic.⁹ As legal authority for these new rules, the Commission looks principally to two separate bases: Title II¹⁰ and Section 706.¹¹ These comments analyze the rules proposed by the

³ FCC, Protecting and Promoting the Open Internet, *Notice of Proposed Rulemaking*, GN Docket No. 14-28 (May 15, 2014) [*NPRM*], available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0515/FCC-14-61A1.pdf.

⁴ See *Comcast Corp. v. F.C.C.*, 600 F.3d 642 (D.C. Cir. 2010) [*Comcast*].

⁵ See *Verizon v. F.C.C.*, 740 F.3d 623 (D.C. Cir. 2014) [*Verizon*].

⁶ See *id.* at 6; see also FCC, Preserving the Open Internet Broadband Industry Practices, *Report and Order*, GN Docket No. 09-191 (Dec. 23, 2010) [*Open Internet Order*], available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf. It is worth noting, though, that several firms remain bound to abide by the rules of the *Open Internet Order* either by voluntary commitments (which are enforceable by the Federal Trade Commission) or by consent decrees agreed to as part of the FCC's transaction review process.

⁷ NPRM, at ¶¶ 89-88.

⁸ *Id.* at ¶¶ 89-109.

⁹ *Id.* at ¶¶ 110-41.

¹⁰ Communications Act of 1934, Pub. L. No. 73-416, §§ 201-76, 48 Stat. 1064, 1070 (1934), as amended in relevant part by the Telecommunications Act of 1996, Pub. L. No. 104-104, § 101, 110 Stat. 56, 61 (1996) (codified as amended at 47 U.S.C. §§ 201-76 (2012)) ["1934 Act" or "Communications Act" or "Act"].

Commission,¹² and each of the legal authorities the agency proposes to rely upon.¹³ We aim to provide considered and detailed guidance on how the Commission should proceed going forward, bearing in mind the economic realities of the situation, the legal and legislative history of the current regulations, and what the discernable trends in the American telecommunications marketplace suggest the near future of broadband Internet access services will look like. In a separate filing, made jointly with the International Center for Law & Economics, we provide analysis and recommendations of the issue from a policy and normative perspective.

In the NPRM, the Commission seeks comment on two statutory provisions as potential, alternative bases for its legal authority to adopt the rules it proposes: Section 706 and Title II.¹⁴ Although relying upon Section 706 is perhaps a dubious proposition, as explained below,¹⁵ using Title II is simply unworkable. Even if the Commission is successful in reclassifying broadband Internet access as a “telecommunications service” under Title II, which in itself will not be an easy task,¹⁶ it will subsequently need to forbear from applying numerous provisions of Title II where they are unwarranted.

Indeed, the legality of “reclassification” may well turn on the FCC’s ability to forbear from the most onerous provisions of Title II for two reasons. Statutorily, the FCC has a duty to promote broadband deployment under Section 706. Constitutionally, agencies must take into account the reliance interests predicated upon their prior interpretations of a statute when re-interpreting that statute. It may not be an exaggeration to say that never in American history has so much investment been predicated on an agency’s statutory interpretation: namely, the hundreds of billions of dollars of capital expenditure premised

11 Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (1996), as amended in relevant part by the Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008) (codified as amended at 47 U.S.C. § 1302) [“1996 Act” or “Telecommunications Act”].

¹² See discussion *infra* Part II.

¹³ See discussion *infra* Parts III-V

¹⁴ NPRM, at ¶¶ 142-59. Other sources of legal authority, such as Title III, are referenced as potential tools for tying in regulations to specific areas (e.g., mobile broadband service providers), but such provisions are merely complimentary to the major sources of authority cited by the Commission, so it is those major sources which will be the focus of these comments. See *id.* at ¶¶ 156-58.

¹⁵ See *infra* Section V. In brief, we doubt that Section 706 can reasonably be interpreted, under Chevron, as an independent grant of authority, or one broad enough to support regulation the legality of the FCC’s interpretation of Section 706.

¹⁶ See *infra* Section III-A.

on the FCC’s interpretation of “telecommunications” such that broadband would not be treated as a Title II service.¹⁷ Similarly, since that re-interpretation would likely implicate other Internet services beyond broadband, the FCC would have to forbear from subjecting these services to Title II. Unfortunately, in both cases, forbearance will be fraught with legal disputes stretching years or even decades into the future, leaving regulated parties without the legal certainty on which long-term investment decisions depend.¹⁸ Because “enforcement against a firm or industry is linked with enough dangers to influence investment, either by its direct effects or in conjunction with accompanying policy controversies,”¹⁹ not only the initial “reclassification” decision implicated in the NPRM, but every subsequent dispute predicated on it risks impairing investment.

If, like Ulysses, the FCC spent a decade battling Laestrygonians and Cyclopes in court, scheming to outwit Poseidon, it would find that its Ithaca – the long awaited destination of Title II – scarcely resembles the homeland it has dreamt of returning to. The thing those advocating Title II most want (banning prioritization) simply is not permitted under Title II.²⁰ Indeed, the FCC would find Title II a hostile place for doing what Congress ordered the FCC to do in the 1996 Act: promote broadband deployment. Whatever value the Title II common carriage regime had in governing the monopoly services for which it was crafted, it should not now be retrofitted to govern broadband Internet access services, for transposing that outmoded scheme onto the Internet ecosystem would undoubtedly do much more harm than good.

If the FCC concludes that it needs to regulate beyond what it can do within the existing regulatory classification of broadband under Title I, it should ask Congress for that authority – rather than attempt effectively to rewrite the Communications Act by reclassifying and then undoing that “reclassification” (partially) through forbearance.

¹⁷ See *infra* Section III-B.

¹⁸ Of course, long-term capital investments are always made under high degrees of uncertainty, especially in sectors subject to ongoing technological change. The point is not that government can eliminate uncertainty, but that it can minimize future regulations as an additional source of uncertainty.

¹⁹ George Bittlingmayer, *Regulatory Uncertainty And Investment: Evidence From Antitrust Enforcement*, 20 CATO J. 296, 303 (2001).

²⁰ See *infra* Section III-C.

II. Discussion of Proposed Rules

In the NPRM, the Commission proposes three specific rules, along with a statement of purpose, an acknowledgement of other laws and considerations, and the accompanying definitions.²¹ Those three rules can be characterized as pertaining to: (1) transparency, (2) blocking, and (3) commercially unreasonable practices.²² Each of these proposed rules will be discussed in turn.

A. Transparency

As a threshold matter, it is worth noting that the transparency rule the Commission issued in its *Open Internet Order* was upheld by the D.C. Circuit in *Verizon v. FCC*, and that rule "remains in full force, applicable to both fixed and mobile providers."²³ However, in the NPRM the Commission proposes to go further with a revised transparency rule,²⁴ and offers up an "enhanced transparency rule" that takes "into account changes in the nature of the provision of broadband services since 2010[,]"²⁵ with the enhancements designed "to improve its effectiveness for end users, edge providers, the Internet community, and the Commission."²⁶ These enhancements are purportedly necessary because the transparency rule under the *Open Internet Order* was such that it could be satisfied by ISPs with a single disclosure, and the Commission is concerned "that a single disclosure may not provide the required disclosures in a manner that adequately satisfies the informational needs of all

²¹ NPRM, Appendix A, p. 66-67.

²² *See id.*

²³ NPRM, at ¶ 65 (citing *Verizon*, 740 F.3d at 659).

²⁴ NPRM, at ¶¶ 63-88. As set forth in Appendix A of the NPRM, the transparency rule consists of three subparts. First, providers of broadband Internet access services must "publicly disclose" information on the "network management practices, performance, and commercial terms" of their services. These disclosures are designed: (1) "for end users to make informed choices regarding use of such services," (2) "for edge providers to develop, market, and maintain Internet offerings," and (3) "for the Commission and members of the public to understand how such [provider] complies with the requirements [of no blocking and no commercially unreasonable practices] of this chapter. Second, the transparency rule requires that, in making its public disclosures, a broadband Internet access service provider "shall include meaningful information regarding the source, timing, speed, packet loss, and duration of congestion." Third, the transparency rule requires that, in making its public disclosures, a broadband Internet access service provider "shall publicly disclose in a timely manner to end users, edge providers, and the Commission when they make changes to their network practices as well as any instances of blocking, throttling, and pay-for-priority arrangements, or the parameters of default or 'best effort' service as distinct from any priority service." *Id.* at p. 66.

²⁵ *Id.* at ¶ 65.

²⁶ *Id.*, at ¶ 67.

affected parties[,]"²⁷ and concluded that "it would be more effective to require broadband providers to more specifically tailor disclosures to the needs of these affected parties."²⁸

To be sure, Justice Brandeis was right in saying that "Sunlight is ... the best of disinfectants."²⁹ And in the context of the Internet, transparency certainly has value, for it is only when consumers have meaningful access to accurate information about the broadband services offered by ISPs that they may make rational choices in the marketplace and that the true market forces of competition can have effect. However, while transparency undeniably has benefits, it also undeniably has costs.³⁰ Thus, as with any policy choice, whether a given transparency rule should be put into place should be determined by weighing both the costs and benefits that the rule will likely produce.

As to the likely benefits of the enhanced transparency rule, it is unclear how much utility can be derived from the additional disclosures the enhanced transparency rule requires beyond those mandated by the transparency rule upheld by the D.C. Circuit.³¹ On its face, the enhanced transparency goes beyond the existing transparency by (1) requiring ISPs to disclose information regarding their compliance with the rules proposed in the NPRM prohibiting blocking and commercially unreasonable practices, (2) requiring ISPs to publish any changes made to their network management practices (including any instances of blocking, throttling, or pay-for-priority arrangements), and (3) requiring specific disclosures to be made with regard to congestion. Assuming that the NPRM's rules are enacted, requiring ISPs to attest to their compliance with these rules seems appropriate, and minimally burdensome. Similarly, requiring ISPs to issue updated disclosures whenever their network management practices significantly change also seems quite reasonable and

²⁷ *Id.*, at ¶ 68.

²⁸ *Id.*

²⁹ NPRM, at ¶ 66 (citing L. Brandeis, *Other People's Money*, Chapter 5 (National Home Library Foundation ed. 1933), available at <http://www.louisville.edu/library/collections/brandeis/node/196>).

³⁰ See, e.g. Geoffrey A. Manne, *The Hydraulic Theory of Disclosure Regulation and Other Costs of Disclosure*, 58 ALA. L. REV. 473 (2007).

³¹ Compare NPRM, Appendix A, p. 66 (Section 8.3) with *Open Internet Order*, 25 FCC Rcd 17936 ("A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding the use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.").

unobjectionable. However, several of the specific disclosures required, and the required form of such disclosures, do raise some concerns.

For one, merely requiring ISPs to tailor their disclosures to the various parties the ISPs deal with (i.e., consumers, edge providers, the Internet community, and the FCC) greatly increases the burden of complying with these disclosures, especially as such disclosures must be periodically updated to reflect changes to ISPs' network management practices. It is true that many consumers may "have difficulty understanding commonly used terms associated with the provision of broadband services[,]" while edge providers "may benefit from descriptions that are more technically detailed[,]" but that does not necessarily mean that ISPs should be bound to publish individualized disclosures for each group.³² For example, a single disclosure—with an easy-to-read executive summary and a more detailed technical appendix—could satisfy the information needs of both groups, while also significantly reducing the ISPs' costs of compliance.

Also, while disclosure of specific instances of blocking, throttling, and pay-for-priority arrangements may be of significant interest to an ISP's consumers, the Internet community at large, and the FCC, there are also good reasons why such disclosures may be harmful. In the *Open Internet Order*, the Commission clarified that "the transparency rule did not require public disclosure of competitively sensitive information or information that would compromise network security or undermine the efficacy of reasonable network management practices."³³ Unfortunately, the enhanced transparency rule risks disclosing a great deal of information that could be considered "competitively sensitive", such as the specific protocols used by an ISP to prioritize certain traffic over others (based either on the source or form of the content), as well as the particular deals an ISP has agreed to with certain edge providers. Disclosure of these types of information may lead to tacit collusion (a.k.a. conscious parallelism, or oligopolistic interdependence) among ISPs,³⁴ and may effectively require the disclosure of (and thus undermine) trade secrets.

³² NPRM, at ¶ 68.

³³ *Open Internet Order*, 25 FCC Rcd at 17938-50, ¶¶ 55-57.

³⁴ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993). (Tacit collusion "describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.")

Most important perhaps, where the logic of disclosure is that making available information about misdeeds deters them, shedding light on information (*e.g.*, certain pricing, services or contract terms) that is concealed for procompetitive reasons deters these, as well.³⁵ Similarly, if every change in network management practices requires disclosure with positive costs, some changes will be deterred even if they would have benefitted consumers. While the benefits of “good” disclosure might outweigh the costs of “bad” disclosure, this certainly won’t always be the case and there is no indication that the FCC has undertaken the analysis necessary to determine which effect prevails.

In particular, if the FCC requires, in the name of transparency, publication of sensitive information like prices (not merely filing them with the FCC under seal), this would amount to a *de facto* tariff, which is nothing but a list of prices. In practical effect, this could amount to an effective requirement of uniform pricing. Regardless, tariffing is a core element of common carriage.³⁶ To the extent the Commission were relying on Section 706 as the legal basis for its rules, this would amount to an illegal imposition of common carriage in violation of both *Cellco* and *Verizon*.

Finally, while a rule requiring ISPs to disclose accurate information regarding the congestion on their networks may have some direct utility for consumers, it may not be as much as one would think at first blush. For one, free speed-test applications (both for mobile devices and websites) are readily available, so consumers already have the ability to determine—at their own discretion—how much throughput their ISPs are able to provide at a given moment in time, which gives accurate insight into the congestion (or lack thereof) on the ISPs’ networks, and can allow consumers to determine whether they are really receiving the level of throughput they have contracted for. However, such tests—and reports about congestion on an ISP’s network writ large—are only so effective at shedding light on the real problem behind slow Internet connections, as often times the root cause(s) of these delays occur not directly on an ISP’s network, but at an interconnection point, or perhaps even deeper in the Internet ecosystem.³⁷ Thus, it is unclear how useful such mandatory congestion disclosures would be for consumers in

³⁵ See generally, Manne, *supra* note 30.

³⁶ 47 U.S.C. § 201(b).

³⁷ See David Young, *Why is Netflix Buffering? Dispelling the Congestion Myth*, Verizon Policy Blog (July 10, 2014), available at <http://publicpolicy.verizon.com/blog/entry/why-is-netflix-buffering-dispelling-the-congestion-myth>.

deciding from whom to purchase their broadband Internet access services, given that that decision may not enable consumers to avoid congestion problems anyway.

Altogether, some of the proposed enhancements to the existing transparency rule seem well-intended. At the same time, however they may also have some significant unintended consequences, and the Commission should keep those potential drawbacks in mind when considering any change to the transparency rule that is already on the books.

B. Blocking

The second rule proposed in the NPRM pertains to blocking.³⁸ A baseline "no-blocking" rule is purportedly "essential to the Internet's openness and to competition in adjacent markets such as voice communications and video and audio programming[.]"³⁹ because, the FCC alleges, ISPs have an incentive to block—or substantially degrade—online services that compete with the ISPs' service offerings or those of an affiliate, most notably, to prevent consumers from "cutting the cord" and dropping their old telephone and cable TV packages for broadband-only offerings.⁴⁰

Even if this were true, ISPs have a strong incentive to encourage more intensive use of their data services because of the profitability of getting consumers to upgrade their speed packages, which the FCC's own data show consumers have continued to do at significant rates in current years. Indeed, examples of an ISP actually blocking a competitive application/service from accessing its last-mile network are remarkably few, and those few instances have been widely publicized, each resulting in the ISP soon relenting once consumers shone the news spotlight upon the controversial practice.⁴¹ There are already

³⁸ NPRM, at ¶¶ 89-109. As set forth in Appendix A of the NPRM, the blocking rule contains two separate provisions: (1) A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management. (2) A person engaged in the provision of mobile broadband Internet access service, insofar as such person is so engaged, shall not block consumers from accessing lawful websites, subject to reasonable network management; nor shall such person block applications that compete with the provider's voice or video telephony services, subject to reasonable network management. *Id.* at p. 66-67.

³⁹ NPRM, at ¶ 89.

⁴⁰ Shalini Ramachandran, *Evidence Grows on TV Cord-Cutting*, Wall St. J. (Aug. 7, 2012), available at <http://online.wsj.com/news/articles/SB10000872396390443792604577574901875760374>.

⁴¹ See, e.g., Stephen Lawson, *Vonage CEO Slams VoIP Blocking*, PCWorld (Mar. 8, 2005), available at <http://www.pcworld.com/article/119919/article.html>; Phil Goldstein, *Confirmed: AT&T Enables FaceTime Over Cellular for iPhone 5 Customers with Unlimited Data*, FierceWireless (June 18, 2013), available at

millions of tech-savvy Americans on the web, and the tools necessary to detect a blocking or serious degradation of service are widely available, so there is every reason to suspect that any future instances of such blocking will also be detected. If they are truly nefarious (i.e., the ISP is blocking a legal service/application that its customers are trying to access),⁴² then public outcry by the affected subscribers should likely be sufficient to convince the ISP to change its practices, rather than bear the brunt of public backlash, in hopes of pleasing its customers (and its investors).

This dynamic could only be bolstered by FCC's transparency rule. The Commission should seriously consider whether disclosure alone is enough to allow market forces and existing laws to govern net neutrality concerns. In the alternative, the FCC should explain how the blocking and non-discrimination rules might be scaled back as the disclosure rule expands – or else explain what justifies issuing new rules that are, collectively, *more* burdensome than those issued under the Open Internet Order, two of which were, of course, struck down in court.

Better economic analysis would not only be sound policymaking, it may be required for the FCC to avoid its regulations being struck down as arbitrary and capricious. Since the D.C. Circuit struck down the FCC's no-blocking and non-discrimination rules on other grounds, the court simply did not proceed this far in its analysis and thus should not be understood to immunize the FCC from having to better explain its analysis.

C. Commercially Unreasonable Practices

The third and final rule proposed in the NPRM pertains to discrimination, but does it under the umbrella of “commercially unreasonable practices.”⁴³ The D.C. Circuit struck down the Commission's attempt to impose a rule prohibiting “unreasonable discrimination” on fixed broadband providers, because doing so effectively subjected such ISPs to “common carrier status.”⁴⁴ The Commission, citing the D.C. Circuit's *Verizon* decision, has proposed a

<http://www.fiercewireless.com/story/confirmed-att-enables-facetime-over-cellular-iphone-5-customers-unlimited-d/2013-06-18>.

⁴² Of course, ISP subscribers do not have the right to access any and all content they want on the Internet, as there are separate laws in place that compel ISPs to block access to sites known to host illegal content, such as child pornography, as dictated by a list of websites kept regularly updated by [NTIA].

⁴³ NPRM, at ¶¶ 110-41.

⁴⁴ *Verizon*, 740 F.3d at 655 (citing *Midwest Video II*, 440 U.S. 689, 700-01 (1979) (holding that the Commission's rules on cable operators amounted to common carriage, and that such action was beyond the agency's jurisdiction).

standard somewhat weaker than the "unreasonable discrimination" standard under Title II,⁴⁵ and more akin to the multi-part "commercial reasonableness" standard for mobile data service providers blessed by Judge Tatel of the D.C. Circuit in 2012.⁴⁶

As set forth in Appendix A of the NPRM, the discrimination rule provides that "A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not engage in commercially unreasonable practices."⁴⁷ The proposed rule goes on to clarify that "Reasonable network management shall not constitute a commercially unreasonable practice."⁴⁸ This hews pretty closely to the data roaming rule upheld in *Cellco*, and also retains the safe harbor for "reasonable network management" from the *Open Internet Order*. Ostensibly, this proposed rule allows for ISPs to offer broadband Internet access services adapted to "individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms."⁴⁹

But there is little guidance provided as to what type of activity would qualify as commercially *unreasonable*. It is proposed that review under such a rule would be on a case-by-case basis and factor in the totality of the circumstances, looking in particular to several factors for guidance: (1) Impact on Present and Future Competition,⁵⁰ (2) Impact on Consumers,⁵¹ (3) Impact on Speech and Civic Engagement,⁵² (4) Technical Characteristics,⁵³ (5) "Good Faith" Negotiation,⁵⁴ and (6) Industry Practices.⁵⁵

The first two of the factors focus upon economic and consumer welfare principles. These arguably should be the most determinative factors to consider when deciding whether the

⁴⁵ 47 U.S.C. § 202(a).

⁴⁶ NPRM, at ¶ 110; *see also* *Cellco P'ship v. F.C.C.*, 700 F.3d 534, 544-49 (D.C. Cir. 2012) [*Cellco*].

⁴⁷ NPRM, Appendix A, p. 67.

⁴⁸ *Id.*

⁴⁹ *Verizon*, 740 F.3d at 652 (citing *Cellco*, 700 F.3d at 548).

⁵⁰ NPRM, at ¶ 124.

⁵¹ *Id.* at ¶ 129.

⁵² *Id.* at ¶ 131.

⁵³ *Id.* at ¶ 132.

⁵⁴ *Id.* at ¶ 133.

⁵⁵ *Id.* at ¶ 134.

business practices of an ISP are commercially unreasonable.⁵⁶ But the overall determination also surely needs to be made in light of prevailing industry practices and the technical characteristics of the broadband Internet access services at issue. Additionally, as the FCC's "public interest" standard⁵⁷ is broader than the "consumer welfare" standard used by antitrust litigants (the FTC, the DOJ, states and private plaintiffs),⁵⁸ it is reasonable to factor in the impact that certain business practices may have on speech and civic engagement, as the Internet unquestionably has become an unprecedented platform for individuals to engage in speech and contribute their thoughts to the marketplace of ideas.

III. Legal Analysis of Title II

Should the FCC "reclassify broadband?" For all the pressure brought to bear on the FCC to consider this question, it is not even the right question. The FCC does not simply classify services into the regulatory silos of the Act. Instead, "classification" is the result of the FCC's interpretation of the complex language of the Act – something the FCC struggled with mightily in the years after the 1996 Act. Its interpretations were guided by both legal analysis of the text and policy judgments about the consequences of imposing Title II on broadband.

The question the FCC has now posed – in fact, been forced to pose by a political feeding frenzy – is whether the FCC should re-open the difficult questions of how to interpret the terms "telecommunications" and "transmission." Doing so would reverse the bipartisan consensus that has driven the flourishing of the Internet and massive investment in the infrastructure needed to power the countless services Americans have come to take for granted.

Moreover, it is far from clear that the FCC can parse any reinterpretation of what constitutes a "telecommunications service" so narrowly as to apply only to broadband and not other Internet services. Whether or not the FCC applies Title II, through such reinterpretation, matters enormously because the FCC cannot forbear its way back to a

⁵⁶ [CITE to Policy Comments](#).

⁵⁷ 47 U.S.C. § 214(a); 47 U.S.C. § 310(d).

⁵⁸ See 15 U.S.C. § 45.

regulatory regime that resembles the Title I light-touch; the forbearance process is just not so simple.

Yet for all this, so-called “reclassification” would not even accomplish what those advocating for Title II demand: a ban on prioritization.

A. Even Under Title II, the FCC Cannot Ban Prioritization

Taking the last point first, in the *Verizon* decision, the D.C. Circuit struck down the no-blocking and non-discrimination rules contained in the FCC’s 2010 Open Internet Order because it found that the non-discrimination rule amounted to common carriage and that the Commission had failed to explain until too late in the litigation process why the same was not true of the no-blocking rule.⁵⁹ The Commission has accordingly attempted to craft rules that do not amount to common carriage by allowing room for individualized negotiation. Doing so would, according to the D.C. Circuit in *Verizon*, mean that the new rules would not amount to imposing common carriage status on broadband providers, which Section 3 of the Act bars the Commission from doing to any information service regulated under Title I.⁶⁰

The FCC’s critics insist the FCC should instead “reclassify” broadband under Title II, claiming that this would allow the FCC not merely to revive its 2010 rules, but to go beyond them, most notably to ban all prioritization of traffic. But in fact, even under Title II, the FCC cannot ban all forms of prioritization. It may only ensure that discrimination is just and reasonable, not ban entire classes of it.⁶¹

Public Knowledge, for example, asserts that the FCC can ban paid prioritization under Title II,⁶² citing *Carterfone*⁶³ and *Computer II*.⁶⁴ In fact, neither analogy is relevant. Both of these

⁵⁹ See *Verizon*, 740 F.3d at 658-59.

⁶⁰ See 47 U.S.C. § 153(51) (“A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services[.]”); 47 U.S.C. § 153(53) (defining “telecommunications service”).

⁶¹ See 47 U.S.C. § 202 (“It shall be unlawful for any common carrier to make any *unjust* or *unreasonable* discrimination in charges, practices ... or services for or in connection with like communication service, ... or to make or give any *undue* or *unreasonable* preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any *undue* or *unreasonable* prejudice or disadvantage.”) (emphasis added).

⁶² Harold Feld, *Sorry AT&T, Title II Would Not “Require” Paid Prioritization*, Pub. Knowledge Blog (Oct. 8, 2010), available at <https://www.publicknowledge.org/news-blog/blogs/sorry-att-title-ii-would-not-require-paid-pri>.

precedents dealt with the Commission having to issue orders governing the conduct of Title II common carriers in response to new technological developments,⁶⁵ but neither implies that Title II's statutory scheme could be used to prohibit paid prioritization by ISPs.

Carterfone, which flowed directly from the earlier ruling in *Hush-A-Phone*,⁶⁶ was a landmark decision in American communications law, but it dealt only with the line between network operators and customer premises equipment (CPE).⁶⁷ Originally, network operators provided (usually by lease) both the network elements and the CPE used by subscribers to connect to others on the network, and the Commission allowed the network operators (then, principally AT&T) to keep outside parties from providing CPE (usually through unreasonably high tariffs under Section 203)⁶⁸ under the theory that it may harm the network and decrease the utility of it for other subscribers.⁶⁹ However, after the D.C. Circuit reversed the FCC's order prohibiting the use of the Hush-A-Phone,⁷⁰ the Commission followed this reasoning and struck down AT&T's prohibitively high tariff on the use of the Carterfone based on the same principle that it is "the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental."⁷¹ These two precedents went a long ways towards opening up the market for CPE and spurring innovations in network technologies and devices, but the link

⁶³ Use of the Carterfone Device in Message Toll Telephone Service, *Memorandum Opinion and Order*, 14 F.C.C. 2d 571 (1968) [*Carterfone Order*].

⁶⁴ The *Computer II* line of regulatory decisions consists of: Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), *Final Decision*, 77 F.C.C. 2d 384 (1980); Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), *Memorandum Opinion and Order*, 84 F.C.C. 2d 50 (1980); Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), *Memorandum Opinion and Order on Further Reconsideration*, 88 F.C.C. 2d 512 (1981).

⁶⁵ The *Carterfone* decisions concerned a device that allowed consumers to connect a mobile radio transmitter (e.g., a handset) to the telephone network, *Carterfone Order* at 572, while the *Computer II* series of decisions concerned "the adoption of rules delineating the circumstances in which computer use by common carriers constituted common carrier communication subject to regulation under Title II of the Act and when such use constituted unregulated data processing." *Computer and Commc'ns Indus. Ass'n v. F.C.C.*, 693 F.2d 198, 203 (D.C. Cir. 1982).

⁶⁶ *Hush-A-Phone Corp. v. United States*, 238 F.2d 266 (D.C. Cir. 1956) (reversing per curiam the Commission's ruling siding with AT&T and rejecting the use of the Hush-A-Phone by consumers because of the threat it posed of damaging the network).

⁶⁷ *Carterfone Order* at 572.

⁶⁸ 47 U.S.C. § 203(a).

⁶⁹ STUART M. BENJAMIN ET AL., *TELECOMMUNICATIONS LAW AND POLICY* 344-45 (3rd ed. 2012).

⁷⁰ *Hush-A-Phone*, 238 F.2d at 268-69.

⁷¹ *Id.* at 268.

between bygone tariffs on CPE levied under Section 203 and unreasonable discrimination under Section 202 is tenuous at best; The FCC explicitly stated, in response to arguments raised under Section 202, that "We find it unnecessary to resolve this question and will not rely upon section 202(a)."⁷² In essence, the FCC understood that *Carterfone* was a no blocking rule, not a non-discrimination rule – and that is the extent of its relevance today.

The *Computer II* line of decisions are more on point, as they at least deal with the sort of transmission and data-processing technologies that form the foundation of the modern Internet, but they offer little to suggest that the FCC could act to prohibit paid prioritization as *per se* "unreasonable discrimination" under Title II. The FCC proceedings that eventually came to be known as *Computer I* and *Computer II* dealt with the "regulatory and policy problems posed by the growing interdependence of communications and data processing[.]"⁷³ In *Computer I*, the Commission first tried to take a "functional approach" and "distinguished between communications services using computers to perform message or circuit switching, which were regulated, and data processing communications services, which were left to marketplace competition[.]" while the "regulatory status of 'hybrid' services, which combined both communications and data processing functions, was to be determined on a case-by-case basis depending upon which function was predominant."⁷⁴ However, "[a]s computer and communications technology continued to merge, the line between regulated and unregulated activities became increasingly blurred," and, in *Computer II*, the Commission recognized that "[t]he respective technologies had become so intertwined . . . that it had become impossible to draw an 'enduring line of demarcation' between them."⁷⁵ Thus, the Commission was faced with the policy choice of whether to "regulate all combined data processing and communications services under Title II, or regulate none."⁷⁶ Despite the arguments of various parties calling for strong Title II regulation for all enhanced services, "the Commission chose the alternative course and decided not to impose Title II regulation on any combined data processing and communications services, which the Commission termed 'enhanced services[.]'" and

⁷² *Carterfone Order*, at 574.

⁷³ *Computer and Commc'ns Indus. Ass'n v. F.C.C.*, 693 F.2d 198, 203 (D.C. Cir. 1982).

⁷⁴ *Id.* at 203.

⁷⁵ *Id.* at 204-05 (citing *Computer II Final Decision*, 77 F.C.C. 2d at 430).

⁷⁶ *Id.* at 207.

instead kept these services regulated only under the Commission's ancillary jurisdiction,⁷⁷ because deciding whether services would be regulated under Title I or Title II using "case-by-case determinations . . . would defeat the purpose of the Communications Act, first, by creating regulatory uncertainty that would inhibit market entry and thus limit the range of services available to consumers, and, second, by absorbing Commission resources that would be better employed elsewhere."⁷⁸

Computer II, therefore, confirmed the wisdom of keeping "enhanced services" free from Title II regulations, and, contrary to claims by Public Knowledge,⁷⁹ *Computer II* allowed all common carriers to offer such "enhanced" services in addition to the "basic" services they were already offering under Title II, either directly or via a subsidiary.⁸⁰ This shift in approach paved the way for fierce competition in the unregulated broadband marketplace between traditional telephone companies and the upstart cable operators.

Just what this means for any potential rule on paid prioritization, though, is murky. The regulatory classifications of "basic" and "enhanced" services were superseded by the Telecommunications Act of 1996, and replaced with "telecommunications" and "information" services, respectively. Could the Commission attempt the line-drawing exercise eschewed in *Computer II* and *Brand X*, and decide that every enhanced/information service includes a basic/telecommunications component,⁸¹ thereby subjecting broadband services – but not other services – to Title II? The problem, as Richard Bennett, among others, has made clear, is that that such distinctions (which amount to a kind of structural separation) might make sense where the basic service is synonymous with the transmission (*i.e.*, where network is single function). But on today's Internet, the "layers" increasingly blur together, and the more complicated the apps "on top" become, the more,

⁷⁷ *Id.* at 206-07.

⁷⁸ *Id.* at 211.

⁷⁹ Feld, *supra* note [cite] ("Similarly, in the FCC's *Computer II* Proceeding, the FCC held that it would not allow carriers to offer 'enhanced services' (the precursor to information services) directly.").

⁸⁰ See *Computer and Comm'ns Indus. Ass'n*, 693 F.2d at 218-19. The *Computer II* rules imposed a structural separation requirement on AT&T, whereby it could offer "enhanced services" only via a separate subsidiary, but this requirement was not extended to other common carriers, because they were adjudged not to have enough market power to pose a significant threat of anticompetitive conduct. *Id.* All common carriers were required to separately account and pay for the basic transmission that enabled their enhanced service offerings, pursuant to their established tariff, to ensure that they did not gain unfair competitive advantage by using funds from their regulated activities to cross-subsidize their unregulated activities. *Id.*

⁸¹ See discussion *infra* at 27; NPRM, at ¶ 149.

not less, the underlying network needs to be managed.⁸² Thus, it is difficult to apply the kinds of simplistic structural separation by layer of either *Carterfone* or *Computer II* to today's Internet. Tim Wu himself, the intellectual father of net neutrality, recognized the perils of attempting to enforce such rigid structural separation:

While structural restrictions like open access may serve other interests, as a remedy to promote the neutrality of the network they are potentially counterproductive. Proponents of open access have generally overlooked the fact that, to the extent an open access rule inhibits vertical relationships, it can help maintain the Internet's greatest deviation from network neutrality. That deviation is favoritism of data applications, as a class, over latency-sensitive applications involving voice or video.⁸³

In other words, the effect of structural separation would be to *more* prioritization, not less, ironically, because an open access network can't be optimized for every type of service that could go over it, and will necessarily favor some over others. This will happen in ways that shift over time, making whatever line drawing is done obsolete at some point, which in turn will increase long term uncertainty, ensuring litigation over line-drawing, and, in the end, deterring new entry while insulating established incumbents.

More generally, there is little reason to think that Title II could be used to prohibit paid prioritization, as "both the Commission and the courts have consistently interpreted that provision to allow carriers to charge different prices for different services."⁸⁴ Indeed, it has been a principle of common carrier regulation for over 100 years that common carriers are "only bound to give the same terms to all persons alike under the same conditions and circumstances," and "any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge."⁸⁵ Thus, if broadband Internet access services were made subject to Title II, ISPs could still provide a diversity of offerings, and charge certain parties higher prices for transmission across their network based on some

⁸² [CITE to Policy COmments](#)

⁸³ Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141, 142 (2003). [See also POLICY COMMENTS CITE](#).

⁸⁴ NPRM, at p. 94 (Commissioner Pai, dissenting).

⁸⁵ See *Interstate Commerce Comm'n v. Baltimore & O.R. Co.*, 145 U.S. 263, 283-84 (1892).

"inequality of condition",⁸⁶ so long as those charges are reasonable and those offerings are provided to all similarly situated parties. Title II would impose some significant restrictions upon any paid prioritization agreements,⁸⁷ but it would not prevent them. Nonetheless, many still believe that Title II is the only way to get regulations strong enough to prevent paid prioritization from destroying the concept of an Open Internet, so a more in-depth analysis of this potential approach is warranted.

B. What "Reclassification" Actually Means

If the Commission wishes to utilize Title II as its base of authority for the rules it proposed in the NPRM, it will first need to "reclassify" broadband Internet access service, or at least some component thereof, as a "telecommunications service"⁸⁸ in order to avoid running afoul of the prohibition in Title I on imposing common carrier regulations on non-common carriers.⁸⁹ Underlying any "reclassification" is a reinterpretation of the definitions set forth in Title I by Congress, and which services fall within the scope of each defined term.⁹⁰ Specifically, the question here is whether the provision of broadband Internet access falls within the scope of a "telecommunications service"⁹¹ or if it is purely an "information service"?⁹²

1. The FCC's Interpretative Struggle in its Historical Context

This is not an issue of first impression for the Commission. The defined categories of "information" and "telecommunications" services have remained unchanged since the passage of the 1996 Act, and the Commission has already had to wrestle with the issue of whether broadband Internet access services fall into the first category, the second, or both

⁸⁶ Such inequalities of condition may include the distance the data must travel (e.g., Is the content cached locally or on a central server?), the time-sensitivity of the data (e.g., Is the content sensitive to latency or jitter?), the amount of data flowing over the network (e.g., If your data accounts for 10% or more of monthly traffic over the network, you must pay an additional fee), the intended recipient of the data (e.g., Is the data flowing between two users on the same network or on different networks?), or any of a number of other potentially relevant factors.

⁸⁷ See, e.g., 47 U.S.C. § 203 (requiring common carriers to publicly file and post schedules of the charges used in their services, and show the classifications, practices, and regulations affecting such charges).

⁸⁸ See 47 U.S.C. § 153(53).

⁸⁹ See 47 U.S.C. § 153(51) ("A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services[.]"); 47 U.S.C. § 153(53) (defining "telecommunications service").

⁹⁰ See generally 47 U.S.C. § 153 (defining various terms used in the Communications Act).

⁹¹ 47 U.S.C. § 153(53).

⁹² 47 U.S.C. § 153(24).

– just as the Commission had previously wrestled with the “enhanced” and “basic” categories prior to the 1996 Act on which the Act based these new categories.⁹³ While “classification” and “reclassification” are inherently question of legal interpretation resting on engineering realities, it is essential to understand the policy context within which the FCC reached its current interpretation that broadband service is an information service subject to Title I, not a telecommunications service subject to Title II.

The initial steps taken by the Commission with regards to classification came out of a 1998 rulemaking specifically asking how broadband Internet access services should be treated under the framework of the 1996 Act for purposes of Universal Service contributions.⁹⁴ This report concluded that, even though information services are offered “via telecommunications,” these “hybrid” services should be classified as “information services” rather than “telecommunications services,” because:

if we interpreted the statute as breaking down the distinction between information and telecommunications services, so that some information services were classed as telecommunications services, it would be difficult to devise a sustainable rationale under which all, or essentially all, information services did not fall into the telecommunications service category.⁹⁵

In other words, the Commission attempted to draw a bright line between Title I and Title II services, thus effectively walling off the Internet from the regulations of the analog era. This was part of a conscious and deliberate policy under President Clinton and FCC Chairman Bill Kennard to promote investment in competing broadband delivery platforms.

At the time, telcos were beginning to provide Digital Subscriber Line (DSL) service while cable companies were beginning to provide cable modem service. The Commission regulated DSL under Title II just as it did all services provided by the heirs to the regulated

⁹³ See *1998 Universal Service Report*, at ¶ 21 (“Specifically, we find that Congress intended the categories of “telecommunications service” and “information service” to parallel the definitions of “basic service” and “enhanced service” developed in our *Computer II* proceeding, and the definitions of “telecommunications” and “information service” developed in the Modification of Final Judgment breaking up the Bell system.”).

⁹⁴ FCC, Federal-State Joint Board on Universal Service, *Report to Congress*, CC Docket No. 96-45 (Apr. 10, 1998) [*1998 Universal Service Report*], available at http://transition.fcc.gov/Bureaus/Common_Carrier/Reports/fcc98067.pdf.

⁹⁵ See *id.*, at ¶ 57.

monopoly built by AT&T. This included mandatory unbundling of the local copper loop as the basis for competition among companies reselling DSL service provided over incumbents' networks. But the Commission had never subjected cable modem service to Title II. Thus, telcos started the broadband race at a considerable disadvantage: they had to share the fruits of their investments with their rivals.

The Commission began unraveling this mess by classifying *retail* Internet Access Service as a Title I service in 1998.⁹⁶ But the Commission had not formally classified broadband service under the Act.

Chairman Kennard was beginning to grapple with this radically inconsistent of what were increasingly being recognized as equivalent ways of delivering broadband service. In 1998, the Commission released its Universal Service Report, making investment in broadband infrastructure the Commission's paramount objective.⁹⁷ Kennard appears to have recognized that, to implement the "Hands off the Net" and "First, do no harm" consensus of the New Democrats – from President Clinton and Vice President Gore on down through Ira Magaziner and others – he would have to deregulate broadband across the board. Only by doing so could he ensure that cable companies and telcos competed with each other as two robust "pipes" for broadband. This would mean shifting the concept of competition from the level of retail service – where a "lemonade stand" stand model of competition might unfold, with 4-10 resellers competing to sell use of the same network – to the level of networks. where two physical pipes might compete with terrestrial wireless and satellite services.

Essentially, Kennard faced two related but distinct questions: First, should broadband generally be subject to Title II regulation? Second, should the owners of broadband networks be forced to share their network – the fruits of their investment – with competitive resellers created by government?

⁹⁶ 1998 *Universal Service Report*, at ¶ 15, 73.

⁹⁷ *Id.* at 229.

Kennard would set in motion resolution of the first question with the Notice of Inquiry issued by the Commission in 2000.⁹⁸ In 2002, Chairman Michael Powell made clear that the Commission would not impose Title II regulation on cable modem service, which had never been regulated as a common carrier, by formally classifying broadband Internet access services delivered over cable modems as a pure "information service".⁹⁹ In 2005, Chairman Kevin Martin applied the same classification to DSL, completing the broad arc of what Kennard had begun: creating a consistent, light-touch regulatory approach for broadband in order to encourage investment in deployment across the board. Between those two declaratory rulings, the Supreme Court heard a challenge to the cable modem order in the *Brand X* case.¹⁰⁰ During this time, the Commission also moved away from mandatory unbundling, as discussed below.

2. The Supreme Court's *Brand X* Decision and Justice Scalia's Dissent

In *Brand X*, the Court upheld the Commission's decision to classify broadband Internet access delivered via cable modem as being only an "information service" and not a "telecommunications service", rather than as being a combination of "information" and "telecommunications" services (akin to the distinction between "basic" and "enhanced" services under the *Computer Inquiries* line of reasoning used by the Commission before the passage of the 1996 Act),¹⁰¹ because the statutory definitions did not speak directly to the

⁹⁸ See FCC, Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, *Notice of Inquiry*, GN Docket No. 00-185 (Sept. 28, 2000), available at <http://transition.fcc.gov/Bureaus/Miscellaneous/Notices/2000/fcc00355.pdf>.

⁹⁹ See FCC, Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, GN Docket No. 00-185 (Mar. 15, 2002) (classifying cable modem service as an "information service" under Title I), available at <http://askcalea.fbi.gov/archives/docs/20020315.fcc.02-77.pdf>; see also FCC, Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Report and Order and Notice of Proposed Rulemaking*, CC Docket No. 02-33 (Sept. 23, 2005) (establishing a new regulatory framework for wireline broadband Internet access service providers that, after a one-year transition period, removed DSL from the regulatory provisions of Title II, such as the unbundling of network elements), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-05-150A1.pdf.

¹⁰⁰ *Nat'l Cable & Telecom. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 125 S.Ct. 2688 (2005) [*Brand X*] (affirming the FCC's ruling to classify cable modem broadband Internet access services as "information services" under Title I).

¹⁰¹ See *1998 Universal Service Report*, at ¶ 21 ("Specifically, we find that Congress intended the categories of "telecommunications service" and "information service" to parallel the definitions of "basic service" and "enhanced service" developed in our *Computer II* proceeding, and the definitions of "telecommunications" and "information service" developed in the Modification of Final Judgment breaking up the Bell system.").

point,¹⁰² and because it was reasonable for the Commission to conclude that the information processing and transmission components of cable modem broadband Internet access services are so inherently intertwined that the Commission had to treat them as a combined service subject to Title I, rather than trying to parse out the separate components and apply different regulatory treatment to each.¹⁰³

3. The FCC's Present Options Regarding Telecommunications and Information Services

The reasoning upheld by the Court in *Brand X* was the same logic originally employed by the Commission in 1998,¹⁰⁴ and which still holds true today: there is no logically coherent manner by which to separate the information processing and transmission components of broadband Internet access services that would not inevitably be either over- or under-inclusive. Regulations designed to govern only the last-mile of the Internet ecosystem, over which ISPs have direct control, may be subsequently interpreted and applied to cover the conduct of edge providers as well.¹⁰⁵ This is particularly true in light of the broad authority the Commission claims through its ancillary jurisdiction to go even beyond its

¹⁰² *Brand X*, 545 U.S. at 989 (holding that the Commission's statutory construction passes *Chevron* step one because the word "offering" as used in the statutory definition of "telecommunications services" can "reasonably be read to mean a 'stand-alone' offering of telecommunications").

¹⁰³ *Id.* at 990-1000 ("[T]he Commission reasonably concluded, a consumer cannot purchase Internet service without also purchasing a connection to the Internet and the transmission always occurs in connection with information processing. ... The service that Internet access providers offer to members of the public is Internet access, not a transparent ability (from the end user's perspective) to transmit information. We therefore conclude that the Commission's construction was reasonable.") (internal citations omitted).

¹⁰⁴ *1998 Universal Service Report*, at ¶¶ 43-48 ("The language and legislative history of both the House and Senate bills indicate that the drafters of each bill regarded telecommunications services and information as mutually exclusive categories. ... We note that our interpretation of 'telecommunications services' and 'information services' as distinct categories is also supported by important policy considerations. An approach in which a broad range of information service providers are simultaneously classed as telecommunications carriers, and thus presumptively subject to the broad range of Title II constraints, could seriously curtail the regulatory freedom that the Commission concluded in *Computer II* was important to the healthy and competitive development of the enhanced-services industry.").

¹⁰⁵ Richard Bennett, *Designed for Change: End-to-End Arguments, Internet Innovation, and the Net Neutrality Debate*, Info. Tech. & Innovation Found. 34 (Sept. 2009), available at <http://www.itif.org/files/2009-designed-for-change.pdf> ("The problems with adapting the Web to the Internet illustrate a primary vulnerability of end-to-end networks, the fact that application programmers need to have quite detailed knowledge of the network's traffic dynamics to avoid creating pathological conditions. In theory, functional layering is supposed to isolate network concerns from application design; in practice, new applications often produce dramatic side effects on network routers. Single-function layers are much more interdependent than independent.").

statutory jurisdiction in order to regulate areas that merely are "reasonably ancillary" to its statutory grants of authority.¹⁰⁶

If, however, the Commission does decide that changes in technology and business practices require a reinterpretation of the meaning of "telecommunications" and severability of information and telecommunications service, it should first follow through on the Commissioner Pai's proposal that each Commissioner should select two independent scholars, one economist and one technical expert, to write an independent study of the issue, so that the Commission could draw on a variety of carefully considered sources.¹⁰⁷ Based on such a reassessment of the engineering realities underlying any interpretation of the Act, the FCC might adopt the reasoning of Justice Scalia's dissent in *Brand X*.¹⁰⁸ Scalia argued that "the telecommunications component of cable-modem service retains such ample independent identity that it must be regarded as being an "offer"—especially when seen from the perspective of the consumer or the end user, which the Court purports to find determinative."¹⁰⁹ By way of example—disregarding the fanciful analogy of broadband Internet access being comparable to a pizza delivery service¹¹⁰ — Justice Scalia claims that:

Since the delivery service provided by cable (the broadband connection between the customer's computer and the cable company's computer-processing facilities) is downstream from the computer-processing facilities,

¹⁰⁶ 47 U.S.C. 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."); *see generally Verizon*, 740 F.3d at 632 ("We have held that the Commission may exercise such ancillary jurisdiction where two conditions are met: '(1) the Commission's general jurisdictional grant under Title I covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities.") (citing *American Library Ass'n v. F.C.C.*, 406 F.3d 689, 691-92 (D.C. Cir. 2005)).

¹⁰⁷ NPRM, at p. 96-97 (Commissioner Pai, dissenting) ("Just as we commissioned a series of economic studies in past media-ownership proceedings,²² we should ask ten distinguished economists from across the country to study the impact of our proposed regulations and alternative approaches on the Internet ecosystem. To ensure that we obtain a wide range of perspectives, let each Commissioner pick two authors. To ensure accuracy, each study should be peer reviewed. And to ensure public oversight, we should host a series of hearings where Commissioners could question the authors of the studies and the authors of those studies could discuss their differences. Surely the future of the Internet is no less important than media ownership. But we should not limit ourselves to economic studies. We should also engage computer scientists, technologists, and other technical experts to tell us how they see the Internet's infrastructure and consumers' online experience evolving. Their studies too should be subject to peer review and public hearings.").

¹⁰⁸ 545 U.S. at 1005-21 (Scalia, J., dissenting); *see also* NPRM, at ¶¶ 149-50.

¹⁰⁹ *Brand X*, 545 U.S. at 1008 (Scalia, J., dissenting).

¹¹⁰ *Id.* at 1007-11.

there is no question that it merely serves as a conduit for the information services that have already been "assembled" by the cable company in its capacity as an ISP.¹¹¹

a. Scalia Was Wrong — He Was, After All, in the Dissent

Scalia's claim reveals a fundamental misconception about broadband Internet access services. While it may be that they all involve telecommunications services in a sense,¹¹² the notion that there is a stage in the process where a pure telecommunications service can be logically abstracted from the broadband Internet access service as a whole is simply inaccurate:

A telephony or television service offered over a broadband network has to operate within performance bounds similar to those of the dedicated networks that were built for these services in the past. Internet access operates on a much looser set of performance boundaries, of course. But Wu believes that an unmanaged Internet portal can provide a high-performance path between service providers on the Internet and ISP customers that will permit greater consumer choice with respect to telephony and television services. This can only be true as a fact of engineering if the Internet portal is managed: it needs to assign higher priority to real-time streams than to those that carry content that's not time-sensitive. The demand for an unmanaged portal actually frustrates the goal that Wu wants to achieve.¹¹³

Scalia insisted that splitting these into separate Title I and Title II components was the only reasonable reading of the Telecommunications Act, while the majority deferred, under *Chevron*, to the FCC's more realistic refusal "to find a telecommunications service inside every information service, extract it, and make it a stand-alone offering to be regulated

¹¹¹ *Id.* at 1010.

¹¹² See 47 U.S.C. 153(24) (defining "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications*, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service") (emphasis added).

¹¹³ [Bennet *supra* CITE at 29-30.](#)

under Title II of the Act."¹¹⁴ In 2002, the Commission decided that "Such radical surgery is not required."¹¹⁵ What it should have found is that "such radical surgery is impossible, as a matter of network engineering." That it didn't means, of course, that it may nevertheless attempt this surgery now.

Wheeling the patient back into the operating room twelve years later to perform that same surgery raises a host of difficult line-drawing questions.

At multiple different stages in the broadband Internet ecosystem consumer data is broken down into binary/digital form and then transmitted between or among endpoints without a change in form along the way, until it reaches a computer (e.g., a wireless router, a network switch, a content server, a personal electronic device), where it is processed, and then either manipulated by the end-user or sent on its way to its next destination. It is true that only broadband ISPs are directly consumer-facing, and a service is not a "telecommunications service" unless it is offered "for a fee *directly to the public*[,] "¹¹⁶ but the statutory definition goes on to state "or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."¹¹⁷ Thus, while it may be logically sustainable to "reclassify" the last mile transmission services offered by ISPs—as part of their broadband Internet access service offerings—as being telecommunications services, the same logic would likely extend beyond merely the last mile: If an ISP is offering to its customers a telecommunications service (i.e., "I'll transmit your data to any other point on the web in exchange for a monthly service fee."), it also is offering a telecommunications service to all the other users of the web, or their agents (i.e., "I'll transmit your data to all the customers on my network in return for service fees and/or an agreement to exchange traffic."). That would constitute "such classes of users" to make said transmission service "effectively available directly to the public" under the statute.¹¹⁸

¹¹⁴ Inquiry Concerning High-Speed Access to the Internet over Cable Modem and Other Facilities, *Declaratory Ruling & Notice of Proposed Rulemaking*, 17 F.C.C.R. 4798, 4825 (2002) [2002 *Declaratory Ruling*], available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-02-77A1.pdf.

¹¹⁵ *Id.*

¹¹⁶ *Brand X*, 545 U.S. at 1011 (Scalia, J., dissenting) (emphasis in original) (citing 47 U.S.C. 153(53)).

¹¹⁷ 47 U.S.C. 153(53) ("The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.").

¹¹⁸ *See id.*

Thus, there is no bright line by which the FCC can limit the effects of "reclassification" to the last-mile ISP connections in particular or even to broadband more generally. Not only Net neutrality regulations, but also the rest of Title II, would then be extended to cover interconnection/peering arrangements, as well as many of the services now offered by edge providers that also utilize a transmission component and that could logically be defined as a telecommunications service.¹¹⁹ This line-drawing exercise would be fraught with difficult questions, and companies subject to (or potentially subject to) Title II would undoubtedly challenge the decision to exempt other companies. These problems are, of course, precisely why the majority in *Brand X* concluded that it was reasonable for the FCC to conclude that the transmission component of broadband Internet access services is inextricably linked to the information-processing components thereof, and thus avoid imposing the outmoded common-carrier regime of Title II upon any of it. If the FCC now wishes to change course,¹²⁰ and apply Title II to broadband Internet access services, it is incumbent upon the agency to explain its change of interpretation. The Commission must establish that the benefits of doing so would likely outweigh the costs.

b. But Even if Scalia Were Right...

But suppose Justice Scalia were correct (and the *Brand X* majority were wrong): the FCC can, find a separate telecommunications component in every information service. Would this help the FCC? The answer is not so clear

Separating the transmission component of broadband service, while regulating the information service component under Title I. This would, indeed, have changed the outcome of *Brand X* because the FCC would then have *had* to, absent forbearance, subject transmission to an unbundling mandate. But the focus of net neutrality debate is not actually on the transmission component of broadband (as conceived of by Justice Scalia) but rather about prioritization: the operation of the routers that sort traffic between stages

¹¹⁹ Online voice and video-conferencing services, such as Apple's FaceTime or Google's Hangouts, are obvious examples that could be roped in under Title II, but sites that offer internal messaging services for their users (such as Facebook or Tinder) may also then fall under the scope of Title II.

¹²⁰ *1998 Universal Service Report*, at ¶ 46 ("We note that our interpretation of 'telecommunications services' and 'information services' as distinct categories is also supported by important policy considerations. An approach in which a broad range of information service providers are simultaneously classed as telecommunications carriers, and thus presumptively subject to the broad range of Title II constraints, could seriously curtail the regulatory freedom that the Commission concluded in *Computer II* was important to the healthy and competitive development of the enhanced-services industry.").

of transmission. The operation of these routers is necessarily an information service, even under Scalia’s view, because it involves “processing... [of] information via telecommunications”

First, at issue in *Brand X* was the unbundling mandate

C. Forbearance Cannot Adequately Negate the Adverse Consequences of Title II

Section 10 of the 1996 Act¹²¹ authorizes the Commission to forbear from applying provisions of Title II that it deems unnecessary, as Justice Scalia noted in his *Brand X* dissent.¹²² Many of those advocating Title II have cited Scalia’s dissent in asserting that forbearance will allow the Commission to avoid adverse consequences of Title II.¹²³ Forbearance would be especially important to those who recognize that, as discussed above, reinterpreting what is a “telecommunication service” may implicate the edge providers that advocates of Title II claim must be left “free.” But can forbearance really substitute for the current certainty provided by the classification of broadband under Title I?

Before considering what forbearance could do, one must assess the basis for comparison: what is the status quo? Today, broadband providers have been insulated against Title II not merely by the FCC’s two declaratory rulings saying that they are not subject to Title II, but by the FCC’s interpretation of key terms in the Act that undergird those rulings. As explained below, it would be legally difficult for the FCC to re-interpret those provisions—despite the deference agencies generally enjoy under *Chevron*—in a way that would not be

¹²¹ 47 U.S.C. § 160 provides: “Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that—(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.”

¹²² *Brand X*, 545 U.S. at 1012 (Scalia, J., dissenting).

¹²³ See, e.g., Austin Schlick, *A Third-Way Legal Framework for Addressing the Comcast Dilemma*, 3 (May 6, 2010), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-297945A1.pdf; Tim Wu & Tejas N. Narechania, *Sender Side Transmission Rules for the Internet*, Columbia Public Law Research Paper No. 14-400, 19 (June 6, 2014) (publication forthcoming in Fed. Comm. L.J.), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2447107.

arbitrary or capricious, and would adequately address the reliance interests predicated on Title I, consistent with the Supreme Court’s decision in *Fox*.¹²⁴ These are features, not bugs, of the status quo: the fact that “reclassifying” broadband is difficult, complicated, and politically charged, means that Title I offers long-term certainty on which investors can reasonably rely.

Re-opening the key definitions in the Act would create multiple levels of uncertainty, complexity for the Commission, and litigation:

1. Who is and is not subject to Title II?
2. From which, if any, aspects of Title II might a company, once subject to Title II, be exempted through forbearance?
3. How long would it take to reach a forbearance decision?
4. Once a forbearance decision has been made, can the FCC reverse it?

The first kind of uncertainty is discussed above.¹²⁵ The rest are discussed below in this section. Forbearance is also discussed in the penultimate section of this comment in the analysis of regulatory takings jurisprudence.¹²⁶

1. The FCC’s Discretion under Section 10 and Ability to Change Course on Forbearance

Those arguing for “reclassification” argue that the FCC will enjoy considerable deference, and will thus be able to forbear from whatever provisions of Title II it sees fit.¹²⁷ Thus, at best, the current regulatory certainty would be replaced with a promise from the FCC – essentially, “trust us, we’ll take care of you.” However sincere that promise might be at the outset, it is hardly reassuring, given how long the forbearance process might take for the FCC to do properly, and for the order to work its way through the courts in the litigation that will inevitably result – especially if the Commission has to start over, which could happen more than once.

¹²⁴ F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 513-14 (2009) [*Fox*].

¹²⁵ See *supra* at III.B.

¹²⁶ See *infra* at VI.E.

¹²⁷ See, e.g., Schlick, *supra* note 123, at 4 (identifying the six provisions of Title II the Commission proposed to apply as part of “Reclassification Lite”); Harold Feld, *Title II Forbearance Is Actually So Easy It Makes Me Want To Puke*, WETMACHINE (July 14, 2014), available at <http://www.wetmachine.com/tales-of-the-sausage-factory/title-ii-forbearance-is-actually-so-easy-it-makes-me-want-to-puke/>.

The central problem (again, a feature of the system; a problem for advocates) is that the FCC has made forbearance very difficult, and cannot change its approach without explaining and justifying that change. After the Republican-led FCC used forbearance to clear regulatory barriers – most notably to fiber deployment – the FCC under Democrat Julius Genachowski reversed course, and raised the bar considerably for forbearance. Specifically, the FCC denied Qwest’s forbearance petition because it concluded that the market for voice services in the Phoenix area, after discounting competition from wireless-only households who had cut-the-cord, was a cable-telco duopoly and that was inadequate to protect consumers.¹²⁸ But under *Qwest*, if wireless broadband were not considered a competitor and no account were taken of new entrants like Google Fiber, the FCC could not grant significant forbearance in the nearly 70% of markets in which Americans have two or fewer ISP choices according to FCC data.¹²⁹

If the FCC were now to take a different approach, it would have to explain and justify that change – or have its new approach struck down as arbitrary and capricious. The FCC’s failure to explain its change with sufficient analytical rigor caused the D.C. Circuit in 2008 to reverse the FCC’s denial of Verizon’s petition for forbearance from its unbundling obligations as an ILEC.¹³⁰

A closer look at the *Qwest* decision, and the underlying FCC order, is instructive here, because, as the following discussion will show, the factual predicate necessary to support a grant of forbearance is now a decidedly difficult burden to satisfy. Indeed, the *Qwest* decision is already being used to by opponents to raise the analytical bar in their rivals’ forbearance proceedings.¹³¹

¹²⁸ *Qwest Corp. v. FCC*, 689 F. 3d 1214 (10th Cir. 2012) [*Qwest*].

¹²⁹ Indus. Analysis & Tech. Div. Wireline Competition Bureau, *Internet Access Services: Status as of December 31, 2012*, 9 (Dec. 2013), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db1224/DOC-324884A1.pdf (showing 64% of American households having access to two or fewer ISPs capable of delivering fixed-broadband with speeds at least 6 Mbps downstream and at least 1.5 Mbps upstream).

¹³⁰ *Verizon Telephone Companies v. FCC*, 570 F. 3d 294 (D.C. Circ. 2009).

¹³¹ See, e.g., CenturyLink’s Petition for Forbearance Pursuant to 47 U.S.C. Section 160(c) from Dominant Carrier Regulation and *Computer Inquiry* Tariffing Requirements on Enterprise Broadband Services, *Comments of TW Telecom, et al.*, WC Docket No. 14-9 (July 7, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521371593> (arguing that the market power and market definitions used in the *Qwest Order* should apply to CenturyLink and its; CenturyLink’s Petition for Forbearance Pursuant to 47 U.S.C. Section 160(c) from Dominant Carrier Regulation and *Computer Inquiry* Tariffing Requirements on Enterprise Broadband Services, *Comments of Sprint Corp.*, WC Docket No. 14-9 (July 7, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521371311> (arguing that the traditional market power framework described

In the time leading up to the 10th Circuit's decision, Qwest, an incumbent local exchange carrier (ILEC) operating in the Phoenix metropolitan statistical area (MSA), was petitioning the FCC for a grant of forbearance from the application of certain dominant-carrier regulations, including, inter alia, unbundling requirements.¹³² The FCC had denied Qwest's forbearance petition, "citing insufficient evidence of sufficiently robust competition that would preclude Qwest from raising prices, unreasonably discriminating, and harming consumers."¹³³ Qwest challenged this denial, and presented strong evidence that (after factoring in wireless-only households who had cut-the-cord, and no longer subscribed to any wireline voice services) its share of the Phoenix MSA was substantially below the 50% market share threshold the Commission had previously relied upon in other forbearance orders, but, crucially, "at the time, the Commission was reconsidering its analytical framework for forbearance petitions."¹³⁴

In *Qwest*, the Court explained its finding that the Commission had adequately explained its change of position as follows:

In sum, the Commission offered an extensive discussion of its reasons for abandoning the two-part test in the *Omaha Order* and for adopting the market-power approach – an approach with some basis in the Commission's precedent and, in the Commission's view, better in keeping with the underlying purposes of section 10. The Commission, therefore, was conscious of the change it was making, believed it to be better, explained why it was necessary, and offered a sound basis for repudiating its prior decisions. *Fox Television*, 556 U.S. at 515-16, 129 S.Ct. 1800; *Verizon Tel.*, 570 F.3d at 304 (stating that "[t]he flaw" in the Commission's policy shift was "not in the th[e] change, but rather in the [Commission's] failure to explain it"). No doubt, the Commission *did* move the goalpost here, but it did so

in the *Qwest Phoenix Forbearance Order* is the model that should be used to evaluate CenturyLink's forbearance request, and that such request should be denied).

¹³² *Qwest*, 689 F.3d at 1216.

¹³³ *Id.*

¹³⁴ *Id.* at 1220.

under somewhat unique circumstances and it "articulate[d] a satisfactory explanation" for doing so.¹³⁵

Yet the court also criticized the FCC's previous changes in its evidentiary standard and noted the potential basis for blocking future changes of standard:

This kind of goalpost-moving does not reflect an optimal mode of administrative decisionmaking. And we do not foreclose the possibility that under some circumstances **an agency's shifting of the policy goalpost (e.g., the evidentiary requirements for satisfying a particular statutory or regulatory standard) may lead us to conclude that the agency has acted arbitrarily or capriciously.** See *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996) (noting that "[s]udden and unexplained change [in an agency's position], or change that does not take account of legitimate reliance on prior interpretation, may be arbitrary, capricious [or] an abuse of discretion" (alteration in original) (citations omitted) (quoting 5 U.S.C. § 706(2)(A)) (internal quotation marks omitted)); *Hatch v. Fed. Energy Regulatory Comm'n*, 654 F.2d 825, 834-35 (D.C.Cir.1981) (holding that an agency's sudden shift in the nature of proof required of the regulated party was not sufficiently explained and necessitated remand); *Pub. Serv. Co. of Ind., Inc. v. Fed. Energy Regulatory Comm'n*, 584 F.2d 1084, 1087-88 (D.C.Cir.1978) (holding that an agency's sudden, unexplained shift in the kind of data that a regulated party was required to submit was arbitrary); *Verizon Tel.*, 570 F.3d at 304 ("[I]t is arbitrary and capricious for the FCC to apply such new approaches without providing a satisfactory explanation when it has not followed such approaches in the past."); see also *Fed. Energy Regulatory Comm'n v. Triton Oil & Gas Corp.*, 750 F.2d 113, 116 (D.C.Cir.1984) ("The Commission may not abuse its discretion by arbitrarily choosing to disregard its own established rules and procedures in a single, specific case. Agencies must implement their rules and regulations in a consistent, evenhanded manner.")¹³⁶

¹³⁵ *Qwest*, 689 F.3d at 1230-31.

¹³⁶ *Id.* at 1228 (emphasis added).

2. The FCC's Forbearance Precedents Would Make It Difficult for the Agency to Grant Adequate Forbearance

While the FCC may have justified making forbearance more difficult in *Qwest*, it is difficult to see how, after *Qwest*, the FCC could justify reversing course to reach the opposite conclusion about the broadband market (“highly competitive”) while simultaneously justifying the need for Net neutrality rules (“not competitive enough”) and adequately justifying its re-interpretation of Title II in a way that would account for the enormous reliance interests predicated on Title I treatment of broadband, either as a policy matter or to avoid imposing an unconstitutional regulatory taking under the Fifth Amendment, as discussed below.¹³⁷

It is also worth noting the limited nature of the precedents cited by those currently arguing that forbearance would be easy. In *EarthLink*, the court did uphold the FCC's grant of forbearance of unbundling obligations that would otherwise have applied to fiber broadband, but note that “the FCC then appropriately stepped through the three-part forbearance inquiry, at each step explaining its view that forbearance would only have a ‘modest’ effect that was outweighed by forward-looking benefits (increased competition and fiber deployment).”¹³⁸ The impact of forbearance in this case was “modest” because the service at issue had a 0% market share; it did not yet exist.

Harold Feld also points to the D.C. Circuit's 2009 decision in *Ad Hoc Telecom. Users Committee v. FCC*, saying:

The FCC did exactly what folks asking it to classify broadband access as Title II want them to do – give general national forbearance based on the competing interests in Section 706 with a backstop of fairly light Title II authority under Sections 201, 202 and 208 (which allows parties to complain to the FCC about violations and allows the FCC to resolve these complaints).¹³⁹

¹³⁷ See *infra* at VI.E.

¹³⁸ *EarthLink, Inc. v. FCC*, 462 F. 3d 1, 9 (D.C. Cir. 2006) [*EarthLink*].

¹³⁹ 572 F. 3d 903 (D.C. Circuit 2009).

It is true that the FCC granted forbearance from dominant carrier regulations (i.e., not the “common carriage” sections he mentioned). But Feld ignores several salient aspects of this decision.

First, the Court found it dispositive that the Commission denied the forbearance requests in part, keeping the ILECs that provided special access lines (direct connections for businesses seeking high speed broadband) subject to Sections 201, 202 and 208. Feld notes this but dismisses these as “fairly light Title II authority.” This reveals an important distinction that is rarely discussed in general conversations about forbearance: While those advocating for “Title II Lite” generally imply, if not state explicitly, that they are seeking to impose only just enough Title II net neutrality, in fact, they would subject broadband providers to full-blown common carriage regulation.

Moreover, the Commission made clear, and the court found dispositive, that the forbearance at issue was being granted in the context of the highly specialized market for “special access” lines (business broadband). The court allowed the FCC to forbear from dominant carrier regulations, because business customers had the sophistication to take advantage of the common carrier rules, which generally are more suited to governing business-to-business conduct, while the dominant carrier regulations are generally more suited to protecting unsophisticated consumers:

To respond to the concern that ILECs might be able to skirt their basic Title II common-carrier obligations to allow interconnection and charge just, reasonable, and not unreasonably discriminatory prices, the FCC pointed out that business end-users and competitive broadband service providers who lease or use the ILECs' special access lines may bring complaints under 47 U.S.C. § 208. Section 208 establishes a formal fast-track process for business end-users and competitive broadband providers to challenge the reasonableness of rates charged by ILECs, among other things. Under § 208, all complaints as to “the lawfulness of a charge, classification, regulation, or practice” will be investigated and resolved within five months. *Id.* § 208(b)(1). In its decision here, moreover, the FCC reiterated its commitment to the five-month mandate for resolution of § 208 complaints. *See AT&T Order*, 22 F.C.C.R. at 18,726, ¶ 36; *Embarq/Frontier Order*, 22 F.C.C.R. at 19,498, ¶ 35. In that regard, it bears mention that competitive broadband business service providers and business customers are sophisticated entities

that presumably would not be shy about invoking available remedies if faced with ILECs gouging them.¹⁴⁰

Further, the FCC had granted forbearance only with respect to non-TDM services, while retaining them for the traditional TDM services that form the backbone of traditional telephone networks. As the court explained:

This means the following: To the extent ILECs try to abuse their control over special access lines, competitive carriers not only can file § 208 complaints with the FCC but also can obtain access to the ILECs' price-regulated TDM-based services to provide and compete with the ILECs in providing non-TDM-based special access services.

Perhaps most importantly, the FCC “noted competitive carriers’ growing ability to deploy their own facilities and thereby reduce their reliance on ILECs altogether.”¹⁴¹ This highlights perhaps the greatest difficulty the FCC may face in attempting to distinguish its refusal to grant forbearance in *Qwest* from any attempt to grant forbearance in the future: *Qwest* hinged on the FCC’s finding that the market was an effective duopoly, whereas *Ad Hoc Telecom Users Committee* hinged on the ease of deploying a new network not to a mass market but to limited numbers of business users. And, finally, the *EarthLink* case was decided *before* the *Qwest* decision – and as discussed, is hardly inconsistent with it.

In summary, it is difficult to see how the FCC could justify a radical change in its approach to forbearance, even assuming it has the discretion to make such a change.

3. Forbearance Would Be Long and Messy

But whatever discretion the FCC enjoys in forbearance and in changing its views on how to apply it, the process of sorting this out will not be quick or easy. The FCC is not proposing simply to chip away at the margins of the Title II regime, but to adopt it wholesale – and then un-do most of it. The more the FCC tries to rush the process of building a record to justify its case, the more likely it is to lose in court and have to start over.

¹⁴⁰ *Ad Hoc Telecom. Users Committee v. FCC*, 572 F. 3d 903 (D.C. Cir. 2009).

¹⁴¹ *Id.* at 910.

While the statute does not specify who bears the burden of proof in a forbearance proceeding, the Commission has, through a notice-and-comment rulemaking proceeding, placed the burden on the petitioner.¹⁴² That interpretation was recently upheld by the Tenth Circuit Court of Appeals in *Qwest*.¹⁴³

Making “reclassification” contingent on forbearance would not fully address reliance interests. A court would probably recognize forbearance as a way of addressing reliance interests and the FCC’s statutory duty to promote broadband only if “reclassification” were made contingent on successful, and expeditious completion of forbearance. As explained below, this would likely be difficult, but even if it were effective, it would probably prove inadequate for the simple reason that the process of forbearance is sufficiently long, complicated and uncertain that the real harm to investment would already have been done by the looming uncertainty of the regulatory treatment of broadband.

4. The Possibility of *Unforbearance* May Undermine the Certainty Offered by Forbearance

Simplifying forbearance is a double-edged sword: On the one hand, making forbearance easier or faster would seem to help the FCC edit down Title II to create a more workable regulatory regime. But on the other hand, simplifying and expediting forbearance would, presumably, have the same effect on *unforbearance*. To that extent, changing the forbearance process would undermine the regulatory certainty provided by forbearance, making it less effective as a policy tool for neutralizing the negative consequences of Title II on investment and therefore less capable of helping the Commission fulfill its statutory mandate to promote broadband or address the reliance interests predicated on Title I.

It is unclear whether the FCC can *unforbear*, since Section 10 is silent on this point. If forbearance is a one-way ratchet, a forbearance decision towards Title II Lite will be secure once made. But if not, if the FCC gets discretion under *Chevron* to read *unforbearance* into Section 10, then the more deference the agency gets on how to use Section 10, the easier it will be to undo any forbearance decision in the future because, most importantly, it

¹⁴² FCC, Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 19334, As Amended, *Report and Order*, WC Docket No. 07-267 ¶ 20 (2009) [*Forbearance Procedures Order*].

¹⁴³ *Qwest*, 689 F.3d at 1225-26.

would be arbitrary and capricious for the FCC to apply inconsistent methodologies in the two cases. The prospect of easy unforbearance means that forbearance decisions will be, at best, temporary reprieves.

Whether the FCC can unforbear at all is a difficult question to answer under the mess that is *Chevron* jurisprudence, but the critical point is, so long as it goes unanswered (i.e., until the FCC actually attempts to do it and a court rules on the question), the looming *possibility* of unforbearance will necessarily diminish the certainty offered by any grant of forbearance. (Indeed, avoiding such shifts is essentially the purpose of barring arbitrary and capricious decision-making.) This, in turn, will frustrate the FCC's effort to rebuild something like Title I inside of Title II to avoid discouraging investment in broadband – and other services potentially subject to Title II.

In 2010, FCC General Counsel Austin Schlick attempted to quell concerns about unforbearance after the FCC first floated the idea of reclassification-with-forbearance or “Title II Lite,” noting that, in “In 17 years we've been forbearing in the wireless space, [unforbearance] ... has never happened and it strikes me as a rather difficult challenge to the commission.”¹⁴⁴ To be sure, there is a genuine question of how *Chevron* would apply in this circumstance. Consistent with our discussion of Section 706 below, we would generally prefer a more constrained version of *Chevron* deference, and an assumption that Congress did not intend to give powers to agencies that it could have, but did not, write into the statute. But after *City of Arlington*, it is far from clear that the courts would bar the FCC from reading unforbearance into the statute. Indeed, our general, descriptive argument about the state of the law is not that courts will refuse to defer to agency constructions that read powers into statutes that are not there, but that the FCC's interpretation of Section 706 as an independent grant of authority has such profound implications that it effectively moots the rest of the Act – and that the text and history of Section 706 and the 1996 Telecommunications Act in general render such a reading unreasonable. There is certainly nothing inconsistent about predicting that the FCC will

¹⁴⁴ Mark Robichaux, *Cable Show 2010: Schlick: Title II Offers More Certainty*, MULTICHANNEL NEWS (May 13, 2010), available at <http://multichannel.com/news/policy/cable-show-2010-schlick-title-ii-offers-more-certainty/266257#sthash.cnJFZmyq.dpuf>.

eventually lose on its interpretation of Section 706 while predicting that it might prevail if it reads unforbearance into Section 10.¹⁴⁵

Perhaps the strongest argument for the FCC's implied power to unforbear came from Public Knowledge. Now among the chief proponents of "reclassification" today, Public Knowledge has insisted forbearance, dismissing concerns to the contrary.¹⁴⁶ Yet, ironically, back its 2010 Reply Comments on the FCC's net neutrality NPRM, Public Knowledge urged that "The Commission should [], mindful of the inevitable court battles that would result from any unforbearance proceeding, exercise the utmost care in deciding to forbear from provisions of Title II in the first place."¹⁴⁷ Public Knowledge noted the debate that had occurred among commenters about the possibility of unforbearance, and noted:

It is not novel for the Commission to forbear from particular rules temporarily. *See, e.g., CTIA v. FCC*, 330 F.3d 502 (D.C. Cir. 2006) (upholding temporary forbearance in number portability *See CTIA's Petition for Forbearance From Commercial Mobile Radio Services Number Portability Obligations, Memorandum Opinion and Order*, 14 F.C.C.R. 3092, 1999 WL

¹⁴⁵ We do note, for the sake of completeness, that, the version of the Telecommunications Act that passed the Senate contained the current Section 10 as Section 303, the current Section 706 as Section 304, and an additional section, Section 305, authorizing the FCC to modify or terminate any provision of the Act. In addition, Section 305 explicitly authorized something akin to unforbearance: "provide for periodic reconsideration of any modifications or terminations made to such regulations, with the goal of applying the same set of regulatory requirements to all integrated telecommunications service providers, regardless of which particular telecommunications or information service may have been each provider's original line of business." S.652, 104th Cong., Sec. 305 (June 15, 1995) (Engrossed in Senate), available at <http://thomas.loc.gov/cgi-bin/query/F?c104:1:./temp/~c104NxksSg:e184729>; see *infra* at [CITE]. Clearly, Congress knew how to explicitly authorize unforbearance. This legislative history *might* be interpreted to undermine the reasonableness of a claim by the FCC that Section 10 included an implied unforbearance power. But given that the D.C. Circuit did not even bother to consider the history of Section 305 in its analysis of Section 706, this kind of analysis seems unlikely to carry the day in court. More importantly, the fact that the FCC might ultimately lose in such litigation does not diminish the initial harm done in undermining past investment expectations predicated on Title I, which the Commission will try to preserve through forbearance, if the possibility of unforbearance hinges on arcane questions of statutory interpretation under *Chevron*.

¹⁴⁶ See, e.g., Harold Feld, *Title II Forbearance Is Actually So Easy It Makes Me Want To Puke*, WETMACHINE (July 14, 2014), available at <http://www.wetmachine.com/tales-of-the-sausage-factory/title-ii-forbearance-is-actually-so-easy-it-makes-me-want-to-puke/> ("the anti-Net neutrality camp argues that getting the FCC to forbear from any rule is such a horribly complicated and detailed market-by-market analysis that the FCC couldn't possibly grant the kind of broad, nationwide forbearance we would need to make Title II workable. As someone who actually lived through the 8 years of the Bush Administration and saw almost every single pro-competition provision of the 1996 Act stripped away by forbearance proceedings, I can only say 'hah, I wish.'")

¹⁴⁷ Framework for Broadband Internet Service, *Reply Comments of Public Knowledge*, GN Docket No. 10-127, at 21 (Aug. 12, 2010), available at https://www.publicknowledge.org/files/docs/PK_Reply_Comments_Third_Way.pdf.

58618 (1999) ("*Temporary Forbearance Order*"). Nor was the Commission required to make a particularized showing that the end of its forbearance period was dependent on a dramatic change in circumstances. If the Commission can place a reasonable time limit on forbearance, there is no reason that forbearance should be intended to operate solely as a permanent, regulatory veto of a rule or statute.¹⁴⁸

If the FCC did prevail in such an interpretation under Section 10, how hard would unforbearance be? AT&T addressed this issue well in 2010, responding to the FCC's initial "Reclassification Lite" proposal:

As more details on the legal theories girding this proposal come out, we've noticed a rather curious contradiction in the FCC's proposal. On one hand, when the FCC explains why it can jettison over a decade of bi-partisan deregulatory precedent and impose Title II common carrier regulations on the Internet, the agency claims that the legal threshold for "reclassification" is quite low. Citing the Supreme Court's decision in *FCC v. Fox Television Stations*, the FCC says it need not show any major change in circumstances or "market shift;" it only needs to take a "fresh look" at Internet technology and the broadband market and then "simply provide a reasoned justification" for its decision. (As you might expect, we and others have a very different view of Fox).

On the other hand, when explaining why nobody should be concerned that the FCC will later rely on this same permissive interpretation of *Fox* to simply "unforbear" and impose some or all of the remaining Title II regulations on broadband Internet access, the agency says that reversing its forbearance precedent would involve a "painstaking process" requiring it "to compile substantial record evidence that the circumstances it previously identified as supporting forbearance had changed.

Yup, you heard that right – the FCC is saying that, under *Fox*, overturning precedent is quite easy when it suits the FCC's net neutrality agenda (you

¹⁴⁸ *Id.* at 21, n. 86.

just need a “fresh look”), but it’s suddenly very hard when doing so would raise concerns about the legitimacy of that same agenda (it requires a “painstaking process”). If this sounds like the FCC wants to have its cake and eat it too, don’t worry, the FCC has an answer for that as well. It claims that in the 17 years since Congress gave it forbearance authority, it has *never* reversed a forbearance decision.

But reversing a whole slew of broadband forbearance decisions is exactly what the FCC’s National Broadband Plan contemplates. In response to a group of carriers that are urging the FCC to “revisit the broadband forbearance relief” granted to AT&T, Verizon, Qwest and others just a few years ago for our optical and packet-switched broadband transmission services, the National Broadband Plan recommends re-examining “the FCC’s decisions to deregulate aspects of these services.” In fact, the FCC has already sought comment on a framework for doing just that in its special access rulemaking.¹⁴⁹

Indeed, in 2012, the FCC invited comment on reregulating special access, presumably through unforbearance.¹⁵⁰

In other words, if the FCC can clear the hurdle of *Chevron*, it is difficult to see why the agency could not claim the same deference for unforbearance as it claims now for forbearance. Numerous commenters made this point during the 2010 rulemaking cycle.¹⁵¹

¹⁴⁹ Paul Mancini, AT&T Senior Vice President and Assistant General Counsel, *The FCC: Having Its Forbearance Cake and Eating It Too*, June 16, 2010, <http://www.attpublicpolicy.com/government-policy/the-fcc-having-its-forbearance-cake-and-eating-it-too/>

¹⁵⁰ Special Access for Price Cap Local Exchange Carriers, *Report & Order & Further Notice of Proposed Rulemaking*, WC Docket No. 05-25 (2012), available at <http://www.fcc.gov/document/fcc-initiates-comprehensive-special-access-data-collection>.

¹⁵¹ See Framework for Broadband Internet Service, *Notice of Inquiry*, GN Docket No. 10-127 (2010), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-114A1_Rcd.pdf. In that docket, see, e.g., TWC Comments of Time Warner Cable, at 65, available at <http://apps.fcc.gov/ecfs/document/view;jsessionid=DGDzRknYSL2Rn11Yh1YWhTmDpRnJgVpGGQqYb822MLhv2PYT6TyZj!-1694890999!-477673473?id=7020545208> (“[A]ny forbearance ruling reached by this Commission would be subject to change by future Commissions, which would remain free to remove forbearance relief and restore the presumptive application of full Title II regulation”); Comments of AT&T Inc., at 116, available at

Since the FCC has never explicitly disclaimed the ability to unforbear, it is not clear that the *Fox* decision would require the FCC to justify its initial finding that Section 10 allows for unforbearance, too, let alone impose any additional burden on the FCC's use of unforbearance in the future.

5. The FCC Cannot Sidestep Standard Forbearance Requirements through Section 706

In the 1998 Advanced Services Order,¹⁵² the Commission found that Section 706 is not an independent grant of authority:

After reviewing the language of section 706(a), its legislative history, the broader statutory scheme, and Congress' policy objectives, we agree with numerous commenters that section 706(a) does not constitute an independent grant of forbearance authority ***or of authority to employ other regulating methods***. Rather, we conclude that ***section 706(a) directs the Commission to use the authority granted in other provisions***, including the forbearance authority under section 10(a), to encourage the deployment of advanced services.¹⁵³

In 2010, the FCC reinterpreted Section 706(a) to be an independent grant of authority, yet still tried to argue that this new interpretation was consistent with the *Advanced Services Order*.¹⁵⁴ As the D.C. Circuit summarized:

<http://apps.fcc.gov/ecfs/document/view?id=7020544677> ("Accordingly, forbearance would be prone to...attempted reversal by future Commissions making equally context-specific a subjective determinations."); Comments of NCTA, at 65, available at

<http://apps.fcc.gov/ecfs/document/view;jsessionid=bTyjRknTxjhK1QP1chZypQBG7Vgf9yQvXv8ZbqnDrhh2VrcZpFrs!-477673473!-1694890999?id=7020546797> ("A decision to forbear does not immunize the decision from future reversal anymore than any other ruling.").

¹⁵² Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, CC Docket No. 98-147 (1998) [*Advanced Services Order*], available at http://transition.fcc.gov/Bureaus/Common_Carrier/Orders/1998/fcc98188.pdf.

¹⁵³ *Advanced Services Order*, at ¶ 69 (emphasis added).

¹⁵⁴ Open Internet Order, *supra* note 3, at ¶¶ 118-19 ("The Advanced Services Order is, therefore, consistent with our present understanding that Section 706(a) authorizes the Commission (along with state commissions) to take actions, within their subject matter jurisdiction and **not inconsistent with other provisions of law**, that encourage the deployment of advanced telecommunications capability by any of the means listed in the provision") (emphasis added).

The Commission accordingly concluded that Section 706(a) did not give it independent authority—in other words, authority over and above what it otherwise possessed—to forbear from applying other provisions of the Act. **The Commission’s holding thus honored the interpretive canon that “[a] specific provision . . . controls one[] of more general application.”**

While **disavowing a reading of Section 706(a) that would allow the agency to trump specific mandates of the Communications Act**, the Commission nonetheless affirmed in the *Advanced Services Order* that Section 706(a) “gives this Commission an affirmative obligation to encourage the deployment of advanced services” using its existing rulemaking, forbearance and adjudicatory powers, and stressed that “this obligation has substance.”¹⁵⁵

Clearly the *Open Internet Order’s* finding on Section 706(a) is a reinterpretation that is inconsistent with its prior finding, as the D.C. Circuit acknowledged.¹⁵⁶

There are likely legal barriers to the FCC simply reinterpreting Section 706(a) to mean that it can forbear here. One of the D.C. Circuit’s limiting principles for Section 706, and in fact the very one that led to the no-blocking and non-discrimination rules being struck down, is that the FCC cannot use this authority in a way that conflicts with or “trumps” another part of the Act. Since Section 10 sets explicit standards for forbearance, the FCC cannot simply dispense with them by asserting that Section 706(a) gives it authority to do so. If Section 706(a)’s language on forbearance gives the FCC the ability to avoid Section 10’s requirements, then Section 10’s requirements are effectively rendered moot — an interpretation barred by the statutory canon against surplusage.¹⁵⁷

¹⁵⁵ *Id.* ¶¶ 118-19.

¹⁵⁶ *Verizon*, 740 F.3d at 637 (“Perhaps the Commission should have more openly acknowledged that it was not actually describing the *Advanced Services Order*, but instead rewriting it in a more logical manner. In this latter task, however, the Commission succeeded: its reinterpretation of the *Advanced Services Order* was more reasonable than the *Advanced Services Order* itself.”).

¹⁵⁷ ESKRIDGE, LEGISLATION 865 (“A construction which would leave without effect any part of the language of a statute will normally be rejected.”).

6. Assuming the FCC Could Legally Lower the Bar for Forbearance, Would It Actually Do So?

Finally, behind all these legal questions lurks a critical political question: Assuming the FCC does have the discretion to make forbearance much easier, as a legal matter, will it actually be willing to lower the bar for forbearance going forward, knowing that a more deregulatory-minded FCC could, in the future, use forbearance to effectively gut the entire Communications Act? Once the FCC has engaged in a large-scale across-the-board *sua sponte* grant of forbearance in markets that the FCC would have, in 2012, considered insufficiently competitive, what is to stop a future FCC from seizing that precedent and applying it more widely?

Discretion, in other words, is a double-edged sword. Those who insist the FCC has all the discretion it needs today are unlikely to actually support the use of that discretion in the future, given their general bias against forbearance.

At a minimum, avoiding the potential for making forbearance *too* easy would make it more difficult for the FCC to justify changing its mind to make forbearance just easy enough to accomplish the bare minimum of forbearance it concludes is necessary to rebuild something like Title I within Title II.

From the perspective of those companies that have reasonably relied on their Title I status, the worst case scenario might be agency reinterpretation of the Act to effect “reclassification,” followed by overly cautious attempts at forbearance. The FCC might, for example, hesitate to lower the analytical bar for forbearance – but in the process, such caution might cause the current forbearance effort to fail. It’s conceivable that the FCC would then either give up on forbearance altogether, or continue to make half-hearted attempts without ever going quite far enough in justifying its change of approach that it can actually successfully conclude forbearance. The result could be, rather than recreating some of the certainty provided by Title I today, protracted litigation and a prolonged or indefinite lack of certainty – or worse, certainty that the rules simply have fundamentally changed, from Title I’s regulatory light touch to the heavy-handed monopoly regulations of Title II.

D. Even if the FCC Can Adequately Justify its Re-Interpretation, It May Not Legally be Able to Force Common Carriage Status

In her 2010 comments on the FCC's NPRM, Barbara Esbin, then Senior Fellow at The Progress & Freedom Foundation, explained why, beyond merely having to explain its rationale for re-interpreting the meaning of "telecommunications service" (to avoid its decision being arbitrary and capricious), the FCC lacks the statutory authority to change the regulatory classification of an existing service for purely policy reasons, and may be sharply limited in its ability to change regulatory classifications of existing services, even for ostensibly legal reasons.¹⁵⁸

For all the talk among advocates of Title II that the D.C. Circuit "invited" the FCC to "reclassify" broadband, this fundamental question has yet to be examined by any court. The D.C. Circuit's *Cellco* and *Verizon* decisions address a related, but distinct issue: at what point has the FCC imposed *de facto* common carriage? This question is whether the FCC may legally change the *de jure* status of an information service of broadband and, if so, how.

Esbin explained:

Southwestern Bell follows a long line of cases denying the FCC the ability to impose Title II regulation based simply on its notions of good policy. "While the Commission may look to the public interest in fine-tuning its regulatory approach, it may not impose common carrier status upon any given entity on the basis of the desired policy goal the Commission seeks to advance." In NARUC I, for example, the D.C. Circuit upheld the FCC's decision to create a private mobile radio service, including a new class of entrepreneurial operators known as "special mobile radio systems," in the absence of any indication that the systems would in practice behave as common carriers." The court, stated, further, that "we reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve. **The common law definition of common carrier is**

¹⁵⁸ See Preserving the Open Internet, *Comments of Barbara S. Esbin*, GN Docket No. 09-191 (Jan. 14, 2010), available at <http://www.pff.org/issues-pubs/filings/2010/011410-FCC-network-neutrality-esbin-filing.pdf>.

sufficiently definite as not to admit of agency discretion in the classification of operating communications entities.¹⁵⁹

She continued in an extensive discussion that merits inclusion here in full:

In drawing this conclusion, the NARUC I court stated that, “[f]or purposes of the Communications Act, a common carrier is “any person engaged as a common carrier for hire...,” 47 U.S.C. § 153(h) (1970), whereas the Commission’s regulations offered a “slightly more enlightening definition: any person engaged in rendering communication service for hire to the public,” 47 C.F.R. § 21.1 (1974). The concept of “the public,” according to the court, “is sufficiently indefinite as to invite recourse to the common law of common carriers to construe the Act.” *Id.* at 640. “A good deal of confusion,” the court observed, “results from the long and complicated history of that concept.” *Id.* After surveying relevant authorities, the NARUC I court identified as key “the quasi-public character implicit in the common carrier [which] is that the carrier undertakes to carry for all people indifferently....” *Id.* at 641. The court explained, “[A] carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal. It is not necessary that a carrier be required to serve all indiscriminately; it is enough that its practice is, in fact, to do so.” *Id.* **Because private and common carriers may be indistinguishable in terms of the clientele actually served, the dividing line between them must turn on the manner and terms by which they approach and deal with their customers.** Thus, in determining whether to overturn the FCC’s classification of Specialized Mobile Radio Systems (SMRS) as non-common carriers, the court examined the likelihood that SMRS would hold themselves out indifferently to serve the public, or such portion of the public as could reasonably make use of the service. “In making this determination, we must inquire, first, whether there will be any legal compulsion thus to serve indifferently, and if not, second, whether there are reasons implicit in the nature of SMRS operations to expect an indifferent holding out to the eligible user public.” *Id.* at 642. The court concluded that the answer was no.

¹⁵⁹ *Id.* at 77.

There was nothing in the proposed FCC regulations that would either compel SMRS to serve any particular applicant, or more importantly, limit “their discretion in determining whom, and on what terms, to serve...” *Id.* While not a model of clarity, **this pre-1996 Act analysis could be read to suggest that the FCC is empowered to impose common carrier status on a non-common carrier, thus supplying the “regulatory compulsion to serve the public indifferently.”** Such a reading, however, is contradicted by the court’s rejection of “those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending on the regulatory goals it seeks to achieve. ... A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.” *Id.* at 644. **This strongly suggests that although an entity may take on the obligations of common carriage by holding itself out indifferently to provide communications service to the public, the FCC was not delegated the authority by Congress to force common carrier status on non-common carriers.** This situation is distinguishable from those cases in which the FCC has created a new service, and specified that those wishing to provide it must operate as common carriers.¹⁶⁰

In other words, it simply is not clear that the FCC can impose Title II common carrier status on broadband carriers that have either always, or long, been regulated under Title I -- no matter how well the FCC explains this change of interpretation.

E. The Commission Has a Statutory Duty to Promote Broadband Investment and Deployment

Perhaps the clearest reason for the FCC not to “reclassify” broadband lies in Section 706 itself: Far from being the vast grant of discretion the FCC now claims, the FCC had, until 2010, always understood Section 706 to be what any reasonable lay person reading the

¹⁶⁰ *Id.* at 77-78, n. 365. As an example of such a new service being subjected to common carriage requirements, Esbin cites *In the Matter of Amendment to the Commission’s Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems and DBSC Petition for Declaratory Rulemaking Regarding the Use of Transponders to provide International DBS Service*, Report and Order ¶ 45, IB Docket No. 95-41; 11 F.C.C.R. 2429; DBS-88-08/94-13DR, Release Number FCC 96-14, Released 1/22/96.

text would have understood Congress to have meant: a command to the FCC to promote broadband deployment and investment: a duty, not a power.

For four years, the FCC has justified its efforts to regulate Net neutrality with the far-fetched claim that regulating broadband would actually promote investment in it through a sort of Rube Goldberg mechanism of causation: net neutrality regulations will increase innovation, which will then make broadband connections more valuable, which will then increase demand for broadband and spur more deployment. The FCC has refused to subject this “triple cushion shot” theory to independent economic analysis, as requested by FCC Commissioners.¹⁶¹

Now, the Commission is considering something even more radical: to fundamentally reverse the regulatory treatment of broadband, to switch the default assumption to one of heavy regulation – but then to reverse most of that change through forbearance. In theory, the net effect should be the same, since the Commission will merely be imposing the same rules under a different basis. But, in fact, the starting presumption may be what really matters, because the default will be what matters during the years it may take for the FCC to complete its forbearance proceedings, for the result to be litigated, for the FCC to try again, for litigation, and so on...

F. The FCC Must Counterbalance the Reliance Interests Predicated on Title I under *Fox*

Aside from the issue of statutory interpretation, if the FCC is to reclassify broadband Internet access as a “telecommunications service” under Title II, it also must account for the significant reliance interests the FCC’s previous classification has engendered. Specifically, because the Commission previously classified broadband Internet access services under Title I (exclusively), and broadband providers quite reasonably relied upon that classification in making capital investments on an unprecedented scale: With one estimate showing \$1.2 trillion in broadband investment since 1996, and almost \$500 billion since the Commission officially subjected them to Title I in 2005.¹⁶²

¹⁶¹ See, e.g., NPRM, at p. 96-97 (Commissioner Pai, dissenting).

¹⁶² U.S. Telecom, *Broadband Investment* (2012), available at <http://www.ustelecom.org/broadband-industry/broadband-industry-stats/investment>.

Changing course now by applying Title II regulations¹⁶³ to the networks built on the expectation of being lightly regulated under Title I would be arbitrary and capricious – unless the Commission properly accounted for the reliance interests engendered by the previous interpretation by offering a reasoned explanation for why the old interpretation is being abandoned in favor of the new one.

Only recently has the Supreme Court clearly articulated this principle when, in 2009, it struck down the FCC's reinterpretation of its indecency standards.

[T]he agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. ... It would be arbitrary or capricious to ignore such matters.¹⁶⁴

The mere fact that this is not a well-developed area of law does not mean it would not be the hurdle on which “reclassification” fails in court. Indeed, it was the FCC itself that lost on this very issue. This is not an accident. The FCC is a uniquely powerful agency with vast discretion. On its whims depend hundreds of billions of dollars of investment. What clearer test case could there be for the principle that agencies must take account of reliance interests than the FCC changing its mind about the basis for regulating broadband providers, the leading source of capital investment in the U.S. economy for over a decade?

So what must the FCC do to satisfy this burden? Of course, the Commission could begin by attempting to downplay the degree to which broadband providers actually relied on its classification under Title I. Disaggregating incentives would be a difficult task. But even if the FCC could somehow show that most of these investments would have been made anyway, the FCC would merely have reduced, somewhat, the scale of the reliance interests. The investment numbers at issue are so large that this seems like splitting hairs. Could the Commission seriously claim that the regulatory treatment of broadband makes no

¹⁶³ *E.g.*, 47 U.S.C. §§ 203, 251, 271.

¹⁶⁴ *Fox*, 556 U.S. at 513-14 (internal citation omitted); *see also* 5 U.S.C. 706(2).

difference after three chairmen – one Democrat and two Republicans – spent essentially seven years wrestling with the difficult question of how to rescue broadband from Title II?

At a minimum, this approach would require serious economic analysis – which the Commission has heretofore been unwilling to engage in. The Commission has not performed any such analysis on its own, preferring instead merely to rely on its convenient-yet-unproven triple cushion shot theory. Indeed, the Commission recently rejected Commissioner Pai’s proposal that each Commissioner should select two independent scholars, one economist and one technical expert, to write an independent study of the issue, so that the Commission could draw on a variety of carefully considered sources.¹⁶⁵

Second, the Commission could argue that Title II would not actually harm broadband providers because the FCC would forbear from applying those aspects of Title II that might otherwise have discouraged investment. In other words, the FCC could essentially maintain the status quo, applying Title II with one hand but taking nearly all of it away with the other. This is essentially what the FCC proposed in 2010 with its “Title II Lite.” Of course, it would only work to the extent the FCC is actually able to provide long-term certainty that these regulations will not be applied to broadband – and to do so quickly, without leaving broadband providers under a regulatory cloud that might make it more difficult to raise the capital needed to continue investing in their networks.

As discussed above, this is simply not how forbearance actually works. Forbearance takes too long and is too unpredictable to provide this certainty. At a minimum, broadband providers would be left to languish in regulatory uncertainty during the period of years during which the FCC attempted forbearance and litigated over it.¹⁶⁶

¹⁶⁵ NPRM, at p. 96-97 (Commissioner Pai, dissenting) (“Just as we commissioned a series of economic studies in past media-ownership proceedings, we should ask ten distinguished economists from across the country to study the impact of our proposed regulations and alternative approaches on the Internet ecosystem. To ensure that we obtain a wide range of perspectives, let each Commissioner pick two authors. To ensure accuracy, each study should be peer reviewed. And to ensure public oversight, we should host a series of hearings where Commissioners could question the authors of the studies and the authors of those studies could discuss their differences. Surely the future of the Internet is no less important than media ownership. But we should not limit ourselves to economic studies. We should also engage computer scientists, technologists, and other technical experts to tell us how they see the Internet’s infrastructure and consumers’ online experience evolving. Their studies too should be subject to peer review and public hearings.”).

¹⁶⁶ See *supra* at 39 *et seq.*

Third, the Commission could try to provide a degree of “detailed justification” commensurate with whatever reliance interest the FCC could not either plausibly discount or address through forbearance. But what would this look like? Some scholars have argued for “reclassification” based primarily on their claim that the factual predicate for the Commission’s 2002 and 2005 decisions no longer holds.¹⁶⁷ In the 2005 *DSL Declaratory Order*, the Commission held that:

Because wireline broadband Internet access service inextricably combines the offering of powerful computer capabilities with telecommunications, we conclude that it falls within the class of services identified in the Act as “information services.” The information service classification applies regardless of whether subscribers use all of the functions and capabilities provided as part of the service (e.g., e-mail or web-hosting), and whether every wireline broadband Internet access service provider offers each function and capability that could be included in that service. Indeed, as with cable modem service, an end user of wireline broadband Internet access service cannot reach a third party’s web site without access to the Domain Naming Service (DNS) capability “which (among other things) matches the Web site address the end user types into his browser (or ‘clicks’ on with his mouse) with the IP address of the Web page’s host server.” The end user therefore receives more than transparent transmission whenever he or she accesses the Internet.¹⁶⁸

Certain scholars have argued that, because it has become less common for broadband subscribers to rely on their broadband provider for email or webhosting, and because it is now possible for lay users to select an alternative DNS service like the free Google Public DNS service with relative ease,¹⁶⁹ it no longer makes sense to treat broadband as an “inextricably combined” bundle of telecommunications and information services, and that the Commission should therefore break out the telecommunications component

¹⁶⁷ See, e.g., Wu & Narechania, *supra* note 123.

¹⁶⁸ 2005 Declaratory Ruling at ¶ 15.

¹⁶⁹ See Google, *What is Google Public DNS?* (last visited July 15, 2014), available at <https://developers.google.com/speed/public-dns/>

separately.¹⁷⁰ If this is all the Supreme Court meant by a “more detailed explanation,”¹⁷¹ then the *Fox* test has little real meaning.

Indeed, the FCC made clear that it did *not* assume, in reaching its conclusion, that all broadband users relied on the additional information services available as part of broadband service.¹⁷² So merely noting that more users today choose not to get email, web hosting or DNS from their broadband provider hardly seems like a “detailed explanation” capable of explaining the FCC’s change in interpretation without being arbitrary and capricious.

There is, of course, another approach the Commission could take to providing a more “detailed explanation” of its reasoning for applying Title II to broadband. It could explain its change of course on policy grounds and claim the kind of deference from the court that agencies generally get in resolving policy questions. There are certainly many who believe that Chairmen Kennard, Powell and Martin were misguided in their effort to promote broadband competition – and that Title II should govern broadband.

We disagree, and believe that the state of competition vindicates this partisan approach to promoting facilities-based competition and that the key to promoting more competition lies in removing remaining barriers to entry at the federal and state level, not returning to monopoly-era regulation.¹⁷³ But as a legal matter, if the Commission were to find otherwise, it is difficult to see how it could argue that the market is uncompetitive enough to require returning to Title II, but just competitive enough to allow the FCC to forbear

¹⁷⁰ See, e.g., Wu & Narechania, *supra* note 123.

¹⁷¹ *Fox*, 556 U.S. at 512-13 (“[T]he agency need not always provide a more detailed justification [for a change in policy] than what would suffice for a new policy created on a blank slate. Sometimes it must – when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.”).

¹⁷² 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 Demand Proceedings, *Report & Order & Notice of Proposed Rulemaking*, 20 FCC Rcd 14853, ¶ 15 (2005) [2005 Declaratory Ruling] (“The information service classification applies regardless of whether subscribers use all of the functions and capabilities provided as part of the service (e.g., e-mail or web-hosting), and whether every wireline broadband Internet access service provider offers each function and capability that could be included in that service.”).

¹⁷³ Berin Szoka & Geoffrey Manne, *The Feds Lost on Net Neutrality, But Won Control of the Internet*, WIREd (Jan. 16, 2014), available at <http://www.wired.com/2014/01/one-talking-comes-net-neutrality/>; [Cross cite to policy comment]

from those aspects of Title II that the Commission needs to forbear from – either as a political matter, a policy matter or a legal matter.

G. Conclusion: Re-Opening Title II Would Create a Mess, which Forbearance Cannot Clean Up

Upon entering Number Ten Downing Street after first being elected British Prime Minister in 1979, Margaret Thatcher famously recited the venerable “Prayer of St. Francis.” Most notably, she vowed: “Where there is discord, may we bring harmony.”¹⁷⁴

“Harmony” is precisely what the FCC brought to the regulatory treatment of broadband through bipartisan action taken between 1998 and 2005. Reversing that treatment would do the opposite, replacing harmony with discord. This would do precisely the opposite of what the FCC purports to be doing: fulfilling its statutory mandate under Section 706 (again, a duty, not a power) to promote broadband deployment. It would also violate Congress’s clear command in Section 230 that “It is the policy of the United States... to preserve the vibrant and competitive free market ... for the Internet and other interactive computer services, unfettered by Federal or State regulation...”¹⁷⁵

Promising to clean up the mess through forbearance is, essentially, an empty promise, on which the FCC simply cannot deliver – and certainly not in a timely fashion. Those pushing the Commission to “reclassify and forbear” are either insincere about forbearance or are simply misinformed about what forbearance would require. They cannot possibly accept the factual predicate needed to forbear under *Qwest* and would likely fight hard to lower that bar, lest forbearance be used more aggressively to gut the rest of the Act. But it is certainly possible that they simply underestimate the difficulty the FCC would face in attempting to explain why forbearance should be easy when the Commission wants to forbear (two steps forward for regulation, one step back through forbearance) but difficult when it doesn’t really want to do so.

Finally, as discussed below, the Commission would face the “mother of all regulatory takings cases” if it attempted to change the regulatory status of broadband networks and other services, given the staggering amounts of capital invested in them since 1996 and

¹⁷⁴ Margaret Thatcher, *Remarks on Becoming Prime Minister (St Francis’s Prayer)* (May 4, 1979), available at <http://www.margaretthatcher.org/document/104078>

¹⁷⁵ 47 U.S.C. § 230.

being invested in them on an ongoing basis. At best, the Fifth Amendment would require the FCC to deliver effective forbearance, which it would be unable to do; at worst, forbearance would be inadequate because the underlying change of status and the “discord” this creates in investment expectations would be the taking.¹⁷⁶

IV. Title III & Wireless Services

The NPRM proposes to maintain the definitions of the *Open Internet Order* and distinguish between “fixed” and “mobile” providers of wireless broadband Internet access.¹⁷⁷ The transparency rule would apply to both, while the rules on blocking and discrimination would apply only to fixed broadband Internet access.¹⁷⁸ Distinguishing between the two types of wireless broadband Internet access services, and applying the most stringent rules only to fixed wireless services, seems makes some sense, because fixed wireless local loops,¹⁷⁹ satellite Internet access,¹⁸⁰ and other fixed-wireless broadband alternatives (e.g., devices utilizing the TVWS databases,¹⁸¹ or Citizens Broadband Radio Services utilizing the 3.5 GHz Band¹⁸²) will in the near future increasingly be used as substitutes for traditional wireline broadband Internet access.¹⁸³ This is particularly true for rural areas and other

¹⁷⁶ See *infra* VI.0.

¹⁷⁷ NPRM, at ¶ 62.

¹⁷⁸ *Id.*

¹⁷⁹ Gary Jacobson, *A Fast-Evolving Technology Helps AT&T in DirecTV Deal*, DallasNews (May 23, 2014), available at <http://www.dallasnews.com/business/technology/headlines/20140523-a-fast-evolving-technology-helps-att-in-directv-deal.ece>.

¹⁸⁰ ViaSat, d/b/a Exede Internet, is one such company that offers broadband Internet access services utilizing satellite technology. See Exede Internet, *About Exede* (last visited July 15, 2014), available at <http://www.exede.com/what-is-exede> (offering downloads speeds of up to 12 Mbps); see also Office of Eng'g & Tech. & Consumer & Gov't Affairs Bureau, *2014 Measuring Broadband America Fixed Broadband Report: A Report on Consumer Fixed Broadband Performance in the U.S.*, at 15, 63, n. 3 (2014) [2014 Fixed Broadband Report] (showing Exede Internet to deliver, on average, during peak periods, 138% of advertised speeds), available at <http://data.fcc.gov/download/measuring-broadband-america/2014/2014-Fixed-Measuring-Broadband-America-Report.pdf>.

¹⁸¹ See, e.g., Tammy Parker, *Google's TV White Space Database Approved for Operation*, FierceWirelessTech (June 28, 2013), available at <http://www.fiercewireless.com/tech/story/googles-tv-white-space-database-approved-operation/2013-06-28>.

¹⁸² See Dan Meyer, *FCC Continues Push to Free Up Spectrum in 3.5 GHz Band*, RCRWireless (Apr. 23, 2014), available at <http://www.rcrwireless.com/article/20140423/spectrum/fcc-continues-push-free-spectrum-3-5-ghz-band/>; but see Jim Barthold, *Citizens Broadband Radio Service Faces Hurdles at FCC*, FierceTelecom (July 7, 2014), available at <http://www.fiercetelecom.com/story/citizens-broadband-radio-service-faces-hurdles-fcc/2014-07-07>.

¹⁸³ Wireless services may never match the levels of throughput, latency, or energy efficiency of their wireline counterparts, due to the greater physical barriers and challenges involved in transmitting data over the airwaves, but they likely will be able to manage sufficient throughput to enable most IP-enabled applications (e.g., email, web

markets where it is prohibitively expensive to deploy fiber to all houses, but feasible to deploy fiber to a single location (likely a macro-cell used for backhaul to the rest of the Net) and allow all nearby users to connect their devices wirelessly to that single point (perhaps using repeaters or commercial signal boosters), thereby achieving a reasonably comparable Internet experience to what is available in more urban areas.¹⁸⁴ However, fixed-wireless broadband alternatives may soon come to compete directly with wireline providers in metropolitan areas, as well, due to the comparatively low costs of overbuilding.¹⁸⁵ Thus, in order to fully account for the underlying factual circumstances and the reasonably foreseeable future developments in the field, any potential Open Internet rules need to recognize these alternative methods of providing broadband Internet connectivity, and treat them accordingly.

This suggests that any rules on blocking or discrimination that apply to wireline broadband Internet access providers should apply to fixed wireless alternatives as well, as the two are direct substitutes, while perhaps a different set of rules should apply to mobile wireless broadband Internet access,¹⁸⁶ as they are more complementary services that serve a slightly different market. Nevertheless, the advances in fixed-wireless have been largely paralleled (and in some cases exceeded) by the advances in mobile-wireless technologies, with providers of commercial mobile radio services (CMRS) and private mobile radio services (PMRS) increasingly using Wi-Fi hotspots to offload data traffic onto more localized networks, and an impending revolution in heterogeneous network (HetNet) technology already on the horizon.¹⁸⁷

browsing, HD video streaming, VoIP), even if certain applications (e.g., video-conferencing, 4K/8K video streaming, live interactive multiplayer gaming) can only ever be achieved using wireline technologies.

¹⁸⁴ See 47 U.S.C. § 254(b)(3) (stating as one of the principles of Universal Service that "Consumers in all regions of the Nation, including . . . rural, . . . and high cost areas, should have access to telecommunications and information services . . . that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.").

¹⁸⁵ See, e.g., *2014 Fixed Broadband Report* at 18 ("[B]ecause satellites broadcast wirelessly directly to the consumers, no actual terrestrial infrastructure has to be deployed.").

¹⁸⁶ NPRM, at ¶ 62 (defining "mobile broadband Internet access service" as "a broadband Internet access service that serves end users primarily using mobile stations.").

¹⁸⁷ HetNets utilize both traditional large (macro- (1/1)) cell towers and smaller cells (either micro- (1/10), nano- (1/100), pico- (1/1,000), or femto- (1/10,000)) throughout their network footprint in order to offload data traffic more locally, thereby reducing latency, easing congestion, and allowing the network operator to squeeze more utility out of its spectrum holdings. See, e.g., 4G Americas, *Femto, Pico, Micro: Small Cells Are Gaining Momentum*, MarketWired (Oct. 4,

Thus, it appears that “[t]he definition of broadband services is changing. Wi-Fi and broadband was once about a high speed connection to the Internet at home. Now it’s about a connection wherever you need it.”¹⁸⁸ Is it still logically sustainable, then, to accord such differing treatment to fixed- and mobile-wireless broadband Internet access services?¹⁸⁹ Is it legally sustainable to extend the Open Internet rules on blocking and discrimination to mobile wireless broadband Internet access services?¹⁹⁰ If the Commission determines that the line between fixed wireless broadband Internet access (e.g., a Wi-Fi hotspot provided by a cable company) and mobile wireless broadband Internet access (e.g., LTE coverage from a nearby cell site) is likely to be continually blurred going forward, it may decide that similar rules should apply to both.

Mobile-wireless broadband Internet access services are already governed under the “commercial reasonableness” standard of the *Data Roaming Order* originally approved by the D.C. Circuit in *Cellco*,¹⁹¹ and cited approvingly in *Verizon*.¹⁹² After summarizing why the Commission may not use Section 706 to impose common carrier status on non-common carriers, because doing so would “trump specific mandates of the Communications Act,”¹⁹³ the *Verizon* court noted the regulatory status of wireless services:

Likewise, because the Commission has classified mobile broadband service as a “private” mobile service, and not a “commercial” mobile service, see Wireless Broadband Order, 22 F.C.C.R. at 5921 ¶ 56, treatment of mobile broadband providers as common carriers would violate section 332: “A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this [Act].” 47 U.S.C. § 332(c)(2); see *Cellco*, 700

2012), available at <http://www.marketwired.com/press-release/Femto-Pico-Micro-Small-Cells-Are-Gaining-Momentum-1709479.htm>.

¹⁸⁸ See AT&T, *About Us: AT&T Broadband Services* (last visited July 15, 2014), available at <http://about.att.com/mediakit/broadband>.

¹⁸⁹ NPRM, at ¶ 62.

¹⁹⁰ *Id.* ¶ 155.

¹⁹¹ *Cellco*, 700 F.3d at 537.

¹⁹² *Verizon*, 740 F.3d at 650.

¹⁹³ *Verizon*, 740 F.3d at 637 (quoting Open Internet Order, ¶ 119); see also 47 U.S.C. § 153(51) (“A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services[.]”); 47 U.S.C. § 153(53) (defining “telecommunications service”).

F.3d at 538 (“[M]obile-data providers are statutorily immune, perhaps twice over, from treatment as common carriers.”).¹⁹⁴

This quote from Judge Tatel, who wrote the majority opinions in both *Cellco* and *Verizon*, illustrates the significant hurdles the Commission would face in attempting to impose Open Internet rules on mobile broadband. For one, “wireless internet service both *is* an ‘information service’ and *is not* a ‘commercial mobile service[,]”¹⁹⁵ so both of these classifications would have to be reversed if the Commission were to try to impose Open Internet rules on mobile broadband by way of Title II. However, it is doubtful whether the Commission could accomplish this feat even by way of statutory reinterpretation, as doing so would conflict with the clear language of the Act.

Under Title III, the terms “commercial mobile service” and “private mobile service” are given different definitions,¹⁹⁶ and accorded different regulatory treatment.¹⁹⁷ The Act specifically prohibits treating the provider of “a private mobile service . . . as a common carrier for any purpose under this chapter.”¹⁹⁸ If Open Internet rules are based on Title II, mobile-wireless broadband Internet access would need to be reclassified as a “commercial mobile service” in order to comply with the terms of the Act. However, the definition of a “commercial mobile service” provides that such service must be “provided for profit and make[] *interconnected service* available [to the public];” with “interconnected service” meaning “service that is interconnected with the public switched network[.]”¹⁹⁹ The “public switched network” is not a defined term in the Act, but the FCC has defined it by rulemaking as equivalent to the Public Switched *Telephone* Network.²⁰⁰ Under this definition, it is difficult to see how mobile data networks could ever be interconnected services because they are not voice services: they do not “use the North American

¹⁹⁴ *Verizon*, 740 F.3d at 650.

¹⁹⁵ *Cellco*, 700 F.3d at 538 (citing *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 F.C.C.R. 5901, 5915-21 ¶¶ 37-56 (2007)).

¹⁹⁶ Compare 47 U.S.C. § 332(d)(1-2) with 47 U.S.C. § 332(d)(3).

¹⁹⁷ Compare 47 U.S.C. § 332(c)(1) with 47 U.S.C. § 332(c)(2).

¹⁹⁸ 47 U.S.C. § 332(c)(2).

¹⁹⁹ 47 U.S.C. § 332(d)(1-2) (emphasis added); see also 47 U.S.C. § 153(33) (defining “mobile service”).

²⁰⁰ 47 C.F.R. § 20.3 (“Any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use the North American Numbering Plan in connection with the provision of switched services.”).

Numbering Plan in connection with the provision of switched services.”²⁰¹ But even if the FCC claimed that mobile broadband networks do somehow connect with the PSTN, that claim will become increasingly difficult to defend as the transition to all-IP world networks onward: soon all voice traffic will flow entirely over IP networks, never once connecting with the legacy PSTN.

Now, in theory, the Commission could point to that trend and claim that it justifies changing its definition of “public switched network” (again, a term not defined in the Act) to mean the Internet itself – specifically, to replace the reference to the North American Numbering Plan, with a reference to IPv4 and/or IPv6 and the International Corporation of Assigned Names and Numbers (ICANN), and then state that every network within the Network of networks is part of the “public switched network.” This interpretation would be entirely unprecedented, and would stretch the boundaries of reasonableness, even under *Chevron*. The FCC would have to explain why this change is not arbitrary and capricious, and the change might be considered a regulatory taking, given the hundreds of billions of dollars invested in mobile data networks since 1996 on the understanding that these were not common carrier services.²⁰²

The FCC would also face a difficult analytical challenge in explaining such a change of interpretation to avoid being found arbitrary and capricious: the more the FCC emphasizes the similarities between wireless and fixed broadband, the more difficult it will be for it to make the case that wireless data services are not, to some important degree, effective substitutes for fixed services. This might help the Commission in the short term to justify forbearance (and distinguish its approach from *Qwest*, where the agency dismissed wireless as a competitor). But more generally, it would undermine the arguments for Net neutrality regulation in the first place and, especially for Title II. Title II was written for AT&T’s monopoly service. Applying it to a supposed cable-telco “duopoly” in fixed services is inappropriate to begin with, but Title II is an even poorer fit for a marketplace in which (as is actually increasingly the case, despite the FCC’s refusal to admit it in this context), mobile providers compete with cable and telcos for broadband customers.²⁰³

²⁰¹ *Id.*

²⁰² *See infra* at 93.

²⁰³ [CITE to policy comments, section at the end lifted from Comms Act Comments talking about formalism/silos/rejection of intermodal competition.]

V. Section 706 is Not an Independent Grant of Authority

In 1998, the FCC declared that Section 706 was not an independent grant of authority but rather a directive to use other grants of authority in the act for a specific purpose: promoting broadband investment, deployment and competition.²⁰⁴ In 2007, the FCC cited Section 706 as the basis for a claim of ancillary jurisdiction to enforce the Commission's 2005 Open Internet Policy Statement.²⁰⁵ The D.C. Circuit rejected this claim but, since the FCC had not officially reinterpreted Section 706, did not opine on the meaning of that provision.²⁰⁶

So, in 2010, the FCC accepted the invitation to reinterpret Section 706, though it did try to claim the new interpretation was consistent with the old one. In January, the D.C. Circuit accepted this interpretation as a reasonable reading of an ambiguous statute, under the seminal 1984 Supreme Court decision of *Chevron v. Natural Resources Defense Council*, thus upholding the FCC's 2010 transparency rule, and essentially invited the FCC to try again by writing new rules under Section 706.²⁰⁷ The Tenth Circuit recently reached the same conclusion.²⁰⁸ The problem is that neither the D.C. Circuit nor the 10th Circuit engaged in what can be recognized as a real *Chevron* analysis.

While there is scholarly controversy over what exactly the two steps of *Chevron* are, the D.C. Circuit (and other courts) has long understood them to be (1) whether the statute is ambiguous, and (2) whether the agency's proffered interpretation is reasonable.²⁰⁹ Under this understanding, step two's reasonability analysis is very similar to the reasonability analysis of agency action under the arbitrary and capricious standard of 5 U.S.C. § 706 (a striking numerical coincidence).

²⁰⁴ *Advanced Services Order*, ¶ 66.

²⁰⁵ *Comcast*, 600 F.3d at 659.

²⁰⁶ *Id.*

²⁰⁷ *Verizon*, 740 F.3d at 636-40.

²⁰⁸ *Direct Commc'ns Cedar Valley, LLC v. F.C.C.*, No. 11-9581, 59 (10th Cir. 2014) [*Cedar Valley*], available at <http://www.gpo.gov/fdsys/pkg/USCOURTS-ca10-11-09581/pdf/USCOURTS-ca10-11-09581-0.pdf>.

²⁰⁹ See, e.g., *Natural Res. Def. Council v. Daley*, 209 F.3d 747 (D.C. Cir. 2000); *Kennecott Utah Copper Corp. v. United States Dept. of Interior*, 88 F.3d 1191 (D.C. Cir. 1996); *Consumer Fed'n of Am. v. Dept. of Health and Human Servs.*, 83 F.3d 1497 (D.C. Cir. 1996); *Env'tl. Def. Fund v. EPA*, 82 F.3d 451 (D.C. Cir. 1996); *Republican Nat'l Committee v. FEC*, 76 F.3d 400, 406 (D.C. Cir. 1995); *Madison Gas & Elec. v. EPA*, 25 F.3d 526, 529 (7th Cir. 1994).

In fact, there are good reasons to believe that both courts erred in their analysis, that other appellate courts will reach the opposite conclusion, and that, if presented with the question, the Supreme Court will, too. Reading Section 706 as an independent grant of authority would allow the Commission to regulate any form of communications (not merely broadband providers) however the FCC sees fit, apparently with or without the procedural safeguards of normal rulemaking, provided that the Commission can claim its regulations will promote broadband (apparently, a toothless requirement) without violating some specific provision of the Act – and, of course, the Constitution. In this reading, Section 706 is not merely a “failsafe” (the word the D.C. Circuit picks out of the scant legislative history of this section) but, in fact, essentially a new Communications Act, to be created by the FCC out of whole cloth.

A. The FCC’s Interpretation of Section 706 is Absurd and Will Fail Serious *Chevron* Analysis

Crescit eundo, it grows as it goes, is a poetic expression of boundless possibility, an apt expression of the frontier mentality, and thus a fine motto for the Great State of New Mexico.²¹⁰ But it is utterly inappropriate as the mantra for a regulatory agency, which is supposed to be “a creature of statute, having only those powers expressly granted to it by Congress or included by necessary implication from the Congressional grant.”²¹¹ This absurd interpretation would open the door to FCC regulation far beyond net neutrality, runs contrary to a more careful reading of the statute, and contradicts basic common sense about what Congress really intended.

Of course, with two appellate courts having reached this absurd interpretation, it would be easy to assume that this is just how *Chevron* deference works. Four important facts provide the proper context for these decisions and predicting how other courts will resolve the question in the future. First, the two court opinions on Section 706 are arguably dicta (not binding precedent, even upon those courts).²¹² Second, the application of regularly used

²¹⁰ Lucretius, *De rerum natura*, Book VI.

²¹¹ Soriano v. United States, 494 F.2d 681, 683 (9th Cir. 1974).

²¹² In *Verizon*, the actual holding of the case was that the no-blocking and non-discrimination rules were illegal impositions of Title II common carrier requirements on a Title I information service. The court upheld the transparency rule, which could have been done under the FCC’s ancillary authority to Section 257. See *Verizon*, In *Cedar Valley*, the holding was that the FCC had the authority to pass USF requirements on VOIP providers. Since the court found that the

tools of statutory construction, such as textual and substantive canons and legislative history, strongly suggest Section 706 is not an independent grant of authority to the FCC. Third, it is difficult to conceive of a statutory ambiguity whose re-interpretation would have so dramatic an effect, effectively allowing a regulatory agency vast discretion to sidestep one of the most complex, important pieces of legislation of the modern era. And fourth, there was remarkably little analysis of how to apply *Chevron* to such an ambiguity in either court's decision.

Perhaps the most remarkable thing about the FCC's newfound power under Section 706, besides its breadth, is how scant the analysis of this section has been. In *Comcast*, the FCC argued that the FCC's Net neutrality regulations were justified under its ancillary authority.²¹³ The D.C. Circuit found nothing to which to anchor the FCC's ancillary jurisdiction arguments, rejecting the FCC's claims that Section 706 was an independent grant of authority because the Commission had previously specifically said the opposite, and had yet to formally undo that interpretation.²¹⁴ In the Open Internet Order, the FCC made that re-interpretation formal but only as a formality – it offered no meaningful statutory analysis and, indeed, it never has since.

Instead, the FCC's *Open Internet Order* and brief defending that order in *Verizon* seized on a single line in the D.C. Circuit's *Comcast* decision, where the Court noted that Section 706 “could at least arguably be read to delegate regulatory authority to the Commission.”²¹⁵ In the NPRM, the Commission simply asserted that all it needed to do was go through the formality of re-interpreting Section 706.²¹⁶ Accordingly, it offered only a paragraph of analysis on each of Sections 706(a)²¹⁷ and 706(b).²¹⁸ The FCC failed to address a host of

FCC had authority under several grants of authority aside from 706(b), the argument about 706(b) being an independent grant of authority was unnecessary to the holding. See *Cedar Valley*, *supra* note [cite], at 55.

²¹³ See Brief for Respondents Fed. Comm'ns Comm'n, *Comcast Corp. v. Fed. Comm'ns Comm'n*, No. 08-1291, at (Nov. 23, 2009), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-295087A1.pdf.

²¹⁴ In the Matter of Preserving the Open Internet Broadband Industry Practices Report and Order at 64-65 (Dec. 23, 2010) (quoting *In re Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 F.C.C.R. 24,012, 24,047, ¶ 77 (1998) (Wireline Deployment Order)), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf.

²¹⁵ *Comcast*, 600 F.3d at 672.

²¹⁶ *Open Internet Order*, at ¶¶ 117-23.

²¹⁷ *Id.* at ¶ 122.

²¹⁸ *Id.* at ¶ 123.

difficult questions about whether Section 706 was really ambiguous, or if it is, whether the FCC's construction of it was reasonable. We believe it is neither.

When applying *Chevron*, courts engage in a two-step analysis:

First, applying the ordinary tools of statutory construction, a court must determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Chevron is rooted in a background presumption of congressional intent: namely, "that Congress, when it left ambiguity in a statute" administered by an agency, "understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 740-741 (1996). *Chevron* thus provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency. See *Iowa Utilities Bd.*, 525 U.S. 366, 397 (1999). Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.²¹⁹

B. *Chevron* Step 1: Applying the Normal Tools of Statutory Analysis, Section 706 is Not an Independent Grant of Authority

The first step of *Chevron* analysis is to consider whether Congress' intent as expressed in the statute is clear. In *Verizon*, the D.C. Circuit seemingly skipped any analysis of whether Section 706(a) was ambiguous, stating:

²¹⁹ *City of Arlington, Texas v. FCC*, 133 S.Ct. 1863, 1868 (2013) [*"City of Arlington"*].

Recall that the provision directs the Commission to “encourage the deployment... of advanced telecommunications capability... by utilizing ... price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” 47 U.S.C. § 1302(a). As Verizon argues, this language could certainly be read as simply setting forth a statement of congressional policy, directing the Commission to employ “regulating methods” already at the Commission’s disposal in order to achieve the stated goal of promoting “advanced telecommunications” technology. But the language can just as easily be read to vest the Commission with actual authority to utilize such “regulating methods” to meet this stated goal.²²⁰

Courts normally do not find a statute ambiguous just because an agency declares it to be so. Instead, courts generally engage in a textual analysis of the statute using canons of interpretation, look at text within the Act as a whole, and examine legislative history to determine Congressional intent. Here, the court rested on just the FCC’s assertion of ambiguity,²²¹ and an out-of-context and incomplete quoting of the Senate Report calling Section 706 a “fail-safe,”²²² and then deferred to the FCC’s interpretation – in effect, blindly.²²³

For Section 706(b), the court noted that the FCC had never before relied on it to justify any action until the FCC reinterpreted it in 2010, but that this was not unusual since the FCC had never before made a finding that broadband was not being deployed in a “reasonable and timely fashion.”²²⁴ The court then quickly deferred to the agency, again simply saying the statute seems ambiguous and the agency’s interpretation of it is reasonable – again, with scant analysis.²²⁵ The majority’s conclusion that “nothing in the regulatory background or the legislative history either before or after passage of the 1996 Telecommunications

²²⁰ *Verizon*, 740 F.3d at 637-38.

²²¹ *Id.*

²²² *Id.* at 639.

²²³ *Id.* at 640.

²²⁴ *Id.* at 640-42; 47 U.S.C. § 706(b).

²²⁵ *Verizon*, 740 F.3d at 642.

Act forecloses such an understanding” is not only wrong, but is also a woefully unsupported argument.²²⁶ Similarly, the Tenth Circuit assumed ambiguity in Section 706(b) before deferring to the FCC’s interpretation on the grounds that Section 706(b) would have no meaning if it were not an independent grant of authority.²²⁷

7. The Real Meaning of Section 706

In fact, the Commission’s approach to Section 706(a) prior to 2010 amply demonstrates that it understood this Section not to establish a power in itself but to define a critical objective that could tip the balance in decisions made by the Commission under other provisions of the Act. The FCC’s failure to adequately weigh this objective could factor into an assessment of whether the Commission’s decisionmaking was arbitrary and capricious. Although the Commission had not developed a history of using Section 706(b) (because, prior to 2010, it had not reached the finding of inadequate deployment necessary to trigger this subsection), it has a very clear, simple meaning: a *requirement*, enforceable in court via a petition for *mandamus*, that the FCC act once it has reached such a finding.

Again, the FCC itself in 1998 concluded that, in rejecting petitions for the FCC to use Section 706 to bypass the forbearance requirements of Section 10:

After reviewing the language of section 706(a), its legislative history, the broader statutory scheme, and Congress’ policy objectives, we agree with numerous commenters that section 706(a) does not constitute an independent grant of forbearance authority ***or of authority to employ other regulating methods***. Rather, we conclude that ***section 706(a) directs the Commission to use the authority granted in other provisions***, including the forbearance authority under section 10(a), to encourage the deployment of advanced services.²²⁸

In 2006, the D.C. Circuit said that Section 706 “sets forth the following overarching direction...” and then quoted the key language from Section 706(a) to explain *how* the FCC was supposed to apply Section 160 (forbearance), Section 251 (unbundling network

²²⁶ *Id.* at 641.

²²⁷ *Cedar Valley*, *supra* note 208, at 58.

²²⁸ *Advanced Services Order*, at ¶ 69 (emphasis added).

elements, but only as “necessary” to prevent incumbent LECs from “impairing” CLECs from offering their resale service of the LEC’s facility).²²⁹ The Court summarized the FCC’s use of Section 251 in its 2003 Triennial Review Order:

In the agency's view, balancing the costs and benefits of unbundling, with particular attention to incentivizing new fiber investment by both ILECs and CLECs, the scales tipped against mandating unbundling. The FCC emphasized that its "obligation to ensure the deployment of advanced telecommunications capability under section 706 warrants different approaches with regard to existing [copper] loop plant and new [fiber] loop plant."²³⁰

The court went on to discuss Section 706 in a way that perfectly illustrates what Section 706 was intended to do: provide a counterweight to other goals laid out by the Act, to be weighed by the Commission against each other. The court noted that, after explaining that the Court had, in 2004,

... upheld the FCC's nationwide decision to refrain from requiring § 251 unbundling as to the fiber broadband elements described above....

Furthermore, we held that the FCC "reasonably interpreted § 251(c)(3) to allow it to withhold unbundling orders, even in the face of some impairment, where such unbundling would pose excessive impediments to infrastructure investment," *id.* at 580, because "Section 706(a) identifies one of the Act's goals beyond fostering competition piggy-backed on ILEC facilities, namely, removing barriers to infrastructure investment," *id.* at 579. Even if the FCC's judgment "entails increasing consumer costs today in order to stimulate technological innovations," we opined, "there is nothing in the Act barring such trade-offs." *Id.* at 581. That is, FCC may weigh the "costs of unbundling"

²²⁹ *EarthLink*, 462 F.3d at 5.

²³⁰ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Report & Order & Order On Remand & Further Notice of Proposed Rulemaking*, FCC 03-36, 18 F.C.C.R. 16,978 (2003) [2003 Triennial Review Order], available at http://transition.fcc.gov/wcb/cpd/triennial_review/; see also *EarthLink*, 462 F.3d at 5-6 (discussing the 2003 Triennial Review Order).

(e.g., investment disincentives) against the "benefits of removing this barrier to competition." *Id.* at 579 (discussing hybrid loops); *see id.* at 583 ("[T]he [Section] 706 considerations . . . are enough to justify the [FCC's] decision not to unbundle FTTH.").²³¹

The Court continued:

At the outset, the FCC made clear that its forbearance analysis is "informed" by section 706's mandate to encourage deployment of broadband services. *Id.* ¶ 20 (citing Act pmbL, § 706; *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 F.C.C.R. 24,012, 24,047 (1998) (discussing the relationship between § 160 and section 706)).²³²

8. The D.C. Circuit Doesn't Know an "Elephant in a Mousehole" When It Sees One

Perhaps the most important part of the *Verizon* decision is the court's assertion that:

To be sure, Congress does not, as Verizon reminds us, "hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). But FCC regulation of broadband providers is no elephant, and section 706(a) is no mousehole.

The court's decision essentially rests on the blithe assertion of the second sentence, which fails for two reasons. First, as made clear in the following paragraph, the FCC's interpretation of Section 706, approved by the court, would allow the FCC not merely to regulate broadband providers, but *any* form of communications. Thus, while the FCC might begin by using Section 706 to support net neutrality or Universal Service regulations, there is nothing in its interpretation of Section 706 nor in the D.C. Circuit's decision (other than this carelessly written sentence) that would prevent the FCC from regulating any other "communications" company in America. Second, the FCC simply assumes that this novel basis for regulation has sufficient limiting principles so as not to be an "elephant." One can only wonder just how sweeping a power must be before the majority would recognize it as an "elephant."

²³¹ *Id.* at 5-6.

²³² *Id.* at 6-7.

In the next paragraph, the court explained its analysis:

Of course, we might well hesitate to conclude that Congress intended to grant the Commission substantive authority in section 706(a) if that authority would have no limiting principle. *See Comcast*, 600 F.3d at 655 (rejecting Commission’s understanding of its authority that “if accepted . . . would virtually free the Commission from its congressional tether”); *cf. Whitman*, 531 U.S. at 472–73 (discussing the nondelegation doctrine). But we are satisfied that the scope of authority granted to the Commission by section 706(a) is not so boundless as to compel the conclusion that Congress could never have intended the provision to set forth anything other than a general statement of policy. The Commission has identified at least two limiting principles inherent in section 706(a). *See Open Internet Order*, 25 F.C.C.R. at 17970 ¶ 121. First, the section must be read in conjunction with other provisions of the Communications Act, including, most importantly, those limiting the Commission’s subject matter jurisdiction to “interstate and foreign communication by wire and radio.” 47 U.S.C. § 152(a). Any regulatory action authorized by section 706(a) would thus have to fall within the Commission’s subject matter jurisdiction over such communications—a limitation whose importance this court has recognized in delineating the reach of the Commission’s ancillary jurisdiction. *See American Library Ass’n*, 406 F.3d at 703–04. Second, any regulations must be designed to achieve a particular purpose: to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.” 47 U.S.C. § 1302(a). Section 706(a) thus gives the Commission authority to promulgate only those regulations that it establishes will fulfill this specific statutory goal—a burden that, as we trust our searching analysis below will demonstrate, is far from “meaningless.” Dissenting Op. at 7.²³³

“Searching analysis,” indeed! What would real *Chevron* analysis look like? It would begin with a more careful examination of the text of the Telecommunications Act and of the true, sweeping implications of the FCC’s interpretation of Section 706 as an independent grant of authority.

²³³ *Verizon*, 740 F.3d at 639-40.

9. Applying Canons of Construction to the Text of Section 706 Show that it is Not an Independent Grant of Authority

While an understanding of the text requires understanding the context within which it is situated, no textual analysis can really begin without the text itself. The text of Section 706 reads as follows:

(a) In general

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

(b) Inquiry

The Commission shall, within 30 months after February 8, 1996, and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.²³⁴

²³⁴ 47 U.S.C. § 1302.

There are several textual canons directly applicable to understanding Section 706 and its place within the larger statutory scheme governing FCC authority.

c. The Whole Act Rule

The first, and most important, canon of interpretation that the D.C. and Tenth Circuits should have considered (but did not), is the Whole Act Rule.²³⁵ For instance, the terms “shall” and “may” do not always grant authority to the FCC in the Communications Act. Sometimes, these words do denote a grant of authority.²³⁶ But in others, they can create an imposition of a duty on a private actor,²³⁷ a grant of legal privilege to a private actor,²³⁸ a hook for mandamus,²³⁹ or as a hook for an arbitrary and capricious ruling.²⁴⁰ To understand Section 706, we must look to the Act as a whole to understand what is meant.

²³⁵ See, e.g., *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (“Statutory interpretation... is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.”).

²³⁶ See, e.g., 47 U.S.C. § 209 (“If, after hearing on a complaint, the Commission **shall** determine that any party complainant is entitled to an award of damages under the provisions of this chapter, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.”) (emphasis added).

²³⁷ See, e.g., 47 U.S.C. § 203 (“Every common carrier ... **shall**, within such reasonable time as the Commission **shall** designate, file with the Commission and print and keep open for public inspection schedules showing all charges ... and showing the classifications, practices, and regulations affecting such charges.”) (emphasis added).

²³⁸ See, e.g., 47 U.S.C. § 230(c)(2) (“No provider or user of an interactive computer service **shall** be held liable on account of – (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in [§ 230(c)(1)].”) (emphasis added); see also *Comcast*, 600 F.3d at 651 (discussing Section 230’s “grant[of] civil immunity”).

²³⁹ See, e.g., 47 U.S.C. § 621 (“Within 1 year after December 15, 2010, the Federal Communications Commission shall prescribe ... a regulation [incorporating] the ‘Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television[.]’; see also *Telecomm. Research & Action Ctr. v. F.C.C.*, 750 F.2d 70, 80 (D.C. Cir. 1984) (“[T]he standard [for issuance of a writ of mandamus] provides useful guidance in assessing claims of agency delay: (1) the time agencies take to make decisions must be governed by a ‘rule of reason[.]’ (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason[.] (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority[.] (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not ‘find any impropriety lurking behind agency lassitude in order to hold that agency action is ‘unreasonably delayed.’”) (internal citations omitted); *Your Home Visiting Nurse Servs. v. Shalala*, 525 U.S. 449, 457 (1999) (Parties seeking mandamus also must demonstrate that the agency has breached “a ‘clear, nondiscretionary duty[.]’”) (quoting *Heckler v. Ringer*, 466 U.S. 602, 616 (1984)).

The Communications Act is what governs the FCC’s authority. In 1996, when Congress updated portions of the Communications Act, it deliberately wrote some sections of the Telecommunications Act to modify the Communications Act (now codified in Chapter 5 of Title 47),²⁴¹ while leaving a few provisions out of the Communications Act, including Section 706 (among a handful of free-standing sections now codified in Chapter 12 of Title 47). The fact that Congress chose not to put Section 706 in the Communications Act must, under the whole act rule, mean *something*.

The D.C. Circuit did not address this question: yet another example of the scantiness of its analysis. But its interpretation, that Section 706 is an independent grant of authority, is by far the least plausible of three potential interpretations. Why would Congress include the power to essentially write a new act in a free-standing provision?

Our discussion thus far has assumed that the D.C. Circuit was correct that, if Section 706 *were* an independent grant of authority, it would not include the power to trump other provisions of the Act. But to be more precise, since Section 706 was not actually inserted into the 1934 Communications Act, why is this clearly true? If Section 706 *is* a grant of power, why is it subject to the limits of the 1934 Act at all? There is, in fact, no direct connection between the two in the text of the Telecommunications Act. This is, of course, an absurd idea, but it simply demonstrates that the D.C. Circuit invented a limit upon the scope of Section 706 in order to justify the conclusion it had in mind: that reading Section 706 as an independent grant of authority is not implausible.²⁴²

Far more plausible – indeed, the only plausible inference to draw from this examination of Section 706 in the context of the “whole act” – is that Congress simply did not intend Section 706 to be an independent grant of authority.

²⁴⁰ See, e.g., 47 U.S.C. § 251(d)(2).

²⁴¹ 47 U.S.C. § 609 (“This *chapter* may be cited as the “Communications Act of 1934.”).

²⁴² See *Verizon*, 740 F.3d at 639-40 (“Of course, we might well hesitate to conclude that Congress intended to grant the Commission substantive authority in section 706(a) if that authority would have no limiting principle. See *Comcast*, 600 F.3d at 655 (rejecting Commission’s understanding of its authority that ‘if accepted. . . would virtually free the Commission from its congressional tether”); cf. *Whitman*, 531 U.S. at 472–73 (discussing the nondelegation doctrine). But we are satisfied that the scope of authority granted to the Commission by section 706(a) is not so boundless as to compel the conclusion that Congress could never have intended the provision to set forth anything other than a general statement of policy.”).

A corollary to the Whole Act Rule is that while a “title cannot control the plain words of the statute”, the “court may consider the title to resolve uncertainty in the purview of the act.”²⁴³ Here, the heading Title VII of the Telecommunications Act was “Miscellaneous”, which does not suggest a grant of independent authority.²⁴⁴ This is precisely how Congress would label a “mousehole.”²⁴⁵

Thus, it appears even from just the placement of Section 706 within the larger statutory scheme that it should not be read as an independent grant of authority. But, if it is not an independent grant of authority, does it lack meaning and thus run up against the canon against surplusage? The answer is no. Section 706(a) is more than a statement of policy. It is a directive which points the FCC to use its powers outlined elsewhere in the Act in order to promote broadband deployment, which is how the FCC had actively incorporate Section 706(a) into its analysis prior to 2010, as discussed above. Similarly, Section 706(b) is a directive to the FCC to use other authority granted to it if certain conditions obtain. Section 706(a) could thus be used in an arbitrary and capricious analysis to determine whether the FCC has gone outside its bounds in using other authority. Section 706(b) is a hook for mandamus because it has a temporal aspect attached to it. If the FCC does not take immediate action after finding broadband is not being deployed in a reasonable and timely manner, then someone may be able to get a court to issue a writ of mandamus against the FCC.

d. *Noscitur a Sociis*: Congress Intended Section 706 to be Deregulatory

The mention of “price caps” among the “regulating methods” mentioned in Section 706(a) does not, as some have asserted, undermine the reading of Congress’s intent as deregulatory when understood in the context of the act. The move from traditional rate of

²⁴³ 2A Sutherland 140.

²⁴⁴ S.652, 104th Cong. (Jan. 1, 1996) (Enrolled Bill), *available at* <http://beta.congress.gov/bill/104th-congress/senate-bill/652/text>.

²⁴⁵ See *supra* at 69.

return regulation to price caps was, indeed, a significant form of deregulation actively sought by regulated entities prior to the Act.²⁴⁶

Thus, the list of “regulating methods”²⁴⁷ strongly suggests that Congress understood the purpose of Section 706 to be deregulatory. Under the textual canon *noscitur a sociis*,²⁴⁸ this explains the overall purpose of Section 706, and a reading of Section 706 that is *not* deregulatory would be inconsistent with the canon.

Application of this canon is not necessarily inconsistent with Judge Silbmeran’s reading of Section 706 as an independent grant of authority – not, as the majority would have it, to regulate communications in any way that promoted broadband without violating some provision of the act, but instead as a far narrower power. As Silberman put it:

The key words obviously are “measures that promote competition in the local telecommunications market or other regulating methods that remove barriers to infrastructure investment.” Those are the words that grant actual authority.²⁴⁹

But application of *noscitur a sociis* is utterly inconsistent with the majority’s view, which might explain why they did not bother to consider it.

e. The Court Should Have Avoided Dormant Commerce Clause Problems Implied by Its Interpretation of Section 706(a)

Under the canon of constitutional avoidance, courts will not defer to an agency interpretation of a statute if that interpretation would violate a Constitutional provision.²⁵⁰

²⁴⁶ See John Podesta, *Unplanned Obsolescence: The Telecommunications Act of 1996 Meets the Internet*, 45 DEPAUL L. REV. 1093, 1101 (1996) (“Finally, [telcos] persuaded many regulators to relieve them of the burden of rate-of-return regulation in favor of price caps.”).

²⁴⁷ Specifically: “regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” 47 U.S.C. § 1302.

²⁴⁸ Latin for “it is known from its associates.” See also Eskrdige, at 852 (“Light may be shed on the meaning of an ambiguous word by reference to words associated with it.”).

²⁴⁹ *Verizon*, 660-62 (Silberman, J., concurring in part and dissenting in part).

²⁵⁰ ACA opinion (“it is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so.”).

Here, the FCC’s interpretation of Section 706(a) raises serious dormant commerce clause problems.²⁵¹

The *Verizon* majority’s reading of Section 706(a) as a grant of power to the FCC makes sense, in terms of internal consistency of Section 706(a), only if it is also a grant of power to state regulatory commissions “with regulatory jurisdiction over telecommunications services.” But under the Supreme Court’s jurisprudence, the Dormant Commerce clause prevents states from regulating interstate commerce unless given a positive grant to do so by Congress.²⁵² Specifically, when “Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause,”²⁵³ but courts require congressional intent to permit otherwise impermissible state actions to “be unmistakably clear.”²⁵⁴ This is a far higher standard than *Chevron*: unmistakable clarity versus reasonable interpretation of an ambiguous statute. The *Verizon* majority’s reading of Section 706(a) as a grant of power to the FCC makes sense, in terms of internal consistency of Section 706(a), only if it is also a grant of power to state regulatory commissions “with regulatory jurisdiction over telecommunications services.” But under the Supreme Court’s jurisprudence, the Dormant Commerce clause prevents states from regulating interstate commerce unless given a positive grant to do so by Congress.²⁵⁵ Specifically, Of course, when “Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause,”²⁵⁶ but courts require congressional

²⁵¹ 47 U.S.C. § 1302 (“The Commission **and each State commission** with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans...”) (emphasis added). 706(b) is not a problem on these grounds because it applies only to the FCC.

²⁵² See, e.g., *Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59 (2003) (authorization of state laws regulating milk solids does not authorize milk pricing and pooling laws); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 958-60 (1982) (congressional deference to state water law in 37 statutes and numerous interstate compacts did not indicate congressional sanction for invalid state laws imposing a burden on commerce); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982) (disclaimer in Federal Power Act of intent to deprive a State of “lawful authority” over interstate transmissions held not to evince a congressional intent “to alter the limits of state power otherwise imposed by the Commerce Clause”).

²⁵³ *Northeast Bancorp v. Board of Governors of the Federal Reserve System*, 472 U.S. 159, 174 (1985).

²⁵⁴ *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 90 (1984).

²⁵⁵ See, e.g., *Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59 (2003) (authorization of state laws regulating milk solids does not authorize milk pricing and pooling laws); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 958-60 (1982) (congressional deference to state water law in 37 statutes and numerous interstate compacts did not indicate congressional sanction for invalid state laws imposing a burden on commerce); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341(1982) (disclaimer in Federal Power Act of intent to deprive a State of “lawful authority” over interstate transmissions held not to evince a congressional intent “to alter the limits of state power otherwise imposed by the Commerce Clause”).

²⁵⁶ *Northeast Bancorp v. Board of Governors of the Federal Reserve System*, 472 U.S. 159, 174 (1985).

intent to permit otherwise impermissible state actions to “be unmistakably clear.”²⁵⁷ This is a far higher standard than *Chevron*: unmistakable clarity versus reasonable interpretation of an ambiguous statute.

It is difficult to see how the FCC or a state Commission could convince a court that Section 706(a) is “unmistakably clear” in authorizing state PUCs to regulate the Internet (again, not just broadband, according to the majority) in ways that regulate broadband. The problem is that the Internet is a uniquely worldwide (not merely interstate) medium, making it extremely difficult for states to limit the effects of their regulation to their own citizens. Thus, federal courts have struck down a host of local laws under the Dormant Commerce clause as leading to impermissible extraterritorial regulation.²⁵⁸ If state commissions were to employ the FCC’s interpretation of 706(a) authority accepted in *Verizon*, a patchwork of regulations over the Internet seems likely.²⁵⁹ All that would be required is that a state commission make a “triple-cushion shot”²⁶⁰ case that its regulation of a broadband provider, *or any other form of communications*, would promote broadband deployment. Regulatory uncertainty caused by such a patchwork would reduce investment incentives and slow down the rollout of high-speed Internet—precisely the opposite of a the goal Congress set forth in Section 706.

If Congress did not make it “unmistakably clear” that state commissions should have this power, then the inclusion of state regulatory commissions in Section 706(a) would have no effect. Under the canon against surplusage,²⁶¹ reading Section 706(a) as an independent

²⁵⁷ *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 90 (1984).

²⁵⁸ See, e.g., *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 102–04 (2d Cir. 2003) (striking down Vermont’s statute governing sexually explicit content on the Internet and concluding that the statute constituted impermissible extraterritorial regulation); *Se. Booksellers Ass’n v. McMaster*, 371 F. Supp. 2d 773, 786, 787 (D.S.C. 2005) (invalidating the South Carolina statute prohibiting dissemination of material “harmful to minors” over the Internet because the act “regulat[es] commerce occurring wholly outside of South Carolina” (citation omitted)); *Ctr. for Democracy & Tech. v. Pappert*, 337 F. Supp. 2d 606, 662 (E.D. Pa. 2004) (striking down the state law requiring Internet service providers to remove or disable access to child pornography either stored on or available through its service and noting that the Act “has the practical effect of exporting Pennsylvania’s domestic policies” (citation omitted)).

²⁵⁹ Larry Spiwak, *The FCC Can’t Use Section 706 to Preempt State Laws Prohibiting Municipal Broadband...*, Phoenix Center for Advanced Legal & Econ. Pub. Pol’y Stud. (May 1, 2014), available at <http://phoenix-center.org/blog/archives/1901> (“Thus, because *Verizon* now gives the FCC the power to oversee broadband service providers under Section 706, then *Verizon a fortiori* also provides state PUCs with the same ability to regulate broadband service providers.”).

²⁶⁰ *Verizon*, 740 F.3d at 660 (Silberman, J., concurring in part and dissenting in part).

²⁶¹ See, e.g., *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality opinion by Scalia, J.) (It is a “cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant.”).

grant of authority is not a reasonable reading of the statute because the canon of constitutional avoidance would neuter half of it. Courts should not defer to the FCC's expansive interpretation of 706(a), since it would "raise a multitude of constitutional problems" not intended by Congress.²⁶²

A far more reasonable reading is the FCC's original reading: that Section 706(a) is a directive to the FCC and the states to use other powers given to them for this particular purpose.

10. Legislative History Evinces a Clear Congressional Intent for Deregulation and Limiting FCC Discretion

Both the FCC and the D.C. Circuit's analysis of legislative history started and ended with an out-of-context quote of a Senate Report announcing that Section 706 was intended to be a "fail-safe".²⁶³ If there is anything ambiguous about Section 706, though, it is this Senate Report quote rather than the text of the statute itself. In the 1998 Advanced Services Order, the FCC stated

We are not persuaded by [the] argument that the statement in the Senate Commerce Committee's Report that section 706 is intended as a 'fail-safe' indicates that Congress provided independent forbearance authority in Section 706(a). The Senate Commerce Committee's Report makes clear that section 706 'ensures that advanced telecommunications capability is promptly deployed by requiring the [Commission] to initiate and complete regular inquiries,' and then take immediate action if it determines that such capability is not being deployed to all Americans. The Report does not clarify, however, whether Section 706 is an independent grant of regulatory authority or whether it directs the Commission to use regulatory measures granted in other provisions of the Act.²⁶⁴

²⁶² Cf. *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) ("when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail— whether or not those constitutional problems pertain to the particular litigant before the Court.").

²⁶³

²⁶⁴ *Advances Services Order*, *supra* note , at ¶ 75.

Beyond the Senate committee report, there is essentially no discussion of Section 706 in the legislative history. This would be bizarre if, indeed, Section 706 were intended to be alternative to the rest of the Act as a basis for regulation (even without trumping specific provisions of the Act).

In general, the legislative history of the Telecommunications Act of 1996 clearly shows Congress had two concerns: promoting free markets through deregulation in telecommunications and limiting FCC discretion. Interpreting Section 706 to give the FCC vast discretion to re-regulate Title I services serves neither goal; indeed, it frustrates both. For example, the chairman of NARUC defined the goal as follows:

A brief word about the relationship between the economic-regulatory structures I have described and the critical goal of advanced infrastructure deployment. The goal of the framework described is a market open to competition, with fair opportunities and flexible regulation for all participants. Where we decide burdens must be imposed, they should be imposed in a competitively neutral way, and similarly for benefits. In such circumstances, firms' investment decisions can be driven by market forces—especially consumer demand—not regulatory mandate. In an open competitive framework it is reasonable to rely on private incentives to drive investment. Mandates, which as a practical matter would fall most heavily on the traditionally regulated firms, are unnecessary-or worse. Much of the investment in the infrastructure of the future will of course be made by long established firms—but as much or perhaps even more will come from new—and essentially unregulated—firms. We have to remind ourselves that none of us knows what the right investment proportion, or type of investment is. But that is, in the end, why we wish to rely on markets, and to allow competition in these markets. To mandate a particular outcome is to reject the rationale for reliance on competition which that is the fundamental purpose of this exercise.²⁶⁵

²⁶⁵ Telecommunications Policy Reform: Hearing Before the Senate Committee on Commerce, Science, and Transportation, 104th Cong. 60-61 (1995) (statement of Kenneth Gordon on behalf of the National Association of Regulatory Utility Commissioners); *see also* S. Conf. Rep. 104-230, 104th Cong., 2d Sess. 1, S.7984 (1996) (statement of Senator Ernest F. Hollings) ("Competition is the best regulator of the marketplace. But until that competition exists, until the markets are

To interpret Section 706 to give the FCC expansive discretion in order to positively regulate is clearly inconsistent with this goal.

11. The Differences between Subsections (a) and (b) Further Confirm that Congress Did Not Intend Either to be an Independent Grant of Authority

There are two striking differences between Section 706(a) and Section 706(b). The former says both the FCC and state regulators “shall encourage” broadband deployment, while the latter says the FCC (but not states) “shall take immediate action to accelerate [broadband] deployment” (if it concludes such deployment is being unreasonably delayed). Far from supporting the D.C. Circuit’s view that one or both must be an independent grant of authority, this framing confirms that neither was intended to be a grant of authority. As explained above, Subsection (a) was intended to identify a factor that both the FCC and states should weigh in their general decision-making when using powers granted to them elsewhere, and Subsection (b) was intended to create a duty for the FCC to act, which could be enforced by filing a mandamus petition. What is important, for understanding how to interpret Section 706 generally, is that Congress chose not to impose this enforceable duty on state regulators. Why not? Because doing so would have raised a different federalism: federal commandeering of state officers.

Under the 10th Amendment, the federal government may not commandeer state officials.²⁶⁶ As explained above, the canon of constitutional avoidance rejects a reading of a statute that would raise serious constitutional problems. For instance, since Section 706(b) requires “immediate action” by the FCC, it makes sense that the drafters did not include the state commissions within its ambit: To allow a court to issue a writ of mandamus against a recalcitrant state would constitute commandeering state officials.

Here, this means Section 706(a) cannot be read to mandate action by the states. But, insofar as 706(a) does not mandate action by the states, it cannot mandate action by the

opened, monopoly-provided services must not be able to exploit the monopoly power to the consumers’ disadvantage. Competitors are ready and willing to enter the new markets as soon as they are opened.”); 141 Cong. Rec. S.7881-2, S.7886 (June 7, 1995) (statement of Senator Pressler) (“Progress is being stymied by a morass of regulatory barriers which balkanize the telecommunications industry into protective enclaves. We need to devise a new national policy framework - a new regulatory paradigm for telecommunications - which accommodates and accelerates technological change and innovation.”).

²⁶⁶ See, e.g., *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

FCC, either. This effectively undercuts the argument that Section 706(a) must be a grant of authority in order effectuate the Congressional command it contains. Accordingly, this is further evidence that Section 706(a) was never meant to be an independent grant of authority.

12. Section 305 Illustrates Congress Knew How to Write A Broad Grant of Authority but Did not Do So For Section 706

Unmentioned in either court decision is the stillborn fraternal twin of Section 706, the section (Section 305) that would have immediately followed it (Section 304, as what became Section 706 was then labeled) in the version of the Act passed by the Senate, only to be removed by the House in conference.²⁶⁷ For instance, the legislative history of the Act shows that it went through several iterations and proposals, some of which gave the FCC much more authority than the final Act did. Section 305 provided:

SEC. 305. REGULATORY PARITY.

Within 3 years after the date of enactment of this Act, and periodically thereafter, the Commission shall—

(1) issue such modifications or terminations of the regulations applicable to persons offering telecommunications or information services under title II, III, or VI of the Communications Act of 1934 as are necessary to implement the changes in such Act made by this Act;

(2) in the regulations that apply to integrated telecommunications service providers, take into account the unique and disparate histories associated with the development and relative market power of such providers, making such modifications and adjustments as are necessary in the regulation of such providers as are appropriate to enhance competition between such providers in light of that history; and

²⁶⁷ Compare S. 652 ES, 104th Cong., Sec. 304 & 305 (June 15, 1995) (Engrossed in Senate), with S.652 EAH, 104th Cong. (Oct. 12, 1995) (Engrossed Amendment House) and S.652, 104th Cong., Sec. 706 (Jan. 1, 1996) (Enrolled Bill), available at <http://beta.congress.gov/bill/104th-congress/senate-bill/652/text>; see also S. Rep. No. 104-23, at 51 (1995), available at <http://beta.congress.gov/104/crpt/srpt23/CRPT-104srpt23.pdf>.

(3) provide for periodic reconsideration of any modifications or terminations made to such regulations, with the goal of applying the same set of regulatory requirements to all integrated telecommunications service providers, regardless of which particular telecommunications or information service may have been each provider's original line of business.²⁶⁸

Section 305 was unambiguously written as an independent grant of authority – it would have allowed the FCC to do what the D.C. Circuit insists Section 706 cannot: trump other provisions of the Act, by modifying or terminating them. In other words, Section 305 would have allowed the FCC not merely to craft a new Communications Act within the constraints of the existing act, as the D.C. Circuit's interpretation of Section 706 does,²⁶⁹ but to re-write the Act itself. It would also have allowed the FCC to bypass its Section 10 forbearance process, which Section 706 does not.

Consistent with the Whole Act Rule, and the emphasis it places upon titles in understanding Congressional intent, it is instructive to understand the context of these two provisions. Rather than “Miscellaneous,” both sections were grouped under a title labeled “AN END TO REGULATION.”²⁷⁰ Could the Senate possibly have made its intent more clear? Section 304/706 was entitled “Advanced telecommunications incentives,” while Section 305 was labeled “Regulatory parity.” The two immediately followed, as Section 303, the regulatory forbearance language that became Section 10. A leading treatise on the legislative history of the Act explains how Sections 304 and 305 were intended to function:

As adopted by the Senate, Section 706 was plainly *not* designed to achieve regulatory parity – a function that was assigned to its companion provision. That provision was dropped by the Conference Committee without comment. Nor was there any comment on the floor of either house of Congress. It is improbably that the dropped section was regarded as surplusage in light of

²⁶⁸ S. 652 ES, 104th Cong., Sec. 305, 154 (June 15, 1995) (Engrossed in Senate), *available at* <https://beta.congress.gov/104/bills/s652/BILLS-104s652es.pdf>.

²⁶⁹ *See supra* at 62.

²⁷⁰ S. 652 ES, 104th Cong., 3 (June 15, 1995) (Engrossed in Senate), *available at* <https://beta.congress.gov/104/bills/s652/BILLS-104s652es.pdf>.

Section 706, or that the intended meaning of Section 706 was transformed by the Conference Committee's action.²⁷¹

What lessons would a court that bothered to consider the full history of Section 706 draw from the heretofore untold story of the Senate bill?

First, this experience reinforces the point that Congress understood the Act, in general, to be deregulatory, and made that intent clearest in Section 706 (along with Section 230).

Second, Congress knew how to write an independent grant of authority when it wanted to do so. While the exact nature of Section 305 (the ability to craft new regulations that trump any provision of the Act) differs from the grant of authority the FCC has, implausibly, read into Section 706 (the ability to craft new regulations, short of trumping any provision of the Act), it is highly implausible that the Senate would have written Section 305 so clearly as a grant of authority while writing Section 304/706 as it did if the latter was, like the former, intended to be an independent grant of authority.

Third, while divining meaning from the scant record of legislative sausage-making between the passage of the Senate bill and the final signature of the Act by President Clinton is difficult, the most obvious implication of the deletion of Section 305 is that Congress declined to give the FCC the vast discretion contemplated by Section 305. In one sense, the FCC's power under its 2010 re-interpretation of Section 706 is less vast than what Section 305 would have given it, because Section 706 does not allow it to "trump" provisions of the Act. But, in another sense, the FCC actually appears to have more discretion, under its view, to use Section 706, because it need only invent a tenuous factual argument linking its regulations to promoting broadband deployment, whereas Section 305 would have required the FCC to establish that its "modifications and adjustments" were "**necessary** in the regulation of such providers as are appropriate to enhance competition between such providers in light of that history."²⁷² If Congress removed Section 305, a clear grant of authority that was, while broader, also arguably

²⁷¹ Max D. Paglin, James R. Hobson & Joel Rosenbloom, *THE COMMUNICATIONS ACT: A LEGISLATIVE HISTORY OF THE MAJOR AMENDMENTS, 1934-1996*, 378 (1999).

²⁷² S. 652 ES, 104th Cong., Sec. 305, 154 (June 15, 1995) (Engrossed in Senate), *available at* <https://beta.congress.gov/104/bills/s652/BILLS-104s652es.pdf>.

harder to use, is it really plausible that it intended the Section 304/706 to be an independent grant of authority that was, while narrower, arguably easier to use – without clearly wording it as such?²⁷³

We do not think Section 706, as worded, is even ambiguous; its plain meaning has simply been misunderstood by an agency that won't take “no” for an answer – and it has not yet been seriously analyzed by a court.

C. *Chevron* Step 2: The FCC's Construction of Section 706 is Not Reasonable

The arguments above could be reincorporated here to explain why the FCC's construction of Section 706 is unreasonable. But, there are a number of other reasons to think this is not a reasonable interpretation of Section 706, even granting the assumption that the statute is ambiguous. First, the wide latitude given the FCC under the accepted interpretation of Section 706 will allow it to essentially craft an alternative Communications Act within the Act itself—a result clearly not intended by Congress. Second, as outlined by Judge Silberman in his partial dissent in *Verizon*, the interpretation proffered by the FCC and accepted by the majority was not tethered to the text of the statute.²⁷⁴ Third, allowing Section 706 to be an independent grant of authority leads to absurd results inconsistent with the Title I versus Title II classifications set up by Congress.

13. What the FCC's Re-Interpretation Really Means

By re-interpreting Section 706 as an independent grant of authority, the FCC has opened the Pandora's Box of broader Internet regulation through Section 706. Reclassifying broadband under Title II and regulating net neutrality on that basis will in no way solve that problem. Under Section 706, the FCC will possess sweeping power to regulate all forms of communications however it sees fit, provided it does not violate some explicit provision of the Communications Act. Just as importantly, the Commission will be *seen* to possess this power, and may therefore be able to coerce “voluntary” concessions from companies eager to avoid having that power brought down to bear on them.

²⁷³ While this, admittedly, sounds like a “plausibility” assessment under *Chevron* step two, it also speaks to whether the statute is ambiguous. Many scholars have questioned whether there really are two separate steps to *Chevron* or not.

²⁷⁴ *Verizon*, 740 F.3d at 662.

In 2008, the FCC claimed it could regulate net neutrality through “ancillary jurisdiction.” In *Comcast*, the D.C. Circuit said this would “free the FCC from its Congressional tether” – so the FCC simply re-interpreted Section 706 as what amounts to ancillary jurisdiction on steroids: Both allow the FCC to regulate “communications” in ways Congress never specifically authorized, provided the FCC does not violate express statutory language.²⁷⁵ But at least thus far, the Commission would appear to have a much freer hand under Section 706. The Commission often loses on ancillary jurisdiction claims, because whatever it does must be “reasonably ancillary” to specific statutory authority – a question courts view with increasing skepticism. But under the D.C. Circuit’s interpretation of Section 706, the Commission apparently need only assert that its regulatory intervention somehow promotes broadband – and the court, apparently, will defer to that asserted chain of causation, however attenuated and roundabout it might be, under the broad deference granted to empirical claims under *Chevron*. Further, while ancillary jurisdiction requires formal regulation, it is not clear that the Commission could not use its broad Section 706 power (under the D.C. Circuit’s interpretation) informally, without the procedural safeguards of notice-and-comment rulemaking. Finally, Section 706(a) empowers not just the FCC but state regulators, too. Any broad interpretation of the FCC’s authority under 706(a) will also empower state regulators, which, as explained above, raises serious Dormant Commerce Clause concerns.²⁷⁶

It is true that the Commission’s most outrageous use of ancillary jurisdiction – to require TV device makers to implement the “broadcast flag” system of copyright protection – could not be sustained under Section 706, because the same limitation applies to the scope of both: the Commission may regulate only “communications,” not acts or practices that happen before or after “communications” in the operation of a device.²⁷⁷ (The D.C. Circuit ruled that the broadcast flag technology was used only after a television had received the “communications” of copyrighted programming.)²⁷⁸ But this is cold comfort to those worried about the scope of the FCC’s newfound authority over “communications.” For

²⁷⁵ *Comcast*, 600 F.3d at 655.

²⁷⁶ See *supra* note 250, *ff.*, and accompanying text.

²⁷⁷ See Pennina Michlin, *The Broadcast Flag and the Scope of the FCC’s Ancillary Jurisdiction: Protecting the Digital Future*, 20 BERKELEY TECH. L.J. 907 (2005), available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1570&context=btlj>.

²⁷⁸ *American Library Ass’n. v. F.C.C.*, 406 F.3d 689, 705 (D.C. Cir. 2005).

instance, it is not clear why the FCC could not, through Section 706, mandate “network level” copyright enforcement schemes or the DNS blocking that was at the heart of the Stop Online Piracy Act (SOPA).²⁷⁹ The distinction is simple: while “communications” may end after an end-user device such as a television has received a transmission of data, routers and servers are inherent to the process of communications. Thus, it would appear that Section 706, as re-interpreted by the FCC, would, under the D.C. Circuit’s *Verizon* decision, allow the FCC sweeping power to regulate the Internet up to and including (but not beyond) the process of “communications” on end-user devices. This could include not only copyright regulation but everything from cybersecurity to privacy to technical standards.

The FCC’s proffered limitations, accepted at face value by the D.C. Circuit, offer no real barrier to the exercise of power. Nearly all communications are interstate commerce, and following the jurisprudence of the Commerce Clause itself, the FCC could plausibly regulate even intrastate non-commerce anyway.²⁸⁰ As mentioned above, that the FCC or state PUCs may regulate only “communications” under Section 706 would not stop them from regulating anything inherent to the process which can be tied to promoting broadband by extended chains of reasoning – whether that be data caps, USF funding conditions, or even state laws against municipal fiber.

Regardless of one’s opinions of Net Neutrality, this unchecked authority to regulate the Internet, apparently now possessed not only by the FCC but also state regulators, casts a dark shadow over the Open Internet. The threat is not merely formal regulations but the way the threat of regulation, or “case-by-case” interventions might be used to reshape the way the Internet operates – and that these changes may *appear* to be the voluntary result of “self-regulations” or “multistakeholder processes” when, in fact, government lurks behind the curtain, using Section 706 as a lever of control. This Orwellian Oz may not suddenly develop overnight, but it *could* evolve over time without anyone clearly realizing what had changed. Like the frog in the slowly boiling pot, there may never be a moment when the heat suddenly spikes, but eventually, the water will boil.

²⁷⁹ H.R. 3261, 112th Cong. (Oct. 26, 2011), *available at* <https://beta.congress.gov/112/bills/hr3261/BILLS-112hr3261ih.pdf>.

²⁸⁰ See *Gonzalez v. Raich*, 545 U.S. 1 (2005) (allowing the federal government to regulate a sick lady growing medical marijuana for her own consumption).

14. The Real Meaning of Section 706

There is a much better way to interpret Section 706, even if it is a grant of independent authority. In his dissent in *Verizon*, Judge Silberman granted Section 706's ambiguity, and even that it could be read as an independent grant of authority, but he stressed the interpretation given it by the FCC was not a reasonable construction.²⁸¹ He starts with the text, highlighting that the key words purportedly granting authority to the FCC are "measures that promote competition in the local telecommunications market or other regulating methods that remove barriers to infrastructure investment."²⁸² He argues that the FCC and the majority conflate what are effectively two clauses here. The first, about promoting competition, implies that a regulation should be aimed at encouraging competition among broadband providers in defined marketplaces.²⁸³ The second clause, on removing barriers to infrastructure investment, is aimed at preventing monopolists (or those with market power) from exploiting their position in the marketplace and allows the FCC to impose regulations that remove barriers to investment.²⁸⁴ Judge Silberman interprets the FCC's Net Neutrality regulations as relying on this second clause, if anything, but notes that "the Commission never actually identifies any practices of the broadband providers as 'barriers to investment' – not once in over 100 pages – probably because it would be so farfetched an interpretation of those words."²⁸⁵

According to Judge Silberman, even the broad "triple cushion shot" theory advanced by the FCC and accepted by the majority was not really about increasing competition in the broadband marketplace:

Paragraph 14 makes no reference to competition, and paragraph 120 does not refer to competition between broadband providers in the local telecommunications market – which is the statutory objective. Indeed, paragraph 120 indicates that the Commission's objective is to protect the

²⁸¹ *Verizon*, 740 F.3d at 662 (Silberman, J., concurring in part and dissenting in part).

²⁸² *Verizon*, 740 F.3d at 660 (Silberman, J., concurring in part and dissenting in part) (quoting 47 U.S.C. § 1302(a)).

²⁸³ *Id.*

²⁸⁴ *Id.* ("For example, if a particular broadband provider were a monopolist, then by regulating its prices, the Commission might encourage it to expand supply to increase profits, rather than artificially restrict supply so as to charge supracompetitive rates. Such a regulation would not increase competition, but it would at least potentially remove a barrier to investment.").

²⁸⁵ *Id.* at 660-61.

edge providers (not in the telecommunications market) from content competition with the broadband providers.²⁸⁶

Rather than promoting competition or removing barriers to infrastructure investment, the FCC's goals are to "protect[] consumer choice, free expression, end-user control, and the ability to innovate without permission."²⁸⁷ The majority actually goes beyond even this, allowing the FCC to take any action that would, in their reasoned opinion, influence "the rate and extent to which broadband providers develop and expand services for end users."²⁸⁸ Neither of these has anything to do with the actual text of Section 706(a).

The FCC's interpretation of Section 706 leads to absurdities as well, like the possibility that the FCC could ban prioritization under Section 706, but not, as we have explained above, under Title II.²⁸⁹ "We think it obvious," declared the *Verizon* court, "that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers."²⁹⁰ Because the court concluded that the FCC's non-discrimination rule was tantamount to common carriage,²⁹¹ and because the FCC had failed to explain why the same was not true of its no blocking rule until oral arguments,²⁹² the court struck down both rules.

But if, as argued above, prohibiting prioritization is permissible under Title II anyway, if the essence of common carriage is that prioritization simply must be just and reasonable, then why could not the FCC prohibit prioritization without trumping "specific mandates of the Communications Act?"²⁹³ This is certainly a plausible, if hyper-literalist, reading of the decision: Section 706 allows the FCC to do anything that the Communications Act does not explicitly forbid. It is also absurd. This example demonstrates just what an "elephant" the FCC's interpretation of Section 706 really is: a power to do anything that is not specifically, clearly prohibited by the Communications Act. It is in this sense that the FCC would most

²⁸⁶ *Id.* at 661-62.

²⁸⁷ *Id.* at 661.

²⁸⁸ *Id.* at 662 (quoting *Verizon*, 740 F.3d at 643 (Tatel, J., majority opinion)).

²⁸⁹ *See supra* at 18.

²⁹⁰ *Verizon*, 740 F.3d at 650.

²⁹¹ *Id.* at 654.

²⁹² *Id.* at 658-59.

²⁹³ *Id.* at 637 (quoting *Open Internet Order* at 118-19).

truly be building an alternative Communications Act. Far from “formulat[ing] rules to fill the interstices of the broad statutory provisions,”²⁹⁴ the Commission would be erecting veritable skyscrapers within the “very small spaces” (the literal meaning of “interstice”) between the provisions of the Communications Act – new provisions that could dwarf those in the Act itself.

D. *City of Arlington* Does not Help the FCC

The Supreme Court’s decision in *City of Arlington* was widely hailed as a victory for the FCC, and a sign that the Court intends to grant *Chevron* deference broadly.²⁹⁵ In fact, the decision merely clarifies that ambiguities concerning an agency’s authority are not exempt from *Chevron* analysis. If anything, the decision makes clear that *Chevron* does not mean blind deference to agency interpretations. As the court states: “Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will **fairly allow**.”²⁹⁶ If any statutory interpretation has ever crossed that line, the FCC’s re-interpretation of Section 706 surely does.

The statute at issue in *City of Arlington* specifically “required” something (that state and local governments process tower siting applications), but was ambiguous as to how the requirement was to be implemented.²⁹⁷ Thus, the Court held that the FCC had a reasonable argument that the statute implied a power to implement that requirement, where no other power was available.²⁹⁸

Section 706(a), by contrast, provides for “encouragement” and refers to broad categories of “regulating methods” as the means by which to accomplish that encouragement. Section 706(b) calls for “immediate action” by “removing barriers to infrastructure investment and by promoting competition in the telecommunications market.” In both cases, the rest of the Act provides the FCC with other tools that can be used for these purposes. Thus, the

²⁹⁴ *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501 (1978).

²⁹⁵ The [FCC has portrayed](#) the decision as a game-changer. [The New York Times claims](#) the Court “just gave the F.C.C.’s [Net neutrality] argument a lot more weight,” summarizing the holding as follows: “regulatory agencies should usually be granted deference in interpreting their own jurisdictions.”

²⁹⁶ *City of Arlington*, 133 S. Ct. at 1874 (emphasis added).

²⁹⁷ *Id.* at 1873.

²⁹⁸ *Id.* at 1874.

power to implement is not ambiguous in Section 706; it is amply provided in other specific provisions of the Act, to which Section 706 refers in general terms by describing the various kinds of “regulating methods” given to the FCC in the Act.

The fact that Section 706 refers to these powers in general terms rather than citing specific grants of authority found elsewhere in the act has two obvious explanations. By not listing particular grants of authority, Congress made it clear (indeed, unambiguous) that it was referring to *any* grant of power contained in the Act, thus avoiding the problem that would have been raised under the canon of *expressio unius*: if the Commission had failed to list a particular grant of authority, a court would properly have assumed that Congress intended to exclude it. Second, because, to avoid this problem, the list of specific provisions referred to would have been extremely long, this approach allowed the FCC to draft the statute in a simple, elegant fashion – never imagining its minimalist drafting would be interpreted to create an ambiguity through which the FCC could moot much of the rest of the Act.

Nor does “implementation” mean the same thing under Section 706 as in *City of Arlington* because, as Judge Randolph put it in oral arguments in *Comcast*, the provision is “aspirational,” not “operational”.²⁹⁹ But most important, the FCC’s interpretation of the statute in *City of Arlington* was simply far less sweeping in its implications than is the FCC’s re-interpretation of Section 706.

VI. Constitutional Issues

Because the D.C. Circuit in *Verizon* upheld only the FCC’s transparency rule, it did not reach the constitutional questions raised by the FCC’s 2010 Open Internet Order – nor would it have been appropriate for the court to do so.

As discussed in the amicus brief we filed in support of Verizon’s challenge to the *Open Internet Order* along with the Competitive Enterprise Institute and Free State Foundation, the FCC faces two key constitutional problems in trying to regulate net neutrality – and would still face them even if it had clear source of statutory authority to do so. First, net neutrality regulation compels broadband providers, who are speakers with First

²⁹⁹ Oral Argument at 35, *Comcast*, 600 F.3d 642 (2010), available at <http://static.arstechnica.com/CaseN08-1291ComcastvFCC.pdf#page=35>.

Amendment rights of their own, to carry the speech of others. Second, regulation would effect an unconstitutional regulatory taking under the Fifth Amendment without just compensation.³⁰⁰ “Reclassification” raises more acute versions of both concerns, especially because it triggers unbundling obligations, which clearly amount to both compelled speech and a physical taking of network capacity. It is not clear that the FCC can avoid these constitutional problems through forbearance.

Because we attach our brief as Appendix A hereto, below we summarize only briefly our analysis of these issues with regards to net neutrality regulation in particular, but expand upon the analysis regarding “reclassification.”

A. Both Net Neutrality Regulation and Title II Raise Serious First Amendment Questions

The FCC’s proposed no-blocking rule compels speech by forcing broadband providers to post, send, and allow access to nearly all types of content, even if a broadband provider prefers not to transmit such content. Courts have recognized that the First Amendment protects the editorial discretion of broadband providers in determining what content they transmit.³⁰¹ Although alleged network-neutrality violations have been rare, the decision *not* to block content, however uniform, does not diminish broadband providers’ constitutional rights to decide for themselves what to transmit and on what terms. A speaker’s freely-made choice to transmit the messages of others is itself an exercise of First Amendment rights to control the content transmitted; he does not waive his right to determine the content he chooses to transmit in the future.³⁰² Nor is the NPRM here any less

³⁰⁰ Brief of Amici Curiae of TechFreedom, the Competitive Enterprise Institute, the Free State Foundation, and the Cato Institute in support of Appellant, *Verizon v. F.C.C.*, 740 F.3d 623 (D.C. Cir. 2014), *available at* <http://techfreedom.org/post/58399981988/verizon-v-fcc-net-neutrality-amicus-brief-of>.

³⁰¹ See *Comcast Cablevision of Broward Cnty. v. Broward Cnty.*, 124 F. Supp. 2d 685 (S.D. Fla. 2000) (holding a county ordinance requiring favorable-term access for all Internet service providers violates broadband cable owners’ free-speech rights); *id.* at 692 (“Liberty of circulating is not confined to newspapers and periodicals, pamphlets and leaflets, but also to delivery of information by means of fiber optics, microprocessors and cable.”); see also *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (“*Turner I*”) (“[Through] original programming or by exercising editorial discretion over which stations or programs to include in its repertoire[, cable programmers and operators] see[k] to communicate messages on a wide variety of topics and in a wide variety of formats.”) (internal citations omitted); *Ill. Bell Tele. Co. v. Village of Itasca*, 503 F. Supp. 2d 928, 948 (N.D. Ill. 2007) (collecting cases recognizing that cable and satellite companies’ activities are protected by the First Amendment).

³⁰² Cf. *Malik v. Brown*, 16 F.3d 330, 332 (9th Cir. 1994) (“A ‘use it or lose it’ approach [for constitutional rights] does not square with the Constitution.”).

constitutionally suspect because it compels speech rather than restricts it. Constitutionally, it makes no difference whether the government forces broadband providers to speak in certain ways or not to speak at all. Although “[t]here is certainly some difference between compelled speech and compelled silence, . . . in the context of protected speech, the difference is without constitutional significance...”³⁰³ Most fundamentally, “the First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what *not* to say.”³⁰⁴

The NPRM demands particularly exacting scrutiny because it picks and chooses among speakers.³⁰⁵ Its nondiscrimination rule applies only to certain types of Internet service providers: for instance, to broadband providers but not to “edge” providers. Thus, Apple could continue to exercise editorial discretion in deciding which applications it will allow iPhone and iPad users to access. The economic disruption caused when the government regulates only certain speakers, the government’s differential treatment of speakers violates basic First Amendment principles of, yes, neutrality.³⁰⁶

But even under intermediate scrutiny, the FCC would have to “demonstrate that the recited harms’ to the substantial government interest ‘are real, not merely conjectural, and that the regulation will in fact alleviate those harms in a direct and material way.”³⁰⁷ This would require the FCC to perform far more rigorous analysis than it has thus far.

Compelling broadband providers to become common carriers under Title II raises more serious constitutional concerns. The essence of common carrier regulation is that it is not

³⁰³ *Riley*, 487 U.S. at 796–97; see also *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995) (extending the protections against compelled speech to “business corporations generally and [to] professional publishers”); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding unconstitutional a Florida statute requiring newspaper to publish political candidate’s reply to critical editorial).

³⁰⁴ *Riley*, 487 U.S. at 796–97; cf. *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n*, 475 U.S. 1, 9 (1986) (holding electric utility could not be compelled to include in its billing envelope an advocacy group’s flyer with which it disagreed).

³⁰⁵ Cf., e.g., *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 386 (1992) (“The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed.”); *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 94–95 (1972) (finding general ban on picketing near schools impermissibly content-based because it contained an exclusion for labor picketing).

³⁰⁶ Cf. *Turner I*, 512 U.S. at 659 (“Regulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns.”);

³⁰⁷ *Minority Television Project, Inc. v. FCC*, 676 F.3d 869, 879 (9th Cir. 2012) (quoting *Turner I*, 512 U.S. at 664–65).

mandatory: it is a cluster of responsibilities *and legal protects*, a *quid pro quo*, that applies when a company “holds itself out” as providing a service equally to the public.

E. Regulatory Takings

We attach as Appendix B the 2011 article by Prof. Daniel Lyons *Virtual Takings: The Coming Fifth Amendment Challenge to Net Neutrality Regulation*,³⁰⁸ and summarize and apply much of those arguments here. Net neutrality regulation, as proposed by the FCC, violates the Fifth Amendment’s prohibition on takings without just compensation: it works a *per se* taking by giving content providers a permanent easement for nearly unfettered use of network owners’ physical property (the cables and wires constituting their networks).³⁰⁹ This is significantly more true of Title II, both in its common carriage provisions (Sections 201, 202 and 208) and its unbundling requirement (Section 251(c)). Both would deprive network owners of their traditional right to exclude others from, and control the use of, their property.³¹⁰ The NPRM “chops through the bundle” of network owners’ property rights—effecting a *per se* physical taking.³¹¹ And, by requiring network owners to give content providers space on their networks, the proposed rules leave users to bear the full cost of funding networks, which in turn reduces the networks’ value by discouraging consumers from adopting, and fully using, broadband.³¹² The D.C. Circuit in *Verizon* may have found the opposite, that regulation would actually *increase* the value of broadband networks, but only because it was granted deference to the FCC’s unsupported assertion that this was the case. In a constitutional analysis, the FCC would not enjoy the same evidentiary deference.

Even if net neutrality regulation or Title II are not *per se* physical takings under the Supreme Court’s decision in *Loretto*, both would nonetheless constitute unconstitutional regulatory taking without just compensation. Determining when a regulatory taking has occurred requires the traditional *ad hoc* three-factor inquiry: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with

³⁰⁸ Daniel Lyons, *Virtual Takings: The Coming Fifth Amendment Challenge to Net Neutrality Regulation*, 86 Notre Dame L. Rev. 65, 97 (2011).

³⁰⁹ See, e.g., *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831 (1987).

³¹⁰ See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

³¹¹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)

³¹² Cf. *Hodel v. Irving*, 481 U.S. 704, 714 (1987).

reasonable investment-backed expectations; and (3) the nature of the governmental action.³¹³ Although regulation need not implicate all three factors to constitute a taking,³¹⁴ both the FCC's proposed net neutrality regulations and the imposition of Title II plainly would.

To avoid its change of interpretation of what constitutes a "telecommunications service" (i.e., "reclassification") being deemed arbitrary and capricious, the FCC must merely explain its change of interpretation. While the Court has yet to recognize investment decisions among the "reliance interests" that require heightened explanation, such as under its Fox decision (which focused on retroactive prosecution of conduct thought to be legal at the time in reasonable reliance on agency interpretation), such investment decisions lie at the heart of regulatory taking jurisprudence.

Commissioner McDowell raised this concern in his dissent from the Open Internet Order:

This warning is thrown into sharp focus by the billions of dollars invested in broadband infrastructure since the Commission first began enunciating its decisions against Title II classification of broadband Internet networks. See, e.g., AT&T Comments at 19; Verizon Comments at 22.³¹⁵

The Supreme Court's jurisprudence on regulatory takings is undoubtedly confused. But it is difficult to imagine a larger, more draconian regulatory taking than imposing Title II on broadband. Cable operators have never been subject to Title II and, since 2002, they have reasonably relied on the FCC's declaratory order confirming that cable modem service is not subject to Title II, as have telcos since the FCC's 2005 declaratory order classifying their broadband offerings under Title I. Wireless broadband providers have never been subject to Title II because the Act effectively classifies their data services as private services, and the FCC has explicitly done so in its interpretive regulations.³¹⁶ All three kinds of companies have invested hundreds of billions of dollars in their networks in reasonable reliance on their Title I status. While it is true that wireless operators also offered a voice service subject to Title II common carrier regulation, their investment decisions were

³¹³ See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

³¹⁴ see, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 633–34 (2001) (O'Connor, J., concurring)

³¹⁵ *Open Internet Order*, at 157–58, n. 54 (Commissioner McDowell, dissenting).

³¹⁶ See *supra*, § IV.

driven primarily by the need for higher-capacity networks that could offer faster data service, regulated under Title I.

Given the sheer scale of the reliance interests at stake – over a trillion dollars in total broadband investment since 1996³¹⁷ and almost \$500 billion since the Commission officially subjected telco broadband to Title I in 2005³¹⁸ – a regulatory takings argument will doubtless feature prominently in any legal challenge to “reclassification,” and such a lawsuit would offer an ideal opportunity for the courts to clarify how such reliance interests factor into Fifth Amendment analysis.

It is unclear how forbearance would play into such an analysis. The FCC could claim that no regulatory taking had been effected until it actually tried to impose Title II obligations on broadband providers, and that investment expectations would therefore not be disrupted by merely the change in regulatory status. Thus, the FCC would claim it need only defend the net neutrality regulations it imposed under Title II, and no other provisions, even if the FCC could not effectively forbear from them – so long as the FCC did not impose them. It is unlikely that a court would accept such an argument: Once subjected to Title II, the long-term investment planning of broadband operators would be fundamentally disrupted. It is not sufficient to say that the new regulatory status would affect only investments made after the date of the change in status, because broadband networks require long-term planning of capital investments; decisions to invest in new networks involve commitments to capital expenditures made over the course of many years. Thus, the FCC would necessarily have to account, if not for the past capital investments that built the current networks, then at least for those to which companies had reasonably committed making in the future in reasonable reliance upon their regulatory status under Title I at the time of their decision. To this extent, forbearance would either be inadequate because it happens after reclassification, or require the FCC to make reclassification contingent upon successful completion of forbearance (probably impossible, given that “reclassification” is not simply a policy decision, but resolution of a

³¹⁷ Since 1996, private companies have invested a total of \$1.3 trillion in broadband networks. While a total number subtracting the investments made by telcos before the FCC’s 2005 Declaratory Ruling is not readily available, the total amount of investments made by broadband companies not operating under Title II is probably roughly \$500 billion. U.S. Telecom, *Broadband Investment* (2012), available at <http://www.ustelecom.org/broadband-industry/broadband-industry-stats/investment>.

³¹⁸ *Id.*

complex set of interpretive questions), or require the FCC to complete forbearance in a timely manner. In any event, given the practical difficulties in forbearance, it is difficult to see how forbearance could be an effective tool for whittling down the scale of a regulatory taking under Title II to just net neutrality, which would still constitute a significant, if smaller, regulatory taking unto itself.

VII. The FCC’s Legal Options on Net Neutrality

While there are important differences of opinion on what exactly Internet “openness” means and how best to protect it, debate over the FCC’s role has always been less about policy than about law. Indeed, on a high level, there has long been a bipartisan *policy* consensus. It was Republican Chairman Michael Powell who, in 2004, declared that “Consumers Are Entitled to ‘Internet Freedom,’” specifically, to the four freedoms that were eventually combined into the regulations issued by the FCC in 2010 and re-proposed by the FCC in this NPRM.³¹⁹ These principles have been broadly supported ever since, even by those Commissioners who dissented from the FCC’s subsequent actions – all the while, affirming their commitment to these principles. The primary debate has always come down to legal authority: What legal authority, if any, does the FCC have to enforce these principles? Or, to put the question differently, if the FCC concludes that it must act to protect these principles, what should it do?

In our policy comments, we discuss the range of *policy* options available to the FCC, and encourage the FCC to consider the recommendation made by its chief economist for a minimum level of “best efforts” service” as the core of a no-blocking rule.³²⁰ Here, we focus on the larger question of what *legal* approach the FCC should take.

³¹⁹ Michael K. Powell, *Preserving Internet Freedom: Guiding Principles for the Industry*, 3 J. on Telecomm. & High Tech. L. 5, 11 (2004), available at http://www.jthtl.org/content/articles/V3i1/JTHTLv3i1_Powell.PDF.

³²⁰ See ICLE-TechFreedom Policy Comments at § IX. See Timothy Brennan, *Net Neutrality or Minimum Standards: Network Effects vs. Market Power Justifications*, in NETWORK NEUTRALITY AND OPEN ACCESS 61-78 (I. Spiecker and J. Krämer eds. 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1622226. Note that Brennan’s proposal rejects the argument here, that market power/competition policy is appropriate for net neutrality: “The relevant market failure is not insufficient competition but failure to recognize the network externality in the broadband environment: the value of internet access to a content supplier depends upon its viewers’ ability to access links in its content. This market failure does not justify full net neutrality, in particular, a non-discrimination rule. It does suggest a minimum quality standard...” Timothy J. Brennan, *Network Neutrality or Minimum Quality? Barking Up the Wrong Tree—and Finding the Right One*, CPI CHRONICLE (March 2012 (2)).

A. The FCC Should Seek New Legislation from Congress

The Commission's best option is, and always has been, to ask Congress for whatever authority it believes it needs to protect those principles.

Of course, many have pooh-poohed this idea, insisting that Congress is incapable of acting and pointing to the string of failed net neutrality bills over the years and the bitterly partisan nature of the debate around this issue on Capitol Hill. This misses two related and critical points. First, the FCC has spent the last nine years insisting it had legal authority to police net neutrality, beginning with its 2005 settlement with Madison River and continuing with its 2007 settlement with Comcast and, of course, its 2010 Open Internet Order. Given the FCC's stubborn insistence that it has all the legal authority, despite losing twice at the D.C. Circuit, what possible incentive could there be for Congress to take this issue seriously? It is hardly surprising Congress has not invested the time and effort required to forge a legislative compromise. Second, polarization over net neutrality is chiefly a result of the FCC's insistence on pushing forward without clear legal authority.

For the reasons discussed above, we believe that Chairman Kennard was right to begin moving away from Title II generally and to focus on promoting facilities-based competition rather than trying to create artificial competition among resellers of a monopoly service, and that his Republican successors were right to complete this agenda by affirming that broadband, in general, had never been subject to Title II (except for DSL), and should be subject to Title I. We believe they were right as a legal matter and that that the Internet is better off today as a policy matter because of the decisions they made.

Furthermore, there is good reason to think that a legislative consensus is possible. In 2010, Google and Verizon were able to hammer out a joint legislative framework on net neutrality. AT&T and other companies have embraced the basic proposal initially offered by Chairman Wheeler. Indeed, their existing terms of service are largely, if not entirely, consistent with what the Chairman has proposed. What has been missing is a clear call to action from the FCC.

We do not expect the FCC to concede that it might lose if its re-interpretation of Section 706 as an independent grant of authority were subjected to a serious *Chevron* inquiry. Yes, admitting the vulnerability of this absurd interpretation, while simultaneously acknowledging the unworkability of Title II, may be the surest way to force Congress to act. But it is certainly not the only way. The FCC can, without conceding any weakness in

its interpretation of Section 706, nonetheless ask Congress for new authority, and we recommend that it does so. The Commission can stress the need for legislation in three ways.

First, without disclaiming its authority under Section 706, the FCC can ask Congress for *narrower* authority. If the FCC intends to use the authority it has claimed under Section 706 only to regulate broadband and not to regulate other forms of “communications,” there is no reason why it should not ask Congress to narrow its authority accordingly. For the reasons discussed above, if the FCC can plausibly claim that Section 706 is a grant of authority at all, it cannot meaningfully bind itself to narrowing its own interpretation to say that that grant pertains only to broadband and not, as the D.C. Circuit found in *Verizon*, to all forms of “communications.” The Commission would remain free to change its interpretation in the future.

Second, the FCC could, consistent with the clear meaning of Section 706, pick up where it left off with the National Broadband Plan and recommend to Congress those aspects of a pro-deployment agenda that require legislative action. For example, it makes no sense at all that new broadband entrants cannot take advantage of the Act’s provisions providing for access to pole attachments priced on a non-discriminatory basis unless they are either a cable company subject to Title VI or a telco subject to Title II.

Third, more generally, there is widespread recognition that the Communications Act is sorely out of date, and that Congress, in passing the 1996 Telecommunications Act, failed to anticipate just how radically intermodal competition would render obsolete the regulatory silos of the two acts. Congress is already studying this issue in earnest, with the Energy & Commerce Committee having issued three white papers and requests for public comment.³²¹ The FCC should add its own voice to that discourse by recommending what it thinks a new act should look like. Nothing would do so much to trigger movement towards bipartisan consensus as the FCC’s participation in this discourse.

And there is good reason to think that a bipartisan compromise on net neutrality is possible within the context of a larger re-write of the Act. As detailed further in our policy

³²¹ See #CommActUpdate: Overview, available at <http://energycommerce.house.gov/CommActUpdate>.

comments, the proposed Digital Age Communications Act of 2005 represented just such a compromise, forged by a diverse and bipartisan array of academics and telecom experts.³²²

B. Enforcement of a Multistakeholder Code

But short of waiting for Congress to act, what can the FCC do, if Title II is not a viable option and Section 706 is not an independent grant of authority? The best option would be for the FCC to convene a multistakeholder process aimed at producing a clear code of conduct regarding network management. The FCC can claim the authority to require companies to stipulate to this code through Section 706 and to enforce adherence to it under the Commission's general authority to enforce statements made to the Commission.³²³ But, importantly, even if a court does rule that Section 706 is not an enforceable grant of authority, such a code will remain no less enforceable by the Federal Trade Commission, which has unambiguous authority to enforce corporate adherence to codes of conduct.

Ideally, the FCC would pause its rulemaking for, say, nine months, and call on industry and key stakeholders to attempt to craft an enforceable code of conduct. If this process fails to produce a code of conduct, the FCC will have lost little but will at least have demonstrated to Congress that it has exhausted other potential remedies short of legislation. If, on the other hand, such a code succeeds, the FCC could produce a durable policy solution – without having to resolve the thorny issues of its own legal authority.

But if, as we expect will happen, the FCC moved forward with issuing new regulations based on Section 706, it can build a multistakeholder process into its regulations to provide a boots and suspenders approach. Without changing its overall approach, it could build a safe harbor into its regulations as an alternative regulatory system by which companies and consumer advocates could flesh out the details of the broad policy

³²² *Digital Age Communications Act: Report from the Working Group on Institutional Reform*, PROGRESS & FREEDOM FOUND. (Nov. 2006), available at http://www.freestatefoundation.org/images/Final_Published_DACA_Report.pdf; [Cite CROSS REFERENCE].

³²³ 47 U.S.C. § 502 (“Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this chapter, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than \$500 for each and every day during which such offense occurs.”).

framework set forth by the FCC. The FCC could even, as the Federal Trade Commission does with safe harbors under the Children’s Online Privacy Protection Act (COPPA),³²⁴ reserve the right to certify the adequacy of a code of conduct. The beauty of this approach is that it would, without requiring the FCC to concede the vulnerability of its legal claims under Section 706, allow the FCC to incentivize the creation of a legal framework that would remain in place even if it loses on Section 706 – one that would be enforceable by the FTC. Simply put, this would allow the FCC to use its *claimed* authority as leverage – to bluff its way towards getting what it wants as a policy matter.

This approach would be entirely consistent with the Obama Administration’s embrace of multistakeholder processes. What the White House said, in its 2012 *Consumer Privacy Bill of Rights white paper*, about how best to address the complex question of how to regulate consumer privacy is no less true of Net Neutrality:

The Administration supports open, transparent multistakeholder processes because, when appropriately structured, they can provide the flexibility, speed, and decentralization necessary to address Internet policy challenges. A process that is open to a broad range of participants and facilitates their full participation will allow technical experts, companies, advocates, civil and criminal law enforcement representatives responsible for enforcing consumer privacy laws, and academics to work together to find creative solutions to problems. Flexibility in the deliberative process is critical to allowing stakeholders to explore the technical and policy dimensions—which are often intertwined—of Internet policy issues....

Another key advantage of multistakeholder processes is that they can produce solutions in a more timely fashion than regulatory processes.... In the Internet standards world, for example, working groups frequently form around a specific problem and make significant progress toward a solution within months, rather than years. These groups frequently function on the basis of consensus and are amenable to the participation of individuals and groups with limited resources. These characteristics lend legitimacy to the

³²⁴ See 15 U.S.C. § 6503 (“An operator may satisfy the requirements of regulations issued under [15 U.S.C. § 6502(b)] of this title by following a set of self-regulatory guidelines, issued by representatives of the marketing or online industries, or by other persons, approved under subsection (b) of this section.”).

groups and their solutions, which in turn can encourage rapid and effective implementation.³²⁵

The success of a multistakeholder approach could also help to facilitate the passage of legislation, by demonstrating that consensus is possible and establishing a diverse constituency for legislation that is consistent with the code of conduct that emerges from the multistakeholder process.

One important advantage of a relying on a multistakeholder process is that it could be enforced by government without raising any of the constitutional issues identified above – and therefore without the prospect of protracted litigation. While the White House *Privacy Bill of Rights* white paper does not specifically mention this issue, it is among the important reasons why multistakeholder processes are more “nimble” than traditional regulatory ones.

C. Enforcement of Transparency Rule

In addition, or in the alternative, the FCC could also explore the recommendation offered by Judge Silberman in his dissent, that the FCC could have grounded its transparency rule in a claim of ancillary jurisdiction based on Section 257 of the Communications Act.

I do think that the transparency rules rest on firmer ground. The Commission is required to make triennial reports to Congress on “market entry barriers” in information services, 47 U.S.C. § 257, and requiring disclosure of network management practices appears to be reasonably ancillary to that duty.³²⁶

While this claim of ancillary jurisdiction would require more analysis, it could provide a basis for the FCC to compel companies to disclose their network management practices. That, in turn, could allow the FCC to kick start a multistakeholder process – or simply to enforce existing industry practices, even without new legislation. And since the FCC can punish companies for misrepresentations made in filings to the Commission,³²⁷ this claim of ancillary jurisdiction could be the basis for a larger enforcement system.

³²⁵ [CITE] <http://www.whitehouse.gov/sites/default/files/privacy-final.pdf>

³²⁶ Verizon, 740 F.3d at 668, n. 9 (Silberman, J., concurring in part and dissenting in part).

³²⁷ 47 U.S.C. § 502.

D. Merger Conditions

Finally, the FCC has already used merger conditions to require abide by the very Net neutrality conditions it has sought to impose by regulation. AT&T agreed to such conditions when it bought Ameritech back in 2005.³²⁸ Comcast agreed to such conditions when it bought NBC/Universal in 2012 and remains subject to those conditions until 2016.³²⁹ It appears highly likely that the FCC will be able to extend both the duration and application of those conditions if it approves Comcast's acquisition of Time Warner Cable, meaning that roughly 35% of Americans will be

We believe it is inappropriate for the FCC to use merger conditions as a means of circumventing the normal rulemaking process, and that merger conditions should be imposed only to address harms specific to a merger. We supported the original version of the FCC Process Reform Act, which would have barred the FCC from imposing merger conditions that were not specific to the transaction or within authority that the agency would otherwise possess. Yet that provision was removed from the bill before its recent passage in the House of Representatives. And so, whether we like it or not, the reality is that the FCC possesses sweeping *de facto* power to regulate informally through merger conditions. It has certainly not been shy about using it.

VIII. Conclusion

These legal problems, with the exception of the constitutional problems, are all problems that can be solved by Congress through the normal course of the legislative process: passing legislative in both chambers of the elected representatives of the American people and having it signed by our elected President. There is no shame in the FCC admitting it does not have a sound legal basis for regulating net neutrality. Indeed, the first duty of every regulatory agency is not to push the boundaries of the agency's authority in increasingly creative ways, but to defer to Congress and wait clear instructions.

³²⁸ See Ameritech, FCC 95-223, *Consent Decree Order*, 10 FCC Rcd 13846 (1995); see also Ameritech Operating Companies Request to Terminate Consent Decree, *Order*, DA 12-1728 (Nov. 2, 2012), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db1102/DA-12-1728A1.txt.

³²⁹ See Comcast Corp., *Order*, File No. EB-11-IH-0163, DA 12-953, ¶¶ 17-19 (June 27, 2012), available at https://apps.fcc.gov/edocs_public/attachmatch/DA-12-953A1.pdf.

Meanwhile, a spectre haunts the Internet – the spectre of Section 706. The FCC has claimed the power to act as a second national legislature for the Internet, to invent whatever form of regulation it decides will promote broadband deployment. This is essentially a legislative function over communications unrestrained by any clear legal boundaries – except that the FCC may not, as Section 305 of the Senate version of the 1996 Telecommunications Act would have allowed it do, modify or terminate specific provisions of the Communications Act.

Whatever the FCC does about net neutrality, it should renounce this sweeping power – at least insofar as that power extends beyond regulating broadband itself in ways that are demonstrably tried to promoting broadband deployment and competition. The FCC could do this, even while basing net neutrality regulations on Section 706. But the FCC cannot bind itself in the future. If the courts do not strike down the FCC's sweeping re-interpretation of Section 706 as a grossly unreasonable perversion of Congressional intent, Congress must do so – lest Section 706 become the *de facto* Communications Act of 2014.