DISSENTING STATEMENT OF COMMISSIONER AJIT PAI

Re: *Protecting and Promoting the Open Internet*, GN Docket No. 14-28.

Americans love the free and open Internet. We relish our freedom to speak, to post, to rally, to learn, to listen, to watch, and to connect online. The Internet has become a powerful force for freedom, both at home and abroad. So it is sad to witness the FCC's unprecedented attempt to replace that freedom with government control.

It shouldn't be this way. For twenty years, there's been a bipartisan consensus in favor of a free and open Internet. A Republican Congress and a Democratic President enshrined in the Telecommunications Act of 1996 the principle that the Internet should be a "vibrant and competitive free market . . . unfettered by Federal or State regulation."[1] And dating back to the Clinton Administration, every FCC Chairman—Republican and Democrat—has let the Internet grow free from utility-style regulation. The result? The Internet has been an amazing success story, changing our lives and the world in ways that would have been unimaginable when the 1996 Act was passed.

But today, the FCC abandons those policies. It reclassifies broadband Internet access service as a Title II telecommunications service. It seizes unilateral authority to regulate Internet conduct, to direct where Internet service providers put their investments, and to determine what service plans will be available to the American public. This is not only a radical departure from the bipartisan, market-oriented policies that have served us so well for the last two decades. It is also an about-face from the proposals the FCC made just last May.

So why is the FCC changing course? Why is the FCC turning its back on Internet freedom? Is it because we now have evidence that the Internet is not open? No. Is it because we have discovered some problem with our prior interpretation of the law? No. We are flip-flopping for one reason and one reason alone. President Obama told us to do so.

On November 10, President Obama asked the FCC to implement his plan for regulating the Internet, one that favors government regulation over marketplace competition.[2] As has been widely reported in the press, the FCC has been scrambling ever since to figure out a way to do just that.

The courts will ultimately decide this *Order*'s fate. And I doubt they will countenance this unlawful power grab. Litigants are already lawyering up to seek judicial review of these new rules. Given the *Order*'s many glaring legal flaws, they will have plenty of fodder.

But if this *Order* manages to survive judicial review, these will be the consequences: higher broadband prices, slower speeds, less broadband deployment, less innovation, and fewer options for American consumers. To paraphrase Ronald Reagan, President Obama's plan to regulate the Internet isn't the solution to a problem. His plan is the problem.

In short, because this *Order* imposes intrusive government regulations that won't work to solve a problem that doesn't exist using legal authority the FCC doesn't have, I dissent.

I.

The Commission's decision to adopt President Obama's plan marks a monumental shift toward government control of the Internet. It gives the FCC the power to micromanage virtually every aspect of how the Internet works. It's an overreach that will let a Washington bureaucracy, and not the American people, decide the future of the online world.

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[1] Communications Act of 1934, as amended, § 230(b)(2).

[2] The White House, Net Neutrality: President Obama's Plan for a Free and Open Internet, https://web.archive.org/web/20150204034321/http://www.whitehouse.gov/net-neutrality (Nov. 10, 2014).

One facet of that control is rate regulation. For the first time, the FCC will regulate the rates that Internet service providers may charge and will set a price of zero for certain commercial agreements.[3] And the *Order* goes out of its way to reject calls to forbear from section 201's authorization of rate regulation,[4] thus making clear that the FCC will have the authority to determine the appropriate rates and charges for service.[5] The *Order* also expressly invites parties to file such complaints with the Commission.[6] A government agency deciding whether a rate is lawful is the very definition of rate regulation.

As a consequence, if the FCC decides that it does not like how broadband is being priced, Internet service providers may soon face admonishments, citations,[7] notices of violation,[8] notices of apparent liability,[9] monetary forfeitures and refunds,[10] cease and desist orders,[11] revocations,[12] and even referrals for criminal prosecution.[13] The only limit on the FCC's discretion to regulate rates is its own determination of whether rates are "just and reasonable," which isn't much of a restriction at all.

Although the *Order* plainly regulates rates, the plan takes pains to claim that it is not imposing further "*ex ante* rate regulation."[14] Of course, that concedes that the new regulatory regime will involve *ex post* rate regulation. But even the agency's suggestion that it today "cannot . . . envision" *ex ante* rate regulations "in this context" says nothing of what a future Commission—perhaps this very Commission in a few months or years—could envision.[15] Indeed, the FCC grants forbearance against *ex ante* rate regulation but then turns around and says there's no apparent "incremental benefit" to doing so since the Commission could just reverse that decision in any future rulemaking.[16]

Indeed, it's actually quite easy to envision this same Commission deciding to discard the predictive judgment that *ex ante* rate regulation is unnecessary. After all, the Commission in this very *Order* and without explanation junks the agency's 2002 predictive judgment that intermodal broadband competition would develop.[17] The short shrift the *Order* gives to our past bodes poorly for our future—for why should anyone trust these latest promises at all?

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[3] The *Order* bans paid prioritization, and as the *Verizon* court put it: "In requiring that all edge providers receive this minimum level of access for free, these rules would appear on their face to impose per se common carrier obligations with respect to that minimum level of service." *Verizon v. FCC*, 740 F.3d 623, 658 (D.C. Cir. 2014). Setting a prospective rate of zero for a service is the very definition of *ex ante* rate regulation.

[4] *Order* at paras. 449–50.

[5] Communications Act § 201(a), (b).

[6] *Order* at para. 455.

[7] *See* Communications Act § 503(b)(5).

[8] *See* 47 C.F.R. § 1.89.

[9] *See* Communications Act § 503(b)(4).

[10] *See* Communications Act § 503(b).

[11] *See* Communications Act § 312(b).

[12] *See* 47 C.F.R. § 1.91.

[13] *See* Communications Act § 501.

[14] *Order* at paras. 441, 443, 447, 451, 452.

[15] *Order* at para. 452; *see Order* at para. 451 ("[W]e do not and cannot envision adopting new *ex ante* rate regulation of broadband Internet access service in the future").

[16] *Order* at note 1352.

[17] *Order* at para. 330.

Just as pernicious is the FCC's new "Internet conduct" standard, a standard that gives the FCC a roving mandate to review business models and upend pricing plans that benefit consumers.[18] Usage-based pricing plans and sponsored data plans are the current targets. So if a company doesn't want to offer an expensive, unlimited data plan, it could find itself in the FCC's cross hairs.[19]

Consider that activists promoting this rule had previously targeted neither AT&T nor Verizon with their first net-neutrality complaint but MetroPCS—an upstart competitor with a single-digit market share and not an ounce of market power. Its crime? Unlimited YouTube. MetroPCS offered a $40-per-month plan with unlimited talk, text, Web browsing and YouTube streaming. The company's strategy was to entice customers to switch from the four national carriers or to upgrade to its newly built 4G Long Term Evolution network. Whatever the benefits of MetroPCS's approach, activists have said "there can be no compromise."[20]

Or take T-Mobile's Music Freedom program, which the Internet conduct rule puts on the chopping block. The "Un-carrier" lets consumers stream as much online music as they want without charging it against their monthly data allowance. Consumers love it, judging by T-Mobile's rapid subscriber growth. Yet Music Freedom too stands on the brink of a ban—with the FCC "mindful of the concerns raised in the record that sponsored data plans have the potential to distort competition by allowing service providers to pick and choose among content and application providers to feature on different service plans."[21]

Affordable, prepaid plans are now also suspect. These plans have enabled millions of low-income households to have mobile service. And yet the *Order* plays up the "concern that such practices can potentially be used by broadband providers to disadvantage over-the-top providers."[22] In other words, these plans aren't the all-you-can-eat plans endorsed by the FCC, and so they, too, may violate the Internet conduct standard.

Our standard should be simple: If you like your current service plan, you should be able to keep your current service plan. The FCC shouldn't take it away from you. Indeed, economists have long understood innovative business models like these are good for consumers because they give them more choices and lower prices. To apply outmoded economic thinking to the Internet marketplace would just hurt consumers, especially the middle-class and low-income Americans who are the biggest beneficiaries of these plans.

In all, the FCC will have almost unfettered discretion to decide what business practices clear the bureaucratic bar, so these won't be the last business models targeted by the agency. And though the FCC spends several paragraphs describing seven vaguely worded factors that it will consider when applying the Internet conduct standard—end-user control; competitive effects; consumer protection; effect on innovation, investment, or broadband deployment; free expression; application agnostic; and standard practices[23]—these factors lead to more questions than they answer. As the Electronic Frontier Foundation

[18] *Order* at paras. 133–53.

[19] *Order* at paras. 152–53.

[20] *See*, *e.g.*, Susan Crawford, Zero for Conduct, *Medium* (Jan. 7, 2015) ("Zero-rating . . . is absolutely inappropriate. It makes certain kinds of traffic exempt from any data cap at all, or creates a synthetic 'online' experience for users that isn't the Internet. . . . [Z]ero rating is not just a competition issue. It's also a human rights issue. Saying that walled gardens are "good enough" for poorer people is clearly destructive. . . . All compromise is based on give and take. But when it comes to fundamentals—including the earth-shaking idea of the Internet, which has made possible for the first time an open, global, interoperable platform for communications—there can be no compromise."), *available at* http://bit.ly/14xVnUT.

[21] *Order* at para. 152.

[22] *Order* at para. 153.

[23] *Order* at paras. 139, 140, 141, 142, 143, 144, 145.

wrote just this week: This open-ended rule will be "anything but clear" and "suggests that the FCC believes it has broad authority to pursue any number of practices." And "multi-factor test gives the FCC an awful lot of discretion, potentially giving an unfair advantage to parties with insider influence." Or as they put it more bluntly, this rule is "hardly the narrow, light-touch approach we need to protect the open Internet."[24] Even FCC leadership conceded that, with respect to the sorts of activities the Internet conduct standard could regulate, "we don't really know" and that "we don't know where things go next," other than that the "FCC will sit there as a referee and be able to throw the flag."[25]

And because this list is "non-exhaustive," with "other considerations relevant to determining whether a particular practice violates" the standard,[26] Internet service providers are left to guess. Will the rate of return on investment be a factor? How about an operator's margins? What if the Internet service provider separately offers an interconnected VoIP service?

Net neutrality proponents are already bragging that it will turn the FCC into the "Department of the Internet"[27]—and it's no wonder. The FCC's newfound control extends to the design of the Internet itself, from the last mile through the backbone. Section 201(a) of the Communications Act gives the FCC authority to order "physical connections" and "through routes,"[28] meaning the FCC can decide where the Internet should be built and how it should be interconnected. And with the broad Internet conduct standard, decisions about network architecture and design will no longer be in the hands of engineers but bureaucrats and lawyers.

So if one Internet service provider wants to follow in the footsteps of Google Fiber and enter the market incrementally, the FCC may say no. If another wants to upgrade the bandwidth of its routers at the cost of some latency, the FCC may block it. Every decision to invest in ports for interconnection may be second-guessed; every use of priority coding to enable latency-sensitive applications like Voice over LTE may be reviewed with a microscope. How will this all be resolved? No one knows. 81-year-old laws like this don't self-execute, and even in 317 pages, there's not enough room for the FCC to describe how it would decide whether this or that broadband business practice is just and reasonable. So businesses will have to decide for themselves—with newly-necessary counsel from high-priced attorneys and accountants—whether to take a risk.

That's just from some of the rules that the FCC is deciding to apply now. Yet *more* rules are on the horizon. The Commission commits "to commence in the near term a separate proceeding to revisit the data roaming obligations of [mobile broadband] providers in light of our reclassification decisions" and to determine whether full-fledged common-carriage wholesale obligations should apply.[29] And it

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[24] Corynne McSherry, Electronic Frontier Foundation, Dear FCC: Rethink The Vague "General Conduct" Rule (Feb. 24, 2015), *available at* http://bit.ly/1AIJrKU; *see also* Letter from Corynne McSherry, Intellectual Property Director, Electronic Frontier Foundation, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-191, 14-28 (Feb. 19, 2015) ("The Commission has an important role to play in promulgating 'rules of the road' for broadband, but that role should be narrow and firmly bounded. We fear the proposed 'general conduct rule' may meet neither criteria. Accordingly, if the Commission intends to adopt a 'general conduct rule' it should spell out, in advance, the contours and limits of that rule, and clarify that the rule shall be applied only in specific circumstances."), *available at* http://go.usa.gov/3cP53.

[25] February 2015 Open Meeting Press Conference of Chairman Tom Wheeler (Feb. 26, 2015), *available at* http://www.fcc.gov/events/open-commission-meeting-february-2015 (165:30-166:51).

[26] *Order* at para. 138.

[27] *See*, *e.g.*, Nilay Patel, We won the internet back, *The Verge* (Feb. 4, 2015), *available at* http://bit.ly/1C17xB5.

[28] Communications Act § 201(a).

[29] *Order* at para. 526.

promises a new rulemaking to apply section 222's customer-proprietary network information provisions to Internet service providers.[30] Still more are sure to come.

And then there is the temporary forbearance. Did I forget to mention that? Although the *Order* crows that its forbearance from Title II's provisions and rules yields a "'light-touch' regulatory framework,"[31] in reality it isn't light at all, coming as it does with the provisos, limitations, and qualifications that the public has come to expect from Washington, DC. The plan is quite clear about the limited duration of its forbearance decisions, stating that the FCC will revisit them in the future and proceed in an incremental manner with respect to additional regulation.[32] In discussing additional rate regulation, tariffs, last-mile unbundling, burdensome administrative filing requirements, accounting standards, and entry and exit regulation, the plan repeatedly states that it is only forbearing "at this time."[33] For others, the FCC will not impose rules "for now."[34]

To be sure, with respect to some rules, the agency says that it "cannot envision" going further.[35] But as the history of this proceeding makes clear, temporal statements like these don't tend to last very long. Ask people who have followed this proceeding closely, and they could tell you that as late as November 2014, reclassification was not under serious consideration by the FCC "at this time," Title II was not going to be imposed "for now," and the agency "could not envision" going further than either a 706-based approach or the Mozilla-inspired hybrid proposal. In other words, expect the forbearance to fade and the regulations to ratchet up as time marches on.

A.

Consumers will be worse off under President Obama's plan to regulate the Internet. Consumers should expect their bills to go up, and they should expect that broadband will be slower going forward than it otherwise would have been. This isn't what anyone was promised, and no one likes paying more for less.

1. New Broadband Taxes.—One avenue for higher bills is the new taxes and fees that will be applied to broadband. Here's the background. If you look at your phone bill, you'll see a "Universal Service Fee," or something like it. These fees (what most Americans would call taxes) are paid by Americans on their telephone service and funnel about $9 billion each year through the FCC—all outside the congressional appropriations process. Consumers haven't had to pay these taxes on their broadband bills because broadband Internet access service has never before been a Title II service.

But now it is. And so the *Order* explicitly opens the door to billions of dollars in new taxes on broadband. As the *Order* frankly acknowledges, Title II "authorizes the Commission to impose universal service contributions requirements on telecommunications carriers—and, indeed, goes even further to require '[e]very telecommunications carrier that provides interstate telecommunications services' to contribute."[36] And so the FCC now has a statutory obligation to make sure that all Internet service providers (and in the end, their customers) contribute to the Universal Service Fund.

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[30] *Order* at para. 462.

[31] *Order* at para. 5.

[32] *See, e.g.*, *Order* at note 1487.

[33] *Order* at paras. 497 (additional rate regulation and tariffing), 500 (same), 501 (same), 502 (same), 508 (administrative filing requirements and accounting standards), 510 (entry and exit regulation), 513 (last-mile unbundling and resale).

[34] *Order* at paras. 470, 488.

[35] *Order* at para. 451; *see also Order* at paras. 452, 508.

[36] *Order* at para. 488 (quoting Communications Act § 254(d)).

That's why the *Order* repeatedly states that it is only deferring a decision on new broadband taxes—not prohibiting them.[37] This is fig-leaf forbearance, a reprieve only "insofar as [the provisions] would immediately require new universal service contributions for broadband Internet access services sold to end users but not insofar as they authorize the Commission to require such contributions in a rulemaking in the future."[38]

That future is swiftly approaching; it may be just a few months. The *Order* notes that the FCC has referred the question of assessing state and federal taxes on broadband to the Federal-State Joint Board on Universal Service and has "requested a recommended decision by April 7, 2015," right before Tax Day—although a "a short extension of that deadline" may be in order.[39] It's no surprise that many have interpreted this referral as a question of *how* to tax broadband, not *whether* to do so, and states have already begun discussions on how they will spend the extra money.[40]

And the agency's preference is clear. The *Order* argues that taxing broadband "potentially could spread the base of contributions" and could add "to the stability of the universal service fund."[41] For those not familiar with this Beltway argot, let me translate: "Extending these taxes to broadband would make it easier to spend more without public oversight." But using plain English hardly makes for a compelling public message.

We've seen this game played before. During reform of the E-Rate program in July 2014, the FCC secretly told lobbyists that it would raise USF taxes after the election to pay for the promises it was making.[42] Sure enough, in December 2014, the agency did just that—increasing E-Rate spending (and with it telephone taxes) by $1.5 billion per year.[43]

The federal government is sure to tap this new revenue stream soon to spend more of consumers' hard-earned dollars. Indeed, it's been publicly reported that the FCC is itching to use the Universal Service Fund to extend the Lifeline program to broadband. That won't come cheap. In order to provide discounted broadband service to millions of Americans, the FCC will have to find the money somewhere. With this *Order*, that somewhere is your wallet. So when it comes to broadband, read my lips: More new taxes are coming. It's just a matter of when.[44]

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[37] *See, e.g.*, *Order* at para. 489 ("We therefore conclude that limited forbearance is warranted at the present time in order to allow the Commission to consider the issues presented based on a full record in that docket.").

[38] *Order* at para. 490.

[39] *Order* at note 1471.

[40] *See*, *e.g.*, Vermont Public Radio, Under New FCC Standard, 30 Percent Of Vermonters Now Lack Broadband (Feb. 3, 2015) ("One of the things that would come along with [reclassification] is the ability to assess a universal service fee on broadband services. . . . If that happens, the money might be there to fund these higher speeds."), *available at* http://digital.vpr.net/post/under-new-fcc-standard-30-percent-vermonters-now-lack-broadband.

[41] *Order* at para. 489.

[42] *Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8870, 9042 (2014) (Dissenting Statement of Commissioner Ajit Pai); *see also* http://youtu.be/6LDko49R9YM.

[43] *Modernizing the E-Rate Program for Schools and Libraries; Connect America Fund*, WC Docket Nos. 13-184, 10-90, Second Report and Order and Order on Reconsideration, FCC 14-189 (rel. Dec. 19, 2014) (Dissenting Statement of Commissioner Ajit Pai), *available at* http://go.usa.gov/3cpm4.

[44] In fact, broadband taxes may go up even further than this should the FCC revisit its decision to forbear from requiring contributions to the Telecommunications Relay Service (TRS) Fund. *See Order* at para. 470 ("[*F*]*or now* we do forbear in part from the application of TRS contribution obligations that otherwise would newly apply to broadband Internet access service") (emphasis added). There, too, the fix may be in. *See id*. ("Applying new TRS contribution requirements on broadband Internet access potentially could spread the base of contributions to the TRS Fund, having the benefit of adding to the stability of the TRS Fund. Nevertheless, before taking any steps that

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The great irony of all of this? The broadband tax increase enabled by reclassification is going to deter broadband adoption, especially among the low-income Americans for whom broadband (especially mobile broadband) is increasingly important for professional success, education, and more.[45] The iron law of microeconomics still holds: The more you tax something, the less you get of it. In this case, the FCC's decision today will mean fewer digital opportunities for hard-working Americans tomorrow.

2. Slower Broadband.—These Internet regulations will work another serious harm on consumers. Their broadband speeds will be slower than they would have been without these regulations.

The record is replete with evidence that Title II regulations will slow investment and innovation in broadband networks.[46] Remember: Broadband networks don't have to be built. Capital doesn't have to be invested here. Risks don't have to be taken. The more difficult the FCC makes the business case for deployment—and micromanaging everything from interconnection to service plans makes it difficult indeed—the less likely it is that broadband providers big and small will connect Americans with digital opportunities. And neither big nor small providers will bring rural and poor Americans online if it's economically irrational for them to do so. Utility-style regulation of the kind the FCC adopts here thus will simply broaden the digital divide.

The Old World offers a cautionary tale here. Compare the broadband market in the United States to that in Europe, where broadband is generally regulated as a public utility. Data show that 82% of Americans, and 48% of rural Americans, have access to 25 Mbps broadband speeds. In Europe, those figures are only 54% and 12%, respectively. Similarly, wireline broadband providers in the United States are investing more than twice as much as their European counterparts ($562 per household versus $244). The data for wireless broadband providers shows the same pattern ($110 per person versus $55). In the United States, broadband providers deploy fiber to the premises about twice as often (23% versus 12%). And with respect to mobile broadband, 30% of subscribers in the United States have the fastest technology in wide deployment, 4G LTE, but in Europe that figure is only 4%. Moreover, in the United States, average mobile speeds are about 30% faster than they are in Western Europe.[47]

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would depart from the *status quo* in this regard, the Commission would like to assess the need for such additional funding, and the appropriate contribution level.").

[45] Letter from Kim Keenan, President & Chief Executive Officer, MMTC, to the Honorable Tom Wheeler, Chairman, FCC, et al., GN Docket No. 14-28, at 3 (Feb. 18, 2015) ("Title II regulation, even when ostensibly administered with a lighter touch, will likely have unintended consequences on broadband adoption for people of color, the disabled, the economically disadvantaged, rural residents, and seniors."), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001030899.

[46] *See, e.g.*, ACA Comments at 60–66; Alcatel-Lucent Comments at 2; AT&T Comments at 51–53; CenturyLink Comments at 5–6; Charter Comments at 13, 15–16; Cisco Comments at 27; Comcast Comments at 46–50; Cox Comments at 34–36; CTIA Comments at 46–48; Ericsson Comments at 12; Frontier Comments at 2–4; Qualcomm Comments at 4–7; Verizon Comments at 57; Letter from Matthew A. Brill, Counsel for National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 3–5 (Dec. 23, 2014); Letter from Patrick S. Brogan, USTelecom to Marlene Dortch, Secretary, FCC, GN Docket No. 14-28 (Nov. 19, 2014) (attaching Kevin A. Hassett & Robert J. Shapiro, Sonecon, The Impact of Title II Regulation of Internet Providers on Their Capital Investment (Nov. 2014)); Letter from Laurence Brett Glass, d/b/a LARIAT to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1 (Jan. 9, 2015); Letter from John Mayo, Exec. Director, Georgetown Center for Business and Public Policy to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (Jan. 16, 2015) (attaching Anna-Maria Kovacs, Regulatory Uncertainty: The FCC's Open Internet Docket (Jan. 2015)); Martin H. Thelle & Dr. Bruno Basalisco, Copenhagen Economics, Europe Can Catch Up With the US: A Contrast of Two Contrary Broadband Models (June 2013), *available at* http://bit.ly/1zJritJ.

[47] Christopher S. Yoo, U.S. vs. European Broadband Deployment: What Do the Data Say? Penn Law Center for Technology, Innovation and Competition, at 4–5, 13, 23 (June 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=7521285448; CISCO, VNI Mobile Forecast Highlights, 2014-2019 (compare the average mobile connection speed in the United States of 2,619 kbps with the 2,037 kbps average

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It's no wonder that many Europeans are perplexed by what is taking place at the FCC. Just days before the FCC adopted this *Order*, for example, the Secretary General of the European People's Party, the largest party in the European Parliament, observed that the FCC, "at the behest of . . . [P]resident [Obama] himself,", was about to impose the type of "[r]egulation which . . . has led Europe to fall behind the US in levels of investment."[48]

But the *Order* doesn't just adopt utility-style regulation. It goes even further and injects tremendous uncertainty into the market. At least with easy-to-understand, bright-line rules, a business can plan. But a thick regulatory haze—rules that are unclear with the overhang of more rules to come—should make any rational businesses hold back on investment and start returning any free cash back to their shareholders.

Ironically enough, the Commission itself acknowledges at one point that "vague or unclear regulatory requirements could stymie rather than encourage innovation."[49] But those are precisely the kind of requirements the FCC is adopting. Its predictive judgment that uncertainty is "likely to be short term and will dissipate over time as the marketplace internalizes our Title II approach"[50] prioritizes faith above experience.

Making it all worse is the fact that the FCC cannot promise anything about how these new rules will be enforced because it is not the only adjudicator. After this decision, "[a]ny person claiming to be damaged by any" Internet service provider "may bring suit for the recovery of the damages" in any federal district court.[51] Although the *Order* hesitates to admit it,[52] the FCC has now condoned litigation—from individual claims about the justness and reasonableness of ISP pricing to sprawling class actions for violations of the new Internet conduct rule—as an appropriate means of regulating the Internet economy. Is there any American who believes that administrative wrangling at the FCC and endless litigation in the federal courts will do anything for the American consumer?

The not-so-dirty secret, of course, is that this will be a boon for trial lawyers. And the *Order*'s decisions will make their lives even easier. Every edge provider, and thus every person online, is now swept up by FCC's new and rather peculiar view of what constitutes broadband Internet access service. This means that a wayward plaintiff's attorney could sue every single Internet service provider in the country from his hometown courtroom. I'm sure such litigation will benefit our nation's lawyers, but the American people—not so much.

And these are just the intended results of reclassification!

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mobile connection speed in Western Europe), *available at* http://www.cisco.com/assets/sol/sp/vni/forecast_highlights_mobile/index.html#~Country; *see also* Roger Entner, Spectrum Fuels Speed and Prosperity, Recon Analytics (Sep. 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=60000870483; Letter from Scott K. Bergmann, Vice President – Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127, 14-28 (Feb. 10, 2015), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001028379; Letter from Scott K. Bergmann, Vice President – Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127, 14-28 (Oct. 2, 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=60000870404.

[48] Letter from Antonio López Istúriz-White MEP, Secretary General, European People's Party, to the Editor, *Financial Times* (Feb. 22, 2015), *available at* http://on.ft.com/1DViF4r.

[49] *Order* at para. 138.

[50] *Order* at para. 410.

[51] Communications Act § 207.

[52] *Order* at para. 455 (noting the importance of the "doctrine of primary jurisdiction" but declining to forbear from applying section 207 to Internet service providers).

There are unintended consequences as well. *For one*, the rate that broadband providers—ranging from small-town cable operators to new entrants like Google—pay to deploy broadband will go up by an estimated $150–200 million per year.[53] And that's because the Communications Act establishes a higher rate for telecommunications carriers to pay for access to poles, conduits, and rights of way than other Internet service providers.

While it may not be the "Commission's intent to see any increase in the rates for pole attachments,"[54] the agency has no power to stop it. The actual utilities that own these poles get to charge what they want up to the statutory maximum, and the FCC has just raised that maximum. Or to use the FCC's preferred parlance, utilities will have the "incentive and ability" to exploit this new maximum rate for Internet service providers. The end result: Reclassification would subject Internet service providers "to significantly higher attachment rates, inadvertently threatening the very broadband deployment the Commission seeks to facilitate."[55]

For another, reclassification will expose many small companies to higher state and local taxes. Tax rates on telecommunications companies are often significantly higher than those imposed on general businesses, and so reclassification threatens Internet service providers with property tax hikes, new transaction-based taxes and fees, and greater income, franchising, and gross receipts taxes.[56] And these tax hikes won't necessarily be *de minimis*. In the District of Columbia, for instance, companies will face an instant 11% increase in taxes on their *gross receipts*.[57] That big bite will leave a welt on Washington consumers' wallets.

The *Order* trots out Congress's recent (temporary) extension of the Internet Tax Freedom Act to claim that states and localities cannot impose new "[t]axes on Internet access."[58] And that's true (and a victory for consumers). But broadband taxes like those imposed by the *Order* have evaded the scope of the Internet Tax Freedom Act so far—because they are "fees," not "taxes," and because they're not exclusively about "Internet access" but more generally applied.[59] And since Congress has not entrusted the Commission with interpreting the Internet Tax Freedom Act, even our most fervent pronouncements for it to be broader will not make it so.

All of these new fees and costs add up. One estimate puts the total at $11 billion a year.[60] And every dollar spent on fees and new costs like lawyers and accountants has to come from somewhere:

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[53] *See, e.g.*, Letter from Steven F. Morris, Vice President and Associate General Counsel, National Cable & Telecommunications Association, GN Docket No. 14-28, WC Docket No. 07-245, at 2 (Jan. 22, 2015), *available at* http://go.usa.gov/3cppB.

[54] *Order* at para. 482.

[55] Letter from Thomas Cohen & Edward A. Yorkgitis, Jr., Counsel for American Cable Association, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, 09-51, WC Docket No. 07-245, at 2 (Jan. 20, 2015), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001014745.

[56] Letter from James Assey, Executive Vice President, National Cable & Telecommunications Association, to Jonathan Sallet, General Counsel, FCC, GN Docket Nos. 14-28, 10-127, at 2 (Dec. 2, 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=60000989301.

[57] *Id*. at 3–4.

[58] *Order* at para. 430 (quoting Internet Tax Freedom Act § 1101(a)(1), Pub. L. 105-277, 112 Stat. 2681, 2719 (1998), and citing Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 624, 128 Stat. 2130, 2377 (2014)).

[59] Letter from James Assey, Executive Vice President, National Cable & Telecommunications Association, to Jonathan Sallet, General Counsel, FCC, GN Docket Nos. 14-28, 10-127, at 3 (Dec. 2, 2014).

[60] Hal Singer & Robert Litan, No Guarantees When It Comes to Telecom Fees, *Progressive Policy Institute Blog*, at FN5 (Dec. 16, 2014) (estimating annual taxes and fees of $11 billion assuming the Internet Tax Freedom Act is made permanent), *available at* http://bit.ly/1AcraGq; Robert Litan & Hal Singer, Outdated Regulations Will Make

(continued….)

either the pockets of the American consumer or projects to deploy faster broadband. And so these higher costs will lead to slower speeds and higher prices—in short, less value—for the American consumer.

B.

So do American consumers want slower speeds at higher prices? I don't think so.

That's certainly not what I heard when I hosted the Texas Forum on Internet Regulation in College Station, the FCC's *only* field hearing on net neutrality where audience members were allowed to speak. There, I heard from Internet innovators, from students, from everyday people who wanted something else from the FCC—something that I thought had a familiar ring to it. The consumers I spoke with wanted competition, competition, competition.

And yet, literally nothing in this *Order* will promote competition among Internet service providers. To the contrary, reclassifying broadband, applying the bulk of Title II rules, and half-heartedly forbearing from the rest "for now" will drive smaller competitors out of business and leave the rest in regulatory vassalage. Monopoly rules designed for the monopoly era will inevitably move us in the direction of a monopoly. President Obama's plan to regulate the Internet is nothing more than a Kingsbury Commitment for the digital age.[61] If you liked the Ma Bell monopoly in the 20th century, you'll love Pa Broadband in the 21st.

Today there are thousands of smaller Internet service providers—wireless Internet service providers (WISPs), small-town cable operators, municipal broadband providers, electric cooperatives, and others—that don't have the means or the margins to withstand a regulatory onslaught. Imposing on competitive broadband companies the rules designed to constrain Cornelius Vanderbilt's railroad empire or the continent-spanning Bell telephone monopoly will do nothing but raise the costs of doing business. Smaller, rural competitors will be disproportionately affected, and the FCC's decision will diminish competition—the best guarantor of consumer welfare.

This isn't just my view. The President's own Small Business Administration—apparently acting independently—admonished the FCC that its proposed rules would unduly burden small businesses. The SBA urged the FCC to "address[] the concerns raised by small businesses in comments" and "exercise appropriate caution in tailoring its final rules to mitigate any anti-competitive pressure on small broadband providers as well."[62] Following the President's lead, the FCC ignores this admonition by applying heavy-handed Title II regulations to each and every small broadband provider as if it were an industrial giant. As a result, small providers will be squeezed—perhaps out of business altogether. If they go dark, consumers they serve (including my parents, who are WISP subscribers in rural Kansas) will be thrown offline.

Unsurprisingly, small Internet service providers are worried. I heard this for myself at the Texas Forum on Internet Regulation. One of the panelists, Joe Portman, runs Alamo Broadband, a WISP that serves 700 people across 500 square miles south of San Antonio. As he put it, his customers "had very limited choices for internet service before we came along. The big names, the telcos and cable

(Continued from previous page)
Consumers Pay More for Broadband, *Progressive Policy Institute Policy Brief*, at 1 (Dec. 1, 2014) (estimating annual taxes and fees of $15 billion assuming the Internet Tax Freedom Act expires), *available at* http://bit.ly/1wcR7VX.

[61] Remarks of FCC Commissioner Ajit Pai at TechFreedom's Forum on the 100th Anniversary of the Kingsbury Commitment (Dec. 19, 2013), *available at* http://go.usa.gov/3cKdk.

[62] Small Business Administration Office of Advocacy, Fact Sheet: Advocacy Submits Comments to the Federal Communications Commission regarding Small Business Engagement and Regulatory Flexibility Act Compliance, http://go.usa.gov/3cKdP (Sept. 25, 2014); Letter from Winslow L. Sargeant, Ph.D., Chief Counsel, Office of Advocacy, U.S. Small Business Administration, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 13-5, 12-353, WC Docket Nos. 05-25, 10-90, RM-10593 (Sept. 25, 2014), *available at* http://go.usa.gov/3cKsm.

companies, when it comes to rural areas such as the areas we serve don't see the value and won't invest the capital (at least if it's their money) to build infrastructure and bring service to the people that live there. We, and thousands others like us, have found a way to do it."[63]

What does Joe think of Title II? He thinks it's "pretty much a terrible idea."[64] His staff "is pretty busy just dealing with the loads we already carry. More staff to cover regulations means less funds to run the network and provide the very service our customers depend on." Bottom line? Title II will just impede broadband deployment—especially from WISPs like his.

Other WISPs feel the same way. Take Galen Manners, in my hometown of Parsons, Kansas. He runs Wave Wireless, a WISP that delivers Internet access to residents of rural Labette County[65]—including my parents. I can tell you from personal knowledge that folks back home have few options. Google Fiber isn't building there; other major ISPs wouldn't bother either.

Manners said that Wave Wireless "will feel the sting of the [Title II] regulations," which "will complicate and increase the cost of providing service. The result is the consumer will pay more for [his] service." Manners hopes he can weather the regulatory storm, unlike WISPs that he thinks may go out of business. But he summed up his situation in a way that applies to companies and customers nationwide: "It's not a good thing for business. It's not a good thing for the consumer. . . . It's going to be a game-changer."[66]

Just last week, 142 WISPs joined the chorus. Whether it's Aerux.com in Castle Rock, Colorado, or Aristotle.Net in Little Rock, Arkansas, whether it's STE Wireless in Utica, Nebraska, or Cyber Broadcasting in Coal City, Illinois, these WISPs have deployed wireless broadband to customers who often have no alternatives. They rely heavily on unlicensed spectrum, take no federal subsidies, and often run on a shoestring budget with just a few people to run the business, install equipment, and handle service calls. They have no incentive and no ability to take on commercial giants like Netflix. And they say the FCC's new "regulatory intrusion into our businesses . . . would likely force us to raise prices, delay deployment expansion, or both."[67]

Or consider the views of 24 of the country's smallest Internet service providers, each with fewer than 1,000 residential broadband customers. The largest, FamilyView Cablevision, has just 900 customers in Pendleton, South Carolina. The smallest, Main Street Broadband, has just 4 residential customers in Cannon Falls, Minnesota. They wrote us that Title II "will badly strain our limited resources" because these Internet service providers "have no in-house attorneys and no budget line items for outside counsel" and the "rules of the road . . . could change anytime the issues an advisory, rules on a complaint, or adopts new rules. To subject small and medium-sized ISPs to such a regime, no less the very smallest of ISPs, is simply unreasonable."[68]

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[63] Testimony of Joe Portman, President and Founder, Alamo Broadband Inc., Elmendorf, Texas, at the Texas Forum on Internet Regulation, at 1 (Oct. 21, 2014), *available at* http://go.usa.gov/3cpPe.

[64] *Id.* at 2.

[65] *See* Wave Wireless, About Us, http://www.wavewls.com/about-us.html.

[66] Ray Nolting, Proposed regulations concern business, FCC commissioner, *Parsons Sun* (Feb. 21, 2015), *available at* http://bit.ly/1JOoplx.

[67] Letter from Dustin Surran, Aerux.com, Castle Rock, Colorado, Bryan Robinson, Affordable Internet Solutions, Waverly, Nebraska, and 140 other WISPs to the Honorable Thomas Wheeler, Chairman, FCC, GN Docket No. 14-28 (Feb. 19, 2015), *available at* http://go.usa.gov/3c8rH.

[68] Letter from Robert J. Dunker, Owner/President, Atwood Cable Systems, Inc., Atwood, Kansas, Richard A. Nowak, Owner/President, Bellaire TV Cable Company, Bellaire, Ohio, and 22 other small ISPs to the Honorable Thomas Wheeler, Chairman, FCC, GN Docket Nos. 14-28, 10-127 (Feb. 17, 2015), *available at* http://go.usa.gov/3cpPw.

Or how about the 43 municipal broadband providers that flatly told the FCC that "there is no basis for the Commission to reclassify our Internet service for the purpose of imposing any Title II common carrier obligations."[69] They continued, "Title II regulation will undermine the business model that supports our network, raises our costs and hinders our ability to further deploy broadband."[70] Their closing is a stinging rebuke to those who argue that Title II is harmless to those providers who don't harm consumers:

> [W]e ask that you not fall prey to the facile argument that if smaller ISPs are not blocking, throttling, or discriminating amongst Internet traffic on their networks today, they have nothing to fear because they will experience no harm under Title II regulation. The economic harm will flow not from following net neutrality principles, which we do today because we think it is beneficial to all, but from the collateral effects of a change in regulatory status that will trigger consequences beyond the Commission's control and risk serious harm to our ability to fund and deploy broadband without bringing any concrete benefit for consumers or edge providers that the market is not already proving today without the aid of any additional regulation.[71]

There's a special irony given that right before this vote, the FCC voted to preempt state laws regarding city-owned broadband projects. This is an initiative President Obama announced just one month before this *Order* was adopted while he was in Cedar Falls, Iowa, and the FCC is now dutifully implementing that initiative too. But I'm not sure the President realized that Cedar Falls Utilities, the very municipal broadband provider he touted, thinks that Title II is a tremendous mistake.[72] Well, now he—and we—know better.

It's for these reasons that the Small Business & Entrepreneurship Council, a nonprofit organization representing nearly 100,000 small businesses nationwide, wrote to us that Title II "will deeply erode investment and innovation, which will dramatically harm entrepreneurs and small businesses."[73]

It's for these reasons that the National Black Chamber of Commerce, the National Gay & Lesbian Chamber of Commerce, the U.S. Hispanic Chamber of Commerce, and the U.S. Pan Asian American Chamber of Commerce wrote us that "Forcing the Internet into a Title II classification can only make it more difficult for individuals to make the highest and best use of this important tool . . . . The last thing small businesses in America need are more forms to fill out; more regulations to track; and more rules to follow."[74]

And it's for these reasons that the trade associations for our nation's smallest Internet service providers asked the FCC last month to "conduct an *en banc* hearing to examine the significant economic

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[69] Letter from Randy Darwin Tilk, Utility Manager, Alta Municipal Broadband Communications, Alta, Iowa, Loras Herrig, City Administrator, Bellevue Municipal Cable, Bellevue, Iowa, and 41 other municipal ISPs to the Honorable Thomas Wheeler, Chairman, FCC, GN Docket Nos. 14-28, 10-127, at 1 (Feb. 10, 2015), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001028442.

[70] *Id.* at 1.

[71] *Id.* at 2.

[72] *See* Editorial, Obama's Favorite Internet Company, *The Wall Street Journal* (Feb. 5, 2015), *available at* http://on.wsj.com/1KnkoBh; Matthew Patane, Obama-touted Iowa utility balks at FCC Internet plan, *Des Moines Register* (Feb. 5, 2015), *available at* http://dmreg.co/1zg2VCS.

[73] Small Business & Entrepreneurship Council Comments at 2.

[74] National Black Chamber of Commerce et al. Comments at 2.

impact of its proposals on small broadband providers."[75] I would have welcomed such an *en banc* hearing. But like all other calls for greater transparency in this proceeding, this request was denied.

So what does the *Order* tell the Americans whose Internet service provider isn't a Comcast, an AT&T, a Google, or a Sprint? What does it tell those whose service will be more expensive as a direct result of reclassification? What does it tell those who may lose their Internet service if their small operator goes out of business? What does it tell those who worked for years to serve their community and build a business, one that's finally in the black? There's no explanation. There's not even an acknowledgement. There's just the smug assurance that it won't be that bad.

C.

So while the FCC is abandoning a 20-year-old, bipartisan framework for keeping the Internet free and open in favor of Great Depression-era legislation designed to regulate Ma Bell, at least the American public is getting something in return, right? Wrong. The Internet is not broken. There is no problem for the government to solve.

That the Internet works—that Internet freedom works—should be obvious to anyone with a Dell laptop or an HP Desktop, an Apple iPhone or Microsoft Surface, a Samsung Smart TV or a Roku, a Nest Thermostat or a Fitbit. We live in a time where you can buy a movie from iTunes, watch a music video on YouTube, post a photo of your daughter on Facebook, listen to a personalized playlist on Pandora, watch your favorite Philip K. Dick novel come to life on Amazon Streaming Video, help someone make potato salad on KickStarter, check out the latest comic at XKCD, see what Seinfeld's been up to on Crackle, manage your fantasy football team on ESPN, get almost any question answered on Quora, navigate bad traffic with Waze, and do literally hundreds of other things all with an online connection. At the start of the millennium, we didn't have *any* of this Internet innovation.

And no, the federal government didn't build that. It didn't trench the fiber. It didn't erect the towers. It didn't string the cable from one pole to the next, and it didn't design the routers that direct terabits of data across the Internet each and every second. It didn't invest in startups at the angel or seed stage or Series A rounds. It didn't code the webpages, the software, the applications, or the databases that make the online world useful. And it didn't create the content that makes going online so worthwhile.

For all intents and purposes, the Internet didn't exist until the private sector took it over in the 1990s, and it's been the commercial Internet that has led to the innovation, the creativity, the engineering genius that we see today.

Nevertheless, the *Order* ominously claims that "[t]hreats to Internet openness remain today," that broadband providers "hold all the tools necessary to deceive consumers, degrade content or disfavor the content that they don't like," and that the FCC continues "to hear concerns about other broadband provider practices involving blocking or degrading third-party applications."[76]

The evidence of these continuing threats? There is none; it's all anecdote, hypothesis, and hysteria. A small ISP in North Carolina allegedly blocked VoIP calls a decade ago. Comcast capped BitTorrent traffic to ease upload congestion eight years ago. Apple introduced FaceTime over Wi-Fi first, cellular networks later. Examples this picayune and stale aren't enough to tell a coherent story about net neutrality. The bogeyman never had it so easy.

[75] Letter from Ross J. Lieberman, Senior Vice President of Government Affairs, American Cable Association, Lisa Schoenthaler, Vice President for Association Affairs Office of Rural/Small Systems, and Stephen E. Coran, Counsel for the Wireless Internet Service Providers Association, to the Honorable Tom Wheeler, Chairman, FCC, GN Docket No. 14-28, at 1 (Jan. 9, 2015), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001012562.

[76] *Order* at para. 8.

But the *Order* trots out other horribles: "[B]roadband providers have both the incentive and the ability to act as gatekeepers,"[77] "the potential to cause a variety of other negative externalities that hurt the open nature of the Internet,"[78] and "the incentive and ability to engage in paid prioritization"[79] or other "consumer harms."[80] The common thread linking these and countless other exhibits is that they simply *do not exist*. One could read the entire document—and I did—without finding anything more than hypothesized harms. One would think that a broken Internet marketplace would be rife with anticompetitive examples. But the agency doesn't list them. And it's not for a lack of effort.

So what is there to fear? A sober reader might borrow from the father of Title II: "The only thing we have to fear is fear itself." But the FCC instead intones the nine scariest words for any friend of Internet freedom: "I'm from the government, and I'm here to help."

To put it another way, Title II is not just a solution in search of a problem—it's a government solution that creates a real-world problem. This is not what the Internet needs, and it's not what the American people want.

D.

So—that's substance. A few words on process. When the Commission launched this rulemaking, I said that we needed to "give the American people a full and fair opportunity to participate in this process."[81] Unfortunately, over the course of the past nine months, we have fallen woefully short of that standard.

Most importantly, the plan in front of us today was not formulated within this building through a transparent notice-and-comment rulemaking process. Rather, *The Wall Street Journal* reports that it was developed through "an unusual, secretive effort inside the White House."[82] Indeed, White House officials, according to the *Journal*, functioned as a "parallel version of the FCC."[83] Their work led to the President's announcement in November of his plan for Internet regulation, a plan which "blindsided" the FCC and "swept aside . . . months of work by [Chairman] Wheeler toward a compromise."[84]

Therefore, all of the action at the Commission was just for show. Those filing comments, holding publicly disclosed meetings with FCC officials, or participating in FCC roundtables were being led to believe that their input would matter. But the joke was on them. While the media and the public were focusing on events at the FCC, the real action was occurring behind closed doors at the White House.

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[77] *Order* at para. 20.

[78] *Order* at para. 83.

[79] *Order* at para. 127.

[80] *Order* at para. 200.

[81] *Protecting & Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, 5656 (2014) (*Notice*) (Dissenting Statement of Commissioner Ajit Pai), *available at* http://go.usa.gov/3cpEj.

[82] Gautham Nagesh & Brody Mullins, Net Neutrality: How White House Thwarted FCC Chief, *Wall Street Journal*, (Feb. 4, 2015), *available at* http://on.wsj.com/16FXTcH.

[83] *Id.*

[84] *Id.*; *see also* Gautham Nagesh, FCC 'Net Neutrality' Plan Calls for More Power Broadband: Chairman Tom Wheeler Considers Hybrid Approach to Internet Access, *Wall Street Journal* (Oct. 30, 2014) ("Mr. Wheeler is close to settling on a hybrid approach, people close to the chairman say."), *available at* http://on.wsj.com/1ES0YkT.

Of course, a few insiders were clued in about what was transpiring. Just listen to what a leader for the government-funded[85] group Fight for the Future had to say: "We've been hearing for weeks from our allies in DC that the only thing that could stop FCC Chairman Tom Wheeler from moving ahead with his sham proposal to gut net neutrality was if we could get the President to step in. So we did everything in our power to make that happen. We took the gloves off and played hard, and now we get to celebrate a sweet victory."[86]

What the press has called the "parallel FCC" at the White House opened its doors to a plethora of special-interest activists: Daily Kos, Demand Progress, Fight for the Future, Free Press, and Public Knowledge, just to name a few.[87] Indeed, even before activists were blocking Chairman Wheeler's driveway late last year, some of them had met with White House officials.[88] But what about the rest of the American people? They certainly couldn't get White House meetings. They were shut out of the process. They were being played for fools.

And the situation didn't improve once the White House announced President Obama's plan and "ask[ed]" the FCC to "implement" it.[89] The document in front of us today differs dramatically from the proposal that the FCC put out for comment last May. It differs so dramatically that even net neutrality advocates frantically rushed in recent days to make last-minute filings registering their concerns that the FCC might be going too far.[90] Yet the American people to this day have not been allowed to see President Obama's plan. It has remained secret.

Especially given the unique importance of the Internet, Commissioner O'Rielly and I asked for the plan to be released to the public. Senate Commerce Committee Chairman John Thune and House of Representatives Energy and Commerce Chairman Fred Upton requested this as well. And according to a survey last week by a respected Democratic polling firm, 79% of the American people favored making the document public.[91] But still the FCC's leadership has insisted on keeping it hidden. We have to pass President Obama's 317-page plan so that the American people can find out what is in it.

This isn't how the FCC should operate. We should be an independent agency making decisions in a transparent manner based on the law and the facts in the record. We shouldn't be a rubber stamp for political decisions made by the White House.

And we should have released this plan to the public, solicited their feedback, incorporated that input into the plan, and then proceeded to a vote. There was no need for us to resolve this matter today. There is no immediate crisis in the Internet marketplace that demands immediate action.

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[85] *See* The Center For Rights, d/b/a Fight for the Future Education Fund, Form 990, Schedule A (2013–14) (self-characterizing group as "[a]n organization that normally receives a substantial part of its support from a governmental unit or the general public" and listing over $1 million in taxpayer support between 2011 and 2013).

[86] Kerry Picket, Obama's Move to Regulate Internet Has Activists' "Fingerprints All Over It," *The Daily Caller*, (Feb. 23, 2015), *available at* http://bit.ly/1zg6pFj.

[87] *Id.*

[88] *Id.*

[89] *See* The White House, Net Neutrality: President Obama's Plan for a Free and Open Internet, https://web.archive.org/web/20150204034321/http://www.whitehouse.gov/net-neutrality (Nov. 10, 2014).

[90] *See, e.g.*, Letter from Austin C. Schlick, Director, Communications Law, Google Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (Feb. 20, 2015), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001032150; Letter from Corynne McSherry, Intellectual Property Director, Electronic Frontier Foundation, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-191, 14-28 (Feb. 19, 2015), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001031536.

[91] The Progressive Policy Institute, Press Release, New Survey Finds Americans Skeptical that FCC Regulation of the Internet Will Be Helpful; Favor More Disclosure (Feb. 19, 2015), *available at* http://bit.ly/1FyPKoO.

The backers of the President's plan know this. But they also know that the details of this plan cannot stand up to the light of day. They know that the more the American people learn about this plan, the less they like it. That is why this plan was developed behind closed doors at the White House. And that is why the plan has remained hidden from public view.

II.

There's another reason the public does not know what rules the *Order* adopts. The Commission never proposed them.

A.

Recall that last year's *Notice* came on the heels of the D.C. Circuit's *Verizon* decision, which "struck down the 'anti-blocking' and 'anti-discrimination' rules," holding that "the Commission had imposed *per se* common carriage requirements on providers of Internet access services."[92] The purpose of the *Notice* was to "respond directly to that remand and propose to adopt enforceable rules of the road, consistent with the court's opinion, to protect and promote the open Internet."[93] Or, as Chairman Wheeler put it: "In response [to the *Verizon* decision], I promptly stated that we would reinstate rules that achieve the goals of the 2010 *Order* using the Section 706-based roadmap laid out by the court. That is what we are proposing today."[94]

And it was. Every single proposal and every single tentative conclusion in the *Notice* was tailored to avoid reclassification and to comply with the limits the *Verizon* court put on the Commission's authority under section 706 of the Telecommunications Act.

For example, the *Notice* proposed to define "blocking" as failing "to provide an edge provider with a minimum level of access that is sufficiently robust, fast, and dynamic for effective use by end users and edge providers."[95] It did so "to make clear that the no-blocking rule would allow individualized bargaining above a minimum level of access," which was "the revised rationale the court suggested would be permissible rather than *per se* common carriage."[96] The *Notice* then devoted an entire section to "establishing the minimum level of access under the no-blocking rule,"[97] because "the [*Verizon*] court suggested [such a rule] would be permissible rather than *per se* common carriage"[98] and would be "[c]onsistent with the court's ruling."[99]

The *Notice* was even more forthright that its proposed rule barring commercially unreasonable practices was tied to the limits of the *Verizon* decision. Under that rule, the Commission would, "consistent with the court's decision, . . . permit broadband providers to engage in individualized practices"—indeed, the "encouragement of individualized negotiation" was one of its "essential elements."[100] The *Notice* tentatively concluded that such a rule was appropriate because the "court

[92] *Notice*, 29 FCC Rcd at 5569, para. 23 (citing *Verizon v. FCC*, 740 F.3d 623, 656–59 (D.C. Cir. 2014)).

[93] *Notice*, 29 FCC Rcd at 5569, para. 24.

[94] *Notice*, 29 FCC Rcd at 5647 (Statement of Chairman Tom Wheeler).

[95] *Notice*, 29 FCC Rcd at 5627 (Proposed Rule § 8.11(a)).

[96] *Notice*, 29 FCC Rcd at 5595, para. 95.

[97] *Notice*, 29 FCC Rcd at 5596, Section III.D.3 (capitalizations omitted); *see Notice* 29 FCC Rcd at 5596–98, paras. 97–104 (discussing the proposed minimum-level-of-access requirement).

[98] *Notice*, 29 FCC Rcd at 5595, para. 95.

[99] *Notice*, 29 FCC Rcd at 5596, para. 97.

[100] *Notice*, 29 FCC Rcd at 5599–5600, para. 111.

underscored the validity of the 'commercially reasonable' legal standard"[101] and "explained that such an approach distinguished the data roaming rules at issue in *Cellco* from common carrier obligations."[102] Or as the *Notice* put it: "The core purpose of the legal standard that we wish to adopt . . . is to effectively employ the authority that the *Verizon* court held was within the Commission's power under section 706."[103] Or as the title of that subpart put it even more bluntly: The goal of the FCC was "codifying an enforceable rule to protect the open Internet that is not common carriage *per se*."[104]

If this weren't enough, the FCC "propose[d] that the Commission exercise its authority under section 706, consistent with the D.C. Circuit's opinion in *Verizon v. FCC*, to adopt our proposed rules"[105] and then cited section 706 of the Telecommunications Act—*but not a single provision of Title II*—in the *Notice*'s ordering clauses.[106] And it affirmatively proposed to remove several legal provisions from the "authority" section of our Part 8 "Open Internet" rules—including all references to Title II—and leave section 706 of the Telecommunications Act as the prime authority for the proposed rules.[107]

In all, the *Notice* cited or quoted the *Verizon* decision 52 separate times,[108] proposed two pages of rules that would be consistent with that decision and within the Commission's section 706 authority,[109] and reiterated in tentative conclusion after tentative conclusion that the FCC should tread no further than the limits the *Verizon* court set on the FCC's authority under section 706.

Contrast that with today's decision. The entire *Order* is premised on the reclassification of broadband Internet access service as a Title II, telecommunications service. Accordingly, none of these rules follow the section 706-based roadmap laid out by the *Verizon* court, and none of them purport to do so.[110] As a result, instead of a minimum-level-of-access rule (that would follow the roadmap), the *Order* adopts the flat no-blocking rule that the *Verizon* court overturned.[111] Instead of the rule against commercially unreasonable practices, which was intended to encourage "individualized negotiation," the

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[101] *Notice*, 29 FCC Rcd at 5599, para. 110.

[102] *Notice*, 29 FCC Rcd at 5602, para. 116.

[103] *Notice*, 29 FCC Rcd at 5602, para. 118.

[104] *Notice*, 29 FCC Rcd at 5599, Subpart III.E (capitalizations omitted); *see also Notice*, 29 FCC Rcd at 5602–10, paras. 116–41 (discussing the proposed no-commercially-unreasonable-practices rule).

[105] *Notice*, 29 FCC Rcd at 5610, para. 142.

[106] *Notice*, 29 FCC Rcd at 5625, para. 183 ("Accordingly, IT IS ORDERED, pursuant to sections 1, 2, 4(i)–(j), 303 and 316 of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. §§ 151, 152, 154(i)–(j), 303, 316, 1302, that this Notice of Proposed Rulemaking IS ADOPTED."). Title II of the Act consists of sections 201 through 276, 47 U.S.C. §§ 201–276.

[107] *Compare* 47 C.F.R. Part 8 ("Authority: 47 U.S.C. secs. 151, 152, 153, 154, 201, 218, 230, 251, 254, 256, 257, 301, 303, 304, 307, 309, 316, 332, 403, 503, 522, 536, 548, 1302."), *with Notice*, 29 FCC Rcd at 5626 ("Part 8 of Title 47 of the Code of Federal Regulations is amended to read as follows: . . . AUTHORITY: 47 U.S.C. §§ 151, 152, 154(i)–(j), 303, 316, 1302."). Note that section 706 of the Telecommunications Act has been unofficially codified at 47 U.S.C. § 1302.

[108] *See Notice*, 29 FCC Rcd at 5564, n.11; 5569, nn.42–48; 5571, nn.58–59; 5574, n.88; 5576, nn.97–100; 5577, n.101; 5579, nn. 111, 114; 5580, n.122; 5581, n.125; 5585, n.153; 5593, n.200; 5594, nn.206–12; 5595, n.213; 5596, nn.219, 221, 223; 5599, n.231; 5600, nn.236–37; 5601, nn.238–39, 241–42; 5602, nn.244–47; 5608, n.270; 5610, n.282; 5612, nn.291–94; 5613, n.296; 5615, n.309.

[109] *Notice*, 29 FCC Rcd at 5626–27 (Appendix A: Proposed Rules).

[110] Although the general Internet conduct rule does claim that it should not be read to constitute common carriage *per se*, the *Order* concedes that the rule "represents our interpretation of these 201 and 202 obligations in the open Internet context," *Order* at para. 295—which is to say that it too is premised on reclassification.

[111] *Order* at paras. 113–15.

Order adopts a flat ban on individual negotiations through a no-paid-prioritization rule.[112] And rather than limiting the new rules to those proposed in the *Notice*, the *Order* also adopts a never-before-proposed no-throttling rule[113] and a wholly new no-unreasonable-interference-or-unreasonable-disadvantage standard for Internet conduct.[114]

Given this new legal justification, it's no wonder that the FCC now feels compelled to cite nine new sources of legal authority for adopting the *Order*, invoking sections 201 and 202 of Title II along with sections 3, 10, 301, 332, 403, 501, and 503 of the Communications Act.[115] Nor that the final rules purport to rely on 20 sections of the Communications Act that were not included in the original proposal, including several sections not discussed even once in the *Notice*.[116]

In sum, the *Notice* proposed "the terms . . . of the proposed rule" and a "reference to the legal authority under which the rule is proposed."[117] But the *Order* adopts something completely different. That's not what the Administrative Procedure Act envisions.

B.

None of this is to say that the Commission had to adopt the exact same rules under the precise rationale proposed in the *Notice*. Of course, the adopted rules may be the "logical outgrowth" of the original proposal.[118] But the *Order*'s decision to reclassify, to forbear, and to adopt rules grounded in Title II is a reversal of the proposals and tentative conclusions in the *Notice*, not a natural evolution.

The standard is whether all interested parties "*should have* anticipated" the final rule.[119] The question "is one of fair notice"[120]: whether "persons are sufficiently alerted to likely alternatives so that they know whether their interests are at stake."[121] In other words, "general notice that a new standard will be adopted affords the parties scant opportunity for comment"—the "agency's obligation is more demanding."[122]

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[112] *Order* at para. 125.

[113] *Order* at para. 119.

[114] *Order* at paras. 133, 136.

[115] *Order* at para. 583.

[116] *Compare Notice*, 29 FCC Rcd at 5626 ("Part 8 of Title 47 of the Code of Federal Regulations is amended to read as follows: . . . AUTHORITY: 47 U.S.C. §§ 151, 152, 154(i)–(j), 303, 316, 1302"), *with Order* at Appendix A ("The authority citation for part 8 is amended to read as follows: AUTHORITY: 47 U.S.C. §§ 151, 152, 153, 154, 201, 202, 208, 218, 230, 251, 254, 256, 257, 301, 303, 304, 307, 309, 316, 332, 403, 503, 522, 536, 548, 1302."). The *Notice* made no mention whatsoever of sections 218, 251, 256, 257, 301, 304, 307, 403, 503, 522, and 536.

[117] 5 U.S.C. § 553(b)(2)–(3).

[118] *See, e.g.*, *Crawford v. FCC*, 417 F.3d 1289, 1295 (D.C. Cir. 2005).

[119] *Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (per curiam) (emphasis added) (internal quotation marks omitted); *see also Council Tree Communications v. FCC*, 619 F.3d 235, 256 (3d Cir. 2010) ("[E]ven if some sophisticated observers would have seen the connection between the stricter compliance that had been noticed and the lower standards eventually announced, the proper question under the APA was whether the agency had provided notice to all 'interested parties.' . . . [T]he inferential notice purportedly provided . . . did not satisfy that standard." (quoting *Wagner Electric Corp. v. Volpe*, 466 F.2d 1013, 1019 (3d Cir. 1972))).

[120] *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).

[121] *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 170 (2d Cir. 2013) (internal quotation marks omitted).

[122] *Horsehead Resource Development Co., Inc. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994).

Although the agency dutifully recites that standard,[123] at points it seems to apply a different one: something akin to asking whether parties *could have* anticipated the final rule.[124] In essence, the *Order* suggests an agency may adopt *any* rule unless it was impossible for anyone to anticipate that rule. No court, to my knowledge, has ever endorsed such a standard. And it's easy to see why: Such a standard would give an agency a tremendous incentive to outline its proposals in broad and vague terms to expand the realm of possibility. Notices of proposed rulemaking could be nothing more than a single sentence: "We propose to regulate XYZ."

Here's an illustration of how those standards differ. Say you and a friend are in Kansas. The two of you have been talking every day for months about how wonderful it would be to visit San Francisco. One day, your friend brings up San Francisco yet again and says "Say, we've talked enough about this. I propose we go on a cross-country drive. Do you want to come?" Eager to go west, you say yes. You get in the car, fall asleep for a few hours, and wake up to find that . . . you're heading east toward Boston! "Wait," you protest, "I thought we were heading to San Francisco!" Your friend replies: "Well, I proposed merely that we go on a cross-country drive. I know we'd been talking every day for months about San Francisco, but you could have realized that I had Boston in mind." Deflated, you retort: "But *should* I have? Shouldn't you have told me we were heading to Boston and given me a chance to say yes or no before we hit the road?"

Here's another one. Say a government agency seeks competitive bids to build a suspension bridge. The request for proposals details how the suspension bridge should be built but reserves the right to build another type of bridge instead. Could a bidder anticipate that the government will hire someone to build an arch bridge through this RFP? Perhaps. But what should bidders expect? That if the agency decides not to build the proposed suspension bridge, it will issue a new RFP. Otherwise, a serious bidder would be obligated to draw plans and submit a proposal for each and every type of bridge feasible—thus reducing the quality of each response since every bidder would need to spread its resources anticipating possibilities rather than focusing on the proposal at hand.

Indeed, courts have repeatedly held that "if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal."[125] And so when a notice of proposed rulemaking has "clearly stated that the FCC intended to adopt [a proposed rule]" and "even recited the rationale for the proposed rule," the courts have reversed the Commission when "the final rule took a contrary position."[126]

The *Order*'s primary retort appears to be that—alongside its section 706-based proposals and tentative conclusions—the *Notice* sought comment on alternatives.[127] As the *Order* puts it, the *Notice*

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[123] *Order* at para. 539.

[124] *Compare, e.g.*, *Order* at para. 37 ("[O]ur forbearance approach results in over 700 codified rules being inapplicable . . . ."), *with Order* at para. 540 (claiming notice for such a result based on two sentences seeking general comment "on the extent to which forbearance from certain provisions of the Act or our rules would be justified"); *see also Order* at note 1671 (arguing that the FCC used "slightly different wording to the same effect" when it had previously endorsed a "could have anticipated" standard).

[125] *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).

[126] *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2d. Cir. 1986).

[127] As the *Order* points out, almost every section of the *Notice* included a generic paragraph seeking comment on alternatives. For example, the *Order* points to paragraph 96 of the *Notice*, which spends six sentences discussing possible alternatives for how to define a no-blocking rule and then one sentence asking commenters to "address the legal bases and theories, including Title II, that the Commission could rely on for such a no-blocking rule, and how different sources of authority might lead to different formulations of the no-blocking rule." *Notice*, 29 FCC Rcd at 5595–96, para. 96 (cited by *Order* at note 1100). Such back-of-the-hand mentions are hardly sufficient to apprise commenters on the hows, the whats, and the whys of reclassification, and so I focus on the *Notice*'s most fulsome discussion instead.

"proposed to rely on section 706 of the Telecommunications Act of 1996, but at the same time stated that it would 'seriously consider the use of Title II of the Communications Act as the basis for legal authority.' The [*Notice*] sought comment on the benefits of both section 706 and Title II, and emphasized its recognition that 'both section 706 and Title II are viable solutions.'"[128]

It's true that the *Notice* sought comment on reclassification. Here is that entire discussion:

> *Title II—Revisiting the Classification of Broadband Internet Access Service*. In a series of decisions beginning in 2002, the Commission has classified broadband Internet access service offered over cable modem, DSL and other wireline facilities, wireless facilities, and power lines as an information service, which is not subject to Title II and cannot be regulated as common carrier service. In 2010, following the D.C. Circuit's *Comcast* decision, the Commission issued a Notice of Inquiry (*2010 NOI*) that, among other things, asked whether the Commission should revisit these decisions and classify a telecommunications component service of wired broadband Internet access service as a "telecommunications service." The Commission also asked whether it should similarly alter its approach to wireless broadband Internet access service, noting that section 332 requires that wireless services that meet the definition of "commercial mobile service" be regulated as common carriers under Title II. In response, the Commission received substantial comments on these issues. We now seek further and updated comment on whether the Commission should revisit its prior classification decisions and apply Title II to broadband Internet access service (or components thereof). How would such a reclassification approach serve our goal to protect and promote Internet openness? What would be the legal bases and theories for particular open Internet rules adopted pursuant to such an approach? Would reclassification and applying Title II for the purpose of protecting and promoting Internet openness impact the Commission's overall policy goals and, if so, how?
>
> What factors should the Commission keep in mind as it considers whether to revisit its prior decisions? Have there been changes to the broadband marketplace that should lead us to reconsider our prior classification decisions? To what extent is any telecommunications component of that service integrated with applications and other offerings, such that they are "inextricably intertwined" with the underlying connectivity service? Is broadband Internet access service (or any telecommunications component thereof) held out "for a fee directly to the public, or to such classes of users as to be effectively available directly to the public?" If not, should the Commission compel the offering of such functionality on a common carrier basis even if not offered as such? For mobile broadband Internet access service, does that service fit within the definition of "commercial mobile service"? We also note that on May 14, 2014, Representative Henry Waxman, Ranking Member of the Committee on Energy and Commerce of the U.S. House of Representatives, sent a letter to Chairman Wheeler proposing an approach to protecting the open Internet whereby the Commission would proceed under section 706 but use Title II as a "backstop authority." We seek comment on the viability of that approach.[129]

If these two paragraphs, tucked into an 85-page document, are sufficient notice to discard the regulatory framework for Internet access services that the Commission has relied on for almost two decades—a framework the FCC has affirmed time[130] and again[131] and again[132] and again[133] and again[134]—

[128] *Order* at para. 327 (quoting *Notice*, 29 FCC Rcd at 5563, para. 4) (footnotes omitted).

[129] *Notice*, 29 FCC Rcd at 5613–14, paras. 149–50 (footnotes omitted).

[130] *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (1998) (*Stevens Report*) (classifying Internet access service).

and the myriad of related precedents and agency rules, then the FCC (and likely every federal agency) has been doing notice-and-comment rulemaking wrong for decades. I am not aware of, and the *Order* does not cite, one single notice of proposed rulemaking that the Commission has issued that is so abbreviated. Nor one that would reverse so much precedent with so little analysis. Nor one whose consequences would be so far reaching (and collateral impacts so many) with so little discussion. Just look at the *Notice*'s detailed discussion of the FCC's section 706 authority to see how we normally tee up a proposal.[135] Or look at the 83-paragraph notice of proposed rulemaking that preceded the classification of wireline broadband Internet access service as an information service to see how we normally tee up a new regulatory framework.[136] The contrast could not be starker.[137]

The failure of the *Notice* to properly frame the Title II proposal matters. Indeed, "[a]n agency adopting final rules that differ from its proposed rules is required to renotice when the changes are so major that the original notice did not adequately frame the subjects for discussion. The purpose of the new notice is to allow interested parties a fair opportunity to comment upon the final rules in their altered form."[138]

And given the *Notice*'s framing, I simply cannot understand how any commenter could have anticipated—let alone should have anticipated—the 128 paragraphs of the *Order* that explain the Commission's rationale for reclassification and the ramifications of that decision.[139] Search the *Notice*'s two paragraphs as I might, I cannot ferret out *any discussion* of the three factual changes that have led to the Commission's determination today—namely, "(1) consumer conduct, . . . (2) broadband providers' marketing and pricing strategies . . . and (3) the technical characteristics of broadband Internet access service."[140] Nor can I find any discussion of how Domain Name System (DNS) service, caching, or any

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[131] *See Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (*Cable Modem Order*) (classifying broadband Internet access service over cable systems), *aff'd sub nom. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

[132] *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Internet Access Services Order*) (classifying broadband Internet access service over wireline facilities).

[133] *See United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006) (classifying broadband Internet access service over power lines).

[134] *See Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007) (*Wireless Broadband Internet Access Order*) (classifying broadband Internet access service over wireless networks).

[135] *Notice*, 29 FCC Rcd at 5610–12, paras. 143–47.

[136] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers*, CC Docket Nos. 02-33, 95-20, 98-10, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002).

[137] *Accord Council Tree Communications v. FCC*, 619 F.3d 235, 254 (3d Cir. 2010) (holding that the FCC failed to provide APA notice for a rule after "find[ing] it instructive that the FCC had previously solicited broader comment on" the point covered by the rule "and in much more specific terms than it did here" and observing that "[t]he contrast could not be more stark").

[138] *Connecticut Light & Power Co. v. Nuclear Regulatory Commission*, 673 F.2d 525, 533 (D.C. Cir. 1982).

[139] *Order* at paras. 306–433. Note that I exclude from this discussion any mention of forbearance, which I address below.

[140] *Order* at para. 330; *see also Order* at paras. 346–54.

other feature of broadband Internet access service falls into the telecommunications system management exception to the definition of information service (or even any discussion of the meaning of that exception).[141] Nor can I find any discussion of the benefits reclassification would have for broadband investment.[142] Nor can I find any discussion of what reclassification means for state or local regulation of broadband services.[143] Nor can I find any mention that the FCC's past "predictive judgments . . . anticipating vibrant intermodal competition" were wrong.[144]

To get to the point: Could someone reading the *Notice* have anticipated the FCC might reject its past proposals and tentative conclusions and instead pursue reclassification? Perhaps. Anything is possible. But *should* the public have anticipated the FCC would move forward with reclassification without issuing a Further Notice of Proposed Rulemaking? Surely not. The *Notice* itself left just too many questions unanswered—and too many questions unasked for that matter.

To be clear, the deficiencies in the *Notice* were not the product of incompetence. Rather, they reflect the fact that the agency was headed in a different direction until political pressure was applied to the Commission last November. Specifically, President Obama's endorsement of Title II forced a change in the FCC's approach.[145] Indeed, the agency was publicly considering a so-called "hybrid" approach on the day of the President's announcement[146] and was reportedly pursuing such an approach even in the days after that announcement[147]—only to succumb to executive branch entreaties when pen was put to paper.[148]

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[141] *Order* at paras. 366–75.

[142] *Order* at paras. 409–25.

[143] *Order* at paras. 430–33.

[144] *Order* at para. 330. To be sure, that last omission is understandable. The FCC could not have mentioned that point until just 22 days before this vote, when the agency decided to hike the standard for what qualifies as broadband Internet access service from 4 Mbps to 25 Mbps, excluding in one fell swoop all wireless and most wireline operators from the market. *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 14-126, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, FCC 15-10 (rel. Feb. 4, 2015) (*2015 Broadband Progress Report*), *available at* http://go.usa.gov/3ay5d. Indeed, the agency still has not published that decision in the Federal Register and the public still has more than a month before the comment period closes on the accompanying notice of inquiry. *Id.* (establishing a deadline for initial comments of March 6, 2015, and a deadline for replies for April 6, 2015).

[145] Gautham Nagesh and Brody Mullins, Net Neutrality: How White House Thwarted FCC Chief, *The Wall Street Journal* (Feb. 4, 2015) ("In November, the White House's top economic adviser dropped by the Federal Communications Commission with a heads-up for the agency's chairman, Tom Wheeler. President Barack Obama was ready to unveil his vision for regulating high-speed Internet traffic. The specifics came four days later in an announcement that blindsided officials at the FCC."), *available at* http://on.wsj.com/16FXTcH. It strains credulity to think otherwise; had the agency been on track to adopt the President's plan all along, there would have been no need for him to "la[y] out a plan to do [Title II]" and (critically) "ask[] the FCC to implement it." The White House, Net Neutrality: President Obama's Plan for a Free and Open Internet, https://web.archive.org/web/20150204034321/http://www.whitehouse.gov/net-neutrality (Nov. 10, 2014).

[146] FCC Chairman Tom Wheeler's Statement on President Barack Obama's Statement Regarding Open Internet (Nov. 10, 2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-330414A1.pdf.

[147] *See* Brian Fung, How Obama's net neutrality comments undid weeks of FCC work, *Washington Post* (Nov. 14, 2014) ("Three people who met with [FCC Chairman Tom] Wheeler in the days after the president's statement say he was 'adamant' that all options remain on the table—but they also walked away with the impression that the chairman is still not ready to give up on the agency's hybrid proposal. 'He certainly referred to the hybrid glowingly,' said one official, who met with Wheeler late this week and spoke on condition of anonymity to speak

(continued….)

But the Commission cannot credibly claim APA notice from the White House's November 10 YouTube announcement of "President Obama's Plan for a Free and Open Internet."[149] Although that announcement did (unlike the *Notice*) propose reclassification under Title II[150] and did (again unlike the *Notice*) propose "bright-line" no-blocking, no-throttling, and no-paid-prioritization rules,[151] I can find no record of the FCC voting on that proposal, publishing it in the Federal Register, nor soliciting the public for comment.

Nor, for that matter, can the *Order* point to Chairman Wheeler's February 4 editorial on Wired.com explaining "This Is How We Will Ensure Net Neutrality."[152] Although that announcement did (unlike the *Notice*) propose reclassification under Title II[153] and did (again unlike the *Notice*) propose "bright-line" no-blocking, no-throttling, and no-paid-prioritization rules,[154] I again can find no record of

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freely about the gathering. 'If we had to bet where he's heading, it's still the hybrid.'"), *available at* http://wapo.st/1alNQed.

[148] Indeed, the agency did not think it could prohibit paid prioritization—the *bête noire* of net neutrality proponents—under Title II before the President's announcement. As the Chairman testified to Congress less than a week after the Commission adopted the Notice, "[t]here is nothing in Title II that prohibits paid prioritization." Hearing before the Subcommittee on Communications and Technology of the United States House of Representatives Committee on Energy and Commerce, "Oversight of the Federal Communications Commission," Video at 44:56 (May 20, 2014), available at http://go.usa.gov/3aUmY. And he was right: Title II makes clear that "different charges may be made for the different classes of communications." Communications Act § 201(b). And there's more than a century of precedent that common carriers may charge different rates for different services. *See, e.g.*, *Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010; Establishment of Rules and Requirements for Priority Access Service*, WT Docket No. 96-86, Second Report and Order, 15 FCC Rcd 16720 (2000) (finding Priority Access Service, a wireless priority service for both governmental and non-government public safety personnel, "*prima facie* lawful" under section 202); *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases Of Switched Access Services Offered By Competitive Local Exchange Carriers; Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket Nos. 96-262, 94-1, 98-157, CCB/CPD File No. 98-63, 14 FCC Rcd 14221 (1999) (granting dominant carriers pricing flexibility or special access services, allowing both higher charges for faster connections as well as individualized pricing and customers discounts); *GTE Telephone Operating Companies Tariff F.C.C. No. 1 et al.*, Transmittal Nos. 900, 102, 519, 621, 9 FCC Rcd 5758 (Common Carrier Bur. 1994) (approving tariffs for Government Emergency Telephone Service(GETS), a prioritized telephone service, and additional charges therefor); *see also, e.g.*, *Interstate Commerce Commission v. Baltimore & O.R. Co.*, 145 U.S. 263, 283–84 (1892) (noting that common carriers are "only bound to give the same terms to all persons alike under the same conditions and circumstances" and that "any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge").

[149] The White House, Net Neutrality: President Obama's Plan for a Free and Open Internet, https://web.archive.org/web/20150204034321/http://www.whitehouse.gov/net-neutrality (Nov. 10, 2014).

[150] *Id.* ("I believe the FCC should reclassify consumer broadband service under Title II of the Telecommunications Act . . . .").

[151] *Id.* ("The rules I am asking for are simple, common-sense steps that reflect the Internet you and I use every day, and that some ISPs already observe. These bright-line rules include: No blocking. . . . No throttling. . . . No paid prioritization.").

[152] Tom Wheeler, FCC Chairman Tom Wheeler: This Is How We Will Ensure Net Neutrality, *Wired*, http://wrd.cm/1EGifR4 (Feb. 4, 2015) ("[T]he time to settle the Net Neutrality question has arrived. This week, I will circulate to the members of the Federal Communications Commission (FCC) proposed new rules to preserve the internet as an open platform for innovation and free expression.").

[153] *Id.* ("I am proposing that the FCC use its Title II authority to implement and enforce open internet protections.").

[154] *Id.* ("These enforceable, bright-line rules will ban paid prioritization, and the blocking and throttling of lawful content and services.").

the FCC voting on that proposal, publishing it in the Federal Register, nor soliciting the public for comment.

Some of us at the FCC have seen this movie before. About one month before concluding the FCC's 2006 media ownership proceeding, then-FCC Chairman Kevin Martin published an editorial in *The New York Times* unveiling his own proposal for revising the newspaper/broadcast cross-ownership rule. In its *Prometheus* decision, the Third Circuit explained that the editorial "did not satisfy the APA's notice requirements. The proposal was not published in the Federal Register, the views expressed were those of one person and not the Commission, and the Commission voted days after substantive responses were filed, allowing little opportunity for meaningful consideration of the responses before the final rule was adopted."[155] It then went on: "Although it was clear from [several Commission notices], taken together, that the Commission was planning to overhaul its approach to newspaper/broadcast cross-ownership, they did not contain enough information about what it was planning to do, or the options it was considering, to provide the public with a meaningful opportunity to comment. Until Chairman Martin's November 2007 personal Op-Ed/Press Release, the public did not know even what options he was considering, let alone the Commission."[156] If anything, Chairman Martin provided more notice than has been offered in this proceeding. There, he made public the exact text of his proposed newspaper/broadcast cross-ownership rule. Here, the details of the Chairman's complex proposal have remained shrouded in mystery.

Indeed, it was widely reported that the Commission strongly considered seeking additional comment because of the notice problems.[157] In an email sent to the press, a "commission spokeswoman" described a blog post that Chairman Wheeler published just hours after President Obama called for reclassification and said: "The Chairman said in his statement last Monday that there is more work to do and substantive legal questions to answer." She then added that "[t]he Commission is considering the best way to invite additional comments on those questions."[158] But ultimately, after even more political pressure was put on the agency to move forward without seeking comment,[159] the agency decided to plow ahead.

So here we are. We are moving forward with an *Order* the contours of which no one could have or should have anticipated, considering how drastically different the *Notice*'s proposals were. The FCC

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[155] *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011).

[156] *Id.* at 451.

[157] *See, e.g.*, Jesse Jackson Urges Wheeler Against Title II, *Communications Daily* (Nov. 19, 2014) ("Several involved in the net neutrality debate have said in recent days that they expect the agency, in light of Wheeler's statement last week, to seek additional comments in the proceeding."); Lydia Beyoud, Obama's Call for Title II Reclassification Forces Rulemaking Delay, *Bloomberg BNA* (Nov. 12, 2014) ("Several sources said that [figuring out a way forward] could involve an additional public comment period, whether from a further notice of proposed rulemaking or through a public notice at the bureau level."), *available at* http://bit.ly/17zHLcC; Laura Ryan, Brendan Sasso and Dustin Volz, What's Next in the Never-Ending Net Neutrality Fight, *National Journal* (Nov. 11, 2014) ("An FCC official said the chairman hasn't decided yet whether he'll need to issue a further notice of proposed rule-making before moving on to final rules."), *available at* http://bit.ly/1AsB4EA; No December Vote: Obama Wants Title II; Wheeler Says There are Issues to Be Resolved, *Communications Daily* (Nov. 12, 2014) ("[S]ome industry attorneys said the agency may seek even more comments."); *id.* ("Some industry attorneys said the commission may open up . . . [the] proceeding . . . to another round of comments to bolster the record for classification.").

[158] Jesse Jackson Urges Wheeler Against Title II, *Communications Daily* (Nov. 19, 2014).

[159] *See, e.g.*, Mario Trujillo, Dems to FCC: 'Time for action' on Web reclassification, *The Hill* (Dec. 18, 2014), *available at* http://bit.ly/1GwPOTF; *see also* No December Vote: Obama Wants Title II; Wheeler Says There are Issues to Be Resolved, *Communications Daily* (Nov. 12, 2014) ("Heartened by Obama's statement, Title II advocates pressed the agency to quickly move ahead with approving net neutrality rules involving reclassification.").

proposed to the public a cross-country trip to San Francisco. Only after the car was on the road did the public realize the agency was taking it to Boston.

C.

The failure of notice extends beyond the rules and rationale to discrete decisions littered throughout the *Order*. Rather than cataloging each and every failure, I'll give three examples to illustrate just how far afield the *Order* has strayed from the *Notice*: (1) its application of forbearance to broadband Internet access service; (2) the treatment of Internet traffic exchange (or IP interconnection); and (3) the new definition of the statutory term "the public switched network."

1. Forbearance Applied to Broadband Internet Access Service.—Consider the application of forbearance to broadband Internet access service. To be sure, the *Notice* included three paragraphs seeking comment on "the extent to which forbearance from certain provisions of the Act or our rules would be justified in order to strike the right balance between minimizing the regulatory burden on providers and ensuring that the public interest is served,"[160] asked whether forbearance should differ for mobile broadband services,[161] and identified six sections of Title II that might be "excluded from forbearance."[162] But as the courts have told us before, even if it was "clear from those sources, taken together, that the Commission was" considering forbearance, "they did not contain enough information about what it was planning to do, or the options it was considering, to provide the public with a meaningful opportunity to comment."[163]

For one, the *Order*'s forbearance decisions are expansive, encompassing at least 49 separate decisions. The *Order* decides, for example, that sections 201 (in part), 202 (in part), 206, 207, 208, 209, 214(e), 216, 217, 222, 224 (including subsection (e)), 225 (but not subparagraph (d)(3)(B)), 229, 230, 251(a)(2), 254 (but not the first sentence of subsection (d) nor subsections (g) or (k)), 255, 257, 276, and 309(b) & (d)(1) of the Communications Act will apply to broadband Internet access service.[164] That's 20 separate sections that will apply in whole or part, 14 more than mentioned in the *Notice*. The *Order* then goes on to temporarily forbear, in whole or part, from applying 15 sections[165] and to permanently forbear, in whole or part, from 14 more.[166] And that's just the provisions of the Act! The *Order* also forbears from some of the Commission's rules,[167] applies others,[168] forbears from conducting certain further

[160] *Notice*, 29 FCC Rcd at 5615–16, para. 153.

[161] *Notice*, 29 FCC Rcd at 5616, para. 155.

[162] *Notice*, 29 FCC Rcd at 5616, para. 154.

[163] *Prometheus Radio Project v. FCC*, 652 F.3d 431, 451 (3d Cir. 2011).

[164] *See Order* at paras. 441 (sections 201 and 202); 453 (sections 206, 207, 208, 209, 216, and 217); 463 (section 222); 469 (section 225); 472 (sections 251(a)(2) and 255); 478 (section 224); 481 (section 224(e)); 486 (sections 214(e) and 254); 521 (section 276); 531 (section 257); 532 (section 230(c)); 533 (section 229); 535–36 (sections 309(b) and (d)(1)).

[165] *See Order* at paras. 470 (section 225(d)(3)(B)); 488 (section 254(d)'s first sentence); 497 (section 203); 505 (section 204); 506 (section 205); 508 (sections 211, 213, 215, 218, 219, 220); 509–12 (section 214 except for subsection (e)); 513 (section 251 except for subsection (a)(2), section 256); 515 (section 258). The *Order* makes clear that forbearance from each of these provisions is only appropriate "at this time," "for now," or "on this record."

[166] *See Order* at paras. 492 (sections 254(g), (k)); 507 (section 212); 517–18 (sections 271, 272, 273, 274, 275); 519 (sections 221, 259); 520 (sections 226, 227(c)(3), 227(e), 228, 260).

[167] *See Order* at para. 522 (forbearing from applying the Commission's truth-in-billing rules).

[168] *See Order* at paras. 472–74 (declining to forbear from the Commission's rules implementing section 255 except "insofar as there is any conflict" with "sections 716–718 and our implementing rules").

rulemakings,[169] and commits to commencing still others.[170] To suggest that any party could have or should have anticipated the byzantine dictates that the *Order* takes 103 paragraphs over 62 pages to explain,[171] based on three high-level paragraphs in the *Notice*, is simply implausible.

For another, no party could have anticipated the Commission's rationale for forbearing from some provisions but not others based on the *Notice*.[172] The *Notice* gave no rationale for when forbearance might be appropriate under these particular circumstances. Instead, it asked commenters to provide a "justification for the forbearance" and told commenters to "define the relevant geographic and product markets in which the services or providers should receive forbearance."[173] In other words, this isn't even a case where the agency has "simply propose[d] a rule and state[d] that it might change that rule without alerting any of the affected parties to the scope of the contemplated change, or its potential impact and rationale, or any other alternatives under consideration."[174] Here, the *Notice* proposed *nothing at all* and asked commenters for forbearance proposals—and the *Order* now adopts some but not all of those proposals using a rationale never before explained.[175] The "'logical outgrowth' doctrine does not extend to a final rule that finds no roots in the agency's proposal because '[s]omething is not a logical outgrowth of nothing.'"[176]

And to put it lightly, this isn't how forbearance usually works. When the Commission has previously forborne as part of a rulemaking, the underlying notice has sought specific comment on whether the FCC should forbear from applying a particular statutory provision to a particular class of carriers and has specified why such forbearance may be appropriate.[177] Indeed, when the FCC first applied forbearance to commercial mobile services, it commenced that proceeding with a detailed notice of proposed rulemaking that examined its new forbearance authority under section 332(c)(1)(A). It explained how the Commission's view of competition affected its forbearance analysis. And it offered rationales for forbearing or not forbearing from each statutory provision.[178]

The standard for petitioners seeking forbearance is equally high: Petitions must identify "[e]ach statutory provision, rule, or requirement for which forbearance is sought" and "[e]ach geographic

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[169] *See Order* at para. 451 (forbearing from applying sections 201 and 202 to the extent they would enable the Commission to "adopt[] new *ex ante* rate regulation . . . in the future").

[170] *See Order* at para. 526 (committing "to commence in the near term a separate proceeding to revisit the data roaming obligations of MBIAS providers in light of our reclassification decisions today").

[171] *Order* at paras. 434–536.

[172] To be fair, the *Order* really doesn't make the rationale clearer for many of its decisions. At most, it claims in a footnote that the rationale for forbearance is to "protect and promote Internet openness." *Order* at note 1673. But like beauty or a public interest standard, what that means is in the eye of the beholder. If notice and comment is to mean anything, commenters must be able to wrestle with a concrete rationale for action, not one so vague that no one could anticipate how it might be applied in any particular circumstance.

[173] *Notice*, 29 FCC Rcd at 5616, para. 154.

[174] *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1023 (2d Cir. 1986).

[175] For more on this novel rationale, *see infra* Section III.D.

[176] *See Environmental Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (alteration in original) (quoting *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994)).

[177] *See, e.g.*, *Lifeline and Link Up Reform and Modernization et al.*, WC Docket Nos. 11-42, 03-109, CC Docket No. 96-45, Notice of Proposed Rulemaking, 26 FCC Rcd 2770, 2862–64, paras. 303–09 (2011) (seeking comment on forbearing from the Act's facilities requirement for resellers that want to participate in the FCC's Lifeline program since that requirement appeared only relevant to participants in the FCC's high-cost program).

[178] *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Notice of Proposed Rulemaking, 8 FCC Rcd 7988, 7998–8001, paras. 49–68 (1993).

location, zone, or area from which forbearance is sought," must "contain facts and argument which, if true and persuasive, are sufficient to meet each of the statutory criteria," and must offer a "full statement of the petitioner's *prima facie* case for relief."[179] The FCC itself never seriously attempted to meet these standards in the *Notice*, thus "present[ing] interested parties with a moving target, which frustrates their efforts to respond fully and early in the process."[180] Or as one party to this proceeding put it: "In essence the Commission is asking the public to shadowbox with itself."[181]

2. Internet Traffic Exchange (also Known as IP Interconnection).—The *Notice* discussed Internet traffic exchange in a single paragraph, tentatively concluding that the FCC should maintain the approach it had previously taken so that the Part 8 "Open Internet" rules would not apply "to the exchange of traffic between networks, whether peering, paid peering, content delivery network (CDN) connection, or any other form of inter-network transmission of data, as well as provider-owned facilities that are dedicated solely to such interconnection."[182] Today, the *Order* follows through on that tentative conclusion and concludes that application of the Part 8 rules to Internet traffic exchanged "is not warranted."[183]

But the *Order* then goes quite a bit further and adopts a "regulatory backstop prohibiting common carriers from engaging in unjust and unreasonable practices,"[184] subjecting Internet traffic exchange arrangements like those mentioned immediately above to "sections 201 and 202 on a case-by-case basis."[185] With this authority, the Commission can order an Internet service provider "to establish physical connections with other carriers, to establish through routes and charges applicable thereto . . . , and to establish and provide facilities and regulations for operating such through routes."[186] In other words, the *Order* classifies Internet traffic exchange as a Title II telecommunications service in everything but name.

The *Notice* proposed nothing like this. As one commenter has observed: "Nowhere did the Commission remotely indicate that it was considering classifying the distinct *wholesale* Internet traffic-exchange services that ISPs provide to other network owners as Title II telecommunications services."[187] To add to the list, nowhere did the *Notice* propose applying sections 201 or 202 of the Act to Internet traffic exchange, and nowhere did the *Notice* suggest that the FCC might order physical connections, through routes, or appropriate charges in response to an IP interconnection dispute.

And when the Commission adopted the *Notice*, the Chairman himself disclaimed that Internet traffic exchange would be part of this proceeding: "Separate and apart from this connectivity is the question of interconnection ('peering') between the consumer's network provider and the various

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[179] *See* 47 C.F.R. § 1.54(a), (b), (e).

[180] *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance under Section 10 of the Communications Act of 1934, as Amended*, WC Docket No. 07-267, Report and Order, 24 FCC Rcd 9543, 9550, para. 12 (2009).

[181] Letter from Earl Comstock et al., Counsel for Full Service Network and TruConnect, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127, 14-28, at 10 (Feb. 3, 2015), *available at* http://go.usa.gov/3aUDR.

[182] *Notice*, 29 FCC Rcd at 5582, para. 59.

[183] *Order* at para. 195; *see Order* at para. 206 ("To be clear, we are not applying the open Internet rules we adopt today to Internet traffic exchange.").

[184] *Order* at para. 203.

[185] *Order* at para. 205.

[186] Communications Act § 201(a).

[187] Letter from Matthew A. Brill, Counsel for the National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 8 (Jan. 14, 2015), *available at* http://go.usa.gov/3aUDF; *see id.* ("[T]he portions of the NPRM seeking comment on the application of Title II are focused on the potential reclassification of *retail* broadband Internet access service as a telecommunications service.").

networks that deliver to that ISP. That is a different matter that is better addressed separately. Today's proposal is all about what happens on the broadband provider's network and how the consumer's connection to the Internet may not be interfered with or otherwise compromised."[188] When the Chairman of the Commission—the agency's "chief executive officer"[189]—says that the proposal is "all about" something other than interconnection, why should parties have anticipated the opposite?

To claim, as the *Order* does, that these are just "regulatory consequences" flowing from other decisions in the *Order* is no defense.[190] Not once in the *Notice* did the Commission suggest that Internet traffic exchange was a "component" of broadband Internet access service (as the *Order* now claims).[191] If anything, the *Notice* disclaimed that notion, tentatively concluding to "retain" the definition of broadband Internet access service from the 2010 *Open Internet Order* "without modification."[192] As the *Notice* stated, the rules based on that definition were "not intended 'to affect existing arrangements for network interconnection'" and "did not apply beyond 'the limits of a broadband provider's control over the transmission of data to or from its broadband customers.'"[193] The *Notice* then confirmed that any edge-provider-facing service it recognized would "include the flow of Internet traffic on the broadband providers' own network[s], *and not how it gets to the broadband providers' networks*."[194]

Nor can the *Order* plausibly claim that "numerous submissions in the record . . . illustrate that the Commission . . . gave interested parties adequate notice" of the Title II-based backstop adopted here.[195] Although many parties discussed Internet traffic exchange during the comment period, they did so because the *Notice* asked if the FCC should change course and apply the Part 8 rules to IP interconnection, a proposal the *Order* squarely rejects today. The submissions during the comment period say nothing about a Title II-based backstop—and even a cursory review of those filings shows that no party anticipated the approach the *Order* now adopts.

3. Redefining the Public Switched Network.—Consider the *Order*'s new definition for the statutory term "the public switched network."[196] As background, section 332 of the Communications Act bars the FCC from treating any mobile service—such as mobile broadband Internet access service—as a telecommunications service unless that mobile service is interconnected with the public switched network.[197] By redefining the term "the public switched network" to include services that use "public IP

[188] *Notice*, 29 FCC Rcd at 5647 (Statement of Chairman Tom Wheeler).

[189] Communications Act § 5(a).

[190] *Order* at para. 206 ("[C]ertain regulatory consequences flow from the Commission's classification of BIAS, including the traffic exchange component, as falling within the 'telecommunications services' definition in the Act.").

[191] *See Order* at note 521 ("Internet traffic exchange is a component of broadband Internet access service, both of which meets the definition of 'telecommunications service.'").

[192] *Notice*, 29 FCC Rcd at 5581, para. 55.

[193] *Notice*, 29 FCC Rcd at 5582, para. 59 (quoting *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17944, n.209 (2010); *id.* at 17933, n.150).

[194] *Notice*, 29 FCC Rcd at 5615, para. 151 (emphasis added).

[195] *Order* at para. 206.

[196] *Order* at para. 391; *see also Order* at Appendix A (amending the definition of "public switched network" in rule 20.3).

[197] Communications Act § 332(c)(2) ("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 . . . ."); Communications Act § 332(d)(3) ("[T]he term 'private mobile service' means any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service . . . ."); Communications Act § 332(d)(1) ("[T]he term 'commercial mobile service' means any mobile service . . . that is provided for profit and

(continued….)

addresses,"[198] the *Order* argues that mobile broadband Internet access service now meets the definition for commercial mobile service and thus can be treated as a telecommunications service.[199]

But the *Notice* never proposed a new definition for the public switched network. Appendix A of the *Notice* did not include such a definition in the list of "proposed rules."[200] The text of the *Notice* did not seek comment on redefining the term.[201] Indeed, the *Notice* never even mentioned the term "the public switched network" or the portion of the FCC rule that currently defines it. Instead, the new definition came from Vonage Holdings Corp. in its comments two full months after the Commission adopted the *Notice*.[202] Although the Commission can address comments in the record (and must respond to significant ones), an agency "must *itself* provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment."[203]

The *Order* attempts to establish notice for this new definition by pointing to several other questions asked in the *Notice*,[204] such as "whether the Commission should revisit its prior classification decisions and apply Title II to broadband Internet access service"[205] and "the extent to which forbearance should apply, if the Commission were to classify mobile broadband Internet access service as a CMRS service subject to Title II."[206] But even the most specific question the *Order* points to—"does [mobile broadband Internet access] service fit within the definition of 'commercial mobile service'?"[207]—falls short of putting the public on notice, since that question takes the definition of commercial mobile service (and hence public switched network) as a given. As the courts have told us before, "[e]ven if this *was* the FCC's intent, 'an unexpressed intention cannot convert a final rule into a 'logical outgrowth' that the public should have anticipated.'"[208]

(Continued from previous page)
makes interconnected service available"); Communications Act § 332(d)(2) ("[T]he term 'interconnected service' means service that is interconnected with the public switched network . . . .").

[198] *Order* at para. 391.

[199] *Order* at paras. 391–99, 402 (applying the new definition).

[200] *See Notice*, 29 FCC Rcd at 5626–27 (Appendix A: Proposed Rules).

[201] *See Notice*, 29 FCC Rcd at 5614, para. 150.

[202] Vonage Comments at 43–44.

[203] *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) (emphasis in original); *see also Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011) (explaining that a proposal "not published in the Federal Register" expressing the views of a party but "not the Commission" does not satisfy the APA's requirements).

[204] *See Order* at para. 391. The *Order* also points to various questions in the *2010 NOI*—but even that item did not propose a new definition for the public switched network and used the term only once in an utterly unrelated context. *See 2010 NOI*, 25 FCC Rcd at 7871, n.24. What is more, I do not see how the *Order* can credibly point to the *2010 NOI* for APA notice when it does not incorporate the record produced by that notice into this proceeding. *See Order* at page 1 (listing GN Docket No. 14-28 (the docket of the *Notice*) but not GN 10-127 (the docket of the *2010 NOI*)). The Commission cannot have it both ways: Either the *2010 NOI* and its associated record is part of this proceeding (and the agency must address the full record against reclassification compiled therein) or it is not (and the agency cannot claim notice based on the *2010 NOI*).

[205] *See Notice*, 29 FCC Rcd at 5614, para. 149.

[206] *See Notice*, 29 FCC Rcd at 5616, para. 155.

[207] *See Notice*, 29 FCC Rcd at 5614, para. 150.

[208] *Council Tree Communications v. FCC*, 619 F.3d 235, 254 (3d Cir. 2010) (quoting *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir.1991)).

Notably, the *Order* relies on these same passages as providing notice that the FCC would amend its rules to define mobile broadband Internet access service as the "functional equivalent of a commercial mobile service."[209] But, again, the *Notice* never proposed to amend this rule. Appendix A of the *Notice* did not include any change to this rule in the list of "proposed rules."[210] And the text of the *Notice* did not mention the term "functional equivalent" even once in the context of classifying mobile broadband Internet access service.[211] Nor does the *Notice* anywhere mention the FCC rule that delineates the framework that the agency has long used to determine whether a service is a "functional equivalent" of a commercial mobile service.[212] Yet today's *Order* fashions and applies a novel and entirely different framework for doing so.

With the *Notice* silent on all of these points, the first filing to address "functional equivalency" came 32 days after the comment period had closed on the *Notice*, following a private meeting between FCC officials and CTIA.[213] Just as the Commission cannot "bootstrap notice from a comment,"[214] it cannot use *ex parte* meetings to inform select members of the public of the Commission's thinking and then claim notice from such meetings.[215] The Administrative Procedure Act's notice-and-comment provisions were intended to ensure a robust debate among *all* parties, not just those invited to participate.

What is more, the lack of notice for these rule amendments prejudices even those who are not party to this proceeding. After all, the statutory bar on common carrier treatment applies to *any* mobile service not interconnected with the public switched network.[216] Thus, before today, online innovators could be sure that mobile applications that did not interconnect with the public switched telephone network could *not* be regulated as telecommunications services. That statutory safe harbor is now gone, even though the FCC never alerted those innovators that such a change could be coming.

D.

In sum, the Commission issued the *Notice* in May when it was heading in one direction (a section 706 solution). It shifted course in November after the President urged the agency to implement a very different plan (a reclassification regime). Rather than following the proper procedure and issuing a further notice, the FCC charged ahead at the behest of activists who were suspicious of the Commission's commitment to their cause and thus demanded that agency adopt rules without delay. That is not what the Administrative Procedure Act demands nor what the American people deserve.

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[209] *See Order* at paras. 404, 406; *see also Order* at Appendix A (amending the definition of "commercial mobile radio service" to include mobile broadband Internet access service as a "functional equivalent" in rule 20.3).

[210] *See Notice*, 29 FCC Rcd at 5626–27 (Appendix A: Proposed Rules).

[211] *See Notice*, 29 FCC Rcd at 5614, para. 150.

[212] *See* 47 C.F.R. § 20.9(a)(14).

[213] *Compare* Letter from Scott Bergmann, Vice President – Regulatory Affairs, CTIA – The Wireless Association, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-137 (Oct. 17, 2014), *available at* http://go.usa.gov/3aUW9, *with* Wireline Competition Bureau Extends Deadline for Filing Reply Comments in the Open Internet and Framework for Broadband Internet Service Proceedings, GN Docket Nos. 14-28, 10-127, Public Notice, 29 FCC Rcd 9714 (Wireline Comp. Bur. 2014) (extending the close of the comment cycle to September 15, 2014).

[214] *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

[215] The *Order* specifically relies on a conversation the FCC's general counsel had with Public Knowledge for its contention that "Interested parties should have reasonably foreseen and in fact were aware that the Commission would analyze the functional equivalence of mobile broadband . . . . Indeed, several parties have submitted comments on this question." *Order* at para. 406.

[216] Communications Act § 332(c)(2) ("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 . . . .").

III.

The legal flaws with this *Order* are not limited to improper procedures; they extend into substance as well.

A.

One of the most basic of those flaws is the FCC's determination that it can reclassify broadband Internet access service as a Title II telecommunications service. Neither the text of the Communications Act nor our precedent condones such a decision. And while the *Order* invokes changed circumstances to justify its reversal of course, the cited circumstances are neither changed nor otherwise adequate to justify applying Title II to broadband Internet access services. In short, this decision is unlawful.

Start with the text of the Communications Act, and specifically the term "information service," which was added through the Telecommunications Act of 1996. Congress defined the term to mean:

> [T]he 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.[217]

Internet access service comfortably fits within this framework. Can an ISP's subscriber generate, store, and make available information via telecommunications? Of course—Internet users do that every day on Facebook. Can such a subscriber acquire, retrieve, and process information via telecommunications? Yes—just check out Google Translate. Can such a subscriber transform and utilize information via telecommunications? Absolutely—just try one of the Internet's hundreds of video editing sites. Would such a subscriber have these capabilities without Internet access service? Obviously not.

Indeed, Congress itself called on the Commission to treat Internet access service as an unregulated, information service elsewhere in the Communications Act.[218] Section 230 established the "policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and *other* interactive computer services, unfettered by Federal or State regulation."[219] That section went on to define "interactive computer service" as "any information service . . . provider that provides or enables computer access by multiple users to a computer server, *including specifically a service or system that provides access to the Internet*."[220] In other words, Congress directly addressed the question of whether an ISP offered an information service—and answered with a resounding "Yes."

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[217] Communications Act § 3(24).

[218] *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014) ("Thus, an agency interpretation that is inconsistent with the design and structure of the statute as a whole . . . does not merit deference." (internal quotation marks and brackets omitted)).

[219] Communications Act § 230(b)(2) (emphasis added); *see also* Communications Act § 230(a)(1), (a)(3), (a)(4), (b)(1), (b)(3) (all using the phrase "Internet and other interactive computer services").

[220] Communications Act § 230(f)(2) (emphasis added). To respond, as the Commission does, that section 230 does not "classify broadband Internet access service, as we define that term herein, as an information service" misses the point. *Order* at para. 386. When Congress adopted section 230 as part of the Telecommunications Act of 1996, of course it did not anticipate the precise definition the FCC would adopt almost 20 years later—but it could and did broadly define "interactive computer service" to envelop "*any*" information service provider, and "specifically a service or system that provides access to the Internet." Communications Act § 230(f)(2) (emphasis added). The *Order* cannot and does not dispute that Internet service providers squarely fall within the definition. At most, it argues that other services also fall within that definition, *Order* at note 1097, which seems rather obvious given how broadly the statute is written.

So it's no wonder that every time the Commission has previously confronted the question of whether an Internet access service is an information service, it has answered yes.[221] And it's no wonder that when the Supreme Court reviewed the FCC's determination that broadband Internet access service over cable facilities was an information service, that decision went "unchallenged."[222]

1. The Stevens Report.—The Commission's first major decision in this regard—1998's *Stevens Report*—is particularly instructive regarding why.[223] That report came at the behest of Congress to review "the definitions of 'information service' . . . [and] 'telecommunications service,'" along with "the application of those definitions to mixed or hybrid services . . . including with respect to Internet access."[224] The *Stevens Report* then exhaustively reviewed the text and legislative history of the Telecommunications Act, along with the agency's own administrative precedent and the courts' administration of antitrust law, to answer these questions. Here are the highlights:

First, the *Stevens Report* found that Congress intended to incorporate judicial precedent into the term "information service"—specifically, the Modification of Final Judgment breaking up the Bell system.[225] The court had prohibited the Bell operating companies from providing any "information service,"[226] and the Telecommunications Act's definition paralleled the court's definition almost word for word.[227] Most relevant here, the court explained that the term covered "two distinctly different types" of services: both "data processing and other computer-related services" and "electronic publishing services," such as news and entertainment.[228]

Second, the *Stevens Report* found that Congress intended to incorporate administrative precedent into the term "information service"—specifically, the Commission's development of the concept of "enhanced service" in its *Computer Inquiries* proceeding.[229] Under that precedent, the Commission had eschewed the idea that it could divide up an integrated service into its component parts: "[N]o regulatory scheme could 'rationally distinguish and classify enhanced services as either communications or data processing,' and any dividing line the Commission drew would at best 'result in an unpredictable or inconsistent scheme of regulation' as technology moved forward."[230] In other words, even though enhanced services were "offered '*over* common carrier transmission facilities,' [they] were themselves

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[221] *See Stevens Report*, 13 FCC Rcd at 11501; *Cable Modem Order*, 17 FCC Rcd at 4798; *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14853; *BPL Internet Access Order*, 21 FCC Rcd at 13281; *Wireless Broadband Internet Access Order*, 22 FCC Rcd at 5901.

[222] *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 987 (2005).

[223] Although the *Order* now claims the *Stevens Report* was "not a binding Commission order," *Order* at para. 315, our precedent has repeatedly treated it as such. *See, e.g.*, *Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, Second Report and Order, 15 FCC Rcd 7105, 7120, n.70 (1999); *Cable Modem Order*, 17 FCC Rcd at 4799, n.2; *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14862, para. 12. Nor does the *Order* offer any reason to dismiss the considered views of five Commissioners reporting to Congress about how to construe the classification provisions of the Telecommunications Act.

[224] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, 111 Stat. 2440, 2521, § 623 (1998).

[225] *Stevens Report*, 13 FCC Rcd at 11520, para. 39.

[226] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 227 (D.D.C. 1982).

[227] *Compare* Communications Act § 3(24), *with United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 229 (D.D.C. 1982). The only difference? The Telecommunications Act added the phrase "and includes electronic publishing."

[228] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 179–80 (D.D.C. 1982) (capitalizations omitted).

[229] *Stevens Report*, 13 FCC Rcd at 11520, para. 39.

[230] *Id.* at 11513, para. 27 (citations omitted) (quoting *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, Final Decision, 77 FCC 2d 384, 425, 428, paras. 107–08, 113 (1980)).

not to be regulated under Title II of the Act, *no matter how extensive their communications components*."[231]

Third, the *Stevens Report* found that the "functions and services associated with Internet access," such as "the provision of gateways (involving address translation, protocol conversion, billing management, and the provision of introductory information content) to information services" and "[e]lectronic mail, like other store-and-forward services," were all "classed as 'information services' under the [Modified Final Judgment]."[232] Similarly, the "Commission has consistently classed such services as 'enhanced services.'"[233]

Fourth, the *Stevens Report* concluded that "address[ing] the classification of Internet access service *de novo*" led to the same conclusion: Internet access service is an information service according to the statute. The question was "whether Internet access providers merely offer transmission . . . or whether they go beyond the provision of a transparent transmission path."[234] And the report concluded that "the latter more accurately describes Internet access service"[235] since Internet access services "combine computer processing, information provision, and other computer-mediated offerings with data transport."[236] The fact that data transport was a component of the service was irrelevant[237]—what mattered was that "[s]ubscribers can retrieve files from the World Wide Web, and browse their contents, *because* their service provider offers the 'capability for . . . acquiring, . . . retrieving [and] utilizing . . . information."[238]

In other words, the *Stevens Report* endorsed the view of a bipartisan group of Senators—John Ashcroft, Wendell Ford, John F. Kerry, Spencer Abraham, and Ron Wyden—that "[n]othing in the 1996 Act or its legislative history suggests that Congress intended to alter the current classification of Internet and other information services or to expand traditional telephone regulation to new and advanced services."[239] And it essentially agreed with Senator John McCain that "[i]t certainly was not Congress's

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[231] *Id.* at 11514, para. 27 (emphasis added) (quoting *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, Final Decision, 77 FCC 2d 384, 428, paras. 114 (1980)).

[232] *Id.* at 11536–37, para. 75.

[233] *Id.* (citing *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, Final Decision, 77 FCC 2d 384, 420–21, paras. 97–98 (1980)).

[234] *Id.* at 11536, para. 74; *id.* at 11520, para. 39 (finding a service to be a telecommunications service only if it offers "a simple, transparent transmission path, without the capability of providing enhanced functionality"); *id.* at 11520–21, para. 40 ("[A]n entity is *not* deemed to be providing 'telecommunications,' notwithstanding its transmission of user information, in cases in which the entity is altering the form or content of that information."); *id.* at 11511, para. 21 ("Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services 'via telecommunications.'").

[235] *Id.* at 11536, para. 74.

[236] *Id.* at 11536, para. 73.

[237] *Id.* at 11539–40, para. 80.

[238] *Id.* at 11538, para. 76 (emphasis added); *id.* at 11537, para. 76 ("Internet access providers typically provide their subscribers with the ability to run a variety of applications, including World Wide Web browsers, FTP clients, Usenet newsreaders, electronic mail clients, Telnet applications, and others." (footnotes omitted)).

[239] *Id.* at 11520, para. 38 (quoting Letter from Senators John Ashcroft, Wendell Ford, John Kerry, Spencer Abraham, and Ron Wyden to the Honorable William E. Kennard, Chairman, FCC (Mar. 23, 1998) (*Five Senators Letter*), *available at* http://apps.fcc.gov/ecfs/document/view?id=2038710001); *see also Five Senators Letter* ("[W]ere the FCC to reverse its prior conclusions and suddenly subject some or all information service providers to telephone regulation, it seriously would chill the growth and development of advanced services to the detriment of our economic and educational well-being.").

intent in enacting the supposedly pro-competitive, deregulatory 1996 Act to *extend* the burdens of current Title II regulation to Internet services, which historically have been excluded from regulation."[240]

Indeed, the *Stevens Report* noted that while the 1996 Telecommunications Act's "explicit endorsement of the goals of competition and deregulation represents a significant break from the prior statutory framework,"[241] the Commission's review of the statute and its legislative history revealed no similar intent to effect a "major change" with respect to the regulatory treatment of enhanced services like Internet access service.[242] And if anything, it found the goals of the Telecommunications Act to "promote competition and reduce regulation"[243] supported the Commission's classification decisions, since making Internet access and other enhanced services "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."[244] Indeed, in passing the 1996 Telecommunications Act, Congress made this clear by declaring it the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[245]

2. Recent Developments.—Developments in the marketplace since the *Stevens Report* make it even more clear that ISPs do not "merely offer transmission" between points of the user's choosing but instead offer a highly complex information service.

Take the most basic example of visiting a webpage via a browser. When the user types a domain name into a browser, the browser typically queries the ISP's Domain Name System (DNS) service for the proper IP address to send that information. The DNS service determines whether that information is stored on the local server; if so, it returns that IP address to the user, and if not, it queries another DNS server. Such DNS servers are typically arranged in a hierarchy and searched recursively; once the URL is found, the appropriate information is forwarded and stored by each DNS server in the chain. These functionalities—caching information and storing and forwarding information—are classic enhanced services.[246]

It gets even more complicated. For one, there is no necessary one-to-one correlation between domain names and IP addresses.[247] So if an Internet user in California and a user in New York City both seek the IP address for www.yahoo.com, an ISP could return different IP addresses to each user. The assignment could be random (to balance the load the server at each IP address must handle). Or the ISP could make the decision based on any number of factors, such as the physical proximity of the servers to the user (to reduce the latency of the connection).

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[240] *Stevens Report*, 13 FCC Rcd at 11519, para. 37 (quoting Letter from Senator John McCain to the Honorable William E. Kennard, Chairman, FCC).

[241] *Id.* at 11511, para. 21.

[242] *Id.* at 11524, para. 45.

[243] Telecommunications Act of 1996, as amended, preamble.

[244] *Stevens Report*, 13 FCC Rcd at 1524, para. 46.

[245] Communications Act § 230(b)(2).

[246] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, Final Decision, 77 FCC 2d 384, 421, para. 97 & n.35 (1980).

[247] To rebut this point, the *Order* notes that it "is not uncommon in the toll-free arena for a single number to route to multiple locations." *Order* at para. 361. But the FCC expressly found that the management of toll-free numbers is "*not* a common carrier service" in 1996 and that "Resporgs" that manage toll-free numbers "do not need to be carriers." *800 Data Base Access Tariffs and the 800 Service Management System Tariff; Provision of 800 Services*, CC Docket Nos. 93-129, 86-10, Report and Order, 11 FCC Rcd 15227, 15248–49, paras. 44–45 (1996) (emphasis added).

For another, even with an IP address, an ISP may not connect a user with a particular end point. Instead, ISPs regularly cache popular content—anything from simple text to streaming video—so that when a subscriber requests such content it can be retrieved more quickly (and with less load on the network) than would occur if the request were sent to its specified destination.[248] And it's not just an ISP's own servers that cache content; an entire industry of content delivery networks have sprung up to move content closer to Internet users to improve performance.[249]

And there's still more: ISPs are eliminating viruses and other malicious attacks on their networks, including by (1) implementing DNS Security Extensions to verify the integrity of the DNS information retrieved for subscribers, (2) erecting firewalls and other screening mechanisms to prevent denial-of-service attacks and the effectiveness of botnets, and (3) monitoring network traffic patterns to ensure early detection of security threats.[250] They are using network address translation to establish non-public IP addresses for their subscribers.[251] And they are processing protocols to bridge the gap between IPv4 and IPv6.[252]

The end result of all this? Even for the most basic web browsing functions, an ISP is doing more than merely offering transmission between points of the user's choosing. Indeed, as one commenter put it, "it is literally *impossible* for a broadband user to specify the 'points' of an Internet 'transmission' on the web" since the user is really just "specifying the original *source of the information* the user wants to retrieve" and the ISP then uses that information to choose the endpoint among several alternatives.[253] Or as the *Stevens Report* put it, Internet access service enables subscribers "to access information with no knowledge of the physical location of the server where that information resides,"[254] not "between or among points specified by the user."[255]

The contrary conclusion—that Internet access service is a telecommunications service and that DNS service, caching, and "a variety of new network-oriented, security-related computer processing capabilities"[256] all fall within the telecommunications system management exception[257]—is in error. These capabilities serve the interests of subscribers, not ISPs. For instance, DNS service doesn't facilitate an ISP's "management . . . of a telecommunications system or . . . service"; it allows a subscriber's request for access to particular content to be translated into an IP address. And in any case, these

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[248] AT&T Reply at 54; Bright House Reply at 6–7.

[249] Akamai Comments at 3; *see also* Netflix, Netflix Open Connect Content Delivery for ISPs ("Unlike traditional content caches which retrieve new content when a user requests an object that is not currently present in the cache, new and popular content is pushed from Netflix to the [Netflix-supplied Open Caching Appliances at interconnection points] on a nightly basis over peering or IP transit."), *available at* http://nflx.it/1wpo0jw.

[250] ACA Comments at 54–60; AT&T Comments at 48–49; CenturyLink Comments at 44–45; Charter Comments at 14–15; Comcast Comments at 57; NCTA Comments at 34–35; T-Mobile Comments at 20; Time Warner Cable Comments at 12; USTelecom Comments at 26–27; USTelecom Reply at 29; Verizon Comments at 59–60.

[251] *See, e.g.*, Broadband Internet Technical Advisory Group, Report on Port Blocking at 6 (Aug. 2013), *available at* http://www.bitag.org/documents/Port-Blocking.pdf.

[252] Comcast Reply at 22; Verizon Comments at 60–61.

[253] Fred B. Campbell, Center for Boundless Innovation in Technology, Broadband Transmissions Are Not "Telecommunications," GN Docket No. 14-28, at 30 (Feb. 18, 2014), *available at* http://go.usa.gov/3aUWA.

[254] *Stevens Report*, 13 FCC Rcd at 11532, para. 64.

[255] Communications Act § 3(50) (defining "telecommunications").

[256] *Order* at para. 373.

[257] Communications Act § 3(24) (defining the term "information service" and noting that it "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").

capabilities are not telecommunications services unless the underlying service itself is a telecommunications service—which, as explained above, it is not.

Moreover, the notion that these capabilities might fall within the management exception to the definition of information services would have been unthinkable to the Congress that enacted the Telecommunications Act. Had Internet access service been a basic service, dominant carriers could have offered it (and all related computer-processing functionality) outside the parameters of the *Computer Inquiries*. Had Internet access service been a telecommunications service, Bell operating companies could have offered it themselves under the Modified Final Judgment. But I cannot find a single suggestion that anyone in Congress, anyone at the FCC, anyone in the courts, or anyone at all thought this was the law during the passage of the Telecommunications Act.[258] Statutory interpretation "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."[259] And it is highly unlikely that Congress drew upon historical sources to define a statutory term, but then intended to give the FCC the discretion to reach the exact opposite result.[260]

Furthermore, given the increasing use of computer processing in the networking, I do not see how "[c]hanged factual circumstances" could lead the FCC to revisit the classification of Internet access service.[261] Although the FCC's prior determinations rested on "a factual record compiled over a decade ago,"[262] the *Order* does not identify any actual change.

First, the *Order* points to "consumer conduct"[263] to show that consumers use the Internet "today primarily as a conduit for reaching modular content, applications, and services that are provided by unaffiliated third parties."[264] Examples include 350–400 million visits a day to Google and Yahoo!'s "popular alternatives to the email services provided" by ISPs, Go Daddy providing "website hosting," and Apple, Dropbox, and Carbonite operating "'cloud-based' storage."[265]

But the availability and popularity of third-party content is hardly new. Yahoo! Mail went online in 1997.[266] HoTMaiL (the original web-based email) launched in 1996.[267] GeoCities, a website-hosting service, launched in 1995 and was the third most-visited site on the web in 1999.[268] And Amazon.com

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[258] Despite the *Order*'s claim to the contrary, *Order* at note 975, this line of reasoning does not contradict the Court's holding in *Brand X*, since the last-mile transmission service discussed there (and which I discuss below) is just not the same service as the Internet access service that the *Order* claims is a telecommunications service here. And one need look no further than section 230 of the Communications Act along with the legislative history reviewed in the *Stevens Report*—all described above—to find compelling evidence that Congress did in fact think that Internet access service was an information service.

[259] *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133 (2000).

[260] *Cf. MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994) ("It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion.").

[261] *Order* at para. 330.

[262] *Order* at para. 330.

[263] *Order* at para. 330.

[264] *Order* at para. 350.

[265] *Order* at para. 348.

[266] Internet Archive Wayback Machine: Yahoo!, http://bit.ly/18xSlB5 (Oct. 15, 1997).

[267] Internet Archive Wayback Machine: HoTMaiL, http://bit.ly/1887bOB (Dec. 20, 1996).

[268] Rosalie Marshall, Yahoo closing GeoCities web hosting service, vnunet.com (Apr. 24, 2009), *available at* http://bit.ly/198SoVg; *see also* Internet Archive Wayback Machine: GeoCities, http://bit.ly/1B0pV9E (Feb. 22, 1997).

was selling books, music, and videos before the turn of the century, and began offering cloud-based Amazon Web Services in 2002.[269] Were the most successful sites back then as large as the most successful sites today? Of course not. The number of broadband Internet connections has skyrocketed from 4.3 million in 2000 (at speeds of 200 kbps) to 122 million (at speeds of 10 Mbps)[270]—and a rising tide lifts all ships (or most, alas for GeoCities).

And the FCC was certainly aware that consumers were visiting third-party sites and using third-party applications in its previous classification decisions. The *Cable Modem Order* itself noted that "cable modem service subscribers, by 'click-through' access, may obtain many functions from companies with whom the cable operator has not even a contractual relationship. For example, a subscriber to Comcast's cable modem service may bypass that company's web browser, proprietary content, and e-mail. The subscriber is free to download and use instead, for example, a web browser from Netscape, content from Fox News, and e-mail in the form of Microsoft's 'Hotmail.'"[271] So what has changed? Nothing legally relevant. New automotive makes, models, and functions have arrived since 2005; that doesn't change the fact that what we are doing is driving. LED bulbs are replacing incandescent bulbs by the millions; that doesn't change the fact that we're using something to light up a room. We access and use the capabilities that Internet access service provides in new and novel ways; that doesn't change the fact that we're accessing and using the Internet.

Next, the *Order* points to "broadband providers' marketing and pricing strategies."[272] Some "advertisements . . . emphasize transmission speed as the predominant feature that characterizes broadband Internet access service offerings," such as AT&T's claim that it offers the "[n]ation's most reliable 4G LTE network" with "speeds up to 10x faster than 3G."[273] Others "link higher transmission speeds and service reliability with enhanced access to the Internet at large," such as RCN's claim that its "110 Mbps High-Speed Internet" offering is "ideal for watching Netflix."[274] And ISPs "price and differentiate their service offerings on the basis of the quality and quantity of data transmission" with higher prices for faster speeds.[275]

But again, this is nothing new. In 1999, Qwest asked customers "Could your business use the bandwidth to change everything?" and advertised service fast enough to access "every movie ever made in any language anytime, day or night."[276] In 2001, Charter was offering "Internet Light" (256 kbps service for $24.95 per month) and "Residential Classic" (1024 kbps for $39.95 per month) as part of its "Charter Pipeline" service.[277] Even America Online in 1999 was advertising how it "spent over $1 billion to build the world's largest high-speed network—now with 56k, connections are faster than ever!"[278]

And again, the FCC knew this when it decided the *Cable Modem Order*. In the Commission's *Second Broadband Deployment Report* in 2000, the FCC noted the prices for broadband Internet access

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[269] Internet Archive Wayback Machine: Amazon.com, http://bit.ly/198StZ0 (Oct. 13, 1999).

[270] *Compare* FCC, High-Speed Services for Internet Access: Subscribership as of June 30, 2000, at 2 (Oct. 2000), *available at* http://go.usa.gov/3aUZe, *with* FCC, Internet Access Services: Status as of December 31, 2013, at 4 (Oct. 2014), *available at* http://go.usa.gov/3aUBH.

[271] *Cable Modem Order*, 17 FCC Rcd at 4816, para. 25.

[272] *Order* at para. 330.

[273] *Order* at para. 351 (citing Public Knowledge Comments Appendix at A-2).

[274] *Order* at para. 352 (citing Public Knowledge Comments Appendix at A-3).

[275] *Order* at para. 353 (citing Public Knowledge Comments Appendix at A-1).

[276] Qwest, Qwest Commercial 1999 – Every Movie, https://www.youtube.com/watch?v=xAxtxPAUcwQ.

[277] Charter, Charter Pipeline (2001), http://bit.ly/1EQV19H.

[278] America Online, AOL Commercial from 1999, https://www.youtube.com/watch?v=MQcCnPWHlLk.

service, from "low-end ADSL service" priced at $39.95 to $49.95 per month, to "[f]aster ADSL services" at $99.95 to $179.95 per month, and "symmetric DSL . . . well-suited to applications . . . such as videoconferencing" and priced at $150 to $450 per month.[279]

But more to the point, contemporary marketing doesn't suggest that a wheel's been invented. Deploying last-mile facilities generally has long been the biggest cost of broadband. As a result, the way in which broadband providers have competed is product/service differentiation. So of course broadband providers today advertise their speeds and their prices—that's a large part of what makes each distinct. But it doesn't mean that their last-mile transmission service *by itself* is what they're selling—I don't know many consumers lining up for fast transmission to a cable headend or central office but not actual access to the Internet.

Lastly, the *Order* argues that "the predictive judgments on which the Commission relied in the *Cable Modem Declaratory Ruling* anticipating vibrant intermodal competition for fixed broadband cannot be reconciled with current marketplace realities."[280] One problem is that this argument doesn't address the reclassification question at all. The statute doesn't classify a service based on the quantity of providers, so it doesn't matter whether there are 4,462 (like there are for Internet access service) or just one (like there is for telegraph service).

The greater problem is this assertion comes up empty too.[281] Alongside the high-speed broadband Internet access service offered by cable operators and telephone companies, 98% of Americans now live in areas covered by 4G LTE networks (*i.e.*, networks capable of delivering 12 Mbps mobile Internet access),[282] wireless ISPs are using unlicensed spectrum to offer new, cheaper services, and new entrants like Google are bringing 1 Gbps service to areas around the country. Indeed, it's no wonder that the *Order* offers no factual support for this assertion. To the contrary, the Commission itself has repeatedly recognized that "current marketplace realities" reflect intermodal competition[283]—including in this very *Order*![284]

In short, all the facts point in the same direction: Broadband Internet access service is an information service.

3. Broadband Internet Access Transmission Services.—Nor can the Commission seek refuge in the Commission's past identification of a transmission service as a component of broadband Internet access service. Even if a broadband Internet access service provider could be said to offer a separable transmission service (and it can't), the transmission service discussed in our precedent is very different from the broadband Internet access service that the FCC classifies today.

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[279] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Second Report, 15 FCC Rcd 20913, 20931, paras. 36–37 (2000).

[280] *Order* at para. 330.

[281] Despite the *Order*'s suggestion to the contrary, the *Cable Modem Order* did not limit its prediction to "fixed broadband."

[282] *2015 Broadband Progress Report* at para. 109.

[283] *See 2015 Broadband Progress Report* at paras. 15–16 (observing that "[p]rivate industry continues to invest billions of dollars to expand America's broadband networks" and explicitly comparing cable, telco, wireless, Google Fiber, and municipal broadband investments).

[284] *Order* at para. 76 & note 114 (noting "the remarkable increases in investment and innovation seen in recent years" and citing as evidence of robust broadband infrastructure investment cable, telco, wireless incumbent investment and new entrants like Google Fiber).

Start with the precedent. In the *Advanced Services Order*, the Commission examined digital subscriber line (DSL) technology, which allowed "transmission of data over the copper loop at vastly higher speeds than those used for voice telephony or analog data transmission" between each "subscriber's premises" and "the telephone company's central office."[285] For this service, a DSL access multiplexer would direct the traffic onto a carrier's packet-switched data network, where it could then be routed to a "location selected by the customer" like a "gateway to a . . . set of networks, like the Internet."[286] The FCC then classified only the *last-mile transmission service* between the end user and the ISP as a telecommunications service, while observing that the Internet access service itself was still an information service.[287]

Similarly, the Commission identified "broadband Internet access transmission service" as a possible telecommunications service in the *Wireline Broadband Internet Access Services Order*.[288] Again, however, that service was the *last-mile transmission service* between the end user and the ISP, and one the carrier could choose to offer as common carriage or private carriage.[289] And it is these last-mile transmission services that many rural carriers still offer as a telecommunications service (in large part in order to receive subsidies from our legacy universal service program, which funds the regulated costs of high-cost loops used to provide telecommunications services).[290]

It was this potential last-mile transmission service that was at issue in the *Brand X* case. As the Commission reasoned, this service was not a separable telecommunications service because the "consumer uses the high-speed wire always in connection with the information-processing capabilities provided by Internet access, and because the transmission is a necessary component of Internet access."[291]

And it was this last-mile transmission service that Justice Scalia identified in his dissent as being a telecommunications service. As he put it: "Since . . . the broad-band connection between the customer's computer and the cable company's computer-processing facilities[] is downstream from the computer-processing facilities, 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 ISP."[292] He analogized to a pizzeria, arguing that a delivery service was being offered *after* the pie was baked:

> If, for example, I call up a pizzeria and ask whether they offer delivery, both common sense and common "usage," would prevent them from answering: "No, we do not offer delivery—but if you order a pizza from us, we'll bake it for you and then bring it to your house." The logical response to this would be something on the order of, "so, you *do* offer delivery."[293]

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[285] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24026–27, para. 29 (1998).

[286] *Id.* at 24027, paras. 30–31.

[287] *Id.* at 24030, para. 36.

[288] *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14899, para. 86.

[289] *Id.* at 14899–900, paras. 86–88 (describing this as a service that both end users and ISPs would purchase).

[290] *Id.* at 14900–03, paras. 89–95; NTCA Comments at 9. Notably, rural carriers exercising this option do *not* treat the Internet access service itself as a Title II telecommunications service and generally offer that service through a separate, affiliated ISP that purchases the last-mile transmission service from the carrier. To the extent the *Order* suggests otherwise, *see Order* at para. 422, it is incorrect.

[291] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 988 (2005).

[292] *Id.* at 1010 (Scalia, J., dissenting).

[293] *Id*. at 1007 (Scalia, J., dissenting).

In contrast, consider the broadband Internet access service at issue in this proceeding. It is not limited to the last-mile transmission service between a customer and an ISP's point of presence. It extends into the ISP's network all the way to "the exchange of traffic between a last-mile broadband provider and connecting networks"[294]—a scope that necessarily extends onto the Internet's backbone, since that's where many networks interconnect. And the *Order* reclassifies Internet access service for "all providers of broadband Internet access service . . . regardless of whether they lease or own the facilities used to provide the service."[295]

To extend the pizzeria analogy, this *Order* does not only cover the delivery of a baked pie. Instead, the *Order* reaches the exchange of ingredients between a pizzeria and its suppliers, since all those ingredients must be "delivered" to the pizzeria. To the extent a pizzeria stores popular ingredients, that's just an adjunct to the delivery services that came before and afterwards. To the extent a pizzeria processes the ingredients, that's just an adjunct too.[296]

In other words, when the *Order* claims that "[t]here is no disputing that until 2005, Title II applied to the transmission component of DSL service,"[297] it is being intentionally misleading. The service being reclassified today is different in kind from the last-mile transmission services that were at issue in prior FCC orders. And so the *Order*'s claim that it is just returning things to how they were ten years ago is just wrong. In fact, the *Order* overturns three decades of precedent—indeed, all the precedent we've ever had on the subject.[298]

4. Heightened Scrutiny.—Not only does the FCC lack the authority to classify broadband Internet access service as a Title II telecommunications service; it also, in any event, fails to supply a reasoned basis for departing from decades of agency precedent that determined it is an information service.[299]

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[294] *Order* at para. 204.

[295] *Order* at para. 337.

[296] *Order* at paras. 366–75. The *Order* misunderstands the analogy when it supposes that "the pizzeria owners discovered that other nearby restaurants did not deliver their food and thus concluded that the pizza-delivery drivers could generate more revenue by delivering from any neighborhood restaurant (including their own pizza some of the time). Consumers would clearly understand that they are being offered a delivery service." *Order* at para. 45. Of course they would. And if someone offered a last-mile transmission service available to any ISP, of course that would be a telecommunications service. But that's not what any broadband Internet access service provider is offering, and so the analogy utterly fails.

[297] *Order* at para. 313.

[298] The *Order* objects in a footnote that "the service we define and classify today *is* the same transmission service as that discussed in prior Commission orders." *Order* at note 1257. But it undermines that argument just one sentence before, when it describes the service as one with "the capability to send and receive packets to all or substantially all Internet endpoints." *Id.* The transmission service the FCC previously recognized was not and is not so expansive—it's a last-mile transmission service connecting customers to computer-processing facilities for Internet access. That's why the *Wireline Broadband Internet Access Services Order* recognized that ISPs would be customers of such service. *See* 20 FCC Rcd at 14902, para. 92 (describing the transmission service offered to "end user and ISP customers"). And that's why even today the tariffs of the National Exchange Carrier Association describe Digital Subscriber Line (DSL) as a local point-to-point service. *See, e.g.*, NECA Tariff FCC No. 5, 20th Revised Page 8-1 http://bit.ly/1wkvPH8 (effective through Mar. 1, 2015) (describing DSL Access service as a transmission service "over local exchange service facilities . . . between customer designated premises and designated Telephone Company Serving Wire Centers"). To return to the pizzeria analogy: Before, the Commission regulated the delivery from the pizzeria to the customer; now, the Commission wants to regulate that delivery plus the delivery of all or substantially all of the ingredients to the pizzeria. The one thing is not like the other.

[299] *See, e.g.*, *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983).

The agency faces one further obstacle in its quest to reclassify broadband Internet access service: heightened judicial scrutiny. When an agency's "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,"[300] an agency decision to reverse course is subject to heightened or more searching review.[301] Both circumstances are present here.

First, as discussed above, the Commission's decision to reclassify broadband Internet access service rests upon a series of factual findings that run directly contrary to those it made in all prior classification decisions.

Second, if there ever could be a case where an agency has engendered serious reliance interests, this is it. After the passage of the 1996 Telecommunications Act and the confirmation that Internet access service was an information service in the *Stevens Report*, the FCC trumpeted the multi-billion investments that AT&T, MCI, Qwest, Level 3, UUNet Technologies, Sprint, and others were making in the Internet backbone, noting that bandwidth on the backbone was doubling every four to six months.[302] Starting the year after the *Stevens Report*, broadband providers have invested over $1.125 *trillion* in their networks.[303] To suggest these providers did not rely on the FCC's decision not to subject Internet access services—broadband or otherwise—to Title II is absurd.

Indeed, look just at the wireless industry as an example. In 2007, when the Commission classified wireless broadband Internet access service as an information service, FCC Chairman Kevin Martin stated that "[t]oday's classification eliminates unnecessary regulatory barriers for wireless broadband Internet access service providers and will further encourage investment and promote competition in the broadband market."[304] It certainly did. Between that decision and now, wireless providers alone have invested over $175 billion.

Regardless of whether the heightened or more traditional standard applies, the *Order* fails to offer an adequate basis for changing course. Indeed, given that neither the material facts nor relevant laws have changed, it is quite plain that the only reason the FCC is departing from prior precedent is because the President told the agency to do so.[305] But courts have been quite clear that this is not a lawful basis for shifting course, with the D.C. Circuit stating that "an agency may not repudiate precedent simply to conform with a shifting political mood."[306] As a result, the FCC's attempt to offer a reasoned basis for turning heel on decades of agency precedent falls far short of meeting APA requirements.

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[300] *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009) (citing *Smiley v. Citibank (South Dakota), N. A.,* 517 U.S. 735, 742 (1996)).

[301] *Id.* at 513–16.

[302] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, para. 38 (1999).

[303] *See, e.g.*, USTelecom, Broadband Investment, Historical Broadband Provider Capex (2015) (data through 2013), *available at* http://www.ustelecom.org/broadband-industry-stats/investment/historical-broadband-provider-capex.

[304] *Wireless Broadband Internet Access Order*, 22 FCC Rcd at 5926 (Statement of Chairman Kevin J. Martin).

[305] *See supra* Part I.

[306] *National Black Media Coalition v. FCC*, 775 F.2d 342, 356 n.17 (D.C. Cir. 1985); *see also Fox*, 556 U.S. at 537 (Kennedy, J., concurring in part and concurring in the judgment) ("Congress passed the Administrative Procedure Act (APA) to ensure that agencies follow constraints even as they exercise their powers. One of these constraints is the duty of agencies to find and formulate policies that can be justified by neutral principles and a reasoned explanation.").

B.

Section 332 of the Communications Act independently bars the FCC from reclassifying mobile broadband Internet access service as a Title II telecommunications service.

In section 332, Congress added a mobile gloss onto the definition of telecommunications service originally formulated for wireline carriers. Pursuant to the statute, providers of "commercial mobile service" are common carriers, and thus telecommunications carriers.[307] By contrast, providers of "private mobile service" are not.[308]

In order to understand why mobile broadband Internet access service is a private mobile service and thus cannot be classified as a Title II service, it is necessary to begin by running through a number of definitions. First, a "commercial mobile service," in relevant part, is any mobile service that "makes interconnected service available."[309] "[I]nterconnected service," in turn, means a "service that is interconnected with the public switched network"[310] and "gives subscribers the capability to communicate to or receive communication from all other users on the public switched network."[311] "[P]ublic switched network," for its part, means the public switched telephone network, *i.e.*, the "common carrier switched network . . . that use[s] the North American Numbering Plan in connection with the provision of switched services."[312] And "private mobile service" is the reverse of commercial mobile service: "any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service."[313]

Given these definitions, it's no surprise that the FCC back in 2007 classified mobile broadband Internet access service as a private mobile service—and hence recognized that it could not be treated as a common-carriage, telecommunications service.[314] As the Commission put it: "[M]obile wireless broadband Internet access service does not fit within the definition of 'commercial mobile service' because it is not an 'interconnected service.'"[315] That's because it does not interconnect with the public switched telephone network but instead a different network—the Internet.[316] The Commission reaffirmed that finding four years later when it held that "commercial mobile data service," which, as relevant here, is the equivalent of retail mobile Internet access service, "is not interconnected with the public switched network."[317]

Courts have repeatedly confirmed this view. The D.C. Circuit in *Cellco* explained that, "providers of 'commercial mobile services,' such as wireless voice-telephone service, are common

[307] Communications Act § 332(c)(1)(A) ("A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier.").

[308] Communications Act § 332(c)(2) ("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.").

[309] Communications Act § 332(d)(1).

[310] Communications Act § 332(d)(2).

[311] 47 C.F.R. § 20.3.

[312] 47 C.F.R. § 20.3.

[313] Communications Act § 332(d)(3).

[314] *Wireless Broadband Internet Access Order*, 22 FCC Rcd at 5901.

[315] *Id.* at 5916, para. 41.

[316] *Id.* at 5916, 5917, paras. 41, 45 & n.118.

[317] *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, 26 FCC Rcd 5411, 5431, para. 41 (2011).

carriers, whereas providers of other mobile services are exempt from common carrier status."[318] The court recognized what it described as Section 332's "statutory exclusion of mobile-internet providers from common carrier status."[319] And it noted that, when read in conjunction with the Communications Act's separate prohibition on treating information services providers as common carriers, mobile broadband Internet access service providers are "statutorily immune, perhaps twice over, from treatment as common carriers."[320] The D.C. Circuit in *Verizon* put it even more bluntly: The "treatment of mobile broadband providers as common carriers would violate section 332."[321]

This regulatory framework creates major problems for the task that President Obama specifically assigned the Commission: reclassifying mobile broadband Internet access service as a Title II telecommunications service.[322] And so the Commission only makes a half-hearted attempt to work within it. In two short paragraphs, the *Order* claims that because mobile broadband Internet access service enables the use of VoIP and similar applications, it "gives subscribers the capability to communicate with all NANP endpoints"[323] and is thus an interconnected service, a commercial mobile service, and a telecommunications service.

But this isn't a new argument—the Commission squarely addressed it and rejected it seven years ago.[324] A service is classified based on its *own* functions and properties,[325] and there is no question that a subscriber to mobile broadband Internet access service, without interconnected VoIP service, *cannot* reach the public switched telephone network. In other words, interconnected VoIP service and mobile broadband are distinct services,[326] so while VoIP might be an interconnected service, mobile broadband is not.[327]

Today's *Order* offers no reasoned basis for departing from these precedents, nor for concluding that VoIP service and mobile broadband Internet access service are now a single, unified service. Yes, mobile users can now communicate with different types of networks; but they could do that in 2007. Yes, there are more subscribers to mobile broadband Internet access service now than in 2007; but that has nothing at all to do with whether VoIP and mobile broadband are distinct services. And while the FCC may assert that "changes in the marketplace have increasingly blurred the distinction between services

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[318] *Cellco Partnership v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012).

[319] *Id.* at 548.

[320] *Id.* at 538; *see also id.* (recognizing that the Communications Act's definition of the term "common carrier" has been "interpreted . . . to exclude providers of 'information services'").

[321] *Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014).

[322] The White House, Net Neutrality: President Obama's Plan for a Free and Open Internet https://web.archive.org/web/20150204034321/http://www.whitehouse.gov/net-neutrality (Nov. 10, 2014) ("I believe the FCC should make these rules fully applicable to mobile broadband as well.").

[323] *Order* at paras. 400–01.

[324] *Wireless Broadband Internet Access Order*, 22 FCC Rcd at 5917–18, para. 45.

[325] *See, e.g.*, *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Memorandum Opinion and Order, 22 FCC Rcd 3513, 3521–22, paras. 15–16 (Wireline Comp. Bur. 2007) (noting the "regulatory classification of the [VoIP] service provided to the ultimate end user has no bearing on" the regulatory status of the entities "transmitting [the VoIP] traffic").

[326] *Wireless Broadband Internet Access Order*, 22 FCC Rcd at 5918, para. 45 (stating that "users of a mobile wireless broadband Internet access service need to rely on another service or application, such as certain voice over Internet Protocol (VoIP) services . . . to make calls").

[327] *Id.* at 5917–18, paras. 45–46.

using NANP numbers and those using public IP addresses,"[328] that's just an *ipse dixit*; no consumer that I know types a phone number into a web browser to make a call, and no one tries to dial a URL into their phone.

What is more, the *Order*'s attempted conflation makes no sense. If mobile broadband Internet access service could lose its status as a distinct service and blend into another merely because it enables access to interconnected VoIP service, then it truly is a regulatory chameleon. Is it a cable service because consumers can use apps to watch cable programming? Is it a radio service because people can use apps to listen to an FM station? Is it food delivery service because some apps let you order pizza from your phone? Obviously not.

Implicitly recognizing these problems with its approach, the *Order* next attempts to jettison the whole regulatory framework and replace it with one far more amenable to the outcome it desires—first by redefining the meaning of public switched network, next by redefining the meaning of functional equivalence, and finally by summoning a "statutory contradiction" into being. None of these attempts withstands scrutiny.

1. Redefining the Meaning of the Public Switched Network.—The Commission's first move is to broaden the definition of the public switched network to include not only services that use the North American Numbering Plan but also those that use "public IP addresses."[329] In other words, the public switched network would now encompass the Internet in addition to the traditional public switched telephone network.

But that's not what the statute allows. A "fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."[330] In the case of a term of art, that ordinary meaning is determined based on common usage among those practiced in the art.

And in the years preceding the passage of section 332(d)(2), the FCC and the courts repeatedly used the term "the public switched network" to refer to the traditional, circuit-switched network that AT&T and local exchange carriers had built to offer telephone service, *i.e.*, the public switched telephone network. In 1981, the Commission noted that "the public switched network interconnects all telephones in the country."[331] In 1982, the D.C. Circuit noted that wide area telecommunications service "calls are switched onto the interstate long distance telephone network, known as the *public switched network*, the same network over which regular long distance calls travel."[332] In 1985, the Federal-State Joint Board on Separations noted that the "costs involved in the provision of access to the public switched network[] are assigned . . . on the same basis as . . . [t]he local loop used by subscribers to access the switched telephone network."[333] And in 1992, the FCC characterized its cellular service policy as "encourag[ing] the creation

[328] *See Order* at para. 401.

[329] *Order* at para. 391.

[330] *Perrin v. United States*, 444 U.S. 37, 42 (1979); *see also Evans v. United States*, 504 U.S. 255, 260 n.3 (1992) (Where a "'word is obviously transplanted from another legal source, whether common law or other legislation, it brings the old soil with it.'" (quoting Justice Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 537 (1947)).

[331] *Applications of Winter Park Tel. Co.*, Memorandum Opinion and Order, 84 FCC.2d 689, 690, para. 2, n.3 (1981).

[332] *Ad Hoc Telecommunications Users Committee v. FCC*, 680 F.2d 790, 793 (D.C. Cir. 1982).

[333] *MTS and WATS Market Structure; Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Order Inviting Further Comments, 50 Fed. Reg. 31749, 41749 (Fed.-State Jt. Bd. 1985).

of a nationwide, seamless system, interconnected with the public switched network so that cellular and landline telephone customers can communicate with each other on a universal basis."[334]

So it's no wonder that when the FCC first defined "the public switched network," it expressly rejected calls to decouple that concept from the traditional public switched telephone network. Commenters had asked the Commission to broaden the scope of the term to include the then-emerging "network of networks."[335] Still others teed up defining the term to "include all networks."[336] But the Commission said no, and tied its definition of the public switched network to "the traditional local exchange or interexchange switched network."[337] In other words, the agency recognized that "Congress intended [the term] to have its established meaning,"[338] which in this case means the public switched telephone network—not the Internet.[339]

In the 20 years since the FCC defined the term, Congress has amended the Communications Act—and section 332—numerous times.[340] On every occasion, it has chosen not to disturb the Commission's interpretation. As the Supreme Court has explained, this "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress."[341]

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[334] *Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service*, CC Docket No. 90-358, Report and Order, 7 FCC Rcd 719, 720, para. 9 (1992); *see also Provision of Access for 800 Service*, CC Docket No. 86-10, Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5421, 5421, n.3 (1991) ("800 numbers generally must be translated into [plain old telephone service] numbers before 800 calls can be transmitted over the public switched network."); *Telecommunications Services for Hearing-Impaired and Speech-Impaired Individuals, and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Notice of Proposed Rulemaking, 5 FCC Rcd 7187, 7190, para. 20 (1990) (noting that "subscribers to every telephone common carriers' interstate service, including private line, public switched network services, and other common carrier services, will contribute"); Letter from Scott Bergmann, CTIA to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-137, at 7 n.2 (Dec. 22, 2014) (collecting authorities).

[335] *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1434, para. 53 (1994) (*CMRS Second Report and Order*).

[336] *Id.*

[337] *Id.* at 1436–37, para. 59. To support its action here, the Commission cites commenters that called on the FCC in 1994 to broaden the scope of the term "the public switched network" to include the "network of networks," or otherwise separate the term entirely from the traditional public switched telephone network. *See Order* at note 1145. Again, this ignores that the Commission *rejected* those commenters' calls to so fundamentally alter the term "the public switched network" and made clear that, consistent with section 332, it was limiting the term to covering services that are "interconnected with the traditional local exchange or interexchange switched network." *CMRS Second Report and Order*, 9 FCC Rcd at 1436–37, para. 59.

[338] *McDermott Intern., Inc. v. Wilander*, 498 U.S. 337, 342 (1991).

[339] Indeed, section 332's legislative history confirms that Congress used the terms interchangeably. Although both the House and Senate versions of the legislation used the term "the public switched network," the Conference Report characterized the House version as requiring interconnection with "the Public switched *telephone* network." H.R. Rep. 103-213, 103d Cong., 1st Sess. 495 (1993) (emphasis added).

[340] *See, e.g.*, Telecommunications Act § 704(b) (amending section 332 of the Communications Act).

[341] *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274–275 (1974)); *see also Cottage Sav. Ass'n v. C.I.R.* 499 U.S. 554, 561 (1991) ("'[I]nterpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law.'" (quoting *U.S. v. Correll*, 389 U.S. 299, 305–06 (1967))); *City of Pleasant Grove v. U.S.*, 479 U.S. 462, 468 (1987) (Where Congress is aware of an administrative interpretation when it revises a statute, it "implicitly approve[s] it.").

And Congress itself has distinguished between "the public switched network" on the one hand and the "public Internet" on the other. In the Spectrum Act of 2012, for example, Congress assigned the First Responder Network Authority certain responsibilities, including developing for public safety users a "core network" that "provides connectivity" to "the public Internet or the public switched network, or both."[342] This provision makes clear that Congress knows the difference between "the public switched network" and the "public Internet." The Commission must respect that distinction.[343]

There's another problem with the Commission's attempt to expand the definition of "the public switched network" to include the Internet: Congress used the definite article "the" and the singular term "network" in section 332(d)(2)—suggesting Congress was referring to a single, integrated network. And the Commission followed that lead when it defined interconnected service as giving "subscribers the capability to communicate to or receive communication from *all other users* on the public switched network."[344] Here, the *Order* impermissibly attempts to define "the public switched network" to be two networks. Furthermore, expanding the definition of the public switched network to encompass two distinct networks—the public switched telephone network and the public Internet—means that *no mobile service* would be interconnected since no service offers interconnection with substantially all of each network. For example, mobile voice service would no longer be an interconnected service nor a commercial mobile service nor a telecommunications service since it unquestionably does not give consumers a way of dialing up websites. And so the one service that everyone agrees Congress intended to be a commercial mobile service would not be one.[345]

In light of all this evidence that the term "the public switched network" in section 332(d)(2) does not include the Internet, the Commission's contrary interpretation is neither reasonable nor credible.

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[342] 47 U.S.C. § 1422(b)(1).

[343] *See, e.g.*, *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (applying the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning" to a single term used in two separate, but related, statutes (internal quotation marks omitted)).

[344] 47 C.F.R. § 20.3 (emphasis added).

[345] In an effort to try to avoid this absurdity, the *Order* says in a footnote that it is making a "conforming change to the definition of Interconnected Service in section 20.3 of the Commission's rules." *Order* at note 1175; *see also* 47 C.F.R. § 20.3 (defining interconnected service as one "[t]hat is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from *all* other users on the public switched network") (emphasis added). That change? Deleting the word "all" from the definition of interconnected service! *Order* at Appendix A. There are many words one could use to describe this amendment. "Conforming" (or "minor") is not one of them. Under this change, every user of Network A (say, the public switched telephone network) could lack the capability to communicate with any user of Network B (say, the Internet) and vice-versa, but, because of the FCC's definitional change, Network A and Network B would now be a single, interconnected network. That is plainly at odds with the entire structure of section 332 and any reasonable understanding of the concept of an interconnected network and interconnected services.

Indeed, the FCC never proposed such a change, has no record on which to do so, and nowhere explains how the change can be squared with the text, purpose, or history of section 332, including the Commission's own view that the purpose of the interconnected services definition is to ensure that those services are "broadly available." *See Order* at para. 402. Although the *Order* tries to bolster its approach by contending that the definition of "interconnected service" and the *CMRS Second Report and Order* recognize that a service can be interconnected even if access is limited in some ways, *Order* at para. 402 & note 1172, this effort fails because the FCC there was focusing on phenomena such as service providers intentionally limiting users' access to the public switched network to certain hours each day, for the sole purpose of avoiding classification as a commercial mobile service. *See, e.g.*, *CMRS Second Report and Order*, 9 FCC Rcd at 1435, para. 55. That is the apple to the *Order*'s orange, given that the Commission here is attempting to deem two networks and services "interconnected" even though they never interconnect.

How does the Commission respond? The *Order*'s primary argument is that Congress "expressly delegated authority to the Commission to define the term 'public switched network,'" and that, in doing so, "Congress expected the notion to evolve and therefore charged the Commission with the continuing obligation to define it."[346] But that's just wishful thinking. Nothing in the text of section 332 nor in its legislative history supports the view that Congress intended the term "the public switched network" to be capable of such an amazing feat of mutation that it could swallow today's Internet.

The actual text makes that clear. The referenced delegation appears in section 332's definition of the term "interconnected service."[347] It states: "the term 'interconnected service' means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending."[348]

This language simply cannot bear the weight the Commission places on it. The idea that this limited interpretative authority means that the Commission has the authority to redefine the traditional public switched network as incorporating today's Internet simply proves too much. Surely, the FCC could not define the public switched network as something that is not the public switched network, whether it be an apple or a turnip. Even when Congress delegates interpretive authority to an agency, that agency must abide by traditional norms of statutory interpretation. So "[w]here 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."[349]

All this delegation recognizes is the uncontroversial notion that the Commission has *some* authority to interpret the relevant terms. Indeed, the Commission previously exercised that limited interpretive authority, and that precedent undermines the Commission's position here. In the *CMRS Second Report and Order*, for example, the Commission defined "the public switched network" as including those switched common carrier services and networks that themselves interconnect with and are thus part of the traditional public switched telephone network.[350] In doing so, the Commission rejected all calls to define the terms so expansively as to include the Internet or otherwise fundamentally alter them.[351]

Relatedly, the *Order* suggests that the Commission's decision in the *CMRS Second Report and Order* to codify the term "the public switched network," rather than the "'technologically based term 'public switched telephone network,'" supports the agency's position today.[352] But this claim also misses the mark. The FCC in 1994 was not broadening the scope of "the public switched network" beyond the traditional local exchange or interexchange switched network. Instead, it was making clear that when a provider offers a switched common carrier—yet, non-telephone—service that nonetheless interconnects with the public switched telephone network, that service cannot avoid treatment as a commercial mobile

[346] *Order* at para. 396.

[347] Communications Act § 332(d)(2).

[348] Communications Act § 332(d)(2). Compare, too, the parenthetical language in section 332(d)(2) with the parallel statutory provisions that nest around the definition of "interconnected service." In both section 332(d)(1), which defines "commercial mobile service," and section 332(d)(3), which defines "private mobile service," the parallel parentheticals state "(as defined in section 153 of this title)." So rather than providing evidence that the phrases are not terms of art or that Congress was delegating the FCC unbounded discretion to define the relevant terms, it is both a far more modest delegation, as explained above, and one that simply recognizes that Congress itself had not codified the relevant terms.

[349] *City of Arlington, Tex. v. FCC*, 133 S.Ct. 1863, 1874 (2013); *see also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

[350] *CMRS Second Report and Order*, 9 FCC Rcd at 1436, para. 59.

[351] *See id.* at 1433–34, para. 53.

[352] *Order* at paras. 391, 396, & note 1145 (citing *CMRS Second Report and Order*, 9 FCC Rcd at 1436, para. 59).

service simply because it is not offering "telephone" service.[353] The Commission could have had any number of non-"telephone" switched common carrier services or networks in mind. This becomes quite plain when one reads this portion of the *CMRS Second Report and Order* in context, including its statement that it was adopting an "approach to interconnection with the public switched network [that] is analogous to the one" it used previously.[354] Thus, this precedent undermines, rather than supports, the Commission's view that it can define the term "the public switched network" in a way that includes services or networks that are not interconnected with the traditional public switched telephone network.

Indeed, the Commission does not really dispute this point.[355] The FCC's discretion to define non-telephone switched common carrier services as part of the public switched network, when those services are interconnected with the network, is of no relevance here because mobile broadband Internet access is not such a service. As explained above—and as the *Order* never seriously argues otherwise—mobile broadband Internet access service itself is not a switched offering that interconnects with the traditional public switched network.[356]

In sum, it is clear that the Commission lacks authority to define the public switched network as including the Internet.

2. Redefining the Meaning of Functional Equivalent.—Alternatively, the Commission claims that it can classify mobile broadband Internet access as a commercial mobile service by finding that it is the "functional equivalent" of that service.[357] But as the Commission's own decisions make clear, section 332(d)(3)'s functional equivalency standard does not give the Commission nearly enough leeway to make that determination. Indeed, the Commission does not even attempt to satisfy the relevant standard.

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[353] *See CMRS Second Report and Order*, 9 FCC Rcd at 1431–37, paras. 50–60; *id.* at 1434, para. 54 ("The purpose underlying the congressional approach, we conclude, is to ensure that a mobile service that gives its customers the capability to communicate to or receive communication from other users of the public switched network should be treated as a common carriage offering (if the other elements of the definition of commercial mobile radio service are also present[.)]"); *id.* at 1433, para. 52 ("Several parties caution that making distinctions based on technologies could encourage mobile service providers to design their systems to avoid commercial mobile radio service regulation."); *see also Wireless Broadband Internet Access Order*, 22 FCC Rcd at 5918, para. 45 n.119 (describing the *Second CMRS Report and Order* and stating that, "[i]n fact, the Commission found that 'commercial mobile service' must still be interconnected with the local exchange or interexchange switched network as it evolves").

[354] *See CMRS Second Report and Order*, 9 FCC Rcd at 1432, 1435, paras. 52, 57 (discussing *Establishment of Satellite Systems Providing International Communications*, CC Docket No. 84-1299, Report and Order, 101 FCC 2d 1046, 1101, para. 114 (1985) (discussing various "switched message services such as MTS, telex, TWX, telegraph, teletext, facsimile and high speed switched data services"); *see also id.*at 1454–59, paras. 100–15 (identifying then-existing common carrier services).

[355] *See Order* at note 1145 (noting that the *Second CMRS Report and Order* recognized that non-telephone common carrier switched services and networks that themselves interconnect with the traditional public switched network are considered part of that network for purposes of section 332).

[356] The *Order* attempts to evade this argument when it contrasts the "millions of subscribers" to mobile broadband Internet access service with the fact that private mobile service "includes services not 'effectively available to a substantial portion of the public.'" *Order* at para. 398. But the statute poses a three-part test: To be a commercial mobile service, a service must be provided for a fee, available to the public, *and* an interconnected service. So a service *is* a private mobile service if it isn't interconnected with the public switched network—even if it's provided for a fee and made available to a substantial portion of the public (or even every single American). Any other reading of the statute would render one part of the statutory test surplusage. Indeed, the Commission has made this very point. *See CMRS Second Report and Order*, 9 FCC Rcd at 1450–51, paras. 88–93 (concluding that most specialized mobile radio services meet the first two parts of the test so that the classification of any particular specialized mobile radio service thus "turns on whether they do, in fact, provide interconnected service as defined by the statute"). Again, the problem for the *Order* is that mobile broadband Internet access service falls squarely into the non-interconnected camp and thus cannot be classified as a commercial mobile service.

[357] *See Order* at paras. 404–05.

Instead, it invents an entirely new method of determining functional equivalency that turns the statutory framework on its head.

The Commission has an established framework for determining whether a service is the functional equivalent of a commercial mobile service.[358] What is the first tenet of that framework? A mobile service that does not meet the literal definition of a commercial mobile service "is presumed to be a private mobile service."[359]

What is the one way that this presumption can be overcome? By showing, through a petition-based process and specific allegations of fact supported by affidavits, that the mobile service in question is the functional equivalent of a commercial mobile radio service based on an evaluation of a variety of factors, expressly including: "consumer demand for the service to determine whether the service is closely substitutable for a commercial mobile radio service; whether changes in price for the service under examination, or for the comparable commercial mobile radio service would prompt customers to change from one service to the other; and market research information identifying the targeted market for the service under review."[360]

So does the *Order* apply the required presumption when determining whether mobile broadband Internet access service is the functional equivalent of commercial mobile service? No. Does the *Order* evaluate the required factors? No. Did the Commission provide APA notice before jettisoning this required framework? Of course not.

And why does the Commission fail to do any of this? The answer to that is clear. Because there are no facts in the record—let alone ones supported by affidavit—that could overcome the presumption or otherwise show that the two services are close substitutes. The Commission doesn't apply the law because the law prevents it from reaching the outcome demanded by the White House.

While not disputing any of this directly, the *Order* suggests that the two services are useful as substitutes because consumers of mobile broadband Internet access service can use VoIP services to place calls to the public switched telephone network.[361] But at most, that observation goes to whether VoIP services are the functional equivalent of commercial mobile services. It has nothing to do with whether the separate mobile broadband Internet access service is.[362]

The fact that mobile broadband Internet access service does not meet the functional equivalency test is not just some quirk in the law. The FCC has been clear that, in light of Congress's determinations in section 332, "very few mobile services that do not meet the definition of CMRS will be a close substitute for a commercial mobile radio service."[363] But the Commission's new test for determining

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[358] *See* 47 C.F.R. § 20.9(14); *see also CMRS Second Report and Order*, 9 FCC Rcd at 1442–48, paras. 71–80 (adopting the current framework for determining whether a service may be deemed the functional equivalent of a commercial mobile service).

[359] *See* 47 C.F.R. § 20.9(14)(i).

[360] *See* 47 C.F.R. § 20.9(14)(ii)(B).

[361] *See Order* at paras. 400–01, 405, 407.

[362] That the FCC classifies a service based on the nature of the service itself is well established. The Commission has found as much in this very context. *See, e.g.*, *Wireless Broadband Internet Access Order*, 22 FCC Rcd at 5917–18, paras. 45–46 (recognizing that the regulatory classification of VoIP services is irrelevant to the regulatory classification of the separate mobile broadband Internet access service); *see also Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Memorandum Opinion and Order, 22 FCC Rcd 3513, 3520–21, paras. 15–16 (Wireline Comp. Bur. 2007) (noting the "regulatory classification of the [VoIP] service provided to the ultimate end user has no bearing on" the regulatory status of the entities "transmitting [the VoIP] traffic").

[363] *CMRS Second Report and Order*, 9 FCC Rcd at 1447, para. 79.

functional equivalency, which consist of just one question—namely, whether the new service "enables ubiquitous access to the vast majority of the public"—completely eviscerates the statutory scheme.[364] Sure, it's more efficient to ask just one question, rather than applying the required framework. And it does make it easier to reach predetermined outcomes. But it upends the statutory scheme Congress put in place. And it's also impermissible here because the Commission did not provide notice that it might abandon that framework.

3. Statutory Contradiction.—Finally, the Commission trots out what it says is an independent basis for reclassifying mobile broadband Internet access as a section 332 commercial mobile service.[365] The Commission says that it must be able to reclassify the service because, if it were otherwise, there would be a "statutory contradiction" between section 332(d)(2), which prohibits the Commission from applying common carrier requirements to private mobile services, and the Commission's decision today to treat mobile broadband Internet access service as a telecommunications service subject to common carriage requirements.[366]

But this argument is just silly. The Commission is simply complaining that it must be able to interpret a statutory provision one way because otherwise it will not able to interpret a second statutory provision as it would like. It is like saying that we must call all dogs "cats" because, if we did not, we could not declare dogs to be feline. Any contradiction here does not lie with the statute. Rather, it is the product of the Commission's attempt to twist the statutory language into a pretzel in order to advance a preferred policy outcome. But no matter how the Commission tries to manipulate the statute, one fact remains: Section 332 prevents the Commission from treating providers of mobile broadband Internet access service as providers of telecommunications services subject to common carriage requirements.[367]

C.

The Commission also relies on section 706 of the Telecommunications Act, claiming that Congress expressly delegated authority to the FCC through this provision.[368] This is simply wrong. The text, statutory structure, and legislative history all make clear that Congress intended section 706 to be hortatory—not delegatory—in nature.

In pertinent part, subsections (a) and (b) of section 706 read:

> (a) . . . 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 . . . 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.
>
> (b) . . . If the Commission's determination [of whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion] is negative, it shall take immediate action to accelerate deployment of such capability by

[364] *See Order* at para. 407.

[365] *See Order* at para. 403.

[366] *See Order* at para. 403 (citing Communications Act § 332 (prohibiting the common carrier treatment of private mobile service providers) and Communications Act § 3 (requiring the common carrier treatment of providers of telecommunications services)).

[367] Recall, too, that a provider of private mobile service "shall not . . . be treated as a common carrier for any purpose." Communications Act § 332(c)(2). One of those purposes is certainly treating it as such for the purpose of avoiding manufactured "statutory contradictions."

[368] *See, e.g.*, *Order* at paras. 275–82.

removing barriers to infrastructure investment and by promoting competition in the telecommunications market.[369]

Although each of these subsections suggests a call to action ("shall encourage," "shall take immediate action"), neither reads like nor is a delegation of authority. *For one*, neither subsection expressly authorizes the FCC to engage in rulemaking. Congress knows how to confer such authority on the FCC and has done so repeatedly: It has delegated rulemaking authority to the FCC over both specific provisions of the Communications Act (*e.g.*, "[t]he Commission shall prescribe regulations to implement the requirements of this subsection"[370] or "the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section"[371]), and it has done so more generally (*e.g.*, "[t]he Commission[] may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of th[e Communications] Act"[372]). Congress did not do either in section 706.

For another, neither subsection expressly authorizes the FCC to prescribe or proscribe the conduct of any party. Again, Congress knows how to empower the Commission to prescribe conduct (*e.g.*, "the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge"[373]) and to proscribe conduct (*e.g.*, "the Commission is authorized and empowered . . . to make an order that the carrier or carriers shall cease and desist"[374]). And again, Congress has repeatedly empowered the FCC to direct the conduct of particular parties (*e.g.*, "[t]he Commission may at any time require any such carrier to file with the Commission an inventory of all or of any part of the property owned or used by said carrier,"[375] or "the Commission shall have the power to require by subpoena the attendance and testimony of witnesses"[376]). Congress did not do any of this in section 706.

For yet another, neither subsection expressly authorizes the FCC to enforce compliance by ordering payment for noncompliance. Where Congress has authorized the Commission to impose liability it has always done so clearly: For forfeitures, the Communications Act directs that "[a]ny person who is determined by the Commission . . . to have . . . failed to comply with any of the provisions of this Act . . . shall be liable to the United States for a forfeiture penalty"[377] and "[t]he amount of such forfeiture penalty shall be assessed by the Commission . . . by written notice."[378] And for other liabilities, the Communications Act directs that "the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled."[379]

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[369] Telecommunications Act § 706(a)–(b).

[370] Communications Act § 227(b)(2).

[371] Communications Act § 251(d)(1).

[372] Communications Act § 201(b) ("The Commissioner [*sic*] may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."); *see also* Communications Act § 303(r) ("Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall— . . . [m]ake such rules and regulations and prescribe such restrictions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . . .").

[373] Communications Act § 205(a).

[374] Communications Act § 205(a).

[375] Communications Act § 213(b).

[376] Communications Act § 409(e).

[377] Communications Act § 503(b)(1).

[378] Communications Act § 503(b)(2)(E).

[379] Communications Act § 209.

The lack of express authority to issue rules, order conduct, or enforce compliance should be unsurprising, however, since section 706's subsections lay out precisely *how* Congress expected the FCC to "encourage . . . deployment" and "take action": Congress expected the FCC to use the authority it had given the agency elsewhere. The FCC already had the authority to adopt "price cap regulation" since it had started converting carriers from rate-of-return regulation to price-cap regulation in the early 1990s.[380] The Telecommunications Act established the FCC's "regulatory forbearance" authority.[381] The Telecommunications Act also authorized the FCC to "remove barriers to infrastructure investment," specifically barriers to entry created by state or local laws,[382] and instructed it to identify and eliminate market entry barriers.[383] And as for "promoting competition in the telecommunications market," the Telecommunications Act added a whole second part to Title II of the Communications Act, titling it "Development of Competitive Markets."[384] In other words, Congress did in fact "invest[] the Commission with the statutory authority to carry out those acts" described in section 706[385]—it just did so through provisions other than section 706.

The structure of federal law confirms this reading. Although Congress directed that many provisions of the Telecommunications Act be inserted into the Communications Act,[386] section 706 was not one of them. Instead, it was left as a freestanding provision of federal law.[387] As such, the provisions of the Communications Act that grant rulemaking authority "under this Act" (like section 201(b)), that grant prescription-and-proscription authority "[f]or purposes of this Act" (like section 409(e)), and that grant enforcement authority for violations of "this Act" (like section 503) simply do not apply to section 706 of the Telecommunications Act. Indeed, the so-called subject-matter jurisdiction of the FCC under section 2 applies, by its own terms, only to "provisions of this Act"[388]—and so the "most important[]" limit the *Verizon* court thought applied to section 706 does not in fact exist.[389] In other words, the statutory superstructure that normally undergirds Commission action just does not exist for section 706 of the Telecommunications Act.

What is more, reading section 706 as a grant of authority outside the bounds of the Communications Act yields absurd results. As the Commission recognized in the *Advanced Services Order* with respect to "regulatory forbearance," reading section 706 as an "independent grant of

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[380] *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786 (1990).

[381] Telecommunications Act § 401 (titled "Regulatory Forbearance" and inserting section 10 into Title I of the Communications Act).

[382] Telecommunications Act § 101 (inserting section 253 into Title II of the Communications Act).

[383] Telecommunications Act § 101 (inserting section 257 into Title II of the Communications Act).

[384] Telecommunications Act § 101 (inserting Part II, §§ 251–61, into Title II of the Communications Act).

[385] *Verizon v. FCC*, 740 F.3d 623, 638 (D.C. Cir. 2014) (quoting *Open Internet Order*, 25 FCC Rcd at 17969, para. 120).

[386] Telecommunications Act § 1(b) ("[W]henever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 *et seq*.)."); *see also* Telecommunications Act § 101 ("Establishment of Part II of Title II. (a) Amendment.—Title II is amended by inserting after section 229 (47 U.S.C. 229) the following new part: . . . ."). Notably, all of the provisions at issue in the Supreme Court case *AT&T v. Iowa Utils. Bd.* were in fact inserted into the Communications Act, and thus the Court could plausibly claim that "Congress expressly directed that the 1996 Act . . . be inserted into the Communications Act." *AT&T v. Iowa Utils. Bd*., 525 U.S. 366, 377 (1999).

[387] For other examples, see Telecommunications Act §§ 202(h), 704(c).

[388] Communications Act § 2(a).

[389] *Verizon v. FCC*, 740 F.3d 623, 640 (D.C. Cir. 2014).

authority . . . would allow us to forbear from applying" certain provisions in the Act even when section 10 would not let us do so.[390] That same logic applies to every "regulating method" specified in section 706. If Congress had intended to grant the FCC almost limitless authority for "price cap regulation," "removing barriers," or "promoting competition," what was the point of specifying limited authority in the Telecommunications Act's actual amendments to the Communications Act?[391]

And the problems proliferate as you dig into each subsection. Subsection (a) is directed not just at the FCC but also to "each State commission with regulatory jurisdiction over telecommunications services."[392] So whatever authority subsection (a) grants the FCC, it also grants state commissions. Such coterminous authority is a statutory oddity to say the least. The Communications Act draws lines between interstate and intrastate regulatory authority.[393] It empowers States to act but reserves authority for the FCC when they fail to do so.[394] It authorizes the FCC to preempt state authority.[395] And it even authorizes States to preempt the FCC.[396] But nowhere does the Communications Act contemplate state action coterminous with, or even at cross-purposes with, the FCC. And it is strange to think that a state commission could forbear from the federal statutory scheme or price regulate broadband Internet access service so long as it thought doing so would encourage broadband deployment.

Perhaps recognizing the problems such a reading would create, the *Order* does not read the authority of state commissions this way—far from it. Instead, the *Order* suggests that States cannot regulate broadband Internet access service because that service is "jurisdictionally interstate for regulatory purposes"[397] and that the Commission will preempt States that impose "obligations on broadband service that are inconsistent with the carefully tailored regulatory scheme."[398] In other words, the *Order* seems to suggest that section 706(a) gives state commissions no authority over broadband (or "advanced telecommunications capability" to use the statutory term) at all![399] But the plain text of the statute does not permit the Commission to have it both ways and invent a scheme that has no basis in the text of the statute. Either subsection (a) delegates authority to the FCC and the state commissions or it does not.

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[390] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24046, para. 73 (1998) (*Advanced Services Order*).

[391] The *Verizon* court asked the wrong question when it noted that it "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." *Verizon v. FCC*, 740 F.3d 623, 639 (D.C. Cir. 2014). The question is not whether section 706 of the Telecommunications Act contains some "intelligible principle" and thus does not violate the non-delegation doctrine. *Cf. Whitman v. American Trucking Associations*, 531 U.S. 457, 472 (2001). Instead, the question is one of congressional intent: Did Congress really intend to put specific limits on the Commission's forbearance authority in one place (section 10 of the Communications Act) only to largely eliminate them in another (section 706 of the Telecommunications Act)? Such an interpretation doesn't make sense.

[392] Telecommunications Act § 706(a).

[393] *See, e.g.*, Communications Act § 2(a) ("The provisions of this Act shall apply to all interstate and foreign communication . . . ."); § 2(b) ("[N]othing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communication service . . . .").

[394] *See* Communications Act §§ 214(e)(6), 252(e).

[395] *See* Communications Act §§ 10(e), 253(d).

[396] *See* Communications Act § 224(c).

[397] *Order* at para. 431.

[398] *Order* at para. 433.

[399] To be fair, the *Order* suggests that States might have some role to play, at least with data collection, *see Order* at notes 708 & 1276, but such a role hardly squares with hardy "regulating methods" like "price cap regulation" and "regulatory forbearance" that the Commission claims for itself.

Subsection (b) creates other problems. That subsection is triggered only if the FCC determines that broadband is not being reasonably and timely deployed to all Americans in its annual report. So what happens when the determination is affirmative? Poof—it's gone.

The consequences of such a light-switch delegation of authority are hard to fathom. One would assume that once the delegation switched off, any adjudications or enforcement actions being taken by the FCC under that subsection would have to be dismissed, since we'd have lost the authority to prosecute them. But if we've preempted a state law using subsection (b), would it still remain preempted? If we've forborne from federal law using subsection (b), would we then need to start enforcing it again? Or if we've adopted rules using subsection (b), would they remain on the books—unenforceable—until a negative determination is again reached? Could we even repeal rules passed using subsection (b) during a period in which subsection (b) has not been triggered? And how would our authority change if, as happened last year, the FCC failed to issue a timely determination under section 706(b)?

Unsurprisingly, the *Order* does not attempt to answer these questions.[400] Nor could it. Absurd results lie behind every possible answer premised on subsection (b) being an independent grant of authority.

Lastly, the history of section 706 confirms its hortatory nature. For years after 1998's *Advanced Services Order*, the Commission consistently interpreted the section to direct the agency to "use, among other authority, our forbearance authority under section 10(a) to encourage the deployment of advanced services."[401] And so the Commission has consulted section 706 in resolving one forbearance petition[402] after another[403] after another.[404] The Commission has also looked to section 706 when employing its authorities under the Communications Act to promote local competition[405] and to remove barriers to

[400] Relying on a statement contained in a *dissenting* opinion by a U.S. Supreme Court Justice, the *Order* speculates that "Commission actions adopted pursuant to a negative section 706(b) determination would not simply be swept away by a future positive section 706(b) finding." *Order* at note 714. But what authority would the Commission have to enforce a section 706(b) rule without section 706(b) authority? Indeed, if Congress gave the Federal Emergency Management Agency (FEMA) authority to act during a hurricane, would anyone think that FEMA could continue that course once the storm had passed, sunny skies had returned, and recovery efforts were over? Of course not. So too here. But more to the point, even asking this question is sure to trap the agency in the labyrinth of section 706(b)'s on-off authority; the only way to escape is not to enter. Here, that means not interpreting section 706 to provide the Commission with authority in the first place.

[401] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24047, para. 77 (1998).

[402] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19469, para. 107 (2005), *aff'd by Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

[403] *Petition of ACS of Anchorage*, WC Docket No. 06-109, Memorandum Opinion and Order, 22 FCC Rcd 16304, 16356, para. 118 (2007).

[404] *Petition of the Embarq Local Operating Companies for Forbearance et al.*, WC Docket No. 06-147, Memorandum Opinion and Order, 22 FCC Rcd 19478, 19503–04, para. 46 (2007), *aff'd by Ad Hoc Telecommunications Users Committee v. FCC*, 572 F.3d 903 (D.C. Cir. 2009).

[405] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3840, para. 317 (1999) ("Our overriding objective, consistent with the congressional directive in section 706, is to ensure that advanced services are deployed on a timely basis to all Americans so that consumers across America have the full benefits of the 'Information Age.'"); *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22426–27, paras. 36–37 (2004).

infrastructure investment (such as the Commission's authority over pole attachments).[406] In other words, our own history shows that we can meet section 706's goals without relying on it as an independent grant of authority.

Section 706's legislative history clinches the point. Recall that the *Verizon* court looked to the Senate Report's description of the provision as a "necessary fail-safe to ensure that the bill achieves its intended infrastructure objective."[407] That was a mistake because the provision described in the Senate Report was *not* the section 706 that Congress enacted. When the Senate passed in 1995 the bill that became the Telecommunications Act of 1996, that legislation contained a precursor to section 706(b) that authorized the FCC to "preempt State commissions that fail to act to ensure [the] availability [of advanced telecommunications capability to all Americans]."[408] In other words, the Senate version would have let the FCC step into the shoes of the state commissions and exercise their authority under federal law if they failed to act. That's a "fail-safe." But the enacted version contained, as the Conference Report dryly put it, "a modification" to that section: This preemptory language was excised.[409] In other words, Congress contemplated giving the FCC fail-safe authority in section 706, but then expressly decided not to do so.

Whether one looks at the statute's text, structure, or history, only one conclusion is possible: Congress did not delegate substantive authority to the FCC in section 706 of the Telecommunications Act. Instead, that statutory provision is a deregulatory admonition. Accordingly, the agency's attempt to adopt these Part 8 rules under section 706 must fail.

D.

The forbearance section of the *Order* most clearly reveals that the Commission's decision today is driven neither by the law nor the facts but rather by the need to reach certain predetermined policy outcomes. Before the forbearance section, the Commission paints a dark and dreary portrait of the broadband marketplace. It is one where broadband providers "hold all the tools necessary to deceive consumers, degrade content, or disfavor the content that they don't like."[410] It is one where consumers largely have no "meaningful alternative broadband options," and "45 percent of households have only single provider option for these services."[411]

After reading such bleak pronouncements, anyone familiar with the Commission's forbearance precedents and the Act's statutory forbearance framework would approach the forbearance section with a sense for foreboding. How is the Commission possibly going to grant the amount of forbearance promised earlier in the document? How can it create a "Title II tailored for the 21st century"?[412] The answer? By inventing out of whole cloth a new method of conducting a forbearance analysis that bears little resemblance to either the terms of the Act or the Commission's precedents.

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[406] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5317, 5330, paras. 173, 208 (2011); *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Notice of Proposed Rulemaking, 22 FCC Rcd 20195, 20209, para. 36 (2007).

[407] S. Rep. No. 104-23 at 50–51 (1995); *see Verizon v. FCC*, 740 F.3d 623, 639 (D.C. Cir. 2014).

[408] *See* S. 652 § 304(b) (104th Cong. 1995) (contained in "Title III—An End to Regulation").

[409] S. Rep. No. 104-230 at 210 (1996).

[410] *Order* at para. 8; *see also Order* at paras. 78–101.

[411] *Order* at note 134; *see also Order* at para. 81.

[412] *Order* at para. 38.

Relying on dicta from the D.C. Circuit, the *Order* claims "'significant, albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband.'"[413] Exercising that apparent discretion, the *Order* first labels a bevy of Title II requirements the "core broadband Internet access service requirements" and applies them to the service. It then "grant[s] extensive forbearance" from other Title II requirements based on a predictive judgment, but it does so without ever finding that there is competition sufficient to ensure just and reasonable rates and practices.[414] That is not what the law allows.

In section 10, Congress set forth the three-part test for forbearance. First, we must find that "enforcement of [a] regulation or provision [of the Act] is not necessary to ensure that the charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory."[415] Next, we must find that "enforcement of such regulation or provision is not necessary for the protection of consumers."[416] And finally, we must "consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services,"[417] and determine whether forbearance is "consistent with the public interest."[418] Section 332(c)(1) lays out largely the same criteria with respect to commercial mobile services.[419]

And there is no question how our precedents apply the statutory forbearance standard. Take just the subset of our forbearance precedents that involve forbearance from economic regulations—such as *ex ante* rate regulation under section 201, tariffing under section 203, rate prescription under section 205, interconnection, resale, and unbundling regulation under section 251, or interconnection, resale, and unbundling regulation under section 271. In *every* case where the Commission has eliminated economic regulations, it has characterized market competition as the determining factor in assessing whether forbearance was appropriate.[420] As the Commission said not so long ago: "[I]n the context of its section 10(a)(1) analysis, 'competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unreasonably discriminatory.'"[421]

So when the Commission forbore from applying economic regulations to commercial mobile services in 1994 (under section 332(c)(1)(A)), it concluded that "the most prudent approach for us to follow in reaching decisions regarding forbearance in this Order must involve an examination of the

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[413] *Order* at para. 437 (quoting *Ad Hoc Telecommunications Users Committee v. FCC*, 572 F.3d 903, 906-07 (D.C. Cir. 2009)).

[414] *Order* at para. 458.

[415] Communications Act § 10(a)(1).

[416] Communications Act § 10(a)(2).

[417] Communications Act § 10(b).

[418] Communications Act § 10(a)(3).

[419] Communications Act § 332(c)(1)(A), (c)(1)(C).

[420] Although I focus here on precedent related to section 10(a)(1)'s criterion for forbearance, our precedent uses this same analysis when examining whether forbearing from an economic regulation would comply with section 10(a)(2)'s focus on protecting consumers.

[421] *Petition for Declaratory Ruling to Clarify 47 U.S.C. § 572 in the Context of Transactions Between Competitive Local Exchange Carriers and Cable Operators; Conditional Petition for Forbearance From Section 652 of the Communications Act for Transactions Between Competitive Local Exchange Carriers and Cable Operators*, WC Docket No. 11-118, Order, 27 FCC Rcd 11532, 11544, para. 27 (2012) (quoting *Petition of U S WEST Communications Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance; Petition of U S WEST Communications, Inc., for Forbearance; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, CC Docket Nos. 97-172, 92-105, Memorandum Opinion and Order, 14 FCC Rcd 16252, 16270, para. 31 (1999)).

prevailing climate of competition."[422] That is because "in a competitive market, market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by carriers who lack market power."[423] And so the FCC ultimately concluded that "the record does establish that there is sufficient competition in this marketplace to justify forbearance from tariffing requirements."[424]

And when the Commission used forbearance to detariff the long-distance telephone market in 1996, market forces and competition lay at the center of the analysis: "Just as we believe that competition is sufficient to ensure that nondominant interexchange carriers' charges for interstate, domestic, interexchange services are just and reasonable, and not unreasonably discriminatory, and to protect consumers, we believe that competitive forces will ensure that nondominant carriers' non-price terms and conditions are reasonable."[425]

And the Commission has analyzed competition *every time* it has granted relief from economic regulations for dominant carriers. In the *Qwest-Omaha Forbearance Order*, the Commission reviewed the local market and determined that "sufficient facilities-based competition for local exchange and exchange access services exists in certain of Qwest's Omaha MSA wire center service areas to justify forbearance relief."[426] In the *ACS of Anchorage Dominance Forbearance Order*, the Commission could only find "that enforcement of dominant carrier rate-of-return regulations and certain related tariffing and pricing rules is not necessary" "[b]ased on the significant competition ACS faces for both mass market and enterprise switched access services."[427] In the *Qwest-Terry Forbearance Order*, the Commission noted the "showing of competition ensures that Qwest is unable to implement charges, practices, classifications, or regulations that are not just and reasonable or that are unjustly or unreasonably discriminatory in this exchange."[428]

And the Commission has not hesitated to find that a lack of competition makes forbearance from economic regulations inappropriate. In the *Verizon 6 MSA Forbearance Order*, the Commission denied forbearance because it found that "the evidence of competition in this record is insufficient . . . to ensure that, in each of the 6 MSAs, charges, practices, classifications, or regulations for or in connection with

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[422] *CMRS Second Report and Order*, 9 FCC Rcd at 1467, para. 136.

[423] *Id.* at 1478, para. 173.

[424] *Id.* at 1478, para. 175.

[425] *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730, 20752, para. 42 (1996). For those not steeped in Commission arcana, an interexchange carrier is a long-distance carrier, and all interstate, interexchange carriers had been determined to be nondominant at the time of this decision.

[426] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19447, para. 64 (2005).

[427] *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance of Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, Memorandum Opinion and Order, WC Docket No. 06-109, Memorandum Opinion and Order, 22 FCC Rcd 16304, 16330–31, para. 58 (2007); *see also Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, WC Docket No. 05-281, Memorandum Opinion and Order, 22 FCC Rcd 1958, 1959, para. 1 (2007) (eliminating other economic obligations "under comparable competitive conditions").

[428] *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Resale, Unbundling and Other Incumbent Local Exchange Requirements Contained in Sections 251 and 271 of the Telecommunications Act of 1996 in the Terry, Montana Exchange*, WC Docket No. 07-9, Memorandum Opinion and Order, 23 FCC Rcd 7257, 7264, para. 13 (2008).

those services are just and reasonable and are not unjustly or unreasonably discriminatory."[429] In the *Qwest 4 MSA Forbearance Order*, the Commission denied forbearance because "there is inadequate evidence of facilities-based mass market competition and we are unable to conclude from the evidence in the record that Qwest no longer holds a significant market share of the services at issue."[430] And in the *Qwest-Phoenix Forbearance Order*, the Commission denied forbearance because the evidence "fails to demonstrate that there is sufficient competition to ensure that, if we provide the requested relief, Qwest will be unable to raise prices, discriminate unreasonably, or harm consumers."[431]

What I cannot find—and what our precedent does not countenance—is any instance where the FCC eliminated economic regulations without first performing any market analysis or finding competition sufficient to constrain anticompetitive pricing and behavior.[432] It's easy to see why. Economic regulations are *designed* to ensure just and reasonable rates and practices. Some do it directly by capping rates,[433] by requiring rates to be tariffed and approved by the FCC,[434] or by letting the Commission prescribe a rate for a particular carrier.[435] Others do it indirectly by generating competition, such as through mandating resale or network element unbundling.[436] And so the FCC has not and, under the statute, cannot forbear from *any* economic regulation on a whim or a lark. Instead, it must identify *something else* that will constrain pricing, and that something else has always been—and can only be—competition.

But in forbearing from economic regulations in today's *Order*, the Commission doesn't just fail to find sufficient competition. It goes so far as to find that competition is lacking in the market for broadband Internet access service: Competition "appears to be limited in key respects,"[437] with consumers facing "high switching costs . . . when seeking a new service,"[438] and "broadband providers hav[ing] significant bargaining power in negotiations with edge providers and end users."[439] Indeed,

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[429] *Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, Inc.*, WC Docket No. 06-172, Memorandum Opinion and Order, 22 FCC Rcd 21293, 21311, para. 33 (2007), *remanded*, *Verizon Tel. Cos. v. FCC*, 570 F.3d 294 (D.C. Cir. 2009).

[430] *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97, Memorandum Opinion and Order, 23 FCC Rcd 11729, 11752, para. 31 (2008).

[431] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 25 FCC Rcd 8622, 8623, para. 2 (2010).

[432] Rather than citing such precedent, the *Order* attempts to sweep aside all competition-focused precedent by claiming it was "responding to arguments that competition was sufficient." *Order* at note 1307. That's no coincidence. Until this *Order*, no Commission has *ever* found that it could forbear from economic regulation absent competition—and so every Commission order and every commenter has focused on the presence or absence of competition.

[433] *See, e.g.*, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107 (2013) (establishing price caps for interstate inmate calling services under section 201 of the Communications Act), *pets. for review pending and pets. for stay granted in part sub nom. Securus Techs. v. FCC*, No. 13-1280 (D.C. Cir. Jan. 13, 2014).

[434] Communications Act § 203.

[435] Communications Act § 205.

[436] Communications Act § 251(b)(1), (c)(3)–(4).

[437] *Order* at para. 501.

[438] *Order* at para. 81.

[439] *Order* at para. 80.

"meaningful alternative broadband options may be largely unavailable to many Americans . . . . When we look to the new standard articulated in the Broadband Progress Report, . . . 45 percent of households have only single provider option for these services."[440] If that's truly how the FCC sees the market, it should go ahead and use the m-word—monopoly—and rely on the economic regulations of the Communications Act that Congress designed to prevent a monopolist (back in 1934, it was Ma Bell) from exercising market power to the detriment of consumers. I do not see how the Commission could possibly forbear from economic regulations while at the same time finding that competition is so limited or non-existent. Yet the *Order* does just that.

And lest there be any doubt that the Commission's analysis here marks a dramatic departure from that employed in prior forbearance decisions, consider this. In just 109 paragraphs, the Commission purports to analyze whether to forbear from *every* statutory provision and regulation applicable to Title II services on a nationwide basis for every broadband Internet service provider in the country.[441] That is substantially shorter than the 199 paragraphs than it took for the Commission to analyze whether to forbear from applying a subset of Title II economic regulations to a single company in just two markets: Omaha (99 paragraphs) and Phoenix (100 paragraphs).[442]

The *Order* offers several justifications for its approach; none are convincing. *First*, it notes "the Commission has in the past granted forbearance . . . where it found the application of other requirements (rather than marketplace competition) adequate to satisfy the section 10(a) criteria."[443] And that's true but only in a sense that's not relevant to today's item.

The FCC has used forbearance to *make adjustments* to *ex ante* rate regulation without looking to marketplace competition. For example, in the cited *Iowa Telecom Forbearance Order*, the Commission granted forbearance so that a dominant carrier could move from one form of *ex ante* rate regulation (a price cap) to another (a forward-looking cost study).[444] In the cited *SMS/800 Refund Forbearance Order*, the Commission granted forbearance so that several dominant carriers could issue a one-time refund to their customers while leaving all other *ex ante* rate regulation in place.[445] And in the cited *USTelecom Forbearance Order*, the Commission eliminated several accounting and reporting requirements while otherwise leaving intact all *ex ante* rate regulation and unbundling requirements.[446]

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[440] *Order* at note 134.

[441] *Order* at paras. 434–542.

[442] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 25 FCC Rcd 8622 (2010).

[443] *Order* at para. 439; *see also Order* at note 1305 (citing cases).

[444] *Petition for Forbearance of Iowa Telecommunications Services, Inc. d/b/a/ Iowa Telecom Pursuant to 47 U.S.C. § 160(c) from the Deadline for Price Cap Carriers to Elect Interstate Access Rates Based on The CALLS Order or a Forward Looking Cost Study*, CC Docket No. 01-331, Order, 17 FCC Rcd 24319, 24325–26, paras. 18–19 (2002).

[445] *Petition for Forbearance from Application of the Communications Act of 1934, as Amended, to Previously Authorized Services*, Memorandum Opinion and Order, 12 FCC Rcd 8408, 8411–12, paras. 9–10 (Common Carrier Bur. 1997).

[446] *See, e.g.*, *Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, WC Docket No. 12-61, Memorandum Opinion and Order, 28 FCC Rcd 7627, 7675–76, para. 107 (2013) (finding that the data filed in ARMIS Report 43-01 "is not needed to ensure just and reasonable rates, terms, and conditions" given the continuation of "price cap regulation"); *id.* at 7691, para. 142 (eliminating the "separate affiliate requirement" for non-Bell operating company dominant carriers while retaining the remainder of *ex ante* rate regulation such as "dominant carrier regulation, Part 32 accounting rules, equal access obligations" and "section 251 [unbundling and resale] obligations").

And it's true that the FCC has used forbearance to eliminate *non-economic regulations* without looking to marketplace competition. For example, in the cited *Foreign Ownership Forbearance Order*, the Commission found "no evidence that the foreign ownership of a common carrier licensee, in and of itself, is directly relevant" to whether rates and practices are "just and reasonable and not unjustly or unreasonably discriminatory."[447] And in the cited *USTelecom Forbearance Order*, the Commission eliminated several noneconomic regulations, such as a requirement to keep a paper copy of a long-distance carrier's "rates, terms, and conditions available in at least one location during business hours."[448]

But merely adjusting economic regulations while keeping most in place or eliminating noneconomic regulations—as the Commission did in each of these cases—without conducting a competitive analysis is hardly the same as what the *Order* purports to do. Namely, the *Order* eliminates certain economic regulations entirely without finding competition sufficient to meet the concerns of section 10(a)(1). *That* the Commission has never done.

Second, the *Order* cites its "predictive judgment that the statutory and regulatory requirements that remain"—particularly section 201 and 202 of the Act—"are sufficient" to ensure just and reasonable rates and practices.[449] What's the basis for this predictive judgment? The *Order* doesn't say, although it goes out of its way to "reject suggestions that market forces will be sufficient to ensure that providers of broadband Internet access service and broadband subscriber access service do not act in a manner contrary to the public interest."[450]

This is precisely the opposite tack of previous FCC forbearance decisions. The Commission has reserved the "regulatory backstop" of sections 201 and 202 as a *supplement* to competition, not a replacement for it. As the Commission's *CMRS Second Report and Order* put it: Even though "there is sufficient competition in this marketplace to justify forbearance," "the continued applicability of Sections 201, 202, and 208 will provide an important protection in the event there is a market failure."[451] The *Order* itself acknowledges as much elsewhere: "Of course, this regulatory backstop is not a substitute for robust competition."[452] And yet the *Order* somehow concludes that forbearance from economic regulations is warranted even though the Commission claims that competition is lacking.

Nor does the Commission explain how "recent experience" informs its predictive judgment.[453] It would be one thing if the *Order* surveyed existing rates and practices and concluded that present rates and practices were just and reasonable—that could be a "practical reference point" for considering the need for economic regulation.[454] But the *Order* doesn't do that. If anything, it specifically calls into question the reasonableness of common industry practices like usage-based pricing, data allowances, and sponsored data plans.[455] And it says the record "demonstrates that [carriers] have the ability to use terms

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[447] *Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees*, IB Docket No. 11-133, First Report and Order, 27 FCC Rcd 9832, 9839, para. 15 (2012).

[448] *Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, WC Docket No. 12-61, Memorandum Opinion and Order, 28 FCC Rcd 7627, 7671–72, paras. 94, 98 (2013).

[449] *Order* at para. 458; *see also Order* at para. 497 ("[It] is our predictive judgment that other protections that remain in place are adequate to guard against unjust and unreasonable and unjustly and unreasonably discriminatory rates and practices in accordance with section 10(a)(1) . . . .").

[450] *Order* at para. 444.

[451] *CMRS Second Report and Order*, 9 FCC Rcd at 1478–79, para. 175.

[452] *Order* at para. 203.

[453] *Order* at para. 499.

[454] *Order* at para. 499.

[455] *See Order* at paras. 151–53.

of interconnection to disadvantage edge providers and that consumers' ability to respond to unjust or unreasonable broadband provider practices are limited by switching costs."[456] And yet the *Order* somehow concludes that forbearance from economic regulations is warranted.

And the *Order* never attempts to explain how it can possibly ensure just and reasonable rates and practices nationwide through its case-by-case approach. The Final Regulatory Flexibility Analysis attached to the *Order* estimates that it may need to adjudicate complaints against 4,462 separate broadband Internet access service providers to ensure just and reasonable rates,[457] each without the presumption that marketplace competition will constrain anticompetitive pricing and practices. And section 208(b)(1) gives the Commission only 5 months to resolve such complaints.[458] It is simply infeasible that our dedicated staff could process and investigate all such complaints in the statutory time frame—and deploying economic regulations like *ex ante* rate regulation is precisely how the FCC normally avoids this practical problem. And yet the *Order* somehow concludes that forbearance from economic regulations is warranted.

Third, the *Order* claims that the "overlay of section 706 of the [Telecommunications] Act and our desire to proceed incrementally" enable the Commission to forbear from large swaths of the Communications Act, including its economic regulations, without a finding of sufficient competition.[459] But neither section 706 nor the Commission's desires allow it to ignore the plain terms of federal law.

For one, whatever direction section 706 gives to the Commission regarding forbearance, it does not allow the FCC to forbear when the section 10(a) criteria are not met—and specifically, the FCC may not grant forbearance where it cannot be assured of the justness and reasonableness of rates and practices. In every case where the agency has incorporated section 706's directive into its forbearance analysis to repeal economic regulations, the FCC has first found sufficient competition to meet section 10(a)(1)'s criterion.

So in the *Triennial Review Order*, the Commission found a sufficiently "competitive environment" to forbear from uncertain unbundling obligations[460]—and the reviewing court agreed that "that robust intermodal competition from cable providers . . . means that . . . mass market consumers will still have the benefits of competition between cable providers and ILECs."[461] In the *Qwest Enterprise Forbearance Order* and the *Embarq/Frontier Enterprise Forbearance Order*, the agency noted that "the marketplace generally appears highly competitive" and found certain economic regulations "no longer appropriate in light of the market conditions"[462]—and the reviewing court upheld the FCC's findings on

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[456] *Order* at para. 205.

[457] *Order* Appendix B at para. 19.

[458] Communications Act § 208(b)(1) ("[W]ith respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed."); *see also* Communications Act § 208(a) ("If [a] carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.").

[459] *Order* at para. 458.

[460] *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*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17151–52, paras. 292 (2003).

[461] *United States Telecom Association v. FCC*, 359 F.3d 554, 582 (D.C. Cir. 2004).

[462] *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and* Computer Inquiry *Rules with Respect to Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 23 FCC Rcd 12260, 12275, 12280, paras. 26, 34 (2008); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of* Computer Inquiry *& Certain Title II Common-Carriage Requirements; Petition of the*

(continued….)

the "feasibility of competitive self-deployment of special access lines—a development that both helps justify and will be furthered by the FCC's decision."[463] And in the *Section 271 Forbearance Order*, the FCC specifically called out "the importance of competition in ensuring just, reasonable, and nondiscriminatory charges and practices for broadband services"[464]—and the reviewing court agreed that the carriers' "secondary market position relative to cable internet providers tends to mitigate the impact of forbearance on the state of competition in the broadband market, especially where cable internet providers themselves are not required to unbundle."[465]

To the extent the *Order* suggests otherwise (*e.g.*, arguing that section 706 allows the Commission "to balance the future benefits of encouraging broadband deployment against the short term impact from a grant of forbearance"[466]), it is wrong.[467] And though the *Order* cites the court reviewing the *Section 271 Forbearance Order* for this proposition, the court was actually making a point about *competition*. The court first noted: "the FCC concluded that any short-term effects on competition are offset by the prospect of additional intermodal competition and the benefits that forbearance will provide: incentives for both ILECs and CLECs to invest in and deploy broadband facilities, which will increase competition going forward and thereby keep rates reasonable, benefit consumers, and serve the public interest."[468] It then upheld the FCC's conclusion: "[T]he agency only needed to show that the positive short-term impact of unbundling would be out-weighed by the longer-term positive impact that *not* unbundling would have on rates, consumers, and the public interest. The record here is up to the task."[469] In contrast, the *Order* blithely recognizes that "the record . . . does not provide a strong basis for concluding that the forbearance granted in this Order is likely to directly impact the competitiveness of the marketplace."[470]

For another, neither section 706 nor a desire to proceed incrementally can give the FCC *carte blanche* to displace the reticulated economic regulatory regime Congress mandated in favor of its own, largely boundless discretion.[471] Sure, the FCC might prefer the "tailored framework" of section 201 over "compliance with interconnection under section 251" because aspects of section 201 interconnection are "at the Commission's discretion" (*e.g.*, the Commission can order through-routes), "rather than being

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Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry *Rules with Respect to Their Broadband Services*, WC Docket No. WC 06-147, Memorandum Opinion and Order, 22 FCC Rcd 19478, 19492, 19496, paras. 22, 30 (2007).

[463] *Ad Hoc Telecom. Users Committee v. FCC*, 572 F.3d 903, 911 (D.C. Cir. 2009).

[464] *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket Nos. 01-338, 03-235, 03-260, 04-48, Memorandum Opinion and Order, 19 FCC Rcd 21496, 21507, para. 24 (2004).

[465] *EarthLink, Inc. v. FCC*, 462 F.3d 1, 11 (D.C. Cir. 2006).

[466] *See, e.g.*, *Order* at para. 495 (internal quotation marks and brackets omitted) ("We note in this regard that when exercising its section 10 forbearance authority '[g]uided by section 706,' the Commission permissibly may 'decide[] to balance the future benefits' of encouraging broadband deployment 'against [the] short term impact' from a grant of forbearance." (quoting *EarthLink, Inc. v. FCC*, 462 F.3d 1, 9 (D.C. Cir. 2006))).

[467] Notably, the *Order*'s response studiously avoids using the statutory word "charges" in favor of the vaguer term "conduct," *Order* at para. 496 & note 1502, and does not explain what, if anything, will ensure just and reasonable charges absent either competition or economic regulation.

[468] *EarthLink, Inc. v. FCC*, 462 F.3d 1, 7 (D.C. Cir. 2006).

[469] *Id.* at 11.

[470] *Order* at para. 501.

[471] *Order* at para. 458.

subject to mandatory regulation under section 251."[472] But such reasoning implies the FCC could have pretty much ignored 90% of the Telecommunications Act—rejecting Congress's entire framework for opening local markets to competition—based on the forbearance authority Congress gave the agency in that same act. That makes no sense whatsoever.

The only sensible way to reconcile the framework of the Telecommunications Act is to demand something more from the FCC than its own "desire" before replacing the mandatory requirements of the law with its own discretionary authority. That something more is today what is always has been: a showing of marketplace competition.

Finally, I take issue with the *Order*'s repeated complaints about the state of the record. To wit:

- "Nor do commenters adequately explain how forbearance could be tailored . . . ."[473]
- "[C]ommenters . . . do not meaningfully explain what incremental benefit that would achieve . . . ."[474]
- "[C]ommenters do not meaningfully explain how these arguments impact the section 10 analysis here, given that the need to protect consumer privacy is not self-evidently linked to such marketplace considerations."[475]
- "[C]ommenters do not meaningfully explain how these arguments impact the section 10 analysis here, given that the need to protect disability access is not self-evidently linked to such marketplace considerations."[476]
- "[C]ommenters do not meaningfully explain how these arguments impact the section 10 analysis here, given that the need for regulated access to access to poles, ducts, conduit and rights-of-way is not self-evidently linked to such marketplace considerations."[477]
- "[C]ommenters do not meaningfully explain how these arguments impact the section 10 analysis here, given that, even taken at face value, arguments based on such marketplace considerations do not purport to sufficiently address the policy concerns underlying section 254 and our universal service programs."[478]
- "Commenters do not meaningfully explain why the transparency rule is inadequate, and thus their arguments do not persuade us to depart from our section 10(a) findings above in the case of section 203."[479]
- "Commenters have not explained why we should not find the protections of section 201(b) and antitrust law adequate here, as well."[480]
- "[C]ommenters fail to demonstrate at this time that other, applicable requirements or protections are inadequate, for the reasons discussed below."[481]
- "[C]omments contending that the Commission should not forbear as to that provision do not explain why the core broadband Internet access service requirements do not provide adequate protection at this time."[482]

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[472] *Order* at para. 513.

[473] *Order* at para. 450.

[474] *Order* at note 1352.

[475] *Order* at note 1390.

[476] *Order* at note 1438.

[477] *Order* at note 1447.

[478] *Order* at note 1466.

[479] *Order* at para. 503.

[480] *Order* at para. 507.

[481] *Order* at para. 494.

- "Given that decision [made elsewhere in the *Order*], commenters do not indicate what purpose section 204 still would serve, and we thus do not depart in this context from our overarching section 10(a) forbearance analysis above."[483]
- "[T]he record here does not demonstrate specific concerns suggesting that Commission clarification of statutory terms as needed would be inadequate in this context."[484]
- "Commenters do not indicate, nor does the record otherwise reveal, an administrable way for the Commission to grant the requested partial forbearance . . . ."[485]
- "Bare assertions that the record here is inadequate to justify forbearance from certain provisions from which we forbear above similarly are too conclusory to warrant deferring a decision to a future proceeding."[486]

Blaming the public rather than the agency itself for the state of the record should shock the administrative conscience. It certainly takes chutzpah. If commenters did not explain how forbearance could be adequately tailored to meet the FCC's needs, it's because the FCC never told commenters what its needs were (at least until this *Order*) nor what forbearance was being contemplated (at least until Chairman Wheeler's Feb. 4, 2015 editorial) nor that forbearance was even necessary (at least until President Obama's Nov. 10, 2014 YouTube announcement). If commenters did not foresee how the FCC would approach forbearance or how certain forbearance decisions would impact other forbearance decisions, how can we possibly blame them?

IV.

At the beginning of this proceeding, I quoted Google's former CEO, Eric Schmidt, who once said: "The Internet is the first thing that humanity has built that humanity doesn't understand."[487] This proceeding makes abundantly clear that the FCC still doesn't get it.

But the American people clearly do. The threat to Internet freedom has awakened a sleeping giant. And I am optimistic that we will look back on today's vote as an aberration, a temporary deviation from the bipartisan path that has served us so well. I don't know whether this plan will be vacated by a court, reversed by Congress, or overturned by a future Commission. But I do believe that its days are numbered.

For all of these reasons, I dissent.

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[482] *Order* at para. 512.

[483] *Order* at para. 505.

[484] *Order* at para. 466.

[485] *Order* at para. 450.

[486] *Order* at note 1660.

[487] *Notice*, 29 FCC Rcd at 5653 (Dissenting Statement of Commissioner Ajit Pai) (quoting Jerome Taylor, Google chief: My fears for Generation Facebook, *The Independent* (Aug. 18, 2010), *available at* http://ind.pn/1vWHCty).