

**The Story of the FCC’S Net  
Neutrality Decision and Why It  
Won’t Stand Up in Court**

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We live in the Internet age. We speak, we post, we rally, we learn, we listen, we watch, we buy, we sell, we meet—in short, we *live*—online. The Internet has transformed billions of lives here and around the world. It has aided the cause of freedom, lifted people out of poverty, democratized entrepreneurship, and much more.

How did this come to be? In the United States, the answer is twofold. First, the private sector took risks. Over the past two decades, companies invested well over \$1 trillion in connecting Americans to the Internet. Confident of limited regulation, they laid fiber, upgraded cable systems, launched satellites, built towers, and deployed spectrum in order to provide broadband Internet access from Alaska to Arizona, Maine to Mississippi.

Second, government stayed out of the way. Starting almost twenty years ago, a bipartisan consensus favored an open Internet. A Democratic President and Republican Congress 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.”<sup>1</sup> And dating back to the Clinton Administration, every FCC Chairman—Republican and Democrat—let the Internet grow free from utility-style regulation. The results of Internet freedom, both for consumers and online entrepreneurs, speak for themselves.<sup>2</sup> Indeed, given how quickly and deeply the online economy in this country has progressed, I believe the Internet is the greatest free-market innovation in history.

Unfortunately, the FCC recently replaced that freedom with government control. On February 26, 2015, a narrow majority of the FCC abandoned those policies. It reclassified broadband Internet access service as a Title II telecommunications service. It seized 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 was a radical departure from the bipartisan, market-oriented policies that served us so well for the last two decades.

The fate of net neutrality regulation will ultimately be decided in the courts. Litigants have already sought judicial review of these new rules.<sup>3</sup> In this Article, I’ll discuss why I believe procedural defects and substantive flaws will prevent the FCC’s decision from standing up in court.

And if I’m wrong—if this *Order* manages to survive judicial review—American consumers will be worse off. For these will be the consequences: higher broadband prices, slower speeds, less broadband deployment, less innovation, and fewer options for American consumers.

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

2. The market capitalization of the top 15 public Internet firms in 1995 was \$16.75 billion. In 2015, it was \$2.42 trillion, or 146 times the 1995 level. <http://bit.ly/1Qaa3d4>. None of this would be the case if Internet entrepreneurs were struggling under the anticompetitive boot of a monopolist Internet service provider.

3. See, e.g., Protective Petition for Review for United States Telecom Association, *United States Telecom Association v. Federal Communications Commission and United States of America*, No. 15-1063 (D.C. Cir. Mar. 23, 2015).

Indeed, we already have seen evidence that the investment and innovation that fomented the digital revolution has slowed as a result of the agency's power grab.<sup>4</sup>

## I. DEFECTS IN PROCESS

First—process. I don't believe the FCC complied with the requirements of the Administrative Procedure Act in adopting Internet regulations.<sup>5</sup> In particular, the public did not know what rules the *Order* adopted beforehand because the FCC never proposed them.

### A. Reclassification

Recall that last year's *Notice of Proposed Rulemaking* 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."<sup>6</sup> 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."<sup>7</sup> 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."<sup>8</sup>

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.<sup>9</sup>

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."<sup>10</sup> It did so "to make clear that the no-blocking rule would allow individualized bargaining above a minimum level of access," which

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4. See, e.g., Statement of FCC Commissioner Ajit Pai On New Evidence That President Obama's Plan To Regulate The Internet Harms Small Businesses And Rural Broadband Deployment (May 7, 2015), available at <http://go.usa.gov/3wAkn> (listing examples of Internet service providers who have stated under penalty of perjury that they are reducing investment in broadband infrastructure as a result of the FCC's decision).

5. 5 U.S.C. § 553 (2012).

6. Protecting and Promoting the Open Internet, *Notice of Proposed Rulemaking*, FCC 14-61, 29 FCC Rcd. 5561, 5569, para. 23 (2014) [hereinafter *Notice*] (citing *Verizon v. FCC*, 740 F.3d 623, 656-59 (D.C. Cir. 2014)).

7. *Notice*, *supra* note 6, 29 FCC Rcd. at 5569, para. 24.

8. *Id.* at 5647 (Statement of Chairman Tom Wheeler).

9. Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56 (codified as amended at 47 U.S.C. § 1302 (2012)).

10. *Notice*, *supra* note 6, 29 FCC Rcd. at 5627 (Proposed Rule § 8.11(a)).

was “the revised rationale the court suggested would be permissible rather than *per se* common carriage.”<sup>11</sup> The *Notice* then devoted an entire section to “establishing the minimum level of access under the no-blocking rule,”<sup>12</sup> because “the [*Verizon*] court suggested [such a rule] would be permissible rather than *per se* common carriage”<sup>13</sup> and would be “[c]onsistent with the court’s ruling.”<sup>14</sup>

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.”<sup>15</sup> The *Notice* tentatively concluded that such a rule was appropriate because the “court underscored the validity of the ‘commercially reasonable’ legal standard”<sup>16</sup> and “explained that such an approach distinguished the data roaming rules at issue in *Cellco* from common carrier obligations.”<sup>17</sup> 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.”<sup>18</sup> 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*.”<sup>19</sup>

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”<sup>20</sup> and then cited section 706 of the Telecommunications Act—but *not a single provision of Title II*—in the *Notice*’s ordering clauses.<sup>21</sup> And it affirmatively proposed to remove several legal provisions from the “authority” section of our Part

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11. *Id.* at 5595, para. 95.

12. *Id.* at 5596, Section III.D.3 (capitalizations omitted); see *Notice*, *supra* note 6, 29 FCC Rcd. at 5596–98, paras. 97–104 (discussing the proposed minimum-level-of-access requirement).

13. *Id.* at 5595, para. 95.

14. *Id.* at 5596, para. 97.

15. *Id.* at 5599–5600, para. 111.

16. *Id.* at 5599, para. 110.

17. *Id.* at 5602, para. 116.

18. *Id.* at 5602, para. 118.

19. *Id.* at 5599, Subpart III.E (capitalizations omitted); see also *Notice*, *supra* note 6, 29 FCC Rcd. at 5602–10, paras. 116–41 (discussing the proposed no-commercially-unreasonable-practices rule).

20. *Id.* at 5610, para. 142.

21. *Id.* 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. Communications Act §§ 201–276, 47 U.S.C. §§ 201–276 (2012 & Supp. 2013).

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.<sup>22</sup>

In all, the *Notice* cited or quoted the *Verizon* decision fifty-two separate times,<sup>23</sup> proposed two pages of rules that would be consistent with that decision and within the Commission’s section 706 authority,<sup>24</sup> 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 the FCC’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.<sup>25</sup> 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.<sup>26</sup> Instead of the rule against commercially unreasonable practices, which was intended to encourage “individualized negotiation,” the *Order* adopts a flat ban on individual negotiations through a no-paid-prioritization rule.<sup>27</sup> And rather than limiting the new rules to those proposed in the *Notice*, the *Order* also adopts a never-before-proposed no-throttling rule<sup>28</sup> and a wholly new no-unreasonable-interference-or-unreasonable-disadvantage standard for Internet conduct.<sup>29</sup>

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

22. 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*, *supra* note 6, 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.

23. See *Notice*, *supra* note 6, 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.

24. *Notice*, *supra* note 6, 29 FCC Rcd. at 5626–27 (Appendix A: Proposed Rules).

25. 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,” Protecting and Promoting the Open Internet, GN Docket No. 14-28, *Report and Order on Remand, Declaratory Ruling, and Order*, FCC 15-24, para. 295 (rel. Mar. 12, 2015) [hereinafter *Order*], which is to say that it too is premised on reclassification.

26. *Id.* at paras. 113–15.

27. *Id.* at para. 125.

28. *Id.* at para. 119.

29. *Id.* at paras. 133, 136.

*Order*,<sup>30</sup> invoking sections 201 and 202 of Title II along with sections 3, 10, 301, 332, 403, 501, and 503 of the Communications Act.<sup>31</sup> Nor is it surprising that the final rules purport to rely on twenty sections of the Communications Act that were not included in the original proposal, including several sections not discussed even once in the *Notice*.<sup>32</sup>

In sum, the *Notice* proposed “the terms . . . of the proposed rule” and a “reference to the legal authority under which the rule is proposed.”<sup>33</sup> But the *Order* adopts something completely different. That’s not what the Administrative Procedure Act envisions.

### B. An Unanticipated Reversal

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.<sup>34</sup> 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.<sup>35</sup> The question “is one of fair notice”<sup>36</sup>: whether “persons are sufficiently alerted to likely alternatives so that they know whether their interests are at stake.”<sup>37</sup> 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.”<sup>38</sup>

30. *Id.* at para. 583.

31. Act of June 19, 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–720 (2012 & Supp. 2013)).

32. Compare *Notice*, *supra* note 6, 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.

33. 5 U.S.C. §§ 553(b)(2)–(3) (2012).

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

35. *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (*per curiam*) (emphasis added) (citations and internal quotation marks omitted); see also *Council Tree Commc’ns 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 Elec. Corp. v. Volpe*, 466 F.2d 1013, 1019 (3d Cir. 1972))).

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

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

38. *Horsehead Res. Dev. Co., Inc. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994).

Although the agency dutifully recites that standard,<sup>39</sup> at points it seems to apply a different one: something akin to asking whether parties *could have* anticipated the final rule.<sup>40</sup> 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 (RFP) 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."<sup>41</sup> And so when a notice of

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39. *Order*, *supra* note 25, at para. 539.

40. *Compare*, e.g., *id.* at para. 37 ("[O]ur forbearance approach results in over 700 codified rules being inapplicable . . ."), *with id.* 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 id.* at n.1671 (arguing that the FCC used "slightly different wording to the same effect" when it had previously endorsed a "could have anticipated" standard).

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

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.”<sup>42</sup>

The *Order*’s primary retort appears to be that—alongside its section 706-based proposals and tentative conclusions—the *Notice* sought comment on alternatives.<sup>43</sup> As the *Order* puts it, the *Notice* “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.’”<sup>44</sup>

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

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42. Nat’l Black Media Coal. v. FCC, 791 F.2d 1016, 1022 (2d Cir. 1986).

43. 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*, *supra* note 6, 29 FCC Rcd. at 5595–96, para. 96 (cited by *Order*, *supra* note 25, 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.

44. *Order*, *supra* note 25, at para. 327 (quoting *Notice*, *supra* note 6, 29 FCC Rcd. at 5563, para. 4) (footnotes omitted).

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.<sup>45</sup>

If these two paragraphs, tucked into an eighty-five-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<sup>46</sup> and again<sup>47</sup> and again<sup>48</sup> and again<sup>49</sup>

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45. Notice, *supra* note 6, 29 FCC Rcd. at 5613–14, paras. 149–50 (footnotes omitted).

46. See Federal-State Joint Board on Universal Service, *Report to Congress*, FCC 98-67, 13 FCC Rcd. 11501 (1998) [hereinafter *Stevens Report*] (classifying Internet access service).

47. 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, FCC 96-Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77, 17 FCC Rcd. 4798 (2002) [hereinafter *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).

and again<sup>50</sup>—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.<sup>51</sup> Or look at the eighty-three-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.<sup>52</sup> The contrast could not be starker.<sup>53</sup>

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 issue a new notice 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.”<sup>54</sup>

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.<sup>55</sup> Search the *Notice*'s two paragraphs as I might, I cannot ferret out *any discussion* of the three factual changes that led to the Commission's determination—namely,

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48. See *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al., Report and Order and Notice of Proposed Rulemaking*, FCC 05-150, 20 FCC Rcd. 14853 (2005) [hereinafter *Wireline Broadband Internet Access Services Order*] (classifying broadband Internet access service over wireline facilities).

49. 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, Memorandum Opinion and Order*, FCC 06-165, 21 FCC Rcd. 13281 (2006) (classifying broadband Internet access service over power lines).

50. See *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, Declaratory Ruling*, FCC 07-30, 22 FCC Rcd. 5901 (2007) [hereinafter *Wireless Broadband Internet Access Order*] (classifying broadband Internet access service over wireless networks).

51. *Notice*, *supra* note 6, 29 FCC Rcd. at 5610–12, paras. 143–47.

52. *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers, Notice of Proposed Rulemaking*, FCC 02-42, 17 FCC Rcd. 3019 (2002).

53. See, e.g., *Council Tree Commc'ns 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”).

54. *Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 533 (D.C. Cir. 1982).

55. *Order*, *supra* note 25, at paras. 306–433.

“(1) consumer conduct, . . . (2) broadband providers’ marketing and pricing strategies . . . and (3) the technical characteristics of broadband Internet access service.”<sup>56</sup> Nor can I find any discussion of how Domain Name System (DNS) service, caching, or any 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).<sup>57</sup> Nor can I find any discussion of the benefits reclassification would have for broadband investment.<sup>58</sup> Nor can I find any discussion of what reclassification means for state or local regulation of broadband services.<sup>59</sup> Nor can I find any mention that the FCC’s past “predictive judgments . . . anticipating vibrant intermodal competition” were wrong.<sup>60</sup>

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.<sup>61</sup> Indeed, the agency was publicly

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56. *Id.* at para. 330; *see also id.* at paras. 346–54.

57. *Id.* at paras. 366–75.

58. *Id.* at paras. 409–25.

59. *Id.* at paras. 430–33.

60. *Id.* 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, *2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment*, FCC 15-10, 30 FCC Rcd. 1375 (rel. Feb. 4, 2015) [hereinafter *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).

61. Gautham Nagesh & Brody Mullins, *Net Neutrality: How White House Thwarted FCC Chief*, WALL ST. J., Feb. 4, 2015, available at <http://on.wsj.com/16FXTcH> (“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.”). It strains credulity to think otherwise; had the agency been on track to adopt the

considering a so-called “hybrid” approach on the day of the President’s announcement<sup>62</sup> and was reportedly pursuing such an approach even in the days after that announcement<sup>63</sup>—only to succumb to executive branch entreaties when pen was put to paper.<sup>64</sup>

But the Commission cannot credibly claim APA notice from the White House’s November 10 YouTube announcement of “President

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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* (Nov. 10, 2014), <https://web.archive.org/web/20150204034321/http://www.whitehouse.gov/net-neutrality>.

62. 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](https://apps.fcc.gov/edocs_public/attachmatch/DOC-330414A1.pdf).

63. See Brian Fung, *How Obama’s Net Neutrality Comments Undid Weeks of FCC Work*, WASH. POST (Nov. 14, 2014), available at <http://wapo.st/1aINQed> (“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 freely about the gathering. ‘If we had to bet where he’s heading, it’s still the hybrid.’”).

64. 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), 47 U.S.C. § 201(b) (2012). 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, *Second Report and Order*, FCC 00-242, 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, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, FCC 99-206, 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, *Order*, 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., ICC v. Balt. & 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”).

Obama's Plan for a Free and Open Internet."<sup>65</sup> Although that announcement did (unlike the *Notice*) propose reclassification under Title II<sup>66</sup> and did (again unlike the *Notice*) propose "bright-line" no-blocking, no-throttling, and no-paid-prioritization rules,<sup>67</sup> 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 in *Wired* explaining "This Is How We Will Ensure Net Neutrality."<sup>68</sup> Although that announcement did (unlike the *Notice*) propose reclassification under Title II<sup>69</sup> and did (again unlike the *Notice*) propose "bright-line" no-blocking, no-throttling, and no-paid-prioritization rules,<sup>70</sup> I again can find no record of 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.<sup>71</sup> 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."<sup>72</sup> 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

65. 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).

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

67. *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.").

68. Tom Wheeler, *FCC Chairman Tom Wheeler: This Is How We Will Ensure Net Neutrality*, *WIRED*, (Feb. 4, 2015, 11:00 AM), <http://wrd.cm/1EGifR4> ("[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.").

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

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

71. Kevin J. Martin, Op-Ed., *The Daily Show*, N.Y. TIMES, Nov. 13, 2007, at A29, available at [http://www.nytimes.com/2007/11/13/opinion/13martin.html?\\_r=0](http://www.nytimes.com/2007/11/13/opinion/13martin.html?_r=0).

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

opportunity to comment. Until Chairman Martin's November 2007 personal Op-Ed and Press Release, the public did not even know what options he was considering, let alone the Commission."<sup>73</sup> 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.<sup>74</sup> 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."<sup>75</sup> But ultimately, after even more political pressure was put on the agency to move forward without seeking comment,<sup>76</sup> 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 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.

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73. *Id.* at 451.

74. See, e.g., *Jesse Jackson Urges Wheeler Against Title II*, COMM. 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."), available at 2014 WLNR 32865286; Lydia Beyoud, *Obama's Call for Title II Reclassification Forces Rulemaking Delay*, BLOOMBERG BNA (Nov. 12, 2014), available at <http://bit.ly/17zHLcC> ("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."); Laura Ryan, Brendan Sasso & Dustin Volz, *What's Next in the Never-Ending Net Neutrality Fight*, NAT'L J. (Nov. 11, 2014), <http://bit.ly/1AsB4EA> ("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."); *No December Vote: Obama Wants Title II; Wheeler Says There are Issues to Be Resolved*, COMM. DAILY (Nov. 12, 2014), available at 2014 WLNR 32111241 ("[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.").

75. *Jesse Jackson Urges Wheeler Against Title II*, COMM. DAILY (Nov. 19, 2014), available at 2014 WLNR 32865286.

76. 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*, COMM. DAILY (Nov. 12, 2014), available at 2014 WLNR 32111241 ("Heartened by Obama's statement, Title II advocates pressed the agency to quickly move ahead with approving net neutrality rules involving reclassification.").

### C. Three Examples

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,"<sup>77</sup> asked whether forbearance should differ for mobile broadband services,<sup>78</sup> and identified six sections of Title II that might be "excluded from forbearance."<sup>79</sup> 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."<sup>80</sup>

For one, the *Order's* forbearance decisions are expansive, encompassing at least forty-nine 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.<sup>81</sup> That's twenty separate sections that will apply in whole or part, fourteen more than mentioned in the *Notice*. The *Order* then goes on to temporarily forbear, in whole or part, from applying fifteen sections<sup>82</sup> and

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77. *Notice*, *supra* note 6, 29 FCC Rcd. at 5615–16, para. 153.

78. *Id.* at 5616, para. 155.

79. *Id.* at 5616, para. 154.

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

81. *See Order*, *supra* note 25, 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)).

82. *See id.* 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." *See generally id.*

to permanently forbear, in whole or part, from fourteen more.<sup>83</sup> And that's just the provisions of the Act! The *Order* also forbears from some of the Commission's rules,<sup>84</sup> applies others,<sup>85</sup> forbears from conducting certain further rulemakings,<sup>86</sup> and commits to commencing still others.<sup>87</sup> 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,<sup>88</sup> 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*.<sup>89</sup> 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."<sup>90</sup> 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."<sup>91</sup> 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.<sup>92</sup> 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."<sup>93</sup>

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83. See *id.* 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).

84. See *id.* at para. 522 (forbearing from applying the Commission's truth-in-billing rules).

85. See *id.* 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").

86. See *id.* 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").

87. See *id.* 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").

88. *Id.* at paras. 434–536.

89. 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." *Id.* at n.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.

90. *Notice*, *supra* note 6, 29 FCC Rcd. at 5616, para. 154.

91. *Nat'l Black Media Coal. v. FCC*, 791 F.2d 1016, 1023 (2d Cir. 1986).

92. For more on this novel rationale, see *infra* Section III.D.

93. See *Env'tl. 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)).

And, to put it lightly, this isn't how forbearance usually works. When the Commission has previously forbore 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.<sup>94</sup> 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), explained how the Commission's view of competition affected its forbearance analysis, and offered rationales for forbearing or not forbearing from each statutory provision.<sup>95</sup>

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 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."<sup>96</sup> 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."<sup>97</sup> Or as one party to this proceeding put it: "In essence the Commission is asking the public to shadowbox with itself."<sup>98</sup>

## 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."<sup>99</sup> In the *Order*, the FCC followed through on that tentative conclusion and concluded that

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94. See, e.g., Lifeline and Link Up Reform and Modernization et al., *Notice of Proposed Rulemaking*, FCC 11-32, 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).

95. Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, *Notice of Proposed Rulemaking*, FCC 93-454, 8 FCC Rcd. 7988, 7998-8001, paras. 49-68 (1993).

96. See 47 C.F.R. §§ 1.54(a), (b), (e) (2014).

97. Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance under Section 10 of the Communications Act of 1934, as Amended, *Report and Order*, FCC 09-56, 24 FCC Rcd. 9543, 9550, para. 12 (2009).

98. 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>.

99. *Notice*, *supra* note 6, 29 FCC Rcd. at 5582, para. 59.

application of the Part 8 rules to Internet traffic exchanged “is not warranted.”<sup>100</sup>

But the *Order* then went quite a bit further and adopts a “regulatory backstop prohibiting common carriers from engaging in unjust and unreasonable practices,”<sup>101</sup> subjecting Internet traffic exchange arrangements like those mentioned immediately above to “sections 201 and 202 on a case-by-case basis.”<sup>102</sup> 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.”<sup>103</sup> In other words, the *Order* classified 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.”<sup>104</sup> 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.<sup>105</sup>

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 networks that deliver to that ISP. That is a different matter that is better addressed separately. The FCC’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.”<sup>106</sup> When the Chairman of the Commission—the agency’s “chief executive officer”<sup>107</sup>—says that the proposal is “all about”

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100. *Order*, *supra* note 25, at para. 195, 206 (“To be clear, we are not applying the open Internet rules we adopt today to Internet traffic exchange.”).

101. *Id.* at para. 203.

102. *Id.* at para. 205.

103. Communications Act § 201(a), 47 U.S.C. § 201(a) (2012).

104. 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.”).

105. *See generally Notice*, *supra* note 6.

106. *Id.* at 5647 (Statement of Chairman Tom Wheeler).

107. Communications Act § 5(a), 47 U.S.C. § 155(a) (2012).

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.<sup>108</sup> 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.<sup>109</sup> 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.”<sup>110</sup> 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.’”<sup>111</sup> 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.”<sup>112</sup>

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.<sup>113</sup> 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 rejected. 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.<sup>114</sup>

### 3. Redefining the Public Switched Network

Consider the *Order*’s new definition for the statutory term “the public switched network.”<sup>115</sup> As background, section 332 of the Communications Act bars the FCC from

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108. *Order*, *supra* note 25, 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.”).

109. *See id.* at note 521 (“Internet traffic exchange is a component of broadband Internet access service, both of which meets the definition of ‘telecommunications service.’”).

110. *Notice*, *supra* note 6, 29 FCC Rcd. at 5581, para. 55.

111. *Id.* at 5582, para. 59 (quoting Preserving the Open Internet; Broadband Industry Practices, , *Report and Order*, FCC 10-201, 25 FCC Rcd. 17905, 17944, n.209 (2010) [hereinafter *Open Internet Order*], *aff’d in part, vacated and remanded in part sub nom.* Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014); *id.* at 17933, n.150).

112. *Notice*, *supra* note 6, 29 FCC Rcd. at 5615, para. 151 (emphasis added).

113. *Order*, *supra* note 25, at para. 206.

114. *Compare Notice*, *supra* note 6, 29 FCC Rcd. at 5582, para. 59, with *Order*, *supra* note 25, at paras. 202–06.

115. *Id.* at para. 391; *see also id.* at Appendix A (amending the definition of “public switched network” in rule 20.3).

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.<sup>116</sup> By redefining the term “the public switched network” to include services that use “public IP addresses,”<sup>117</sup> 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.<sup>118</sup>

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.”<sup>119</sup> The text of the *Notice* did not seek comment on redefining the term.<sup>120</sup> 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*.<sup>121</sup> 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.”<sup>122</sup>

The *Order* attempts to establish notice for this new definition by pointing to several other questions asked in the *Notice*,<sup>123</sup> such as “whether

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116. Communications Act § 332(c)(2), 47 U.S.C. § 332(c)(2) (2012) (“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), 47 U.S.C. § 332(d)(3) (2012) (“[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), 47 U.S.C. § 332(d)(1) (2012) (“[T]he term ‘commercial mobile service’ means any mobile service . . . that is provided for profit and makes interconnected service available”); Communications Act § 332(d)(2), 47 U.S.C. § 332(d)(2) (2012) (“[T]he term ‘interconnected service’ means service that is interconnected with the public switched network . . . .”).

117. *Order*, *supra* note 25, at para. 391.

118. *Id.* at paras. 391–99, 402 (applying the new definition).

119. *See Notice*, *supra* note 6, 29 FCC Rcd. at 5626–27 (Appendix A: Proposed Rules).

120. *See id.* at 5614, para. 150.

121. Comments of Vonage at 43–44, Protecting and Promoting the Open Internet, FCC GN Docket No. 14-28 (rel. May 15, 2014), *available at* <http://apps.fcc.gov/ecfs/document/view?id=7521705875>.

122. *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).

123. *See Order*, *supra* note 25, at para. 391. The *Order* also points to various questions in the 2010 *Notice of Inquiry*—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 Framework for Broadband Internet Service, Notice of Inquiry*, FCC 10-114, 25 FCC Rcd. 7866, 7871 n.24 (2010) [hereinafter 2011 *NOI*]. 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*, *supra* note 25, at 1 (listing GN Docket No. 14-28 (the docket of the *Notice*) but not GN 10-127 (the docket of the 2010

the Commission should revisit its prior classification decisions and apply Title II to broadband Internet access service”<sup>124</sup> 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.”<sup>125</sup> But even the most specific question the *Order* points to—“does [mobile broadband Internet access] service fit within the definition of ‘commercial mobile service’?”<sup>126</sup>—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.”<sup>127</sup>

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.”<sup>128</sup> 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.”<sup>129</sup> 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.<sup>130</sup> 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.<sup>131</sup> Yet the *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 thirty-two days after the comment period had closed on the *Notice*, following a private meeting between FCC officials and CTIA.<sup>132</sup> Just as the Commission cannot “bootstrap notice

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*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*).

124. See *Notice*, *supra* note 6, 29 FCC Rcd. at 5614, para. 149.

125. See *id.* at 5616, para. 155.

126. See *id.* at 5614, para. 150.

127. *Council Tree Commc’ns 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)).

128. See *Order*, *supra* note 25, at paras. 404, 406; see also *id.* 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).

129. See *Notice*, *supra* note 6, 29 FCC Rcd. at 5626–27 (Appendix A: Proposed Rules).

130. See *id.* at 5614, para. 150.

131. See 47 C.F.R. § 20.9(a)(14) (2014).

132. 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*,

from a comment,<sup>133</sup> 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.<sup>134</sup> 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.<sup>135</sup> Thus, before the *Order*, 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. Improper Procedure*

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 neither what the Administrative Procedure Act demands nor what the American people deserve.

## II. DEFECTS IN SUBSTANCE

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

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29 FCC Rcd. 9714 (Wireline Comp. Bur. 2014) (extending the close of the comment cycle to September 15, 2014).

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

134. 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*, *supra* note 25, at para. 406.

135. Communications Act § 332(c)(2), 47 U.S.C. § 332(c)(2) (2012) ("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 . . . .").

### A. Reclassification (Title II)

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.<sup>136</sup>

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.<sup>137</sup> Section 230, added to the Act in 1996, 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."<sup>138</sup> That section went on to define "interactive computer service" as "any information service . . . provider that provides or enables computer access

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136. Communications Act § 3(24), 47 U.S.C. § 153(24) (2012).

137. *Util. Air Regulatory Grp. 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)).

138. Communications Act § 230(b)(2), 47 U.S.C. § 230(b)(2) (2012) (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").

by multiple users to a computer server, *including specifically a service or system that provides access to the Internet . . .*”<sup>139</sup> In other words, Congress directly addressed the question of whether an ISP offered an information service—and answered with a resounding “Yes.”

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 too has answered yes.<sup>140</sup> 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.”<sup>141</sup>

### 1. The Stevens Report.

The Commission’s first major decision in this regard—the 1998 *Stevens Report*—is particularly instructive regarding why this is so.<sup>142</sup> 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.”<sup>143</sup> The *Stevens Report* then exhaustively reviewed the text and legislative history of the

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139. Communications Act § 230(f)(2), 47 U.S.C. § 230(f)(2) (2012) (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*, *supra* note 25, 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), 47 U.S.C. § 230(f)(2) (2012) (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*, *supra* note 25, at n.1097, which seems rather obvious given how broadly the statute is written.

140. See *Stevens Report*, *supra* note 46, 13 FCC Rcd. at 11536, para. 74; *Cable Modem Order*, *supra* note 47, 17 FCC Rcd. at 4802, para. 7; *Wireline Broadband Internet Access Services Order*, *supra* note 48, 20 FCC Rcd. at 14858, para. 5; *BPL Internet Access Order*, *supra* note 49, 21 FCC Rcd. at 13285–88, paras. 8–11; *Wireless Broadband Internet Access Order*, *supra* note 50, 22 FCC Rcd. at 5908–09, para. 18.

141. Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Serv., 545 U.S. 967, 987 (2005).

142. Although the *Order* now claims the *Stevens Report* was “not a binding Commission order,” *Order*, *supra* note 25, at para. 315, our precedent has repeatedly treated it as such. See, e.g., Communications Assistance for Law Enforcement Act, *Second Report and Order*, FCC 99-229, 15 FCC Rcd. 7105, 7120 n.70 (1999); *Cable Modem Order*, *supra* note 47, 17 FCC Rcd. at 4799, n.2; *Wireline Broadband Internet Access Services Order*, *supra* note 50, 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.

143. Dep’t of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, § 623, 111 Stat. 2440, 2521 (1998).

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.<sup>144</sup> The court had prohibited the Bell operating companies from providing any "information service,"<sup>145</sup> and the Telecommunications Act's definition paralleled the court's definition almost word for word.<sup>146</sup> 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.<sup>147</sup>

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.<sup>148</sup> 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."<sup>149</sup> In other words, even though enhanced services were "offered 'over common carrier transmission facilities,' [they] were themselves not to be regulated under Title II of the Act, *no matter how extensive their communications components*.'"<sup>150</sup>

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

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144. *Stevens Report*, *supra* note 46, 13 FCC Rcd. at 11520, para. 39.

145. *United States v. AT&T*, 552 F. Supp. 131, 227 (D.D.C. 1982).

146. *Compare* Communications Act § 3(24), 47 U.S.C. § 153(24) (2012), *with AT&T*, 552 F. Supp. at 229. The only difference? The Telecommunications Act added the phrase "and includes electronic publishing."

147. *AT&T*, 552 F. Supp. at 179–80 (emphasis added)(capitalizations omitted).

148. *Stevens Report*, *supra* note 46, 13 FCC Rcd. at 11520, para. 39.

149. *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)).

150. *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)).

Judgment].”<sup>151</sup> Similarly, the “Commission has consistently classed such services as ‘enhanced services.’”<sup>152</sup>

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.<sup>153</sup> The question was “whether Internet access providers merely offer transmission . . . or whether they go beyond the provision of a transparent transmission path.”<sup>154</sup> And the report concluded that “the latter more accurately describes Internet access service”<sup>155</sup> since Internet access services “combine computer processing, information provision, and other computer-mediated offerings with data transport.”<sup>156</sup> The fact that data transport was a component of the service was irrelevant<sup>157</sup>—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.’”<sup>158</sup>

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.”<sup>159</sup> And it

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151. *Id.* at 11536–37, para. 75.

152. *Id.* at 11543, paras. 97–98 (1980) (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)).

153. *Id.* at 11536–37, para. 75.

154. *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.’”).

155. *Id.* at 11536, para. 74.

156. *Id.* at 11536, para. 73.

157. *Id.* at 11539–40, para. 80.

158. *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)).

159. *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.”).

essentially agreed with Senator John McCain that “[i]t certainly was not Congress’s 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.”<sup>160</sup>

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,”<sup>161</sup> 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.<sup>162</sup> And if anything, it found the goals of the Telecommunications Act to “promote competition and reduce regulation”<sup>163</sup> 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.”<sup>164</sup> 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.”<sup>165</sup>

## 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

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160. *Stevens Report*, *supra* note 46, 13 FCC Rcd. at 11519, para. 37 (quoting Letter from Senator John McCain to the Honorable William E. Kennard, Chairman, FCC).

161. *Id.* at 11511, para. 21.

162. *Id.* at 11524, para. 45.

163. Telecommunications Act of 1996, as amended, preamble. Pub. L. No. 104-104, 110 Stat. 56.

164. *Stevens Report*, *supra* note 46, 13 FCC Rcd. at 1524, para. 46.

165. Communications Act § 230(b)(2), 47 U.S.C. § 230(b)(2) (2012).

server in the chain. These functionalities—caching information and storing and forwarding information—are classic enhanced services.<sup>166</sup>

It gets even more complicated. For one, there is no necessary one-to-one correlation between domain names and IP addresses.<sup>167</sup> So if an Internet user in California and a user in New York City both seek the IP address for [www.yahoo.com](http://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).

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.<sup>168</sup> 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.<sup>169</sup>

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.<sup>170</sup> They are using network address translation to establish non-

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166. 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).

167. 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*, *supra* note 25, 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, *Report and Order*, FCC 96-392, 11 FCC Rcd. 15227, 15248-49, paras. 44-45 (1996) (emphasis added).

168. Reply Comments of AT&T at 54, Protecting and Promoting the Open Internet, FCC GN Docket No. 14-28 (rel. May 15, 2014), *available at* <http://apps.fcc.gov/ecfs/document/view?id=7522634753>; Reply Comments of Bright House at 6-7, Protecting and Promoting the Open Internet, FCC GN Docket No. 14-28 (rel. May 15, 2014), *available at* <http://apps.fcc.gov/ecfs/document/view?id=7522584517>.

169. Comments of Akamai at 3, Protecting and Promoting the Open Internet, FCC GN Docket No. 14-28 (rel. May 15, 2014), *available at* <http://apps.fcc.gov/ecfs/document/view?id=7521479697>; *see also* Netflix, Netflix Open Connect Content Delivery for ISPs *available at* <http://nflx.it/1wpo0jw> ("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.").

170. 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;

public IP addresses for their subscribers.<sup>171</sup> And they are processing protocols to bridge the gap between IPv4 and IPv6.<sup>172</sup>

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.<sup>173</sup> 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,"<sup>174</sup> not "between or among points specified by the user."<sup>175</sup>

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"<sup>176</sup> all fall within the telecommunications system management exception<sup>177</sup>—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 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

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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.

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

172. Reply Comments of Comcast at 22, Protecting and Promoting the Open Internet, FCC GN Docket No. 14-28 (rel. May 15, 2014), *available at* <http://apps.fcc.gov/ecfs/document/view?id=7522598141>; Comments of Verizon at 60–61, Protecting and Promoting the Open Internet, FCC GN Docket No. 14-28 (rel. May 15, 2014), *available at* <http://apps.fcc.gov/ecfs/document/view?id=7521507614>.

173. 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>.

174. *Stevens Report*, *supra* note 46, 13 FCC Rcd. at 11532, para. 64.

175. Communications Act § 3(50), 47 U.S.C. § 153(50) (2012) (defining "telecommunications").

176. *Order*, *supra* note 25, at para. 373.

177. Communications Act § 3(24), 47 U.S.C. § 153(24) (2012) (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").

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.<sup>178</sup> 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.”<sup>179</sup> 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.<sup>180</sup>

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.<sup>181</sup> Although the FCC’s prior determinations rested on “a factual record compiled over a decade ago,”<sup>182</sup> the *Order* does not identify any actual change.

First, the *Order* points to “consumer conduct”<sup>183</sup> 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.”<sup>184</sup> “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.”<sup>185</sup>

But the availability and popularity of third-party content is hardly new. Yahoo! Mail went online in 1997.<sup>186</sup> HoTMaiL (the original web-

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178. Despite the *Order*’s claim to the contrary, *Order*, *supra* note 25, at para. 356 n.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.

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

180. *Cf. MCI Telecomms. Corp. v. AT&T*, 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.”).

181. *Order*, *supra* note 25, at para. 330.

182. *Id.* at para. 330.

183. *Id.* at para. 330.

184. *Id.* at para. 350.

185. *Id.* at para. 348.

186. Internet Archive Wayback Machine: Yahoo!, (Oct. 15, 1997), <http://bit.ly/18xSIB5>.

based email) launched in 1996.<sup>187</sup> GeoCities, a website-hosting service, launched in 1994 and was the third most-visited site on the web in 1999.<sup>188</sup> And Amazon.com was selling books, music, and videos before the turn of the century, and began offering cloud-based Amazon Web Services in 2002.<sup>189</sup> 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)<sup>190</sup>—and a rising tide lifts all ships (or most, except 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.’”<sup>191</sup> 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.”<sup>192</sup> 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

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187. Internet Archive Wayback Machine: HoTMaiL, (Dec. 20, 1996), <http://bit.ly/1887bOB>.

188. Rosalie Marshall, Yahoo closing GeoCities web hosting service, vnunet.com (Apr. 24, 2009), available at <http://bit.ly/198SoVg>; JULIA ANGWIN, STEALING MYSPACE: THE BATTLE TO CONTROL THE MOST POPULAR WEBSITE IN AMERICA 51 (2009); see also Internet Archive Wayback Machine: GeoCities, (Feb. 22, 1997), <http://bit.ly/1B0pV9E>.

189. Mark W. Johnson, *Amazon's Smart Innovation Strategy*, BUSINESSWEEK, Apr. 12, 2010, available at [http://www.businessweek.com/innovate/content/apr2010/id20100412\\_520351.htm](http://www.businessweek.com/innovate/content/apr2010/id20100412_520351.htm); Internet Archive Wayback Machine: Amazon.com, (Oct. 13, 1999), <http://bit.ly/198StZ0>.

190. Compare FCC, High-Speed Services for Internet Access: Subscription 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>.

191. *Cable Modem Order*, *supra* note 47, 17 FCC Rcd. at 4816, para. 25.

192. *Order*, *supra* note 25, at para. 330.

than 3G.”<sup>193</sup> 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.”<sup>194</sup> 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.<sup>195</sup>

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.”<sup>196</sup> 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.<sup>197</sup> 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!”<sup>198</sup>

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 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.<sup>199</sup>

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

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193. *Id.* at para. 351 (citing Comments of Public Knowledge, Benton Foundation & Access Sonoma Broadband, at Appendix A-2, Protecting and Promoting the Open Internet, FCC GN Docket No. 14-28 (rel. May 15, 2014) [hereinafter Public Knowledge Comments], available at <http://apps.fcc.gov/ecfs/document/view?id=7521480282>).

194. *Id.* at para. 352 (citing Public Knowledge Comments, *supra* note 193, at Appendix A-3).

195. *Id.* at para. 353 (citing Public Knowledge Comments, *supra* note 193, at Appendix A-1).

196. Qwest, Qwest Commercial 1999 – Every Movie, <https://www.youtube.com/watch?v=xAxtxPAUcwQ> (last visited May 1, 2015).

197. Charter, Charter Pipeline (2001), <http://bit.ly/1EQV19H>.

198. America Online, AOL Commercial from 1999, <https://www.youtube.com/watch?v=MQcCnPWHILk> (last visited May 1, 2015).

199. 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, *Second Report*, FCC 00-290, 15 FCC Rcd. 20913, 20931, paras. 36–37 (2000).

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.”<sup>200</sup> 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.<sup>201</sup> 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),<sup>202</sup> 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<sup>203</sup>—including in this very *Order*!<sup>204</sup>

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 classified in the *Order*.

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200. *Order*, *supra* note 25, at para. 330.

201. Despite the *Order*'s suggestion to the contrary, the *Cable Modem Order* did not limit its prediction to “fixed broadband.” See generally *Cable Modem Order*, *supra* note 47.

202. *2015 Broadband Progress Report*, *supra* note 60, at para. 109.

203. See *id.* 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).

204. *Order*, *supra* note 25, at para. 76 & n. 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.”<sup>205</sup> 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.”<sup>206</sup> 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.<sup>207</sup>

Similarly, the Commission identified “broadband Internet access transmission service” as a possible telecommunications service in the *Wireline Broadband Internet Access Services Order*.<sup>208</sup> 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.<sup>209</sup> 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).<sup>210</sup>

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.”<sup>211</sup>

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205. Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC 98-188, 13 FCC Rcd. 24012, 24026–27, para. 29 (1998).

206. *Id.* at 24027, paras. 30–31.

207. *Id.* at 24030, para. 36.

208. *Wireline Broadband Internet Access Services Order*, *supra* note 48, 20 FCC Rcd. at 14899, para. 86.

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

210. *Id.* at 14900–03, paras. 89–95; Comments of NTCA at 9, Protecting and Promoting the Open Internet, FCC GN Docket No. 14-28 (rel. May 15, 2014), *available at* <http://apps.fcc.gov/ecfs/document/view?id=7521701730>. 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*, *supra* note 25, at para. 422, it is incorrect.

211. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 988 (2005).

don't know many consumers lining up for fast transmission to a cable 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."<sup>212</sup> 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."<sup>213</sup>

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"<sup>214</sup>—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."<sup>215</sup>

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.<sup>216</sup>

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

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212. *Id.* at 1010 (Scalia, J., dissenting).

213. *Id.* at 1007.

214. *Order*, *supra* note 25, at para. 204.

215. *Id.* at para. 337.

216. *Id.* 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." *Id.* 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.

service,<sup>217</sup> it is being intentionally misleading. The service the FCC reclassified 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.<sup>218</sup>

#### 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.<sup>219</sup>

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,"<sup>220</sup> an agency decision to reverse course is subject to heightened or more searching review.<sup>221</sup> 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.

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217. *Id.* at para. 313.

218. 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." *Id.* 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 supra* note 48, 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, *available at* <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.

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

220. *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)).

221. *Id.* at 513–16.

*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.<sup>222</sup> Starting the year after the *Stevens Report*, broadband providers have invested over \$1.125 trillion in their networks.<sup>223</sup> 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.”<sup>224</sup> 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.<sup>225</sup> 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.”<sup>226</sup> 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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222. 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, *Report*, FCC 99-5, 14 FCC Rcd. 2398, 2416–17, para. 38 (1999).

223. 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>.

224. *Wireless Broadband Internet Access Order*, *supra* note 48, 22 FCC Rcd. at 5926 (Statement of Chairman Kevin J. Martin).

225. See *supra* Part I.

226. Nat’l Black Media Coal. 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. *The Mobile Broadband Hurdle (Section 332)*

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.<sup>227</sup> By contrast, providers of “private mobile service” are not.<sup>228</sup>

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.”<sup>229</sup> “[I]nterconnected service,” in turn, means a “service that is interconnected with the public switched network”<sup>230</sup> and “gives subscribers the capability to communicate to or receive communication from all other users on the public switched network.”<sup>231</sup> “[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.”<sup>232</sup> 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.”<sup>233</sup>

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.<sup>234</sup> 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.’”<sup>235</sup> That’s because it does not interconnect with the public switched telephone network but instead a different network—the

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227. Communications Act § 332(c)(1)(A), 47 U.S.C. § 332(c)(1)(A) (2012) (“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.”).

228. *Id.* § 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.”).

229. *Id.* § 332(d)(1).

230. *Id.* § 332(d)(2).

231. 47 C.F.R. § 20.3 (2014).

232. *Id.*

233. Communications Act § 332(d)(3), 47 U.S.C. § 332(d)(3) (2012).

234. *Wireless Broadband Internet Access Order*, *supra* note 50, 22 FCC Rcd. at 5901.

235. *Id.* at 5916, para. 41.

Internet.<sup>236</sup> 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.”<sup>237</sup>

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 carriers, whereas providers of other mobile services are exempt from common carrier status.”<sup>238</sup> The court recognized what it described as section 332’s “statutory exclusion of mobile-internet providers from common carrier status.”<sup>239</sup> And it noted that, when read in conjunction with the Communications Act’s separate prohibition on treating information service providers as common carriers, mobile broadband Internet access service providers are “statutorily immune, perhaps twice over, from treatment as common carriers.”<sup>240</sup> The D.C. Circuit in *Verizon* put it even more bluntly: The “treatment of mobile broadband providers as common carriers would violate section 332.”<sup>241</sup>

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.<sup>242</sup> 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 North American Numbering Plan (NANP) endpoints”<sup>243</sup> 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.<sup>244</sup> A service is classified based on its *own* functions and properties,<sup>245</sup> and there is no question that a subscriber to

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236. *Id.* at 5916, 5917, paras. 41, 45 & n.118.

237. Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, *Second Report and Order*, FCC 11-52, 26 FCC Rcd. 5411, 5431, para. 41 (2011).

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

239. *Id.* at 548.

240. *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’”).

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

242. 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.”).

243. *Order, supra* note 25, at paras. 400–01.

244. *Wireless Broadband Internet Access Order, supra* note 50, 22 FCC Rcd. at 5917–18, para. 45.

245. *See, e.g.,* Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection under Section 251 of the

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,<sup>246</sup> so while VoIP might be an interconnected service, mobile broadband is not.<sup>247</sup>

The *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 using NANP numbers and those using public IP addresses,”<sup>248</sup> 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.

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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”).

246. *Wireless Broadband Internet Access Order*, *supra* note 50, 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”).

247. *Id.* at 5917–18, paras. 45–46.

248. *See Order*, *supra* note 25, at para. 401.

## 1. Redefining 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 NANP but also those that use "public IP addresses."<sup>249</sup> 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."<sup>250</sup> 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."<sup>251</sup> 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."<sup>252</sup> 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."<sup>253</sup> And in 1992, the FCC characterized its cellular service policy as "encourag[ing] the creation 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."<sup>254</sup>

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249. *Id.* at para. 391.

250. *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))).

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

252. *Ad Hoc Telecomms. Users Comm. v. FCC*, 680 F.2d 790, 793 (D.C. Cir. 1982).

253. *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, para. 3 (Fed.-State Jt. Bd. 1985).

254. *Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service*, *Report and Order*, FCC 91-400, 7 FCC Rcd. 719, 720, para. 9 (1992); *see also Provision of Access for 800 Service*, *Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking*, FCC 91-249, 6 FCC Rcd. 5421, 5421 n.3 (1991) ("800

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."<sup>255</sup> Still others teed up defining the term to "include all networks."<sup>256</sup> But the Commission said no, and tied its definition of the public switched network to "the traditional local exchange or interexchange switched network."<sup>257</sup> In other words, the agency recognized that "Congress intended [the term] to have its established meaning,"<sup>258</sup> which in this case means the public switched telephone network—not the Internet.<sup>259</sup>

In the twenty years since the FCC defined the term, Congress has amended the Communications Act—and section 332—numerous times.<sup>260</sup> 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."<sup>261</sup>

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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, *Notice of Proposed Rulemaking*, FCC 90-376, 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), *available at* <http://apps.fcc.gov/ecfs/document/view?id=60001010832> (collecting authorities).

255. Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, *Second Report and Order*, FCC 94-31, 9 FCC Rcd. 1411, 1434, para. 53 (1994) [hereinafter *CMRS Second Report and Order*].

256. *Id.*

257. *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, supra* note 25, 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, supra* note 255, 9 FCC Rcd. at 1436–37, para. 59.

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

259. 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. NO. 103-213, at 495 (1993) (Conf. Rep.) (emphasis added), *as reprinted in* 1993 U.S.C.C.A.N. 1088, 1184.

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

261. *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*

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.”<sup>262</sup> This provision makes clear that Congress knows the difference between “the public switched network” and the “public Internet.” The Commission must respect that distinction.<sup>263</sup>

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.”<sup>264</sup> 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.<sup>265</sup>

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v. Comm’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 *United States v. Correll*, 389 U.S. 299, 305–06 (1967))); *City of Pleasant Grove v. United States*, 479 U.S. 462, 468 (1987) (Where Congress is aware of an administrative interpretation when it revises a statute, it “implicitly approve[s] it.”).

262. 47 U.S.C. § 1422(b)(1) (2012) (originally enacted by Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6202, 126 Stat. 156).

263. 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)).

264. 47 C.F.R. § 20.3 (2014) (emphasis added).

265. 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*, *supra* note 25, at n. 1175; see also 47 C.F.R. § 20.3 (2014) (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*,

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.

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.”<sup>266</sup> 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.”<sup>267</sup> 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.”<sup>268</sup>

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*supra* note 25, 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, supra* note 25, 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, supra* note 25, at para. 402 & n.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.

266. *Order, supra* note 25, at para. 396.

267. Communications Act § 332(d)(2), 47 U.S.C. § 332(d)(2) (2012).

268. *Id.* § 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.

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."<sup>269</sup>

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.<sup>270</sup> In doing so, the Commission rejected all calls to define the terms so expansively as to include the Internet or otherwise fundamentally alter them.<sup>271</sup>

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 new position.<sup>272</sup> But this claim also misses the mark. The FCC in 1994 did not broaden the scope of "the public switched network" beyond the traditional local exchange or interexchange switched network.<sup>273</sup> Instead, it made 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 service simply because it is not offering "telephone" service.<sup>274</sup> The Commission could

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269. *City of Arlington, Tex. v. FCC*, 133 S.Ct. 1863, 1874 (2013); *see also* *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

270. *CMRS Second Report and Order*, *supra* note 255, 9 FCC Rcd. at 1436, para. 59.

271. *See id.* at 1433–34, para. 53.

272. *Order*, *supra* note 25, at paras. 391, 396, & note 1145 (citing *CMRS Second Report and Order*, *supra* note 255, 9 FCC Rcd. at 1436, para. 59).

273. *CMRS Second Report and Order*, *supra* note 255, 9 FCC Rcd. at 1433–34, para. 53.

274. *See CMRS Second Report and Order*, *supra* note 255, 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

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.<sup>275</sup> 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.<sup>276</sup> 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.<sup>277</sup>

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

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providers to design their systems to avoid commercial mobile radio service regulation.”); *see also Wireless Broadband Internet Access Order*, *supra* note 50, 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”).

275. *See CMRS Second Report and Order*, *supra* note 255, 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).

276. *See Order*, *supra* note 25, at n.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).

277. 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*, *supra* note 25, 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*, *supra* note 255, 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.

## 2. Redefining Functional Equivalence

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.<sup>278</sup> 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. 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.<sup>279</sup> 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.”<sup>280</sup>

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.”<sup>281</sup>

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.

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278. See *Order*, *supra* note 25, at paras. 404–05.

279. See 47 C.F.R. § 20.9(14) (2014); see also *CMRS Second Report and Order*, *supra* note 255, 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).

280. See 47 C.F.R. § 20.9(14)(i) (2014).

281. See 47 C.F.R. § 20.9(14)(ii)(B) (2014).

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.<sup>282</sup> 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.<sup>283</sup>

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."<sup>284</sup> But the Commission's new test for determining 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.<sup>285</sup> 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.<sup>286</sup> 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 to treat mobile broadband Internet

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282. See *Order*, *supra* note 25, at paras. 400–01, 405, 407.

283. 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*, *supra* note 50, 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").

284. *CMRS Second Report and Order*, *supra* note 255, 9 FCC Rcd. at 1447, para. 79.

285. See *Order*, *supra* note 25, at para. 407.

286. See *id.* at para. 403.

access service as a telecommunications service subject to common carriage requirements.<sup>287</sup>

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 be 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.<sup>288</sup>

### C. *The Telecommunications Act (Section 706)*

The Commission also relies on section 706 of the Telecommunications Act, claiming that Congress expressly delegated authority to the FCC through this provision.<sup>289</sup> 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 removing barriers to infrastructure investment

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287. See *id.* at para. 403 (citing Communications Act § 332, 47 U.S.C. § 332 (2012) (prohibiting the common carrier treatment of private mobile service providers) and Communications Act § 3, 47 U.S.C. § 153 (2012) (requiring the common carrier treatment of providers of telecommunications services)).

288. 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), 47 U.S.C. § 332(c)(2) (2012). One of those purposes is certainly treating it as such for the purpose of avoiding manufactured “statutory contradictions.”

289. See, e.g., *Order*, *supra* note 25, at paras. 275–82.

and by promoting competition in the telecommunications market.<sup>290</sup>

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”<sup>291</sup> or “the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section”<sup>292</sup>), 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”<sup>293</sup>). 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”<sup>294</sup>) 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”<sup>295</sup>). 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,”<sup>296</sup> or “the Commission shall have the power to require by subpoena the attendance and testimony of witnesses”<sup>297</sup>). 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

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290. Telecommunications Act §§ 706(a)–(b), 47 U.S.C. §§ 1302(a)–(b) (2012).

291. Communications Act § 227(b)(2), 47 U.S.C. § 227(b)(2) (2012).

292. *Id.* § 251(d)(1).

293. *Id.* § 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 id.* § 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 . . .”).

294. *Id.* § 205(a).

295. *Id.* § 205(a).

296. *Id.* § 213(b).

297. *Id.* § 409(e).

comply with any of the provisions of this Act . . . shall be liable to the United States for a forfeiture penalty”<sup>298</sup> and “[t]he amount of such forfeiture penalty shall be assessed by the Commission . . . by written notice.”<sup>299</sup> 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.”<sup>300</sup>

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.<sup>301</sup> The Telecommunications Act established the FCC’s “regulatory forbearance” authority.<sup>302</sup> The Telecommunications Act also authorized the FCC to “remove barriers to infrastructure investment,” specifically barriers to entry created by state or local laws,<sup>303</sup> and instructed it to identify and eliminate market entry barriers.<sup>304</sup> 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.”<sup>305</sup> In other words, Congress did in fact “invest[] the Commission with the statutory authority to carry out those acts” described in section 706<sup>306</sup>—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,<sup>307</sup> section 706 was not one of them.

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298. *Id.* § 503(b)(1).

299. *Id.* § 503(b)(2)(E).

300. *Id.* § 209.

301. Policy and Rules Concerning Rates for Dominant Carriers, *Second Report and Order*, FCC 90-314, 5 FCC Rcd. 6786 (1990).

302. Telecommunications Act § 401 (titled “Regulatory Forbearance” and inserting section 10 into Title I of the Communications Act).

303. *Id.* § 101 (inserting section 253 into Title II of the Communications Act).

304. *Id.* § 101 (inserting section 257 into Title II of the Communications Act).

305. *Id.* § 101 (inserting Part II, §§ 251–61, into Title II of the Communications Act).

306. *Verizon v. FCC*, 740 F.3d 623, 638 (D.C. Cir. 2014) (quoting *Open Internet Order*, *supra* note 111, 25 FCC Rcd. at 17969, para. 120).

307. 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

Instead, it was left as a freestanding provision of federal law.<sup>308</sup> 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”<sup>309</sup>—and so the “most important[.]” limit the *Verizon* court thought applied to section 706 does not in fact exist.<sup>310</sup> 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 authority . . . would allow us to forbear from applying” certain provisions in the Act even when section 10 would not let us do so.<sup>311</sup> 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?<sup>312</sup>

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.”<sup>313</sup> 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

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“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).

308. For other examples, see Telecommunications Act §§ 202(h), 704(c).

309. Communications Act § 2(a), 47 U.S.C. § 152(a) (2012).

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

311. Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC 98-188, 13 FCC Rcd. 24012, 24046, para. 73 (1998) [hereinafter *Advanced Services Order*].

312. 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. Am. Trucking Ass’n, Inc.*, 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.

313. Telecommunications Act § 706(a), 47 U.S.C. § 1302(a) (2012).

and intrastate regulatory authority.<sup>314</sup> It empowers States to act but reserves authority for the FCC when they fail to do so.<sup>315</sup> It authorizes the FCC to preempt state authority.<sup>316</sup> And it even authorizes States to preempt the FCC.<sup>317</sup> 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”<sup>318</sup> and that the Commission will preempt States that impose “obligations on broadband service that are inconsistent with the carefully tailored regulatory scheme.”<sup>319</sup> 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!<sup>320</sup> 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.

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 forbore 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

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314. See, e.g., Communications Act § 2(a), 47 U.S.C. § 152(a) (2012) (“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 . . . .”).

315. See Communications Act §§ 214(e)(6), 252(e), 47 U.S.C. §§ 214(e)(6), 252(e) (2012).

316. See *id.* §§ 10(e), 253(d), 47 U.S.C. §§ 160(e), 253(d) (2012).

317. See *id.* § 224(c), 47 U.S.C. § 224(c) (2012).

318. *Order*, *supra* note 25, at para. 431.

319. *Id.* at para. 433.

320. To be fair, the *Order* suggests that States might have some role to play, at least with data collection, see *id.* 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.

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.<sup>321</sup> 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."<sup>322</sup> And so the Commission has consulted section 706 in resolving one forbearance petition<sup>323</sup> after another<sup>324</sup> after another.<sup>325</sup> The Commission has also looked to section 706 when employing its authorities under the Communications Act to promote local competition<sup>326</sup> and to remove barriers to infrastructure investment (such as the Commission's)

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321. 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*, *supra* note 25, at n. 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.

322. *Advanced Services Order*, *supra* note 311, 13 FCC Rcd. at 24047, para. 77.

323. Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, *Memorandum Opinion and Order*, FCC 05-170, 20 FCC Rcd. 19415, 19469, para. 107 (2005), *aff'd sub nom.* Qwest Corp. v. FCC, 482 F.3d 471 (D.C. Cir. 2007).

324. Petition of ACS of Anchorage, *Memorandum Opinion and Order*, FCC 07-149, 22 FCC Rcd. 16304, 16356, para. 118 (2007).

325. Petition of the Embarq Local Operating Companies for Forbearance et al. *Memorandum Opinion and Order*, FCC 07-184, 22 FCC Rcd. 19478, 19503-04, para. 46 (2007), *aff'd sub nom.* Ad Hoc Telecomms. Users Comm. V. FCC, 572 F.3d 903 (D.C. Cir. 2009).

326. Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, FCC 99-238, 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, *Memorandum Opinion and Order*, FCC 04-267, 19 FCC Rcd. 22404, 22426-27, paras. 36-37 (2004).

authority over pole attachments).<sup>327</sup> 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 intended to ensure" that the bill achieves its intended infrastructure objective.<sup>328</sup> 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]."<sup>329</sup> 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.<sup>330</sup> 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.

### III. CONCLUSION

We often forget that within a generation—a blink of history's eye—the Internet has fundamentally transformed how people in the United States and around the globe live. This digital miracle, made possible by the free market, has lifted quality of life, spirits, incomes, and horizons for people from every background. And it simply wasn't broken, as even the FCC conceded.

This is why I have called net neutrality a solution that won't work to a problem that doesn't exist. And this is why, in my view, the FCC's regulations are not a model for the future. They are a relic of the past. Time

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327. Implementation of Section 224 of the Act; A National Broadband Plan for Our Future; *Report and Order and Order on Reconsideration*, FCC 11-50, 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, *Notice of Proposed Rulemaking*, FCC 07-187, 22 FCC Rcd. 20195, 20209, para. 36 (2007).

328. S. REP. NO. 104-23, at 50–51 (1995); see *Verizon v. FCC*, 740 F.3d 623, 639 (D.C. Cir. 2014).

329. See S. 652, 104th Cong. § 304(b) (1995) (contained in "Title III—An End to Regulation").

330. S. REP. NO. 104-230, at 210 (1996).

will tell whether these regulations are deemed to comport with the law. But we can already draw an unfortunate policy lesson: the bipartisan era in which the Internet was seen as a vibrant and competitive free market, unfettered by heavy-handed regulation, has come to an end.