

The FCC’s Knowledge Problem: How to Protect Consumers Online

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* Commissioner, Federal Trade Commission. I would like to thank Neil Chilson for his contributions to this essay. The views expressed here are solely my own and do not necessarily represent the views of the Commission or any other individual Commissioner. Portions of this essay were adapted from a keynote address at the MaCCI Law and Economics Conference on the Future of the Internet. Maureen K. Ohlhausen, Comm’r, Fed. Trade Comm’n, *The Open Internet: Regulating to Save the Unregulated Internet?*, Remarks Before the MaCCI Law and Economics Conference on The Future of the Internet (Oct. 26, 2012), available at http://www.ftc.gov/sites/default/files/documents/public_statements/open-internet-regulating-save-unregulated-internet/121026mannheim_0.pdf. In addition, in 2006, while Director of the Office of Policy Planning at the FTC, I spearheaded a task force to research and evaluate issues surrounding Internet access and network neutrality. See Fed. Trade Comm’n, *Broadband Connectivity Competition Policy*, FTC Staff Report (2007), available at <http://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf>.

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The Federal Communication Commission (FCC) has long searched for a legally sustainable way to adopt and enforce network neutrality regulation. The U.S. Court of Appeals for the District of Columbia Circuit added another detour on this path with its January 2014 decision in *Verizon v. FCC*,¹ and the FCC responded in February 2015 with a controversial action that, among other things, reclassifies broadband as a common carrier service subject to utility-style regulation under Title II of the Communications Act of 1934. Over the course of the FCC's journey, much has changed in broadband technology and the broadband marketplace. The *Verizon* decision offered policymakers a chance to take stock of these changes and to consider alternatives to regulation – a chance the FCC rejected. Imposing a set of prescriptive regulations—whether involving speeds or prices—on the dynamic and robust online environment is problematic and, ironically, could impede deployment of the Internet and harm consumers. To protect consumers online, we need informed, flexible, and fact-based enforcement supplemented with self-regulation using technical standards developed through consensus-based, multi-stakeholder organizations of engineers, consumers, and businesspeople. To the extent the government is involved, the Federal Trade Commission (FTC) model of enforcement, advocacy, and industry and consumer education is the better approach that will allow market forces to maximize consumer welfare.

Below, I first describe a framework for thinking about regulation of fast-changing industries and compare and contrast the FCC and the FTC's approaches. Next, I briefly summarize the history of the net neutrality issue, including the FCC's 2010 Open Internet Order,² the subsequent *Verizon* decision striking it down, and the most recent action to reclassify broadband as a Title II service.³ Lastly, I offer some observations about the reclassification decision and its aftermath and suggest a path forward for protecting consumers online.

I. A FRAMEWORK FOR THINKING ABOUT REGULATION: COMPARING THE FCC AND THE FTC

All regulatory agencies face a fundamental knowledge problem, but they use different strategies to deal with that problem, with varying levels of success. Before analyzing how different regulatory paradigms could affect the net neutrality issue, I will first explore the knowledge problem itself and compare how the FCC and the FTC each approaches that problem.

1. 740 F.3d 623 (D.C. Cir. 2014).

2. See Preserving the Open Internet, *Report and Order*, FCC 10–201, 25 FCC Rcd 17905 (2010) [hereinafter *2010 Open Internet Order*], *aff'd in part, rev'd in part sub nom.* *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

3. See Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, FCC 15-24 (Mar. 12, 2015).

A. *The Regulator's Knowledge Problem*

A regulation dictates how the regulated entity is to act, or not act, in specific situations. For example, the *Open Internet Order* prohibited wireline broadband service providers from blocking subscribers' access to content, except in limited circumstances.⁴ When regulators regulate, they are making decisions for others by either prohibiting or requiring certain actions by market participants. Regulators make these decisions based, at least in part, on the relevant information they can gather about the "circumstances of time and place" these entities may face now or in the future.⁵ As a result, all regulators encounter a significant knowledge problem.⁶ As economist and Nobel laureate F. A. Hayek pointed out in his famous essay, *The Use of Knowledge in Society*, such centralized decision-makers have difficulty gathering the knowledge necessary to make good decisions for others, for several reasons.⁷

First, such knowledge is "initially dispersed among many different individuals."⁸ Each regulated entity faces unique circumstances and must make choices and evaluate tradeoffs among its options, based on the information it has at hand.⁹ And every regulated entity holds unique information relevant to its specific situation at that time. Gathering even a static snapshot of all this dispersed knowledge is logistically impossible except perhaps in the smallest and simplest domains. As such, regulators attempt to compensate for the difficulty of collecting all the relevant information by extrapolating from sampled, averaged, or aggregated data.¹⁰

A second difficulty facing centralized decision makers is that many types of relevant knowledge are latent and therefore not amenable to collection or summarization.¹¹ Individuals may not realize that the information they possess is important to the solution of a larger issue and therefore may not provide the information. Or they may not be able to detail such information in a timely manner. For example, think about your current job: If you were promoted tomorrow and had to leave detailed instructions on how to do your job, how long would those instructions take you to write? How much information would not be captured? How likely is it that you

4. See *2010 Open Internet Order*, *supra* note 2, at 17942, para. 63, *aff'd in part, rev'd in part sub nom.* Verizon v. FCC, 740 F.3d 623, 636–42 (D.C. Cir. 2014).

5. F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 521 (1945).

6. Although I address agency regulators specifically in this essay, legislators face similar challenges in their efforts to create legislation. See 1 F. A. HAYEK, *RULES AND ORDER, IN LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY* 124 (1973).

7. Hayek, *supra* note 5, at 523. Hayek's goal in that essay was to explain the general economic problem of allocating resources to their best uses, and he demonstrated how prices serve as a coordinating mechanism that resolves that problem. See *generally id.*

8. *Id.* at 521.

9. *Cf. id.*

10. See *id.* at 523–24 (discussing economists' preoccupation with statistical aggregates).

11. *Id.* at 524.

would forget something that might be important to the next person? Even the simplest jobs require significant on-the-job training because it is too difficult to capture—or even recognize—every important day-to-day requirement.¹² Complex and abstract roles are even harder to summarize. For example, a network engineer's decision-making process about when to rebalance traffic loads on various servers may be the product of years of experience and may be difficult for even the engineer to explain. Regulation cannot capture such latent knowledge.¹³

Third, and perhaps most significantly, regulators make decisions that affect future behavior, where the “particular circumstances of time and place” lie temporally beyond the regulator's grasp.¹⁴ Regulation is necessarily based on information about the past and predictions about the future. Thus, the regulator's knowledge problem is most acute when regulating in a fast-changing factual environment—when guesses about the future are more likely to be incorrect.¹⁵ In such a situation, the collected knowledge quickly becomes stale. Indeed, if the regulator collects knowledge more slowly than the environment changes, even continuous information gathering cannot stop the regulator's knowledge from growing obsolete over time.¹⁶ This problem is especially acute when regulating industries that are characterized by disruptive change, because it is even more difficult to predict future effects when industry structures and paradigms transform over time.

Different regulatory bodies deal with these knowledge problems in different ways, based on a wide range of factors including workload, organizational structure, leadership, personnel, culture, political pressure, and perhaps most fundamentally, the guidance of their enabling statute.¹⁷ We can see these differences by looking at the very different approaches of the FCC and the FTC.

12. Yale Professor James C. Scott uses the Greek term “*mētis*” to describe this “practical knowledge,” or “the wide array of practical skills and acquired intelligence in responding to a constantly changing natural and human environment.” JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* 313 (1998).

13. *Id.* at 310 (“Formal order . . . is always and to some considerable degree parasitic on informal processes, which the formal scheme does not recognize, without which it could not exist, and which it alone cannot create or maintain.”).

14. Hayek, *supra* note 5, at 521.

15. See Tim Wu, *Agency Threats*, 60 DUKE L.J. 1841, 1849 (2011) (“The problem is that, with so little known about the industry, issuing specific rules based on guesses about the future runs a grave risk of creating a bad law, or at least a law that is much worse than one issued after more development.”).

16. See *id.* at 1848.

17. For a discussion of the factors influencing bureaucratic decision-making, see JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* (1989).

B. *The FCC's Prescriptive, Ex Ante Regulatory Approach*

The FCC historically has taken a segmented approach to regulating different communications media, as contemplated by the Communications Act of 1934.¹⁸ Title I of the Act gives the FCC general jurisdiction over certain communications, but offers the agency little specific jurisdictional guidance.¹⁹ The other titles of the Act spell out more clearly the agency's authority and its treatment of communications based on their method of transmission. Thus, the Act classifies business models and outlines different requirements based on whether the business provides landline telephony (Title II),²⁰ radio transmission, including broadcast television, radio, and cellular telephony (Title III);²¹ or "cable services" like cable television (Title VI).²² Certain business offerings, including those classified under Title II, are considered "common carriage" and therefore face significant regulation, including rate regulation. With the convergence of various technologies—for instance, Voice over Internet Protocol (VoIP) competing with circuit-switched telephony or Internet Protocol Television (IPTV) competing with broadcast and cable—this siloed approach to regulation is increasingly out of step with reality.²³ In particular, the Communications Act of 1934, not surprisingly, did not contemplate the most extensive and widely-used communications network of today, the Internet.²⁴

When the FCC implements a statutory requirement or seeks to address a policy problem, it typically exercises its Administrative Procedure Act rulemaking authority,²⁵ under which it details, *ex ante*, the procedures that various types of regulated entities must follow.²⁶ The scope of such rulemakings is limited by the FCC's statutory authority.²⁷

18. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–620 (2012 & Supp. 2013)).

19. Communications Act of 1934 tit. I, §§ 1–12 (codified as amended at 47 U.S.C. §§ 151–162).

20. *Id.* tit. II, §§ 201–276 (codified as amended at 47 U.S.C. §§ 201–276).

21. *Id.* tit. III, §§ 301–399B (codified as amended at 47 U.S.C. §§ 301–399b).

22. *Id.* tit. VI, §§ 601–653 (codified as amended at 47 U.S.C. §§ 521–573).

23. See Randolph J. May, *Why Stovepipe Regulation No Longer Works: An Essay on the Need for a New Market-Oriented Communications Policy*, 58 FED. COMM. L.J. 103, 104–10 (2006).

24. The most significant revision to the Communications Act, the Telecommunications Act of 1996, included some provisions related to broadband and Internet services, but clearly did not anticipate the dominance of the Internet platform nor foresee how it would make obsolete the siloed approach. See generally Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 15 and 47 U.S.C.).

25. See 5 U.S.C. § 553 (2012).

26. F. A. Hayek, who closely examined the interaction between laws and liberty, would call these types of rules "commands" or "rules of organizations." Such rules of organizations differ from "rules of spontaneous orders," such as common law, that arise organically and evolve over time. See F.A. HAYEK, *supra* note 6, at 48–51.

27. See generally, Communications Act of 1934.

The history of the FCC can be fairly described as a series of regulatory attempts (typically rulemakings) to fit new technologies and business models into an increasingly out-of-date regulatory model.²⁸ Starting with the 1913 Kingsbury Commitment,²⁹ through the 1996 Telecommunications Act and its subsequent implementation,³⁰ Congress and the FCC constructed a regulatory framework that distinguishes among services based on their physical platform, business model, and geographic characteristics—distinctions that are increasingly irrelevant.³¹ Consequently, when considering the converging technologies and overlapping business models of an IP-based world, the FCC has struggled to deploy its prescriptive ex ante regulation tool in a manner that is both effective and legally sustainable.³²

This struggle should not be surprising. The FCC's prescriptive ex ante regulatory approach requires the agency to acquire significant knowledge about the present state and future trends of a very complex and rapidly evolving industry that, for the last thirty years (at least back to the breakup of Ma Bell), has been characterized by disruption. Statutory, procedural, and resource constraints make it impossible for the FCC to continually update the rules; thus, its rules are constantly falling out of sync with technological change—and, worse, forcing business and technological innovation to slow down to stay compliant.³³

Additionally, because the FCC's ex ante regulations are an attempt at the almost impossible task of predicting the future, some harms will occur that the agency never anticipated. For example, FCC-mandated payment rates to certain rural telephone companies, combined with advances in VoIP

28. Thus, many of the FCC's regulatory actions are examples of what I have referred to as the Procrustean problem with prescriptive regulation. See Maureen K. Ohlhausen, *The Procrustean Problem with Prescriptive Regulation*, March 18, 2014, available at https://www.ftc.gov/system/files/documents/public_statements/291361/140318fsf.pdf; Maureen K. Ohlhausen, *Three Regulatory Principles to Promote Innovation* (Mar. 2, 2015), available at https://www.ftc.gov/system/files/documents/public_statements/627591/150302ppiregreform.pdf.

29. The Kingsbury Commitment is the agreement settling an antitrust investigation of AT&T and is captured in a 1913 letter from AT&T Vice President Nathan Kingsbury to U.S. Attorney General James McReynolds. The Kingsbury Commitment "paved the way for the company's monopolization of the telephone industry." See e.g., GERALD W. BROCK, *THE TELECOMMUNICATIONS INDUSTRY: THE DYNAMICS OF MARKET STRUCTURE* 155 (1981); Ajit Pai, Comm'r, FCC, Remarks at TechFreedom's Forum on the 100th Anniversary of the Kingsbury Commitment (Dec. 19, 2013), available at <http://www.fcc.gov/document/pai-remarks-100th-anniversary-kingsbury-commitment>.

30. Telecommunications Act of 1996.

31. May, *supra* note 23, at 110–12.

32. See Richard S. Whitt, *Adaptive Policymaking: Evolving and Applying Emergent Solutions for U.S. Communications Policy*, 61 *FED. COMM. L.J.* 483, 555–58 (2009) (chronicling the FCC's challenges in regulating industries under archaic silos of authority).

33. See, e.g., Kevin Werbach, *No Dialtone: The End of the Public Switched Telephone Network*, 66 *FED. COMM. L.J.* 203, 207 (2014) (describing the IP transition's potential to reduce the costs associated with operating the legacy PSTN).

technology, incentivized so-called “traffic pumping” practices that cost national carriers (and ultimately, their customers) an estimated \$330 to \$440 million per year.³⁴ Conversely, regulations may prevent harmless or even beneficial practices. Examples of absent benefits are obviously hard to provide.³⁵ However, beneficial developments in the wake of deregulation in several industries provide some evidence that prescriptive regulation stunted such developments.³⁶ For example, the FCC’s move toward flexible use spectrum allocations created a wave of innovation, including the rise of wireless telephone technologies, suggesting that the previous limited use regime was hindering innovation.³⁷

In other cases, overly prescriptive ex ante rules simply impose costs with little consumer benefit. For example, in 2003, the FCC required every high-definition cable set-top box to include an IEEE 1394 (FireWire) port for media transfers and network connectivity, at the estimated cost of \$5 per set-top box.³⁸ Although consumers never embraced the IEEE 1394 standard—in part because it was soon eclipsed by USB, Ethernet, and other

34. See Connect Am. Fund, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 11-161, 26 FCC Rcd. 17663, 17876, para. 664 (2011) (citing Verizon estimate; another party estimated total cost of access stimulation at \$2.3 billion from 2006 to 2011).

35. See Susan E. Dudley, *Administrative Law & Regulation: Prospects for Regulatory Reform in 2011*, 11 ENGAGE 7 (2011), available at https://www.fed-soc.org/library/doclib/20110603_DudleyEngage12.1.pdf.

36. See generally ROBERT W. CRANDALL, BROOKINGS INST., *EXTENDING DEREGULATION: MAKE THE U.S. ECONOMY MORE EFFICIENT* (2007), available at http://www.brookings.edu/~media/research/files/papers/2007/2/28useconomics%20crandall%20opp08/pb_deregulation_crandall.

37. See, e.g., Amendment of the Comm’n’s Rules to Permit Flexible Serv. Offerings in the Commercial Mobile Radio Servs., *First Report and Order and Further Notice of Proposed Rule Making*, FCC 96-283, 11 FCC Rcd. 8965, 8975–76, paras. 21–22 (1996) (“[T]he market is the best predictor of the most desirable division of this spectrum [W]e are concerned that regulatory restrictions on use of the spectrum could impede carriers from anticipating what services customers most need, and could result in inefficient spectrum use and reduced technological innovation.”); Press Release, FCC, Wireless Bureau Chief Daniel Phythyon Hails Success of Market-Based Spectrum Policies (Sept. 11, 1997), available at http://transition.fcc.gov/Bureaus/Wireless/News_Releases/1997/nrw17037.html (“The FCC’s market-based spectrum policies have unleashed unprecedented competition and innovation in the wireless communications market”) (internal quotation marks omitted); Amendment of the Comm’n’s Rules with Regard to Commercial Operations in the 1695–1710 MHz, 1755–1780 MHz, and 2155–2180 MHz Bands, *Report and Order*, FCC 14-31, 29 FCC Rcd. 4610, 4625, para. 29 (2014), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-31A1_Rcd.pdf (“[O]ur secondary markets and flexible use policies are designed to facilitate the configuration of licenses in their most productive economic use.”).

38. Intel Corporation’s Petition for Waiver of 47 C.F.R. § 76.640(b)(4), *Petition for Waiver*, CS Docket No. 97-80, at 5 (Oct. 7, 2009), available at <http://apps.fcc.gov/ecfs/document/view?id=7020041020>.

standards—the requirement remained in place for approximately seven years, costing consumers millions of dollars.³⁹

In addition to preventing beneficial practices and imposing unnecessary costs, prescriptive ex ante regulations can also chill innovation. For example, if an innovative (and therefore, by definition, likely unanticipated) new product or service does not easily fit within an existing statutory or regulatory classification or framework, the innovator may be uncertain about how to comply with the law. This additional regulatory risk can be a significant barrier to venture capital investment.⁴⁰

The FCC has sought to address its knowledge problems by emphasizing, at various times, its intent to adopt “technologically neutral,” “performance-based,” and “flexible” regulation in a number of policy areas.⁴¹ These are all attempts to reduce the prescriptiveness of regulation in order to better accommodate technological change. However, these approaches still struggle with disruptive change that upsets industry structures. Even technology neutral, performance-based, flexible regulation can only flex so far. Furthermore, even with its best efforts, the FCC is

39. See *id.* The rule was adopted in October 2003 and removed in October 2010. See Implementation of Section 304 of the Telecomm. Act of 1996, *Fourth Further Notice of Proposed Rulemaking*, FCC 10-61, 25 FCC Rcd. 4303, 4311, para. 20 (2010), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-61A1_Rcd.pdf; see also Implementation of Section 304 of the Telecomm. Act of 1996, *Third Report and Order and Order on Reconsideration*, FCC 10-181, 25 FCC Rcd. 14657, 14678–79, para. 43 (2010), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-181A1_Rcd.pdf.

40. Sen. Rob Portman, Op-Ed., *The Regulatory Cliff Is Nearly as Steep as the Fiscal One*, WALL. ST. J., Aug. 16, 2012, available at <http://online.wsj.com/articles/SB10000872396390444772404577587310951310628>.

41. See, e.g., Promoting Interoperability in the 700 MHz Commercial Spectrum, *Report and Order and Proposed Modification*, FCC 13-136, 28 FCC Rcd. 15122, 15152 n.192 (2013), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-13-136A1_Rcd.pdf; FCC, BRINGING BROADBAND TO RURAL AMERICA: REPORT ON A RURAL BROADBAND STRATEGY, DA 09-2258, 24 FCC Rcd. 12791, 12850 n.330 (2009), available at https://apps.fcc.gov/edocs_public/attachmatch/DA-09-2258A1_Rcd.pdf (citing Federal-State Joint Board on Universal Service, *Report and Order*, FCC 97-157, 12 FCC Rcd. 8776, 8801–02, paras. 46–48 (1997), for the proposition that “[t]he Commission adopted the additional principle that federal support mechanisms should be competitively and technologically neutral.”); The Commercial Mobile Alert System, *Second Report and Order and Further Notice of Proposed Rulemaking*, FCC 08-164, 23 FCC Rcd. 10765, 10765–66 (2008), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-08-164A1.pdf (stating that the goal of the order is to implement the WARN Act in a technologically neutral manner); The Proposed Extension of Part 4 of the Comm’n’s Rules Regarding Outage Reporting to Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers, *Notice of Proposed Rulemaking*, FCC 11–74, 26 FCC Rcd. 7166, 7221, para. 45 (2011), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-74A1_Rcd.pdf (“[T]he choice of performance-based, as opposed to design-based, degradation characteristics . . . and the corresponding thresholds chosen to trigger the outage reporting will not unduly burden smaller entities.”).

ultimately constrained by the outdated silo structure of the Communications Act itself.⁴²

C. *The FTC's Flexible, Ex Post Enforcement-Based Approach*

The FTC model is quite different from the FCC's. Instead of mandating regulatory silos, section 5 of the FTC Act—the agency's enabling statute—directs the FTC to prevent and punish “unfair methods of competition” and “unfair and deceptive acts or practices” across all industries (with a few exceptions).⁴³ Although the FCC's regulations generally set the boundaries of what certain types of entities can do, the FTC is more general and normative in its design.⁴⁴ The FTC Act prohibits deceptive or unfair practices for all entities (except those specifically carved out of its jurisdiction, such as common carriers and banks),⁴⁵ but generally permits everything else. Additionally, the FTC's process is enforcement-centric rather than rulemaking-centric.⁴⁶ As such, it is *ex post* rather than *ex ante*—case-by-case rather than one-size-fits-all.

Because an enforcement action requires a complaint to move ahead, the FTC typically focuses on actual, or at least specifically alleged, harms, rather than trying to predict future harms more generally.⁴⁷ Specifically, staff investigations into consumer complaints or a merger filing can serve as the basis for an initial theory of harm, which is then investigated, analyzed using the best available legal and economic tools, tested against the evidence, modified, and re-tested. With this evidence-based process, the FTC may conclude either that the initial theory and subsequent iterations were deficient and drop the matter, or decide there is reason to believe a violation of law exists and pursue the matter further. This enforcement paradigm allows the FTC to approach each complaint or issue anew and to apply broad norms to the facts before it. It also allows the FTC the prosecutorial flexibility to try to maximize consumer welfare.

These structural differences make the FTC's enforcement process less vulnerable to the systemic knowledge problems of the FCC's prescriptive, *ex ante* rulemaking approach. First, rather than having to collect detailed knowledge about an entire industry, the FTC need only gather enough information about the specific parties to the dispute and their behaviors in the relevant market. And the FTC has significant investigatory authority to

42. See *supra* notes 23–32 and accompanying discussion.

43. 15 U.S.C. § 45(a)(1) (2012).

44. See S. REP. NO. 63-597, at 13 (1914) (in drafting FTC Act, Senate Committee on Interstate Commerce “[le]ft it to the commission to determine what practices were unfair”).

45. 15 U.S.C. § 45(a)(2) (2012).

46. See 15 U.S.C. § 57b-3 (2012) (imposing requirements on FTC rulemaking that are far more stringent than APA's requirements for informal agency rulemaking).

47. 15 U.S.C. §45(b) (2012).

gather such information.⁴⁸ Second, collecting such information is simpler because much of the necessary information will be in the hands of the parties to the case. Third, even in rapidly changing industries, the FTC's decision to move forward on a case will directly affect only those parties to the specific case.⁴⁹ When the FTC encounters future matters, it can at that point consider any relevant changes in the environment. Thus, the FTC can apply its longstanding consumer protection and competition principles to new situations in an evolutionary, common-law-like approach.⁵⁰

There is another significant benefit to the FTC's structure and approach. The agency's broad mandate and case-by-case approach, in renowned political scientist James Q. Wilson's words, "permit[s] the agency to behave in ways that would not stimulate the formation of a hostile interest group."⁵¹ In particular, because the FTC's case-by-case enforcement approach avoids taking on entire industries, it creates little incentive for industry-wide efforts to influence policy outcomes through rent-seeking or other behavior. This point is proven in the breach: as Wilson points out, when the FTC stepped beyond this approach in the 1970s by issuing industry-wide prescriptive rules such as the Funeral Industry Practice Rule⁵² and the Used Car Rule,⁵³ those actions did face active, hostile, and powerful opposition.⁵⁴

Thus, the FTC's approach facilitates what technology policy scholar Adam Thierer calls "permissionless innovation," or the "anti-precautionary principle," more effectively than a prescriptive rulemaking approach.⁵⁵ Indeed, as the Internet has become an increasingly integral part of society, the FTC's enforcement-centric approach has enabled it to serve an increasingly large role in protecting consumers and competition online even while the industry has continued to innovate. In fact, the FTC is already addressing major Internet-centric concerns, including new issues in privacy, fraud, advertising and other consumer protection issues, along with competition issues. The FTC also has reviewed Internet-related mergers and acquisitions such as Google's acquisition of AdMob,⁵⁶ enforced legislation

48. See, e.g., 15 U.S.C. § 57b-1 (2012) (empowering the FTC to serve civil investigative demands with respect to unfair or deceptive acts or practices).

49. The FTC's actions will, however, indirectly affect other parties who may change their behavior or future plans to avoid liability for conduct similar to that conduct the Commission challenged.

50. See generally, Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583 (2014).

51. WILSON, *supra* note 17, at 82.

52. Funeral Industry Practices Rule, 16 C.F.R. §§ 453.1-453.9 (2013).

53. Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. §§ 455.1-455.7 (2013).

54. WILSON, *supra* note 17, at 83 (citing THE FEDERAL TRADE COMMISSION SINCE 1970 169-73 (Kenneth W. Clarkson & Timothy J. Muris eds., 1981)).

55. See generally, ADAM THIERER, PERMISSIONLESS INNOVATION: THE CONTINUING CASE FOR COMPREHENSIVE TECHNOLOGICAL FREEDOM (2014).

56. FED. TRADE COMM'N, STATEMENT OF THE COMMISSION CONCERNING GOOGLE/ADMOb, FTC Docket No. 101-0031 (2010), available at

such as the Children's Online Privacy Protection Act,⁵⁷ and investigated competition issues relating to Internet search.⁵⁸

The FTC's settlement with TracPhone and a similar pending case against AT&T provide particularly apt examples of the FTC's ability to apply longstanding consumer protection principles to protect consumers from harmful practices by broadband ISPs.⁵⁹ The complaints in these cases alleged that the companies unfairly and deceptively throttled mobile data speeds for customers to whom it had promised "unlimited" data.⁶⁰ According to the complaints, the companies would slow a subscriber's data speeds by up to 90%, not based on network congestion but simply whenever that subscriber exceeded an arbitrary data use threshold in a single billing cycle.⁶¹ The FTC filed this case after gathering the relevant facts using its civil investigative demand authority, analyzing these facts to understand the throttling practices, and performing an economic analysis of the resulting consumer harm.

These examples demonstrate that the FTC's flexible, normative, and rigorously fact-based approach to enforcement is a good fit for overseeing the dynamic Internet and related industries.

II. NET NEUTRALITY AND THE FCC: A CASE STUDY IN REGULATORY DIFFICULTY

Having outlined the general regulatory challenge and highlighted the differences between the FCC and the FTC's regulatory approaches, I now turn to the specific topic of net neutrality. The FCC's history in addressing net neutrality concerns is a case study in the difficulties of regulating a dynamic industry through ex ante, prescriptive regulation.

http://www.ftc.gov/sites/default/files/documents/closing_letters/google-inc./admob-inc/100521google-admobstmt.pdf.

57. 15 U.S.C. §§ 6501–6508 (2012); *see also* Children's Online Privacy Protection Rule, 16 C.F.R. §§ 312.1–.13 (2013).

58. *See, e.g.*, FED. TRADE COMM'N, STATEMENT OF THE FEDERAL TRADE COMMISSION - IN THE MATTER OF MOTOROLA MOBILITY LLC AND GOOGLE INC., FTC Docket No. 121-0120 (2014),

https://www.ftc.gov/system/files/documents/public_statements/410931/130103googlemotorolastmtoftcomm.pdf.

59. FED. TRADE COMM'N, PREPAID MOBILE PROVIDER TRACPHONE TO PAY \$40 MILLION TO SETTLE FTC CHARGES IT DECEIVED CONSUMERS ABOUT 'UNLIMITED' DATA PLANS, Jan. 28, 2015, <https://www.ftc.gov/news-events/press-releases/2015/01/prepaid-mobile-provider-tracfone-pay-40-million-settle-ftc>; FED. TRADE COMM'N, FTC SAYS AT&T HAS MISLED MILLIONS OF CONSUMERS WITH 'UNLIMITED' DATA PROMISES, Oct. 28, 2014, <http://www.ftc.gov/news-events/press-releases/2014/10/ftc-says-att-has-misled-millions-consumers-unlimited-data>

60. Complaint at 4, paras. 15-16, *FTC v. AT&T Mobility LLC*, No. 14-cv-04785 (N.D. Cal. Oct. 28, 2014).

61. *Id.* at 5, para. 20.

A. What is Net Neutrality?

The D.C. Circuit's decision in *Verizon v. FCC* is the latest judicial volley in a long-standing public policy debate over the neutrality of the Internet, or "net neutrality." Net neutrality as a policy goal is notoriously difficult to define, in part because the goal has evolved substantially over the course of the debate. Several authors have comprehensively documented this shifting definition of net neutrality, which I will not duplicate here.⁶² In broad terms, however, net neutrality is the concept that access to the Internet should be provided on equal, nondiscriminatory terms for all content providers and consumers.⁶³ In 2007, as Director of the FTC's Office of Policy Planning, I led the FTC's inquiry into net neutrality and the release of the subsequent report, "Broadband Connectivity Competition Policy."⁶⁴ Based in part on my experience in leading that effort, I will briefly explain the concerns that animate each side in this debate.

1. Proponents of Net Neutrality Regulation

Net neutrality advocates focus on certain characteristics of the early Internet and express fears that the Internet of the future will be worse for lacking those characteristics. Specifically, they emphasize the Internet's "end-to-end architecture," which carries content between users and servers at the "edge" of the Internet on a "first-in, first-out" or "best efforts" basis. Advocates describe this approach as not just an engineering solution, but also a fundamental philosophical principle.⁶⁵ Professors Mark Lemley and Lawrence Lessig explain this viewpoint as follows: "While the e2e [end-to-end] design principle was first adopted for technical reasons, it has important social and competitive features as well. E2e expands the competitive horizon by enabling a wider variety of applications to connect to and to use the network."⁶⁶

62. See, e.g., Christopher S. Yoo, *Network Neutrality and the Need for a Technological Turn in Internet Scholarship* (Pub. L. & Legal Theory Research Paper Series, Research Paper No. 12-35 2012), available at <http://ssrn.com/abstract=2063994>; see also Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141, 145 (2003) (defining a "neutral network" as one that does not "favor one application . . . over others").

63. See Wu, *supra* note 62, at 145.

64. FED. TRADE COMM'N, BROADBAND CONNECTIVITY COMPETITION POLICY, FTC STAFF REPORT 5 (2007) [hereinafter FTC NET NEUTRALITY REPORT], available at <http://www.ftc.gov/reports/broadband/v070000report.pdf>.

65. See David D. Clark, *The Design Philosophy of the DARPA Internet Protocols*, 18 COMPUTER COMM. REV. 106, 106-07 (1988), available at <http://nms.csail.mit.edu/6829-papers/darpa-internet.pdf>; FTC NET NEUTRALITY REPORT, *supra* note 64; see also J.H. Saltzer et al., *End-to-End Arguments in System Design*, 2 ACM TRANSACTIONS ON COMPUTER SYS. 277 (1984).

66. Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 931 (2001).

Network neutrality advocates see the success of content and applications providers like Google, Netflix, and Facebook as contingent on these fundamental design principles, and especially the Internet's end-to-end architecture.⁶⁷ In particular, many successful "edge" providers are concerned that owners of the underlying infrastructure could engage in anticompetitive hold-up, either by cutting off access to users or to other networks, by charging high prices for transport, or by providing better services to one content provider instead of its competitor either for a fee or because of a business affiliation.⁶⁸ As explained in the FTC broadband report, content providers worry about "(1) blockage, degradation, and prioritization of content and applications; (2) vertical integration by ISPs [Internet service providers] and other network operators into content and applications; . . . and (3) the diminution of political and other expression on the Internet."⁶⁹ These concerns over vertical integration in the industry are the main force propelling the FCC's efforts toward prescriptive, rule-based net neutrality regulations.⁷⁰

Net neutrality advocates generally support a "strong presumption in favor of preserving the architectural features that have produced this extraordinary innovation."⁷¹ They want government to protect these core design attributes by prohibiting certain types of behavior by network infrastructure owners.

2. Opponents of Net Neutrality Regulation

Opponents of net neutrality regulation question the validity of the narrative told by advocates.⁷² They describe how the Internet has never really been "neutral" in the sense that advocates portray the concept.⁷³ They

67. See, e.g., Brett M. Frischmann & Barbara Van Schewick, *Network Neutrality and the Economics of an Information Superhighway: A Reply to Professor Yoo*, 47 JURIMETRICS J. 383, 428 n.7 (2007).

68. Lawrence Lessig, *The Internet Under Siege*, FOREIGN POL'Y (Nov. 16, 2009), <http://foreignpolicy.com/2009/11/16/the-internet-under-siege/>.

69. FTC NET NEUTRALITY REPORT, *supra* note 64, at 5.

70. 2010 *Open Internet Order*, *supra* note 4, at 17918, para. 23, states that:

[A] broadband provider may act to benefit edge providers that have paid it to exclude rivals (for example, if one online video site were to contract with a broadband provider to deny a rival video site access to the broadband provider's subscribers). End users would be harmed by the inability to access desired content, and this conduct could lead to reduced innovation and fewer new services.

71. Lemley & Lessig, *supra* note 66, at 929.

72. See Richard Bennett, *Designed for Change: End-to-End Arguments, Internet Innovation, and the Net Neutrality Debate* (Info. Tech. & Innovation Found., 2009), available at <http://www.itif.org/files/2009-designed-for-change.pdf>; Douglas A. Hass, *The Never-Was-Neutral Net and Why Informed End Users Can End the Net Neutrality Debates*, 22 BERKELEY TECH. L.J. 1565 (2007).

73. Hass, *supra* note 72, at 1575–77.

also argue that “best-effort delivery” of information is not neutral in effect—certain types of services are harmed more than others by such a rubric.⁷⁴ Furthermore, they argue, the end-to-end architecture and the other design principles were engineering solutions to specific historical problems; as the problems have changed, it is appropriate for engineering solutions also to change.⁷⁵

Opponents of net neutrality rules are concerned that regulation, by its nature, is inflexible and would penalize innovation in an attempt to maintain the original design principles of the Internet.⁷⁶ They argue that Internet innovation has depended upon the latitude to experiment with new and different business models.⁷⁷ They point out that many pioneering Internet businesses were vertically integrated and thus would arguably violate modern network neutrality regulation were they still in business today.⁷⁸ They further argue that adopting rigid network neutrality rules would freeze the existing business environment in place and potentially prevent experimentation with different technologies and types of vertically-integrated businesses or business practices.⁷⁹ Regulation could also reduce many of the efficiencies of vertical integration (like eliminating double marginalization problems) and skew investment incentives.⁸⁰ Instead of allowing the market to guide investment dollars where needed and businesses to charge based on the best use of potentially scarce resources, like bandwidth, net neutrality opponents fear the effect of the government dictating many of these critical decisions.⁸¹ Thus, rather than prescriptive rules, opponents advocate more fact-intensive and flexible enforcement of widely acknowledged legal and economic norms, such as antitrust law and consumer protection law.⁸² They also question whether a systemic problem requiring expansive solutions even exists.⁸³

74. *See id.* at 1633.

75. Bennett, *supra* note 72, at 22–23.

76. *See id.* at 1567.

77. Thomas W. Hazlett & Joshua D. Wright, *The Law and Economics of Network Neutrality*, 45 *IND. L. REV.* 767, 770 (2012); *see also* Christopher S. Yoo, *What Can Antitrust Contribute to the Network Neutrality Debate?*, 1 *INT'L J. COMM.* 493, 517 (2007).

78. *See* Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 *GEO. L.J.* 1847, 1888 (2006) (“The failure of early proprietary services provided by America Online, CompuServe, and Prodigy attests to the market’s ability to discipline network owners who attempt to impose closed architectures on consumers who prefer open ones.”).

79. *Id.*

80. *See, e.g.*, George S. Ford, Thomas M. Koutsy & Lawrence J. Spiwak, *Network Neutrality and Foreclosing Market Exchange: A Transaction Cost Analysis* 19–20 (Phoenix Ctr., Pol’y Paper No. 28, 2007) available at <http://www.phoenix-center.org/pcpp/PCPP28Final.pdf>.

81. *See* Yoo, *supra* note 78, at 1902–04.

82. *See, e.g.*, FTC NET NEUTRALITY REPORT, *supra* note 64, at 69 n.314 (quoting Timothy Muris, former FTC Chairman).

83. *Id.* at 68–69.

B. *The FCC's History of Broadband Regulation: The Road to Reclassification*

1. Broadband as a Title I Information Service

The FCC's earliest regulatory approach to consumer Internet service was to treat it as a common carrier service. Telephone companies were not permitted to ban, tamper with, or differentiate between dial-up telephone ISPs, such as CompuServe or AOL.⁸⁴ The FCC used a different approach for always-on cable broadband Internet services. In 2002, it issued the *Cable Modem Order*, which deemed cable modem service to be neither a separate "telecommunications service" under Title II nor "cable service" under Title VI, but instead a largely unregulated "information service" under Title I.⁸⁵ The Supreme Court in 2005 upheld this decision and agreed that cable modem access is an interstate "information service" subject only to Title I.⁸⁶ The FCC then extended similar treatment to broadband access over telephone-based digital subscriber or "DSL" lines.⁸⁷

These classifications permitted the FCC to, in essence, deregulate Internet access. To maintain the possibility of future regulatory action, the FCC asserted ancillary jurisdiction over broadband providers under provisions like section 4(i) of the Act.⁸⁸ In 2005, the FCC acted on this putative authority and issued an Internet Policy Statement outlining certain Internet freedoms "to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers."⁸⁹ In 2008, the Commission alleged Comcast had violated this policy by slowing customers'

84. Deployment of Wireline Servs. Offering Advanced Telecomm. Capability, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC 98-188, 13 FCC Rcd. 24012, 24017-18, para. 11 (1998) [hereinafter *Advanced Services Order*] (finding that incumbent local exchange carriers are subject to various interconnection obligations under Title II).

85. Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, FCC 02-77, 17 FCC Rcd. 4798, 4802, para. 7, 4822-23, paras. 38-39 (2002) [hereinafter *2002 Cable Modem Order*], available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-02-77A1.pdf.

86. Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1000 (2005) (holding the *2002 Cable Modem Order* was a reasonable construction of the Communications Act by the FCC).

87. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Report and Order and Notice of Proposed Rulemaking*, FCC 05-150, 20 FCC Rcd. 14853, 14895-96, para. 79 (2005), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-05-150A1.pdf.

88. 47 U.S.C. § 154(i) (2012).

89. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Policy Statement*, FCC 05-151, 20 FCC Rcd. 14986, 14987-88, para. 4 (2005), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf; see also Appropriate Reg. Treatment for Broadband Access to the Internet over Wireless Networks, *Declaratory Ruling*, FCC 07-30, 22 FCC Rcd. 5901, 5901-02, para. 1 (2007), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-07-30A1.pdf.

use of peer-to-peer networking applications and ordered Comcast to cease and desist from the practice.⁹⁰ Comcast complied with the order but challenged the FCC's exercise of authority over network management practices.⁹¹ The D.C. Circuit sided with Comcast, concluding the FCC's actions were "flatly inconsistent" with the law, in large part because the agency had linked its ancillary jurisdiction over Comcast's actions to mere statements of policy in the Act rather than to sections of the Act expressly delegating authority.⁹²

With its authority to impose net neutrality requirements on broadband providers called into question, then-Chairman Genachowski proposed a "Third Way" to shore up the FCC's position.⁹³ Under this approach, the agency would reclassify the transmission component of "broadband services" as "telecommunications services," allowing the FCC to exercise direct jurisdiction over network management under Title II.⁹⁴ The FCC would then forebear from applying certain Title II obligations on broadband service to lighten the regulatory load.⁹⁵ Congress expressed bipartisan, widespread concern with the Third Way proposal, which led the FCC to argue for yet other bases for its network neutrality jurisdiction—Section 706 of the Telecommunications Act of 1996 and ancillary jurisdiction related to additional specific sections of Titles II, III, and VI.⁹⁶

Based on this new theory of authority, the agency adopted the *Open Internet Order* in December 2010 with new network neutrality rules. Those rules provided that: (1) ISPs must be transparent and disclose their network management practices; (2) both wireless and fixed network owners may not block lawful applications or services, except for purposes of reasonable network management; and (3) fixed broadband providers may not

90. Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp., *Memorandum Opinion and Order*, FCC 08-183, 23 FCC Rcd. 13028, 13050–51, para. 41 (2008), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-08-183A1.pdf, vacated in part *sub nom.* Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

91. *Comcast*, 600 F.3d at 644–45; Cecilia Kang, *Court Rules for Comcast over FCC in 'Net Neutrality' Case*, WASH. POST, Apr. 7, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/06/AR2010040600742.html>.

92. *Comcast*, 600 F.3d at 655, 661.

93. Julius Genachowski, Chairman, FCC, *The Third Way: A Narrowly Tailored Broadband Framework*, (May 6, 2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297944A1.pdf.

94. *Id.*

95. See 47 U.S.C. § 160 (2012) (requiring the FCC to forbear from Title II regulations that, if imposed on common carriers, are not necessary to protect consumers or the public interest).

96. See Robert M. McDowell, Op-Ed., *The FCC's Threat to Internet Freedom*, WALL ST. J., Dec. 19, 2010, <http://www.wsj.com/articles/SB10001424052748703395204576023452250748540>.

unreasonably discriminate, including by degrading the quality or speed of a consumer's access or as to particular websites or services.⁹⁷

2. The *Verizon* Decision

Verizon and others challenged the Order before the U.S. Court of Appeals for the D.C. Circuit, which handed down its decision on January 14, 2014, striking the Order down in part.⁹⁸ The court agreed that the FCC had the authority under section 706 to regulate broadband traffic to promote broadband deployment. According to the court, the FCC reasonably interpreted the ambiguous texts of sections 706(a) and 706(b) as empowering it to establish rules governing how broadband providers treat Internet traffic.⁹⁹ Although the FCC had previously decided that section 706(a) “does not constitute an independent grant of authority,”¹⁰⁰ the court agreed that the Order had “offered a reasoned explanation for its changed understanding of section 706(a).”¹⁰¹

Having concluded that the FCC possesses authority to regulate broadband providers under section 706, the court also held that section 706 authorized the particular rules adopted in the *Open Internet Order* because the FCC's rules applied directly to broadband providers and sought to promote the congressional goals of section 706.¹⁰²

The court also found the FCC's conclusion that the *Open Internet Order* would encourage broadband deployment to be rational and supported by substantial evidence. The court thus deferred to the FCC's findings that edge provider innovation drives a virtuous cycle that incentivizes broadband deployment, broadband providers have the incentive and ability to discriminate against edge providers, and the benefits of the rules would outweigh their costs.¹⁰³ The court found that these conclusions—all of which

97. See 2010 *Open Internet Order*, *supra* note 2, at 17906, para. 1; see also *Open Internet*, FCC.GOV, <http://www.fcc.gov/openinternet> (last visited Mar. 4, 2013); Babette Boliek, *FCC Regulation Versus Antitrust: How Net Neutrality Is Defining the Boundaries*, 52 B.C. L. REV. 1627, 1632 (2011) (citing FCC Commissioner concerns about jurisdiction). The rules treat fixed and wireless providers differently in some respects.

98. See, e.g., *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014).

99. *Id.* at 628. This authority rests on the court's determination that the FCC has reasonably explained how regulating broadband practices is a “regulating method[] that remove[s] barriers to infrastructure investment” in “advanced telecommunications capability.” *Id.* at 637.

100. *Comcast*, 600 F.3d at 658 (quoting *Advanced Services Order*, *supra* note 84, at 24047, para. 77).

101. *Verizon*, 740 F.3d at 636.

102. *Id.* at 641.

103. *Id.* at 644-49.

are economic in nature—were reasonable based on the evidence the FCC had offered.¹⁰⁴

Nevertheless, the court struck down the anti-blocking and anti-discrimination provisions as inconsistent with the Communications Act's express prohibition on treating non-common carrier services as common carriers.¹⁰⁵ At the time of the *Open Internet Order*, broadband internet access service was not a common carrier service. And, as the court observed, the Communications Act of 1934 prohibits applying common carrier regulation to entities that are not common carriers.¹⁰⁶ The court found that the language of the anti-discrimination rule “mirrors, almost precisely,” the common carrier obligation not to engage in “any unjust or unreasonable discrimination.”¹⁰⁷ Furthermore, the anti-discrimination rule, like common carrier obligations, left little or no room for individualized bargaining.¹⁰⁸ The court also struck down the anti-blocking rule because the FCC relied, in the Order and in its briefs, on the same justifications the court found insufficient for the anti-discrimination rule.¹⁰⁹ The court upheld the disclosure requirement, however.¹¹⁰

Having struck down the anti-discrimination rule and the anti-blocking rule, and upholding the disclosure rule, the court remanded the case to the FCC for further proceedings.

3. The Aftermath of *Verizon*

In response to the *Verizon* decision, in May 2014 the FCC adopted a Notice of Proposed Rulemaking (NPRM) to establish a variation on the rules adopted in the *Open Internet Order*, in the hopes that these modified rules would pass court review.¹¹¹ The NPRM first proposed to enhance the transparency requirements to gather more information about the service offered to consumers.¹¹² Second, to address the D.C. Circuit's anti-blocking

104. *Id.* at 644–49. As I discuss below, the Order's rules, which amount to a *per se* ban on vertical arrangements, are inconsistent with current economic theory and antitrust law. See *infra* Part III.A.

105. *Id.*

106. *Verizon*, 740 F.3d at 650 (citing 47 U.S.C. §§ 153(51), 332(c)(2) (2012)).

107. *Id.* at 657.

108. *Id.* at 657 (citing *Cellco P'ship v. FCC*, 700 F.3d 534, 548 (D.C. Cir. 2012) (upholding regulation compelling mobile telephone companies to offer data roaming agreements to each other on “commercially reasonable” terms, finding the rule was not unauthorized common carrier regulation because it preserved “substantial room for individualized bargaining and discrimination in terms.”)).

109. *Id.* at 658–59 (discussing an alternate argument which the FCC first proposed at oral argument, but rejecting it because the court is “unable to sustain the Commission's action on a ground upon which the agency itself never relied.”).

110. *Id.* at 659.

111. *Protecting and Promoting the Open Internet NPRM*, FCC 14-61, 29 FCC Rcd. 5561, 5569 paras. 23–24 (2014).

112. *Id.* at 5585–93, paras. 66–88.

rule concerns, the NPRM proposed to amend the rule so that it does not preclude broadband providers from negotiating individual arrangements with similarly situated edge providers.¹¹³ Third, the NPRM proposed an anti-discrimination rule that prohibits “commercially unreasonable” practices, but still allows providers to serve customers and carry traffic on an individually negotiated basis.¹¹⁴

As an alternative to tweaking the *Open Internet Order* rules, the NPRM includes several paragraphs asking if the FCC should reclassify broadband Internet service as a Title II service, echoing former Chairman Julius Genachowski’s unpopular Third Way proposal.¹¹⁵ However, the general sense was that Chairman Wheeler was focused on adjusting the anti-discrimination and anti-blocking rules to meet the roadmap laid out by the D.C. Circuit.¹¹⁶

The debate changed in early November 2014, when President Obama shared his views on how to achieve net neutrality. On November 10, 2014, President Obama issued a press release announcing a website and a YouTube video calling for the FCC to reclassify the Internet as a Title II service.¹¹⁷ Soon after, Commissioner Wheeler began to emphasize reclassification as his preferred approach.¹¹⁸

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

114. *Id.* at 5608, para. 136.

115. *Protecting and Promoting the Open Internet NPRM*, FCC 14-61, 29 FCC Rcd. 5561, 5612-15 paras. 148-52 & n. 302 (2014) (citing Framework for Broadband Internet Service, *Notice of Inquiry*, FCC 10-114, 25 FCC Rcd. 7866, 7894, para. 64 (2010)).

116. *See, e.g.*, Doug Brake, *On Net Neutrality, FCC Chairman Had It Right the First Time*, FORBES (Nov. 18, 2014, 4:49 PM) <http://www.forbes.com/sites/realspin/2014/11/18/on-net-neutrality-fcc-chairman-tom-wheeler-had-it-right-the-first-time/> (“We need to remember that Wheeler started with compromise. His middle-ground approach split the difference between hands-off antitrust enforcement and common carriage, following the outline of the Commission’s jurisdiction laid out in the *Verizon* ruling.”).

117. Press Release, White House, *Net Neutrality: President Obama’s Plan for a Free and Open Internet* (Nov. 10, 2014), available at <http://www.whitehouse.gov/net-neutrality>.

118. *See* Tony Romm, *FCC’s Tom Wheeler in Step with Barak Obama on Net Neutrality*, POLITICO (Jan. 7, 2015, 9:41 PM) <http://www.politico.com/story/2015/01/tom-wheeler-net-neutrality-114069.html> (claiming “FCC Chairman Tom Wheeler offered his strongest endorsement to date of tough net neutrality rules, aligning himself with President Barack Obama’s vision for an open Internet.”); *see also* Brian Fung, *How Obama’s Net Neutrality Comments Undid Weeks of FCC Work*, THE WASHINGTON POST (Nov. 14, 2014) <http://www.washingtonpost.com/blogs/the-switch/wp/2014/11/14/how-obamas-net-neutrality-comments-undid-weeks-of-fcc-work/> (reporting “[] all of [Chairman Wheeler’s hybrid plan] [] was thrown off-track as soon as Obama called for “bright-line rules” backed up by the FCC’s most aggressive powers. Now a number of companies who were close to signing onto the “hybrid” plan proposed by Wheeler are in a holding pattern. Demand for a less-compromising stance has increased. And pressure is building on Wheeler and the FCC to decide what it should do.”).

C. *The Reclassification Ruling and Order on Remand*

On February 26, 2015, the FCC decided, on a 3-2 vote, to reclassify broadband internet access service as a Title II common carrier service and apply new regulations to the reclassified service. The lengthy decision¹¹⁹ takes a number of actions. Most importantly, it:

1. Reclassifies “broadband internet access service,” or “BIAS,” (a defined term) as a common carrier service subject to Title II of the Communications Act of 1934;¹²⁰
2. Adopts a *per se* ban on blocking, throttling, and paid prioritization;¹²¹
3. Prohibits BIAS providers from “unreasonably interfering with” or “unreasonably disadvantaging” end users or edge providers – the so-called “general conduct rule”; and¹²²
4. Imposes transparency requirements on BIAS providers in addition to those that remain in place from the 2010 Order.¹²³

III. THE PRESCRIPTIVE RULES AND PROBLEMATIC RECLASSIFICATION

A. *The Order on Remand Continues the FCC's Prescriptive Rulemaking Approach*

The *Order on Remand* asserts that the enforcement of the new rules will use “a case-by-case approach.”¹²⁴ Indeed, Chairman Wheeler has explicitly compared the FCC's proposed approach here with the FTC's enforcement approach.¹²⁵

However, consistent with the FCC's tradition of prescriptive *ex ante* regulation, the *Order on Remand* establishes a core of prescriptive rules. It includes three *per se* bans on certain business practices although these bans are economically unjustified; indeed, the FCC itself admits that some of

119. What I refer to colloqually as the “decision” is actually a Report and Order on Remand adopting net neutrality rules, a Declaratory Ruling reclassifying broadband internet access as a Title II common carrier service, and an Order forbearing from applying certain provisions of Title II common carrier regulation to the reclassified service. Together with final rules, various procedural requirements such as a regulatory flexibility analysis, and separate statements from the commissioners (including two lengthy dissents) the “decision” spans 400 pages.

120. *Declaratory Ruling* paras. 306 *et seq.*

121. *Order on Remand* paras. 111-132.

122. *Order on Remand* paras. 133-153.

123. *Order on Remand* paras. 154-185.

124. *Order on Remand* para. 247.

125. Wheeler, Tom, Statement to House, Committee on Energy and Commerce Committee, *FCC Reauthorization: Oversight of the Commission*, Hearing, March 19, 2015 at (1:47:25), available at <http://www.c-span.org/video/?324931-1/federal-communications-commission-oversight-hearing>.

these practices could benefit consumers in some cases. The “general conduct” rule does not alter the core prescriptive nature of the new regulatory regime, but merely adds a penumbra of uncertainty around the core bans. A true case-by-case approach that applied generally accepted legal and economic norms would not prohibit practices that increase consumer welfare but would reduce the “knowledge problem” described above.

1. The Core Rules are a *Per Se* Ban on Certain Forms of Vertical Integration

The *Order on Remand* adopts three prescriptive *ex ante* rules that prohibit certain business practices. Specifically, the rules prohibit BIAS providers from blocking, throttling, or engaging in paid prioritization of Internet traffic.

These rules are overly prescriptive because they *per se* prohibit actions that may in many instances benefit consumers. Indeed, the *Order on Remand* adopts rules that are more prescriptive and interventionist than the *2010 Order*. For example, the *2010 Order* established a presumption against paid prioritization but subject it to a case-by-case review.¹²⁶ In contrast, the *Order on Remand* bans such arrangements outright.¹²⁷ Furthermore, the *2010 Order* did not regulate interconnection agreements between ISPs and transit providers or CDNs (including some edge providers), but the *Order on Remand*, for the first time ever, announces the FCC’s intent to regulate the conditions and prices of such agreements.¹²⁸

The sparse economic reasoning offered by the FCC to justify these *per se* rules runs counter to modern economic and antitrust theory. I will focus on one particular, critically important flaw: the Order’s failure to justify the *per se* ban on paid prioritization.

The *2010 Order* concluded that broadband providers “may have incentives to increase revenues by charging edge providers . . . for access or prioritized access to end users,” and that such access fees would be set “inefficiently high.”¹²⁹ As such, the *2010 Order* adopted a presumption that paid prioritization would be unreasonable discrimination.¹³⁰ Similarly, the

126. *2010 Open Internet Order*, *supra* note 2, at ___ at paras. 76-77 (“[A]s a general matter, it is unlikely that pay for priority would satisfy the ‘no unreasonable discrimination’ standard” but “a strict nondiscrimination rule would be in tension with our recognition that some forms of discrimination, including end-user controlled discrimination, can be beneficial.”)

127. *Order on Remand*, para. 125 (adopting “a bright line rule against” paid prioritization network practices).

128. *Order on Remand*, para. 31 (“This Order – for the first time – provides authority to consider claims involving interconnection. . .”).

129. *2010 Open Internet Order*, *supra* note 2, at 17919, para. 24.

130. *Id.* para. 76.

Order on Remand found that “broadband providers have incentives to charge for prioritized access to end users.”¹³¹ The *Order on Remand* therefore adopts a per se prohibition against paid prioritization.¹³²

Yet the record clearly reflects that paid prioritization can have beneficial effects. As the 2010 *Order* acknowledges—and the record in the proceeding reflects— “[e]conomic literature recognizes that access charges could be harmful under some circumstances and beneficial under others.”¹³³ The *Order on Remand* also acknowledges that “there are arguments that some forms of paid prioritization could be beneficial.”¹³⁴ Similarly, in evaluating the FCC’s tepid cost-benefit analysis, the *Verizon* court labeled this a case “where ‘the available data do[] not settle a regulatory issue.’”¹³⁵ Furthermore, neither the 2010 *Order* nor the *Order on Remand* offer any evidence of existing, ongoing harm.¹³⁶

The FCC’s per se prohibition of a practice that may in many cases have beneficial effects conflicts with U.S. antitrust law and its underlying rationale. The U.S. Supreme Court limits per se condemnation in the antitrust context to “plainly” or “manifestly” anticompetitive conduct.¹³⁷ The Court has been clear that categorical treatment applies only where a “practice facially appears to be one that would always or almost always tend to restrict competition and decrease output” instead of “one designed to ‘increase economic efficiency and render markets more, rather than less, competitive.’”¹³⁸

In addition to the FCC’s own admission that access charges can be beneficial, the facts we see in the Internet ecosystem—growth, innovation,¹³⁹

131. *Reclassification Order* ¶ 82.

132. *Order on Remand*, para. 125.

133. *Id.* at 17921 n.80.

134. *Order on Remand* ¶ 19. Indeed, the *Order on Remand* finds that other types of prioritization made may be beneficial, but offers no meaningful explanation of why some delivery-enhancing services are per se harmful while others are not. For example, the *Order on Remand* notes that edge providers may continue to “enhanc[e] the delivery” of their services by investing in proprietary backhaul or Content Delivery Networks. *Order on Remand* ¶ 128. The *Order* also refrains from a blanket ban on sponsored data plans.

135. *Verizon*, 740 F.3d at 649 (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)).

136. *See id.* at 667 (Silberman, J., concurring in part and dissenting in part). The *Order on Remand* acknowledges that paid prioritization is not widespread, para. 126, and adopts the bright line rule based “on very real concerns about the chilling effects that preferential treatment arrangements *could* have.” Para. 127 (emphasis added).

137. *Broad. Music, Inc. v. CBS*, 441 U.S. 1, 8 (1979); *accord Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977) (noting that per se condemnation is proper only for “conduct that is manifestly anticompetitive.”).

138. *Broadcast Music*, 441 U.S. at 19–20; *see also* Christopher S. Yoo, *Net Neutrality, Consumers, and Innovation*, 2008 U. CHI. LEGAL F. 179, 245–47 (2008) (discussing the Supreme Court’s antitrust jurisprudence as “a useful framework” for understanding how policy should treat deviations from network neutrality).

139. *See Hazlett & Wright, supra* note 77, at 834–39.

procompetitive efficiencies, significant consumer benefits,¹⁴⁰ largely successful industry self-regulation, few reported cases of abuse¹⁴¹—strongly suggest we do not have the type of widespread problem here that would merit categorical treatment. Paid prioritization is a vertical issue requiring nuanced rule of reason analysis to balance its benefits and harms to competition and consumers.¹⁴² Courts and antitrust enforcers have spent years investigating and evaluating the competitive implications of vertical restraints, including those on the Internet. They have found vertical relationships very often yield procompetitive benefits, like reducing double marginalization, mitigating free riding, and encouraging investment.¹⁴³ Likewise, “with few exceptions, the literature does not support the view that these practices are used for anticompetitive reasons, [and] these practices are unlikely to be anticompetitive in most cases.”¹⁴⁴ Notably, a review of the economics literature by current and former FTC and DOJ economists showed that most evaluations of vertical integrations did not present material evidence of net anticompetitive harm.¹⁴⁵ Indeed, both the FTC and DOJ previously advised the FCC to be cautious about imposing rules on broadband Internet providers due to the complexities in evaluating vertical markets.¹⁴⁶

There are many real world examples of vertically integrated firms that have thrived (or failed) on the Internet and, in the process, contributed to significant advances in the industry. For instance, in the 1990s, America Online (AOL) was an important, user-friendly “on-ramp” for people to first view the Internet. It distributed “more than 250 million disks bearing AOL software to the mass market.”¹⁴⁷ At its peak in 2002, AOL had roughly 35 million subscribers.¹⁴⁸ AOL was a closed platform with exclusive content for users. It charged companies like Time Magazine and The New York Times for access to the AOL universe of sites and simultaneously developed and sometimes favored affiliated content, which was a noted part of its

140. *Id.* at 815–16.

141. *Id.* at 811–13.

142. *Id.*, at 796–806. Blocking and discrimination are also vertical issues requiring rule of reason analysis.

143. *Id.* at 797–98.

144. Daniel O’Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, in REPORT: THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 72–73 (2008)

145. James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT’L J. INDUS. ORG. 639, 658 (2005).

146. *See generally*, FTC NET NEUTRALITY REPORT, *supra* note 64; *see also* Ex Parte Submission of the United States Department of Justice, Econ. Issues in Broadband, FCC GN Docket No. 09-51 (rel. Jan. 4, 2010), *available at* <http://www.justice.gov/atr/public/comments/253393.pdf>.

147. Hazlett & Wright, *supra* note 77, at 795 (quoting KARA SWISHER, AOL.COM: HOW STEVE CASE BEAT BILL GATES, NAILED THE NETHEADS, AND MADE MILLIONS IN THE WAR FOR THE WEB 99 (1998)).

148. AOL TIME WARNER, 2002 ANNUAL REPORT 6 (2002), *available at* <http://www.kronemyer.com/Warner%20Music%20Group/AOL%20Time%20Warner%2002%20Annual%20Report.pdf>.

strategy.¹⁴⁹ And, of course, AOL bought Time Warner in 2001 and fully integrated its content and delivery, something it had been working on for years through strategic relationships with GTE, Ameritech Communications, Bell Atlantic, and other DSL providers.¹⁵⁰ As a powerful, vertically-integrated content and network platform, AOL engaged in exactly the type of content discrimination that arguably would violate the FCC's net neutrality rules. Time Warner has since spun off not only AOL—which has enjoyed little success in recent years—but also Time Warner Cable, the company's cable broadband business.¹⁵¹

The AOL example, like many others, confirms what most economists think: that there are procompetitive benefits to vertical integration and that such integration does not necessarily impede innovation, competition, or broadband deployment. Categorical rules prohibiting network discrimination and similar forms of vertical integration therefore are likely to reduce consumer welfare rather than enhance it.¹⁵²

Rather than per se bans, the better way to analyze vertical restraints on the Internet is the rule of reason (or, for vertical combinations, the Clayton Act merger review standards¹⁵³). We should evaluate allegations of vertical integration, foreclosure, or price discrimination on the Internet the same way we do everywhere else—by balancing the procompetitive benefits against the anticompetitive harms of those restraints. The lawfulness of “non-neutral” conduct should depend upon its net effect on competition and consumers.¹⁵⁴ This approach, developed over a century of antitrust cases, will better maximize consumer welfare in the broadband industry than the FCC's per se ban.

2. The “General Conduct” Rule Creates a Penumbra of Uncertainty

In addition to the prescriptive bans on blocking, throttling, and paid prioritization, the *Order on Remand* also adopts a new rule that prohibits BIAS providers from “unreasonably interfer[ing] with or unreasonably

149. See *id.*; Robert Burgelman & Philip Mez, *AOL: The Emergence of an Internet Media Company* 9-12 (Stanford Graduate School of Business, Case No. SM-75, 2001) [hereinafter *AOL Case Study*], available at <http://www.gsb.stanford.edu/faculty-research/case-studies/aol-emergence-internet-media-company.>; Hazlett & Wright, *supra* note 77, at 795.

150. *AOL Case Study*, *supra* note 149, at 3–4 (citations omitted).

151. Aaron Smith, *Time Warner to Split Off AOL*, CNN MONEY, (May 28, 2009, 5:02 PM), http://money.cnn.com/2009/05/28/technology/timewarner_aol/. In an inversion of AOL's purchase of Time Warner, Verizon has recently announced plans to buy AOL. See VERIZON, VERIZON TO ACQUIRE AOL, May 12, 2015, available at <http://www.verizon.com/about/news/verizon-acquire-aol>.

152. Hazlett & Wright, *supra* note 77, at 801–02.

153. Clayton Antitrust Act of 1914, ch. 323, 38 Stat. 730 (codified as amended at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53).

154. *Id.*

disadvantag[ing] the ability of consumers to reach the Internet content, services, and applications of their choosing or of edge providers to access consumers using the Internet.”¹⁵⁵ This no-unreasonable interference/disadvantage rule has been referred to as the “general conduct” rule. According to the *Order on Remand*, this rule is intended to reach “current or future practices that cause the type of harms our rules are intended to address.”¹⁵⁶ The *Order on Remand* specifies a non-exhaustive list of six factors that the FCC will use to judge whether conduct violates the interference/disadvantage standard: 1) the effect on end-user control; 2) competitive effects; 3) effect on consumer protection; 4) effects on innovation, investment, or broadband deployment; 5) effects on free expression; 6) whether the conduct is application agnostic; and 7) whether the conduct reflects standard practices. Thus, the general conduct rule mixes competition law, consumer protection law, and first amendment law, along with other factors.

The general conduct rule is decidedly *not* prescriptive. Indeed, it is very difficult to determine what conduct the rule may prescribe. But this lack of prescriptiveness does not make the rule similar to, for example, the FTC’s Congressionally granted authority to enforce prohibitions on unfair competition and on unfair or deceptive acts or practices. Over many decades, the FTC has enforced these generally applicable principles on a case-by-case basis to build a body of precedent, including in emerging areas such as data security or privacy.

In contrast, “unreasonable interference” and “unreasonable disadvantaging” are not generally applicable, long established legal antitrust or consumer protection principles. Nor were they established by Congress. These are novel concepts. The *Order on Reconsideration* does attempt to define the scope of the rule by referencing elements of long standing legal principles from competition, consumer protection, and first amendment law. But it offers no insight into which of these factors are most important, how the FCC will resolve inevitable conflicts between these factors, or even if the factors are disjunctive.

In short, the general conduct rule wraps three overly prescriptive but relatively certain rules in a broad penumbra of uncertainty. While this may give the FCC the flexibility to regulate future developments on the Internet, the lack of Congressional direction and weak foundation in legal precedent means that, like FCC Chairman Tom Wheeler, “we really don’t know” what the rule means.¹⁵⁷

Indeed, even strong net neutrality advocates like the Electronic Freedom Foundation have expressed serious concern that the general conduct rule is “hardly the narrow, light-touch approach we need to protect

155. *Order on Remand* ¶ 135; proposed 47 C.F.R. §8.11.

156. *Id.*

157. Clip of Press Conference, FCC Chairman Tom Wheeler, available at <http://www.c-span.org/video/?c4534447/wheeler-general-conduct-standard>.

the open Internet” and “a multi-factor test that gives the FCC an awful lot of discretion, potentially giving an unfair advantage to parties with insider influence.”¹⁵⁸

B. The Effects of Title II Reclassification Go Far Beyond Net Neutrality

Industry, legal, and policy experts have noted a wide range of problems with Title II reclassification, including decreasing investment incentives, rising costs to consumers, and regulatory compliance issues.¹⁵⁹ The effects of such a sweeping regulatory change will remain unknown for some time, but we are already seeing collateral consequences of reclassification that have nothing to do with net neutrality. These consequences are all the more concerning when one considers the unclear scope of the services to which reclassification applies.

1. Collateral Effect on FTC Jurisdiction

One collateral consequence is particularly relevant to this discussion: Title II reclassification could reduce the FTC’s authority to protect consumers online. Common carrier—that is, Title II—services are outside of the FTC’s jurisdiction.¹⁶⁰ As a result, Title II reclassification makes it more difficult for the FTC to continue its flexible and effective case-by-case, ex post enforcement against deceptive and unfair acts that harm online consumers.

158. Corynne McSherry, *Dear FCC: Rethink The Vague "General Conduct" Rule* (Feb. 24, 2015), available at <https://www.eff.org/deeplinks/2015/02/dear-fcc-rethink-those-vague-general-conduct-rules>.

159. See, e.g., Anna-Maria Kovacs, *Regulation in Financial Translation: Investment Implications of the FCC’s Open Internet Proceeding* (Georgetown Univ. Ctr. for Bus. & Pub. Policy, Oct. 2014), available at http://www.gcbpp.org/files/Academic_Papers/AP_Kovacs_OpenInternet10-2014.pdf (describing how “from the perspective of investors, Title II reclassification makes no sense.”); James E. Prieger, *Net Neutrality Policy and the Future of Your Internet*, THE HILL (Sept. 14, 2014, 3:00 PM), <http://thehill.com/blogs/congress-blog/technology/217564-net-neutrality-policy-and-the-future-of-your-internet> (describing how reclassification will raise costs for consumers); Michael O’Rielly, Comm’r, FCC, *Thinking the Unthinkable: Imposing the ‘Utility Model’ on Internet Providers*, Remarks at the Free State Foundation’s Policy Seminar (Nov. 14, 2014), available at <http://www.fcc.gov/document/commissioner-oriellys-remarks-free-state-foundation> (explaining the difficulty of using forbearance to avoid the most onerous provisions of Title II).

160. 15 U.S.C. § 45(a)(2) (FTC authority does not reach “common carriers subject to the Communications Act of 1934”). “An entity is a common carrier ... only with respect to services it provides on a common carrier basis.” FTC NET NEUTRALITY REPORT, *supra* note 64, at 38 (citing 47 U.S.C. § 153(44)). See also, *FTC v. AT&T*, No. C-14-4785 EMC, Order Denying Defendant’s Motion to Dismiss at 23 (Mar. 31, 2015) (holding that the FTC’s “common carrier exception applies only where the entity has the status of common carrier and is actually engaging in common carrier activity”).

This is problematic because the FTC leads the world in privacy and data security enforcement. We have successfully brought more than 100 privacy and data security cases and more than 130 spam and spyware cases, including cases against some of the largest players on the Internet.¹⁶¹

The FTC has used this expertise to protect consumers from the deceptive or unfair behavior of their broadband service providers. For example, in June 2009, the FTC brought a case against Pricewert, a rogue Internet service provider that recruited, knowingly hosted, and actively participated in the distribution of spam, child pornography, and other harmful electronic content. The FTC successfully had this provider shut down by a district court judge. More recently, and as mentioned above, the FTC brought cases against AT&T and TracFone for deceptively and unfairly throttling mobile broadband services. In the TracFone case alone the FTC recovered \$40 million in refunds to consumers.¹⁶² Such cases will be more difficult or impossible for the FTC to bring once the FCC's Title II reclassification of broadband takes effect.¹⁶³

Some mistakenly argue that because the FTC has only brought a few cases against traditional ISPs, a loss of jurisdiction over BIAS providers will not harm consumers much. First, the number of cases we have brought against ISPs is quite similar in magnitude to the number of alleged net neutrality violations used to justify the FCC's reclassification and new rules.¹⁶⁴ Second, the FTC brings many cases against companies that have online components. In every case we bring that involves an online component, defendants may possibly argue that they are exempt from FTC jurisdiction. Some of these arguments will no doubt be weak; others, given the troublingly vague language in the FCC's order (see discussion in section

161. According to most recent information from FTC staff, we have brought 53 general privacy cases and 55 data security cases, the vast majority of which have settled. *See generally*, FTC, Legal Resources, https://www.ftc.gov/tips-advice/business-center/legal-resources?type=case&field_consumer_protection_topics_tid=245&field_industry_tid=All&sort_by=field_date_value&=Apply (last visited July 1, 2015)(displaying 184 cases in the Privacy and Security category); Jessica Rich, Director, Bureau of Consumer Protection, FTC, *The FTC's Privacy and Data Security Priorities for 2015*, at 10 (Mar. 3, 2015) ("Our work to protect sensitive data also includes 55 cases to date against companies that failed to implement reasonable security protections."), *available at* https://www.ftc.gov/system/files/documents/public_statements/671241/150303sidleyaustin.pdf. *See also*, FTC, *Privacy and Data Security Update* (2014), <https://www.ftc.gov/reports/privacy-data-security-update-2014>.

162. *See* Press Release, Prepaid Mobile Provider TracFone to Pay \$40 Million to Settle FTC Charges It Deceived Consumers About 'Unlimited' Data Plans (Jan. 28, 2015), *available at* <https://www.ftc.gov/news-events/press-releases/2015/01/prepaid-mobile-provider-tracfone-pay-40-million-settle-ftc>.

163. The FCC's order will not affect cases currently in litigation, or future cases about past behavior. *See Order on Remand*, note 792 ("[T]he classification decisions in this Order appropriately apply only on a prospective basis.").

164. The 2010 Order sets out, counting generously, fewer than fifteen instances of violations or potential violations by wireline providers. *2010 Order*, 25 FCC Rcd at 17915-26, paras. 20-37. Only a fraction of these potential violations rose to the level of actual violations pursued by the FCC – the Madison River and Comcast-Bit Torrent cases being the most prominent. *See Order on Remand* note 123.

III(B)(3) below), will drain FTC resources unnecessarily, at the very least, and will slow our ability to stop consumer harm and pursue remedies.

Consequently, removing FTC jurisdiction in the pursuit of net neutrality will not benefit consumers on balance. Reclassification imposes certain costs in exchange for uncertain benefits. The FTC prevents known harms on the Internet and recovers significant amounts of redress for consumers when harms that do occur. Why risk the known, substantial benefits of FTC enforcement to prevent net neutrality violations that are mostly speculative, particularly when the benefits of a Title II approach are marginal compared to other approaches?

2. Issue Creep Spurred by Rent-Seeking Behavior

The effects of reclassification have effects far beyond the goal of net neutrality. The FCC's reclassification subjects BIAS providers to new regulation unrelated to net neutrality. And the FCC is already facing calls to use Title II to promote various business models.

Some of these collateral consequences are intentional. For example, the *Order on Remand* describes the FCC's new authority over interconnection agreements as a "regulatory consequence flow[ing] from the Commission's classification of BIAS" as a Title II common carrier service. Privacy and data security are another example of a regulatory consequence of reclassification. The FCC recently hosted a workshop to "explore the Commission's role in protecting the privacy of consumers that use broadband Internet access service."¹⁶⁵ That broad phrasing, which focuses on the privacy of the consumers, rather than the practices of BIAS providers, ought to concern not just BIAS providers, but edge providers as well. After all, as FCC Enforcement Bureau Chief Travis LeBlanc's noted recently, "all those communications are going through wireless communications carriers ... that offer Internet services. So we have to start thinking about what that means for privacy."¹⁶⁶ Based on its workshop, the FCC is reportedly preparing a proposal to detail how Title II privacy regulations designed for telephone providers apply to BIAS providers, and has already issued an advisory indicating that the Enforcement Bureau may bring privacy enforcement actions against BIAS providers in the meantime.¹⁶⁷

In addition to intentional collateral changes to regulation, the FCC is already facing pressure from interest groups to use the new Title II authority in other ways that do not relate to network neutrality. For example, some are

165. News Release, FCC, "The Wireline Competition and Consumer & Governmental Affairs Bureaus Schedule Workshop on Broadband Consumer Privacy," March 30, 2015, http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0330/DOC-332753A1.pdf.

166. Alison Grande, FCC To Step Up Broadband Privacy Enforcement, Chief Says, Law360, Mar. 6, 2015, <http://www.law360.com/articles/628839/fcc-to-step-up-broadband-privacy-enforcement-chief-says>.

167. FCC, Enforcement Advisory, DA 15-603 (May 20, 2015), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DA-15-603A1.pdf.

already calling for the FCC to move toward an unbundling regime, where BIAS providers would have to let competing providers offer Internet subscriptions over the same network.¹⁶⁸ Another advocacy group has filed a formal petition for rulemaking asking the FCC, under the reasoning in its *Order on Remand*, to regulate the privacy practices of edge providers such as Google, Facebook, Amazon, YouTube, LinkedIn and Pandora.¹⁶⁹

3. Unclear Scope of Reclassification

These unintended consequences are even more concerning when one looks closely at the how the *Declaratory Ruling* reclassifies “broadband internet access service,” or “BIAS” as a Title II common carrier service. The scope of Title II service depends entirely on the definition of BIAS and how that definition is interpreted. Concerningly, the broad sweep of that definition could permit the current or a future FCC to expand its reach far beyond traditional ISPs. The new rules define BIAS as:

*A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.*¹⁷⁰

The emphasized text in the definition leaves a significant amount of ambiguity about what future services will or will not be within Title II. It leaves the FCC (or potentially the Enforcement Bureau, acting independently) with the authority to expand the scope of reclassification as it deems necessary. Indeed, the final clause of definition, applied aggressively, would appear capable of eliminating the special services exemption.

168. See Christopher Sprigman, Forget Net Neutrality. What Americans Need Is Net Competition, BloombergBusiness, available at <http://www.bloomberg.com/news/articles/2015-04-13/forget-net-neutrality-what-americans-need-is-net-competition> (“The one crucial step the FCC could take to get us [to competition] would be to mandate local loop unbundling.... The best reason for the FCC to mandate local loop unbundling is that it has the power to do it. ... [T]he agency bolstered its second set of net neutrality rules by voting to reclassify Internet access as a telecommunications service. This legal move gives the agency broader power to regulate.”) Some of the more vocal advocates of reclassification appear to support unbundling. See Tweet, Public Knowledge, 6:58 AM, 14 April 2015, <https://twitter.com/publicknowledge/status/587978168545501184>.

169. Consumer Watchdog, Petition for Rulemaking to Require Edge Providers to Honor ‘Do Not Track’ Requests, RM ____ (filed June 15, 2015), available at http://www.consumerwatchdog.org/resources/cwd_petition_for_rulemaking_8-22-12.pdf.

170. *Declaratory Ruling*, para. 25; proposed 47 C.F.R. § 8.2(a) (emphasis added).

Furthermore, the *Ruling* appears to embrace the D.C. Circuit's determination that ISPs offer a service to edge providers,¹⁷¹ but is ambiguous as to whether or how it reclassifies this service. The *Ruling* states, "we need not reach the regulatory classification of the service that the *Verizon* court identified as being furnished to the edge."¹⁷² Yet despite that rather clear disavowal of a decision, the *Ruling* states that "Title II applies... to the second side of the market [the service to the edge provider], which is always a part of, and subsidiary to, the BIAS service."¹⁷³ It later explains that the service to edge providers is "subsumed within the promise made to the retail customer of BIAS service" and "simply derivative of BIAS ... and in any event, fits comfortably within the command that practices provided 'in connection with a Title II service [sic] that must themselves be just and reasonable.'"¹⁷⁴ This extremely ambivalent analysis appears to leave room for future FCC actions that regulate the relationships between ISPs and edge providers.

IV. CONCLUSION

The Internet has evolved in one generation from a network of electronically-interlinked research facilities in the United States to one of the most dynamic forces in the global economy, in the process reshaping entire industries and even changing the way we interact on a personal level. The FCC's efforts to create network neutrality rules notwithstanding, the federal government has largely stood back and allowed this phenomenon to occur without Internet-specific rules and regulations. And, as we have seen over the years with AOL, Microsoft, Google, Facebook, Apple, and many others, the industry, left largely to its own devices, has experimented with countless business and technological models, many of which have provided great benefits to consumers and our economy. Google, for example, follows an open model, while Apple almost religiously adheres to a closed system. Each is successful. And both are valuable to the Internet business ecosystem and to consumers.

I see this freedom to experiment as central to the continued success of the Internet. As we move forward into a new age of technological convergence and the Internet of things, we cannot fall into the trap of legislating or regulating based on an antiquated understanding of the Internet. The Communications Act of 1934 was based on a static understanding of technology; that flaw reverberates today in the FCC's repeated attempts to prescriptively regulate the Internet. Instead of static frameworks, we should follow flexible, normative, and cautious enforcement of the competition and consumer protection laws based on actual harms

171. *Verizon*, 740 F.3d at 653 ("broadband providers furnish a service to edge providers...").

172. *Declaratory Ruling*, para. 339.

173. *Id.* para. 338.

174. *Id.* para. 339.

coupled with self-regulation by open, consensus-based, multi-stakeholder organizations of engineers, consumer groups, and businesspeople. Such regulatory humility will allow markets to serve the greatest good, while still maintaining a federal role in protecting the rights of consumers and a level playing field for competitors.