

Déjà vu All Over Again: Questions and a Few Suggestions on How the FCC Can Lawfully Regulate Internet Access

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I. INTRODUCTION

In March, 2015 the Federal Communications Commission (“FCC”) issued a comprehensive Report and Order on Remand and Declaratory Ruling, and Order, in the matter of *Protecting and Promoting the Open Internet* (“2015 Open Internet Order”).¹ The FCC attempts to lawfully convert broadband Internet access² from a largely unregulated “information service,”³ to a lightly regulated “telecommunications service.”⁴ In the *Order*, the Commission chose to classify Internet Service Providers (“ISPs”)⁵ as common carriers, subject to the telecommunications service regulations contained in Title II of the Communications Act,⁶ as amended, based on changed circumstances necessitating more extensive government oversight.⁷

Having twice failed to convince a reviewing court that the Commission could impose conduit neutrality requirements without making the reclassification, the FCC took a different tack, subjecting ISPs to more

1. *Protecting & Promoting the Open Internet, Report & Order on Remand and Declaratory Ruling, & Order*, FCC 15-24, 30 FCC Rcd 17905 (2015) [hereinafter *2015 Open Internet Order*], <http://www.fcc.gov/openinternet>.

2. The FCC defines “broadband Internet access service” 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.” *Id.*, para. 25.

3. An “information service” is “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(20).

4. A “telecommunications service” is “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” 47 U.S.C. § 153(46) (2014).

5. The FCC emphasizes the need for regulatory safeguards applied to ISPs providing first and last mile links to and from the Internet. However, the reclassification of ISP-provided broadband Internet access also applies to upstream ISPs that perform an intermediary function between content providers and downstream ISPs. “The definition for broadband Internet access service includes the exchange of Internet traffic by an edge provider or an intermediary with the broadband provider’s network. We note that anticompetitive and discriminatory practices in this portion of broadband Internet access service can have a deleterious effect on the open Internet, and therefore retain targeted authority to protect against such practices through sections 201, 202, and 208 of the Act (and related enforcement provisions), but will forbear from a majority of the other provisions of the Act.” *2015 Open Internet Order*, para. 195.

6. *See generally* 47 U.S.C. §§ 201-276 (2014).

7. *2015 Open Internet Order*, para. 43 (explaining that “[a]s the record reflects, times and usage patterns have changed and it is clear that broadband providers are offering both consumers and edge providers straightforward transmission capabilities that the Communications Act defines as a “telecommunications service.”).

muscular rules and regulations.⁸ The *2015 Open Internet Order* has generated substantial controversy, several requests for a stay of the *Order*,⁹ and an expedited appeal,¹⁰ the latter of which questions whether the Commission has adequately justified its reclassification of broadband Internet access.¹¹

This Article will assess whether and how the FCC can successfully defend its *2015 Open Internet Order* on appeal. In the *Order*, the FCC offered several justifications for its decision to apply its “light touch” approach to regulating broadband under Title II of the Communications Act, subject to extensive forbearing from Title II’s common carrier regulatory safeguards.

While it is common in appellate advocacy to use multiple and alternative arguments, the FCC has presented contradictory legal rationales. On one hand, the FCC invokes the so-called *Chevron Doctrine*,¹² which requires courts to defer to the expertise of a regulatory agency when its authorizing statute lacks clarity and the agency reasonably interprets those statutory ambiguities.¹³ However, elsewhere in its decision, the FCC

8. See, e.g., Formal Complaint of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, *Memorandum Opinion and Order*, FCC 08-183, 23 FCC Rcd 13,028 (2008), *vacated*, *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010) (holding that imposing network neutrality rules under the FCC’s “ancillary” authority exceeded its statutory authorization); Preserving the Open Internet, *Report and Order*, FCC 10-201, 25 FCC Rcd 17905 (2010) [hereinafter *2010 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) (holding that because the FCC, under its prior regulatory regime, classified broadband providers as entities exempt from common carrier obligations, “the Communications Act expressly prohibits the [FCC] from . . . regulating them as such”), *on remand*, Protecting and Promoting the Open Internet, *Notice of Proposed Rulemaking*, FCC 14-61, 29 FCC Rcd 5561 (2014) [hereinafter *2014 Open Internet NPRM*].

9. See, e.g., Joint Mot. Stay or Expedition at 1, *U.S. Telecom Ass’n*, No. 15-1063 (May 13, 2015), <http://www.fhhlaw.com/1501063.net%20neutrality%20stay%20request.2015.05.13.PDF>; Order Denying in Part & Granting in Part Joint Mot. Stay or Expedition at 1-2, *U.S. Telecom Ass’n*, No. 15-1063 (June 11, 2015); Protecting & Promoting the Open Internet, *Order Denying Stay Petitions*, DA 15-563, paras. 2-7 (May 8, 2015).

10. See Order Denying in Part & Granting in Part Joint Mot. Stay or Expedition at 1-2, *U.S. Telecom Ass’n*, No. 15-1063 (June 11, 2015); Joint Brief for Petitioners at 5, *U.S. Telecom Ass’n*, No. 15-1063 (D.C. Cir. July 30, 2015), <http://www.ustelecom.org/sites/default/files/documents/Joint%20Brief%20of%20Petitioners%20073015.pdf>.

11. See *id.*

12. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). In *Chevron*, the Supreme Court held that when reviewing an agency’s implementation of its own authorizing statute, if “Congress has not directly addressed the precise question at issue,” and the agency has acted pursuant to an express or implied delegation of authority, the agency’s statutory interpretation is entitled to deference, as long as it is reasonable. *Id.* at 843-44. See also *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

13. *2015 Open Internet Order*, para. 321 (“[W]e exercise the well-established power of federal agencies to interpret ambiguous provisions in the statutes they administer.”) (citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005)).

confidently asserts that ISPs clearly provide essential telecommunications services,¹⁴ evincing no difficulty with interpreting and applying existing service definitions created by Congress. Rather than having to remedy statutory ambiguity, the Commission appears to make the case that ISPs, once deemed to fit within the information service classification, now unambiguously fit within the telecommunications service category.¹⁵

This Article discusses how the FCC has come to understand the need to reclassify broadband Internet access as common carriage, leading the Commission to impose the regulatory safeguards it now considers essential. However, at the very time the Commission seeks to invoke lawful and sufficiently expansive statutory authority, ISPs need substantial flexibility to customize services meeting specific customer requirements, particularly demand for bandwidth intensive video services. Instead of according such flexibility, the Commission continues to apply an absolute, bright line regulatory dichotomy that does not work.

In this age of fast changing technologies and markets, the FCC ignores the fact that ventures readily offer both telecommunications and information services, as well as hybrids that combine elements that could trigger both regulatory classifications. Unlike reviewing courts, which have evidenced no difficulty in assessing how converging markets and technologies impact the FCC's jurisdiction,¹⁶ the Commission continues to attempt the impossible: absolute and long term assessment of convergent services and assignment of them into single, mutually exclusive regulatory categories. Even as it already has attempted to reclassify broadband Internet access, the FCC wants reviewing courts, the public, and industry to think that it can shoehorn any existing or new service completely into one or the other service classification.

While stating its clear intent to forbear and streamline as never before, the FCC will have to convince a reviewing court that it considered all the facts and data in the record supporting the rational decision to reclassify ISP service. This Article concludes that the FCC's best appellate court strategy lies in emphasizing available direct statutory authority and changed circumstances in the Internet ecosystem, rather than ambiguity in the service definitions created by Congress, or alternatively that reviewing courts should defer to the Commission's expertise in assigning convergent

14. *Id.*, para. 59 (“[B]ased on a current factual record, we reclassify broadband Internet access service as a telecommunications service under Title II.”).

15. *Id.*, para. 413 n. 1207 (“[I]n reclassifying [broadband Internet access service] we simply acknowledge the reality of how it is being offered today.”).

16. *Cellco P’ship v. FCC*, 700 F.3d 534, 547 (D.C. Cir. 2012) (reviewing court notes that wireless carriers offer both regulated voice, telecommunications service and unregulated data services classified as information services). The *Cellco* Court explained, “even if a regulatory regime is not so distinct from common carriage as to render it inconsistent with common carrier status, that hardly means it is so fundamentally common carriage as to render it inconsistent with private carrier status. In other words, common carriage is not all or nothing—there is a gray area in which although a given regulation might be applied to common carriers, the obligations imposed are not common carriage per se.” *Id.*

services into unambiguous regulatory categories. This Article recommends that the FCC emphasizes its duty, established in Section 706 of the Communications Act,¹⁷ to identify and remedy broadband market failures.

II. THE CHALLENGE OF CALIBRATING GOVERNMENT OVERSIGHT IN FAST CHANGING MARKETS

Even if the FCC could assert near complete independence from political parties, presidents, and Congress, it cannot avoid its duty to respond to fast changing markets and technologies and calibrate the proper scope of its regulatory oversight. Congress may have handicapped the FCC by constructing service definitions that the Commission must use to determine the scope of its oversight,¹⁸ but the FCC exacerbates the situation by electing to make such category assignments based on the assumption that any existing or prospective service can and must fit solely into one classification, explaining:

We agree with commenters that [telecommunications service and information service] are best construed as mutually exclusive categories, and our classification ruling appropriately keeps them distinct. In classifying broadband Internet access service as a telecommunications service, we conclude that this service is not a functionally integrated information service consisting of a telecommunications component “inextricably intertwined” with information service components. Rather, we conclude, for the reasons explained above, that broadband Internet access service as it is offered and provided today is a distinct offering of telecommunications and that it is not an information service.¹⁹

Over many generations of technologies, and despite vast changes in the telecommunications and information-processing marketplace, the FCC has opted to create and maintain an absolute dichotomy between regulated and largely unregulated services.²⁰ Notwithstanding its confidence in creating this dichotomy, the FCC has shown ambivalence about whether Congress created sufficiently clear statutory definitions, particularly when

17. 47 U.S.C. § 1302 (2014).

18. See, e.g., *id.* at §§ 153(43), 153(46), 153(20).

19. *2015 Open Internet Order*, para. 385. See also Federal-State Joint Board on Universal Service, *Report to Congress*, 13 FCC Rcd 11501, 11522 (1998) [hereinafter *1998 Universal Service Report*] (“[T]he language and legislative history of [the Communications Act of 1996] indicate that the drafters . . . regarded telecommunications services and information services as mutually exclusive categories.”); *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm’n*, 290 F. Supp. 2d 993, 994, 1000 (D. Minn. 2003) (applying the FCC’s dichotomy).

20. See, e.g., *2015 Open Internet Order*, para. 385; *1998 Universal Service Report*, 13 FCC Rcd at 11522.

claimed ambiguity affords the Commission an opportunity to make its own clarifications, category assignments, and reclassifications.²¹

When determining which statutory classification applies to broadband Internet access, the FCC first refrained from making any determination at all,²² but subsequently chose to apply the information service classification in 2002.²³ Now, the Commission has opted to change which classification applies²⁴ so that it can work around the judicial prohibition on applying common carrier nondiscrimination safeguards to non-common carriers.²⁵

The FCC appears to have undertaken a strategy designed to accord it maximum flexibility in devising a new, ex ante regulatory regime. It uses statutory ambiguity as the basis for continual, but inconsistent regulatory classifications. This amounts to a once ambiguous, always ambiguous view of the Communications Act of 1934, as amended by the Telecommunications Act of 1996. By invoking statutory ambiguity, the FCC assumes it has largely unconditional authority to make different interpretations of the same, unchanged, legislatively-crafted definitions. Having previously considered statutory ambiguity as the basis for deeming broadband Internet access thoroughly fitting within the information service category created by Congress, the *2015 Open Internet Order*, changes its classification and now deems all types of Internet access to fit solely within the telecommunications service definition. The Commission reiterates its conclusion that the statutory definitions remain unclear,²⁶ but elsewhere in the *Order* the

21. See, e.g., *2015 Open Internet Order*, para. 385.

22. Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, *Declaratory Rulemaking and Notice of Proposed Rulemaking*, FCC 02-77, 17 FCC Rcd 4798, para. 2. (2002) (“To date, however, the Commission has declined to determine a regulatory classification for, or to regulate, cable modem service on an industry-wide basis.”).

23. Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, *Declaratory Rulemaking and Notice of Proposed Rulemaking*, FCC 02-77, 17 FCC Rcd 4798, para. 2. (2002) (“To date, however, the Commission has declined to determine a regulatory classification for, or to regulate, cable modem service on an industry-wide basis.”).

24. *2015 Open Internet Order*, para. 29 (“[W]e find that broadband Internet access service is a ‘telecommunications service’ and subject to sections 201, 202, and 208.”).

25. See, e.g., *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (holding that because the FCC, under its prior regulatory regime, classified broadband providers as entities exempt from common carrier obligations, “the Communications Act expressly prohibits the [FCC] from . . . regulating them as such”); *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010) (holding that the FCC imposing network neutrality rules under its “ancillary” authority exceeded its statutory authority).

26. See *2015 Open Internet Order*, para. 331 (explaining that when reclassifying services, the FCC is “exercise[ing] the well-established power of federal agencies to interpret ambiguous provisions in the statutes they administer.”). See also *id.*, para. 332. (“The Court’s application of this *Chevron* test in *Brand X* makes clear our delegated authority to revisit our

Commission has no qualms about using the classifications, without adjustment, to specify into which single statutory category broadband Internet access fits.²⁷ Consistent with its insistence that any existing or prospective service fit solely within one category, the FCC decided that all types of broadband services constitute telecommunications services, regardless of the transmission technology.²⁸

It appears that the FCC assumes that because Congress did not explicitly state into which service definition broadband access fits, the Commission can assume unfettered flexibility in making and changing the classification while referring to, and using, the service definitions. Apparently the FCC has no problem with the definitions crafted by Congress. However, the lack of specific statutory instructions provides the FCC with the assumed lawful authority to make ad hoc, and potentially inconsistent, determinations of which statutory definition solely applies to any and all types of broadband Internet access.

Adding complexity and uncertainty to the *2015 Open Internet Order*, the FCC maintains the preexisting telecommunications service/information service dichotomy for broadband by reaffirming that there are several types of services that remain information services.²⁹ Even though these information service providers may use the same broadband

prior interpretation of ambiguous statutory terms and reclassify broadband Internet access service as a telecommunications service.”).

27. *See id.*, para. 385 (“In classifying broadband Internet access service . . . [r]ather, we conclude, for the reasons explained above, that broadband Internet access service as it is offered and provided today is a distinct offering of telecommunications and that it is not an information service.”).

28. *See id.*, para. 59 (“we reclassify broadband Internet access service as a telecommunications service under Title II”). The FCC previously determined that all forms of broadband Internet access constituted an information service. *See Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798, paras. 13-15 (2002) (cable modem broadband), *aff’d sub nom. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 977-78 (2005); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 14,853, 14,863-64 (2005) (digital subscriber line broadband) [hereinafter *DSL Reclassification Order*], *petition for rev. denied, Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007); *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*, 21 FCC Rcd 13,281 (2006) (broadband via power lines); *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks, Declaratory Ruling*, 22 FCC Rcd 5901 (2007) (wireless broadband).

29. *Compare 2015 Open Internet Order*, para. 190 (“We adopt our tentative conclusion in the *2014 Open Internet NPRM* that broadband Internet access service does not include virtual private network (VPN) services, content delivery networks (CDNs), hosting or data storage services, or Internet backbone services (to the extent those services are separate from broadband Internet access service).”), *with, id.*, para. 341 (“The record in this proceeding leads us to the conclusion that providers today market and offer consumers separate services that are best characterized as (1) a broadband Internet access service that is a telecommunications service; and (2) ‘add-on’ applications, content, and services that are generally information services.”).

switching, routing, web address look up, and temporary storage technologies as ISPs now deemed telecommunications services, the FCC retained the information service classification for broadband service provided by Content Distribution Networks (“CDNs”),³⁰ such as Akamai and other ISPs operating as intermediaries upstream from “retail” ISPs providing first and last mile services to end users.³¹ Bear in mind that CDNs and retail ISP interconnect their separate networks to provide consumers with speedy and seamless access to and from the Internet. Inconsistent regulatory classifications appear to differentiate the nature and function of CDNs vis a vis retail ISPs, but consumers expect both type carriers to cooperate fully to achieve a shared mission of ensuring high quality of service.

The FCC justifies the information service retention on grounds that CDNs and other intermediaries do not offer public services providing access to all or most Internet sites.³² However, this rationale ignores the primary role of these intermediaries: to facilitate the kinds of traffic prioritization, for compensation, that downstream ISPs cannot offer.³³ Thus, while ISPs directly serving end users cannot initiate such non-neutral service,³⁴ they can

30. Alexander Reicher, *Redefining Net Neutrality After Comcast v. FCC*, 26 BERKELEY TECH. L.J. 733, 759 (2011) (“By manipulating routing protocols, network administrators can also route traffic to overlay networks, which are physical additions to the Internet in the form of servers deployed widely across the Internet. Content Distribution Networks (CDNs) are some of the most popular overlays on the Internet today. They consist of servers distributed geographically across the Internet that retain a cache of the most frequently demanded content and services from publishers and providers. CDNs work by shortening the physical distance between the end-user and the content, enabling CDNs to optimize content delivery based on different criteria, including faster response time or optimal bandwidth costs.”).

31. See *2015 Open Internet Order*, para. 373 (“[T]his caching function provided by broadband providers as part of a broadband Internet service, is distinct from third party caching services provided by parties other than the provider of Internet access service (including content delivery networks, such as Akamai), which are separate information services.”).

32. *2015 Open Internet Order*, para. 190 (“The Commission has historically distinguished these services from ‘mass market’ services and, as explained in the 2014 Open Internet NPRM, they ‘do not provide the capability to receive data from all or substantially all Internet endpoints.’”) (quoting *2014 Open Internet NPRM*, 29 FCC Rcd, para. 58). See also *2010 Open Internet Order*, 25 FCC Rcd, para. 47 (“These services typically are not mass market services and/or do not provide the capability to transmit data to and receive data from all or substantially all Internet endpoints.”).

33. The FCC acknowledges that CDNs can enhance quality of service to broadband service subscribers by promoting greater certainty that they can access content without delay: “We do not seek to disrupt the legitimate benefits that may accrue to edge providers that have invested in enhancing the delivery of their services to end users. On the contrary, such investments may contribute to the virtuous cycle by stimulating further competition and innovation among edge providers, to the ultimate benefit of consumers.” *2015 Open Internet Order*, para. 128.

34. *2015 Open Internet Order*, para. 135 (“[W]e adopt a rule setting forth a no-unreasonable interference/disadvantage standard, under which the Commission can prohibit, on a case-by-case basis, practices that unreasonably interfere with or unreasonably disadvantage 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.”).

and do interconnect with other ventures whose business plans emphasize such non-neutrality.³⁵ By extension, retaining the information service classification for CDNs and other intermediaries constrains the FCC's ability to prevent the widespread operation of biased networks offering "better than best efforts" traffic enhancement for specific types of traffic generated by specific content providers and distributors.

Last mile ISPs cannot favor specific traffic, but upstream ventures can provide quality of service enhancements, so that certain types of traffic reach the last mile ISP with less latency, and little, if any, circuitous routing.³⁶ Having reached the last mile ISP using expedited and prioritized treatment, CDN traffic then travels on a "best efforts" routing link for the last mile without losing the likelihood of high quality transmission for the entire link from content source to consumer.³⁷

The FCC chose to emphasize that last mile ISPs have the potential to degrade upstream traffic flows.³⁸ Support for this emphasis lies in the widely publicized disputes between CDNs and content sources, on one hand, and last mile ISPs, such as Comcast, on the other hand.³⁹ However, in the

35. The FCC does not consider "better than best efforts" services provided by CDNs as a form of paid prioritization that the Commission prohibits ISPs from providing: "We also clarify that the ban on paid prioritization does not restrict the ability of a broadband provider and CDN to interconnect." *2015 Open Internet Order*, para. 128.

36. "Today, Akamai has application delivery networks that can accelerate entire web or IP-based applications, media delivery networks that provide HD-quality delivery of live and on-demand media . . ." Erik Nygren, Ramesh K. Sitaraman and Jennifer Sun, *The Akamai Network: A Platform for High-Performance Internet Applications*, <https://www.akamai.com/us/en/multimedia/documents/technical-publication/the-akamai-network-a-platform-for-high-performance-internet-applications-technical-publication.pdf>. "Variants of Paid Peering, Deep Caching, Assured Delivery or Secure M2M are among the innovative IP Interconnection business models that could lay the foundation for an advanced Internet platform, based on assured end-to-end Quality of Service Internet Platform – complementary to 'Best Effort'." Arthur D. Little & Liberty Global, *The Future of the Internet, Innovation and Investment in IP Interconnection*, 5 (May, 2014), <http://www.libertyglobal.com/pdf/public-policy/Liberty-Global-2014-Future-Of-The-Internet.pdf>.

37. "CDNs that support dynamic content create a "super highway" to accelerate the delivery of content across a longer distance. An individual ISP cannot provide this." John McIlwain, *How Content Delivery Networks Work* (April 13, 2015), <http://www.cdnetworks.com/blog/how-content-delivery-networks-work/>.

38. See *2015 Open Internet Order*, para. 196.

39. "Using Measurement Lab (M-Lab) data, and constraining our research to the United States, we observed sustained performance degradation experienced by customers of Access ISPs AT&T, Comcast, Centurylink, Time Warner Cable, and Verizon when their traffic passed over interconnections with Transit ISPs Cogent Communications (Cogent), Level 3 Communications (Level 3), and XO Communications (XO). "In a large number of cases we observed similar patterns of performance degradation whenever and wherever specific pairs of Access/Transit ISPs interconnected. From this we conclude that ISP interconnection has a substantial impact on consumer internet performance --sometimes a severely negative impact -- and that business relationships between ISPs, and not major technical problems, are at the root of the problems we observed." Measurement Lab Consortium, *ISP Interconnection and its Impact on Consumer Internet Performance, A Measurement Lab Consortium Technical*

more frequent instances where the last mile ISP does not meddle with upstream traffic, the FCC ignores the fact that plain vanilla delivery does not dilute the network management and traffic prioritization accruing to CDN traffic upstream.⁴⁰ Thus, retaining the information service classification for upstream traffic makes it nearly impossible for the FCC to intervene when problems arise, because the prohibition on common carrier remedies severely limits the remedial actions that the Commission can undertake.

Notwithstanding the tension among its statutory interpretations, the FCC will have to convince a panel of the D.C. Circuit that the *2015 Open Internet Order* reasonably responds to changed circumstances.⁴¹ Historically, the FCC has achieved comparatively greater success in defending regulatory streamlining, or abandonment,⁴² than when it has to convince an appellate courts that changed circumstances warrant regulatory modifications.⁴³ The *2015 Open Internet Order* could face an even more

Report, 5 (Oct. 28, 2014), http://www.measurementlab.net/static/observatory/M-Lab_Interconnection_Study_US.pdf.

40. Dirk Grunwald, *The Internet Ecosystem: The Potential for Discrimination*, 63 FED. COMM. L.J. 411, 413 (2011) (“[C]ommercial content distribution networks can effectively provide ‘preferential access’ to content provisioned on a CDN located within an ISP’s network without actually violating ‘neutral’ access network policies.”).

41. See *2015 Open Internet Order*, paras. 43-48.

42. See, e.g., *Earthlink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006) (affirming the FCC’s decision to forbear from imposing most local loop unbundling requirements on incumbent carriers); *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 588 (D.C. Cir. 2004) (upholding the FCC’s nationwide decision to refrain from requiring § 251 unbundling fiber broadband elements and reversing the Commission’s decision not to eliminate other unbundling requirements in light of the adverse impact on carrier investment incentives); *In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd. 4798, 4821 (Mar. 15, 2002) (declaratory ruling and notice of proposed rulemaking), *aff’d sub nom. Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 977-78 (2005) (affirming FCC decision to apply a statutory service definition triggering limited regulation).

43. See, e.g., *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15,499 (1996) (first report and order), *aff’d in part, rev’d in part, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd. 3696 (1999) (third report and order and fourth further notice of proposed rulemaking), *rev’d and remanded*, *United States Telecom Ass’n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (rejecting the FCC’s local exchange network unbundling requirements as insufficiently calibrated); *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 16 FCC Rcd. 22,781 (2001); *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16,978 (2003) (report and order and order on remand and further notice of proposed rulemaking), *corrected by Errata*, 18 FCC Rcd 19,020 (2003), *vacated and remanded in part, aff’d in part, United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (the FCC should not implement statutory requirements that incumbent carriers cooperate with market entrants when the Commission determines that adequate marketplace competition exist); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (FCC mandated public access channels on cable television networks constituted unlawful common carrier duties).

skeptical court review because the FCC has identified the need for re-regulation, which would result in more extensive government oversight.

A. *The FCC's 2015 Open Internet Order*

In the *2015 Open Internet Order*, the FCC substantially changed its regulatory approach to network neutrality.⁴⁴ Rather than act on a reviewing court's invitation to impose non-common carrier, network neutrality rules, the Democratic majority of the FCC opted for clearer and more muscular, ex ante rules on remand.⁴⁵ The FCC reclassified elements of Internet access as a Title II regulated, common carrier service with no distinction between wireline and wireless ISPs.⁴⁶ The FCC will have to convince a reviewing court that the decision to reclassify broadband service as common carriage resulted from rational decision-making based on a complete record

44. Network neutrality refers to government-mandated nondiscrimination, transparency, and other requirements on ISPs designed to foster a level competitive playing field among content providers and to establish consumer safeguards so that Internet users have unrestricted access, limited only by legitimate concerns such as ISP network management and national security. See *2010 Open Internet Order*, n.48 (2010). See also generally Barbara van Schewick, *Network Neutrality and Quality of Service: What a Nondiscrimination Rule Should Look Like*, 67 STAN L. REV. 1 (Jan. 2015); James B. Speta, *Unintentional Antitrust: The FCC's Only (and Better) Way Forward With Net Neutrality After the Mess of Verizon v. FCC*, 66 FED COMM. L.J. 491 (June, 2014); Amanda Leese, Note, *Net Transparency: Post-Comcast FCC Authority to Enforce Disclosure Requirements Critical to "Preserving the Open Internet"*, 11 NW J. TECH. & INTEL. PROP. 81 (2013); Daniel A. Lyons, *Net Neutrality and Nondiscrimination Norms in Telecommunications*, 54 ARIZ. L. REV. 1029 (2012); Adam Candeub & Daniel McCartney, *Law and the Open Internet*, 64 FED COMM. L.J. 493 (2012); Rob Frieden, *Rationales for and Against Regulatory Involvement in Resolving Internet Interconnection Disputes*, 14 YALE J.L. & TECH. 266 (2012); Dirk Grunwald, *The Internet Ecosystem: The Potential for Discrimination*, 63 FED COMM. L.J. 411 (2011); Rob Frieden, *Assessing the Merits of Network Neutrality Obligations at Low, Medium and High Network Layers*, 115 PENN. ST. L. REV. 49 (2010); Christopher S. Yoo, *Innovations in the Internet's Architecture that Challenge the Status Quo*, 8 J. ON TELECOMM. & HIGH TECH. L. 79 (2010); Marvin Ammori, *Beyond Content Neutrality: Understanding Content-Based Promotion of Democratic Speech*, 61 FED COMM. L.J. 273 (2009); Sascha D. Meinrath & Victor W. Pickard, *Transcending Net Neutrality: Ten Steps Toward an Open Internet*, 12 J. INTERNET L., Dec. 2008, at 1; Christopher S. Yoo, *Would Mandating Broadband Network Neutrality Help or Hurt Competition? A Comment on the End-To-End Debate*, 3 J. ON TELECOMM. & HIGH TECH. L. 23 (2004); Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141 (2003).

45. Regulatory agencies contemplating the potential for future conflicts and harm to competition and consumers create ex ante rules and regulations. Regulatory agencies and courts applying ex post remedies respond to complaints and law suits claiming harm that already has occurred. See Rob Frieden, *Ex Ante Versus Ex Post Approaches to Network Neutrality: A Comparative Assessment*, BERKELEY TECH. L. J. (2015).

46. See *2015 Open Internet Order*, para. 49. The FCC previously imposed less stringent rules on wireless carriers in light of spectrum use, greater potential for congestion and recent entry in broadband markets. The *2015 Open Internet Order*, however, treats wireless ISPs no differently than wireline ISPs. See *id.*, para. 88 ("conclude[ing] that it would benefit the millions of consumers who access the Internet on mobile devices to apply the same set of Internet openness protections to both fixed and mobile networks").

evidencing substantially changed circumstances occurring since 2002 when the FCC first classified Internet access as an information service.⁴⁷

The *Order* emphasized the need for narrowly crafted rules designed to “prevent specific practices we know are harmful to Internet openness—blocking, throttling, and paid prioritization—as well as a strong standard of conduct designed to prevent the deployment of new [anticompetitive] practices that would harm Internet openness.”⁴⁸ The Commission emphasized that ISPs have both the incentive and ability to leverage access in ways that can reduce incentives to innovate and invest in the Internet ecosystem:

The key insight of the virtuous cycle is that broadband providers have both the incentive and the ability to act as gatekeepers standing between edge providers and consumers. As gatekeepers, they can block access altogether; they can target competitors, including competitors to their own video services; and they can extract unfair tolls.⁴⁹

The FCC emphasized that while subjecting ISPs to Title II common carrier oversight, the Commission will use its statutory authority quite narrowly as evidenced by the decision to forbear⁵⁰ from applying “27 provisions of Title II of the Communications Act, and over 700 Commission rules and regulations.”⁵¹ The Commission recognized the need to explain

47. “It is also well settled that we may reconsider, on reasonable grounds, the Commission’s earlier application of the ambiguous statutory definitions of ‘telecommunications service’ and ‘information service.’” *Id.* at para. 334. “The [Supreme] Court’s application of . . . [the] *Chevron* test in *Brand X* makes clear our delegated authority to revisit our prior interpretation of ambiguous statutory terms and reclassify broadband Internet access service as a telecommunications service. The Court upheld the Commission’s prior information services classification because ‘the statute fails unambiguously to classify the telecommunications component of cable modem service as a distinct offering. This leaves federal telecommunications policy in this technical and complex area to be set by the Commission’ Where a term in the Act ‘admit[s] of two or more reasonable ordinary usages, the Commission’s choice of one of them is entitled to deference.’ The Court concluded, given the ‘technical, complex, and dynamic’ questions that the Commission resolved in the *Cable Modem Declaratory Ruling*, ‘[t]he Commission is in a far better position to address these questions than we are.’” *Id.* at para. 332 (citations omitted).

48. *Id.*, para. 4. The FCC prohibits broadband Internet access providers from blocking the delivery of lawful traffic to consumers. Additionally ISPs cannot slow down traffic absent congestion and other compelling circumstances. ISPs also cannot create fast lanes with “better than best efforts” available at premium rates and slow lanes using best efforts routing likely to result in degraded service.

49. *Id.*, para. 20.

50. 47 U.S.C § 160(a) authorizes the FCC to streamline the scope of its Title II oversight by forbearing from applying many common carrier requirements.

51. *Id.* at para. 5. The major provisions of Title II that the *Order* will apply are: nondiscrimination and no unjust and unreasonable practices under Sections 201 and 202; authority to investigate complaints and resolve disputes under section 208 and related enforcement provisions, specifically sections 206, 207, 209, 216 and 217; protection of

how the new requirements satisfy pressing needs, but in the most narrow and well-calibrated matter, in light of virulent opposition from most ISPs and the two Republican Commissioners. The *Order* reports that:

[T]here will be fewer sections of Title II applied than have been applied to Commercial Mobile Radio Service (CMRS), [the regulatory classification for wireless voice telecommunications service] where Congress expressly required the application of Sections 201, 202, and 208, and permitted the Commission to forbear from others. In fact, Title II has never been applied in such a focused way.⁵²

In addition to the specific prohibitions on blocking, throttling, and paid prioritization, the FCC established a general prohibition on ISP practices that unreasonably interfere with, or disadvantage downstream consumers and upstream edge providers of content, applications and services.⁵³ The Commission will consider, on a case-by-case basis, whether an ISP has engaged in a practice “that unreasonably interfere[s] with or unreasonably disadvantage[s] 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.”⁵⁴ The Commission opted to apply more open-ended evaluative criteria than the legal standard it previously proposed, which would have prohibited commercially unreasonable practices.⁵⁵ The Commission concluded that, instead, it would “adopt a governing standard that looks to whether consumers or edge providers face unreasonable interference or unreasonable disadvantages, and makes clear that the standard is not limited to whether a practice is agreeable to commercial parties.”⁵⁶

consumer privacy under Section 222; fair access to poles and conduits under Section 224, protection of people with disabilities under Sections 225 and 255; and providing universal funding for broadband service, but not the requirement to collect contributions to such funding through partial application of Section 254.

52. *Id.* at para. 38.

53. *See id.*, para. 21.

54. *Id.* at para. 135.

55. 2014 *Open Internet NPRM*, para. 10 (“[W]here conduct would otherwise be permissible under the no-blocking rule, we propose to create a separate screen that requires broadband providers to adhere to an enforceable legal standard of commercially reasonable practices, asking how harm can best be identified and prohibited and whether certain practices, like paid prioritization, should be barred altogether.”).

56. *Id.*, para. 150. The FCC identified a number of factors it will consider in future evaluations. These include an assessment whether a practice allows end-user control and is consistent with promoting consumer choice, its competitive effect, whether consumers and opportunities for free expression are promoted or harmed, the effect on innovation, investment, or broadband deployment, whether the practice hinders the ability of end users or edge providers to use broadband access to communicate with each other and whether a practice conforms to best practices and technical standards adopted by open, broadly

The FCC stated that it will use the “no-unreasonable interference/disadvantage” standard to evaluate controversial subjects including the lawfulness of “sponsored data” arrangements where an ISP accepts advertiser payment in exchange for an agreement not to meter and debit the downstream traffic delivery.⁵⁷ The FCC also will use this standard to consider the lawfulness of data caps that tier service by the amount of permissible downloading volume.⁵⁸ In both instances, the FCC sees the potential for an ISP to create artificial scarcity to extract higher revenues, to favor corporate affiliates and third parties willing to pay a surcharge, as well as the potential for disadvantaging competitors, e.g., using data caps to harm new vendors of video programming that compete with an ISP service.⁵⁹ On the other hand, the Commission also recognizes that service tiering can promote innovation and new, customized services.⁶⁰

The *2015 Open Internet Order* expresses the view that reclassifying Internet access as a telecommunications service provides the strongest legal foundation for enforceable regulations, coupled with a secondary reference to Section 706 of the Telecommunications Act of 1996⁶¹ and Title III,⁶² which addresses the use of radio spectrum and applies common carriage regulation to wireless voice carriers.⁶³ By using the stronger Title II foundation, the FCC asserts that it can establish clear and unconditional statutory authority, but also use the flexibility to forbear⁶⁴ from applying

representative, and independent Internet engineering, governance initiatives, or standards-setting organization. *Id.*, paras. 139-145.

57. *See id.* paras. 151-53.

58. *See id.* para. 122.

59. *2015 Open Internet Order*, para. 82 (“Broadband providers may seek to gain economic advantages by favoring their own or affiliated content over other third-party sources. Technological advances have given broadband providers the ability to block content in real time, which allows them to act on their financial incentives to do so in order to cut costs or prefer certain types of content. Data caps or allowances, which limit the amount and type of content users access online, can have a role in providing consumers options and differentiating services in the marketplace, but they also can negatively influence customer behavior and the development of new applications.”).

60. *Id.*, para. 351 (“Furthermore, fixed broadband providers use transmission speeds to classify tiers of service offerings and to distinguish their offerings from those of competitors.”).

61. 47 U.S.C. § 1302 (2014).

62. 47 U.S.C. § 301-399B (2014).

63. *See 2015 Open Internet Order*, paras. 273-74; *see also* *Mobile Services*, 47 U.S.C. § 332 (2014). “We ground the open Internet rules we adopt today in multiple sources of legal authority—section 706, Title II, and Title III of the Communications Act. We marshal all of these sources of authority toward a common statutorily-supported goal: to protect and promote Internet openness as platform for competition, free expression and innovation; a driver of economic growth; and an engine of the virtuous cycle of broadband deployment. We therefore invoke multiple, complementary sources of legal authority. As a number of parties point out, our authority under section 706 is not mutually exclusive with our authority under Titles II and III of the Act.”

64. 47 U.S.C. § 160(a)(1)-(3) (“Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service . . . if the Commission determines

unnecessary common carrier requirements, as has occurred for wireless telephone service.⁶⁵ With a Title II regulatory foundation, the *Order* also makes it possible for the FCC to create an open Internet conduct standard that ISPs cannot harm consumers or edge providers with enforcement tools available to sanction violations.⁶⁶

The FCC's decision to treat Internet access as common carriage triggered petitions for judicial review, asking the courts to decide whether the reclassification constitutes a reasonable decision based on a complete evidentiary record. By opting for the reclassification option, the FCC underscores the riskiness in imposing *ex ante* regulation without an explicit legislative mandate.⁶⁷

III. THE VARIABLE BURDENS OF APPELLATE REVIEW FOR FCC REGULATIONS

The FCC achieves greater success on judicial review when it reduces its regulatory wingspan as compared to instances where it changes the nature of regulation, or imposes new and more burdensome regulations. This section will examine case precedent addressing FCC decisions that change the scope and reach of its oversight. A deregulatory decision typically passes judicial muster unless explicit statutory language requires specific action.⁶⁸

that (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.”).

65. 47 U.S.C. § 332 (c)(1)(A) (“A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this Act, except for such provisions of title II as the Commission may specify by regulation as inapplicable to that service or person.”).

66. With an eye toward providing timely, certain and flexible enforcement of its open Internet rules, the FCC announced its intention to use advisory opinions similar to those issued by the Department of Justice's Antitrust Division. *See generally 2015 Open Internet Order*, paras. 229-239 (discussing the advisory opinion process). Advisory opinions will enable companies to seek guidance on the propriety of certain open Internet practices before implementing them, enabling them to be proactive about compliance and avoid enforcement actions later. The FCC may use advisory opinions to explain how it will evaluate certain types of behavior and the factors that will be considered in determining whether open Internet violations have occurred. Because these opinions will be publicly available, we believe that they will reduce the number of disputes by providing guidance to the industry.” *See id.* para. 229.

67. *See Rob Frieden, Ex Ante Versus Ex Post Approaches to Network Neutrality: A Comparative Assessment*, xx BERKLEY TECH. L.J. xx (2015).

68. “[I]n examining rulemaking and transitions in all three branches of government from the agency's perspective, it may be most helpful to consider how the agency analyzes the costs and benefits of rulemaking. This cost-benefit calculation is quite different than the one typically discussed in administrative law—whether a particular regulation has net benefits to society. Instead, the calculation considers the net benefits of a rulemaking, both in terms of

When the FCC changes regulatory requirements of ventures already subject to oversight, appellate courts typically affirm the decision absent evidence that the Commission failed to generate a complete evidentiary record,⁶⁹ when it chose to ignore relevant information,⁷⁰ or when it devised unreasonable rules and regulations.⁷¹ The FCC's *2015 Open Internet Order* creates a new category where the FCC seeks to re-regulate, an outcome likely to trigger very close scrutiny of the factual and legal rationales used by the Commission.

A. Streamlining and Deregulation

When the FCC reduces, streamlines, or eliminates regulation, it likely receives the benefit of the doubt from reviewing courts based on reasonably anticipated competitive and consumer benefits.⁷² Prevailing

substance and process, to an agency in light of the particular costs to the agency. On the benefit side, the agency may care about the regulatory outcome; budgetary, political, and status rewards; and judicial deference. On the cost side, the agency may worry about regulatory outcome; budgetary, political, and status fallout; and reversal by the courts. Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 487 (2011). Even though regulatory agencies arguably have identical statutory obligations when regulating and deregulating, *see Motor Vehicles Manufacturers Association v. State Farm*, 463 U.S. 29 (1983)(subjecting reduced seat belt requirements to same arbitrary standard as one that would have imposed greater requirements), they likely accrue dividends with the public, Congress and the courts when showing how deregulation will promote efficiency, possibly lead to lower consumer costs and stimulate competition.

69. "When an agency departs from past practice, it 'must provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.'" *CBS Corp. v. FCC*, 785 F.3d 699, 708 (D.C. Cir. 2015) (quoting *Ramaprakash v. FAA*, 346 F.3d 1121, 1124 (D.C. Cir. 2003)).

70. *See, e.g., Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 231 (2008) (FCC "failed to satisfy the notice and comment requirement of the Administrative Procedure Act ('APA') by redacting studies on which it relied in promulgating the rule and failed to provide a reasoned explanation for its choice of the extrapolation factor

for" predicting how quickly broadband over powerline (BPL) emissions attenuate or weaken); *see also Administrative Procedure Act*, 5 U.S.C. § 553(b)-(c) (2014).

71. In *Schurz Commc'ns, Inc. v. FCC*, 982 F.2d 1043 (7th Cir. 1992), the Seventh Circuit rejected the FCC's attempt to modify rules designed to limit broadcast networks' control of programming aired by affiliates, including a rule limiting to 40 percent how much of a network's own prime-time entertainment schedule may consist of programs produced by the network itself. The court strongly admonished the FCC:

The Commission's articulation of its grounds is not adequately reasoned. Key concepts are left unexplained, key evidence is overlooked, arguments that formerly persuaded the Commission and that time has only strengthened are ignored, contradictions within and among Commission decisions are passed over in silence. The impression created is of unprincipled compromises of Rube Goldberg complexity among contending interest groups viewed merely as clamoring suppliants who have somehow to be conciliated. . . . The Commission must do better in articulating

their justification. *Id.* at 1050.

72. *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 908 (D.C. Cir. 2009) (citing *EarthLink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006)) ("Our task on review is therefore limited. We review the FCC's action in this case only to ensure that it is not 'arbitrary,

political and economic doctrine typically support the reduction of government oversight based on the view that this will reduce market distortions, place greater reliance on marketplace self-regulation, promote innovation, stimulate investment, and benefit consumers.⁷³

Opposition to reduced or eliminated regulation sometimes occurs when disputes arise whether public benefits will actually accrue and when a stakeholder determines that it would achieve higher revenues under the status quo. For example, incumbent local and long distance telephone carriers opposed an FCC plan to remove the requirement that all carriers file and adhere to tariffs, which are public contracts specifying, in painstaking detail, the terms and conditions of every type of service.⁷⁴ While tariff filing reduced the speed and flexibility in which carriers specified service terms, incumbent carriers benefitted from the insulation from liability that these public contracts accorded as well as the ability to standardize service into a small number of tariffs.⁷⁵

In the case, *MCI Telecommunications Corp. v. FCC*,⁷⁶ the District of Columbia Circuit overturned the FCC's deregulatory decision, reasoning that the Commission lacked explicit statutory authority to eliminate the tariff-filing requirement contained in Section 203(b)(2) of the

capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)(A). That standard is particularly deferential in matters such as this, which implicate competing policy choices, technical expertise, and predictive market judgments."); *see also Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205, 221 (3d Cir. 2007).

73. For example, the D.C. Circuit Court of Appeals rejected FCC-imposed caps on cable television national market share on grounds that the FCC did not fully consider the extent of current competition:

[T]he Commission has failed to demonstrate that allowing a cable operator to serve more than 30 percent of all cable subscribers would threaten to reduce either competition or diversity in programming.

First, the record is replete with evidence of ever increasing competition among video providers: Satellite and fiber optic video providers have entered the market and grown in market share since the Congress passed the 1992 Act, and particularly in recent years. Cable operators, therefore, no longer have the bottleneck power over programming that concerned the Congress in 1992. Second, over the same period there has been a dramatic increase both in the number of cable networks and in the programming available to subscribers.

Comcast Corp. v. FCC, 579 F.3d 1,7 (D.C. Cir. 2009).

74. Policy & Rules Concerning Rates for Competitive Common Carrier Services & Facilities Authorizations Therefor, *First Report and Order*, 85 F.C.C. 2d 1(1980), *Second Report and Order*, 91 F.C.C. 2d 59 (1982), *Fourth Report and Order*, 95 F.C.C. 2d 554 (1983), *Sixth Report and Order*, 99 F.C.C. 2d 1020 (1985), *reversed sub nom.*, *MCI Telecommunications Corp. v. AT & T*, 512 U.S. 218 (1994).

75. *See Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214 (1998) (filed rate doctrine bars claims against a utility that conflict with its tariff or claims that would vary or enlarge a party's rights as defined by the tariff).

76. *MCI Telecomm. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985), *aff'd*, *MCI Telecomm'n's Corp. v. AT&T* 512 U.S. 218 (1994).

Communications Act.⁷⁷ The Supreme Court affirmed the lower court, holding that the FCC cannot ignore a clear and unambiguous statutory requirement:

The dispute between the parties turns on the meaning of the phrase “modify any requirement” in § 203(b)(2). Petitioners argue that it gives the Commission authority to make even basic and fundamental changes in the scheme created by that section. We disagree. The word “modify”—like a number of other English words employing the root “mod-” (deriving from the Latin word for “measure”), such as “moderate,” “modulate,” “modest,” and “modicum”—has a connotation of increment or limitation. Virtually every dictionary we are aware of says that “to modify” means to change moderately or in minor fashion.⁷⁸

B. New or Revised Regulation When the Statutory Mandate Contains Ambiguities

Many appellate cases involving the FCC address the lawfulness of a new or revised regulatory regime.⁷⁹ The standard of review turns, in large part, on whether the FCC can demonstrate that it reasonably interpreted and applied ambiguous statutory language, compiled a complete evidentiary record, and generated a decision that does not appear arbitrary, capricious or an abuse of discretion.⁸⁰ For instances where the FCC can show ambiguity exists in the statutory language, the review standard, commonly referred to

77. See *MCI Telecomm. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985); see also 47 U.S.C. § 203(b)(2) (2013).

78. *MCI Telecommunications Corp. v. FCC*, 512 U.S. 218, 225 (1994).

79. “[A regulatory] agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). *Qwest Corp. v. FCC*, 258 F.3d 1191, 1198-99 (10th Cir. 2001) (citing *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994) (determining that the FCC failed to provide adequate justifications to prove rational decision making in calculating subsidy mechanism for promoting universal service in high cost areas) (“If the agency has failed to provide a reasoned explanation for its action, or if limitations in the administrative record make it impossible to conclude the action was the product of reasoned decision-making, the reviewing court may supplement the record or remand the case to the agency for further proceedings. It may not simply affirm.”)).

80. Under the Administrative Procedure Act (“APA”), federal courts have an obligation to set aside an agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A) (2013). See also Caroline Cecota & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 *GEO. MASON L. REV.* 575, 575 (2015) [hereinafter Cecota & Viscusi] (“In essence, the APA tasks courts with ensuring that federal agency action is reasonable—or rather, that agencies base their actions on relevant and reliable data and articulate a rational connection between the evidence and their actions.”).

as the *Chevron* Doctrine,⁸¹ requires the FCC to demonstrate that its interpretation is reasonable.⁸²

An appellate court may affirm the FCC even when a rule change results in an expansion of its regulatory wingspan, or prevents states and localities from creating their own regulations.⁸³ For example, the FCC successfully defended its decision to subject Voice over the Internet Protocol (“VoIP”)⁸⁴ telephone services to substantial regulation, despite never stating that VoIP constitutes a telecommunications service.⁸⁵ The FCC avoided stating that VoIP constituted the functional equivalent of common carrier voice telephone service⁸⁶ because doing so probably would have qualified VoIP providers to receive universal service subsidies and other entitlements

81. See *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

82. “First, *Chevron* directed courts to determine whether the relevant statutory language was clear and on point using traditional tools of statutory interpretation. If the statutory language were clear, the agency would have to follow Congress’s unambiguously expressed instruction. If Congress’s intentions were unclear and the language were open to multiple interpretations, then in step two the court would defer to the agency’s interpretation as long as the interpretation was permissible and not foreclosed by the statutory language. The *Chevron* method was to give more leeway to the agency, acknowledging its interpretative mandate from Congress to implement the statute and its relative expertise in regulatory affairs as compared to the courts.” Cecota & Viscusi, *supra*, at 585.

83.

84. VoIP is the real-time carriage and delivery of data packets that correspond to voice. VoIP services range in quality, reliability, and price and can link both computers and ordinary telephone handsets. For technical background on how VoIP works, see Susan Spradley & Alan Stoddard, *Tutorial on Technical Challenges, Associated with the Evolution to VoIP*, FCC (Sept. 22, 2003), <http://www.fcc.gov/events/tutorial-technical-challenges-associated-evolution-voip>. See also generally, Charles J. Cooper & Brian Stuart Koukoutchos, *Federalism and the Telephone: The Case for Preemptive Federal Deregulation in the New World of Intermodal Competition*, 6 J. TELECOM & HIGH TECH. L.293 (2008).

85. Vonage Holdings Corp.’s Petition for Declaratory Ruling Concerning an Order of the Min. Pub. Utils. Comm’n, *Memorandum Opinion & Order*, FCC 04-267, 19 FCC Rcd 22404 (2004), *aff’d. sub nom. Minn. Pub. Utils. Comm’n v. FCC*, 483 F.3d 570 (8th Cir. 2007). “Today, interconnected VoIP providers must contribute to universal service,⁷⁸ offer access to law enforcement subject to legitimate wiretaps, provide E911 emergency service, support users with disabilities, protect the privacy of customer information they use to complete calls, offer number portability, and report service outages. The FCC has adopted all these requirements, which have been relatively uncontroversial, without ever having to decide whether certain forms of VOIP fall under the definition of “telecommunications service” subject to Title II of the Communications Act.” Kevin Werbach, *Reflections on Network Transitions and Social Contracts for the Broadband World*, 13 COLO. TECH. L.J. 45, 65 (2015).

86. “Vonage Holdings is an interesting example of the FCC’s continuing refusal to classify VoIP as either a telecommunications service or an information service. Extrapolating from the FCC argument accepted by the D.C. Circuit leads to the conclusion that offerors of either telecommunications or information services may provide telecommunications as one component of services offered. As such, other Title II requirements also using the verb ‘provide’ may be applied to interconnected VoIP without having to define its type of service. In effect, the FCC has established a means of regulating VoIP implementations outside of the telecommunications/information services dichotomy in addition to exercises of its ancillary Title I authority.” Marc Elzweig, *D, None of the Above: On the FCC Approach to VoIP Regulation*, 2008 U. CHI. LEGAL F. 489, 503 (2008)[hereinafter cited as Elzweig].

reserved for telephone companies.⁸⁷ The FCC also avoided applying the information service classification, because this attribution would have limited the scope of regulatory safeguards it could apply,⁸⁸ just as has occurred for broadband Internet access.⁸⁹

The FCC invoked its “ancillary jurisdiction”⁹⁰ to justify regulation, based on its determination that VoIP could adversely impact existing voice telephone service subscribers as well as carriers already subject to common carrier regulation.⁹¹ Not only did the FCC convince the Eighth Circuit that

87. “The FCC has in the past relied upon its ancillary authority under Title I of the Act to create universal service contribution obligations for interconnected VoIP providers, but has not made VoIP services eligible for funding for universal service. Although the FCC applied contribution obligations on interconnected VoIP providers for calls that did not actually touch the PSTN, it based its decision on the fact that interconnected VoIP services in general still offer the capability of reaching the PSTN.” Jodie Griffin, *Universal Service in an All-IP World*, 23 COMMLAW CONCEPTUS 346, 351 (2015).

88. By avoiding classifying VoIP as either an information service or a telecommunications service, the FCC has flexibility to determine the proper mix of regulatory duties and freedoms. “With VoIP, the FCC has differentiated among implementations, determining some to be telecommunications services and some to be information services, while others remain unclassified. Some VoIP implementations are heavily regulated, while others are not regulated at all. For VoIP services not yet placed in either category, the FCC has imposed incremental, targeted regulations through a series of orders. This treatment is a notable departure from past FCC regulatory actions, and responses are varied. Some argue that the FCC should declare VoIP an information service and leave it unregulated. Other commentators have criticized the regulations that have been applied, and still others have taken this departure as a signal that markedly different regulation regimes should be applied.” Elzweig, 2008 U. CHI. LEGAL F. at 490-91.

89. *See generally, Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (holding that because the FCC, under its prior regulatory regime, classified broadband providers as entities exempt from common carrier obligations, “the Communications Act expressly prohibits the [FCC] from . . . regulating them as such”).

90. The FCC relies on a claim of ancillary jurisdiction when the Commission lacks explicit statutory authority. The FCC successfully invoked ancillary jurisdiction to regulate cable television even before the Commission received a statutory mandate to do so. “The FCC needed a hook to assert jurisdiction over cable. To reach that goal, it used a two-step process. First, the Commission found that cable was within its primary statutory grant of authority under section 152(a) of the [Communications] Act, which allows the FCC to regulate ‘all interstate and foreign communication by wire or radio.’ Second, the FCC invoked section 303(r) of the Act, which allows the Commission to issue ‘such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,’ as ‘public convenience, interest, or necessity requires.’ The FCC also referenced section 154(i), which provides that ‘[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Communications Act], as may be necessary in the execution of its functions.’ Kevin Werbach, *Off the Hook*, 95 CORNELL L. REV. 535, 572 (2010) (citations omitted).

91. *See Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006) (requiring interconnected VoIP service providers to supply 911 emergency calling capabilities); *Vonage Holdings Corp. v. F.C.C.*, 489 F.3d 1232 (D.C. Cir. 2007) (affirming the FCC's decision to require VoIP operators to contribute to universal service funds); *In re Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services, Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 6927 (2007)

the Commission should have jurisdiction over VoIP service, the court also upheld the FCC's preemption of state regulation that could interfere with formation of a single, national regulatory policy.⁹²

A successful claim of ancillary jurisdiction allows the FCC to apply existing, direct statutory authority to new technologies and ventures.⁹³ The FCC first applied this strategy in defending cable television regulations, which it argued were necessary to prevent economic harm to incumbent, regulated television broadcasters, despite the lack of explicit statutory authority to regulate cable television operators.⁹⁴

In the recent case of *Cellco Partnership v. FCC*,⁹⁵ the FCC succeeded in convincing the District of Columbia Circuit that it has the jurisdiction and the power to impose rules requiring wireless carriers to provide Internet access to visitors, despite the fact that the service in question constituted an information service and not regulated voice telephone service.⁹⁶ In its Order, the FCC mandated that all cellphone companies interconnect their wireless data networking capabilities, so that users temporarily located outside their home service territory can continue to access Internet services.⁹⁷ The Court accepted the FCC's rationale for requiring wireless carriers to provide data service to "roaming" subscribers of another company because the FCC previously had ordered these companies to provide roaming for their voice telephone services, a common carrier service, so that roamers could continue to make and receive calls.⁹⁸ Even though the FCC lacked statutory authority to regulate information services, which at the time included wireless data service, the Court agreed that ensuring the continuity of attendant data services was ancillary to its voice-roaming requirement.⁹⁹ In so holding, the Court accepted the rationale

(extending customer proprietary network information obligations to interconnected VoIP service providers), *aff'd sub nom. Nat'l Cable & Telecom. Assoc. v. FCC*, 555 F.3d 996 (D.C. Cir. 2009); *Matters of Local Number Portability Porting Interval and Validation*, Report and Order, 25 FCC Rcd 6953 (2010) (establishing fast deadlines for migrating a telephone service subscriber to and from VoIP service); *The Proposed Extension of Part 4 of the Commission's Rules Regarding Outage Reporting to Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers*, Report and Order, 27 FCC Rcd 2650 (2012) (requiring VoIP carriers to report service outages).

92. *See Minn. Pub. Utils. Comm'n*, 483 F.3d at 581 ("After carefully considering the positions presented by both sides of this dispute, we conclude the FCC did not arbitrarily or capriciously determine state regulation of VoIP service would interfere with valid federal rules or policies.").

93. *See, e.g., Vonage Holding Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007) (affirming FCC regulatory oversight of VoIP and preempting state deregulation or inconsistent regulation).

94. *See United States v. Sw. Cable Co.*, 392 U.S. 157 (1968); *see also United States v. Midwest Video Corp.* (Midwest Video I), 406 U.S. 649 (1972).

95. *Cellco P'ship v. FCC*, 700 F.3d 534 (D.C. Cir. 2012).

96. *See id.*

97. *See id.*

98. *See id.*

99. *See id.* at 544 ("[G]iven the 'high level of deference due to an agency in interpreting its own orders and regulations,' we have little difficulty concluding that the Commission's

that the FCC's ancillary jurisdiction enables the Commission to leverage existing statutory authority over incumbent technologies to regulate related new technologies that would otherwise be exempt from common carrier regulation.¹⁰⁰ In this case, because the FCC had direct statutory authority to mandate wireless voice roaming interconnection under Titles II and III of the Communications Act, the FCC could impose a duty to deal between wireless carriers, so long as the requirements did not rise to the level of common carriage.¹⁰¹

Under *Chevron*, the can FCC change the scope and emphasis of its regulatory mission based on changed circumstance and a new evidentiary record.¹⁰² For example, in *In re FCC 11-161* (Universal Service Reform Affirmance),¹⁰³ the Tenth Circuit upheld a substantially revised and refocused universal service regime that establishes surcharges on voice telephone service subscribers to subsidize carrier voice and broadband services in high cost areas.¹⁰⁴ This case provides strong validation of judicial deference to regulatory agency expertise when the applicable statutes either lack specificity, provide multiple objectives, or contemplate changed circumstances necessitating revised implementation.¹⁰⁵ In this case, the court

classification of the voice roaming rule as a common carrier obligation does not amount to a conclusion that automatic-roaming requirements necessarily entail common carriage.”) (citing *MCI Worldcom Network Servs v. FCC*, 274 F.3d 542, 548 (D.C. Cir. 2001)). The Court also noted that, “the data roaming rule imposes obligations that differ materially from the kind of requirements that necessarily amount to common carriage,” *id.* at 547, and “the data roaming rule leaves substantial room for individualized bargaining and discrimination in terms.” *Id.* at 548.

100. *See id.*

101. *See id.*

102. *2015 Open Internet Order*, para. 332 (“[The] *Chevron* test in *Brand X* [which affirmed the information service classification to cable modem, Internet access] makes clear our delegated authority to revisit our prior interpretation of ambiguous statutory terms and reclassify broadband Internet access service as a telecommunications service.”).

103. *In re FCC 11-161 (Universal Service Reform Affirmance)*, 753 F.3d 1015 (10th Cir. 2014),

104. *In re FCC 11-161 (Universal Service Reform Affirmance)*, 753 F.3d 1015 (10th Cir. 2014). *See also* Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support; Developing a Unified Inter carrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up, and Universal Service Reform Mobility Fund, *Report and Order and Further Notice of Proposed Rulemaking*, 26 FCC Rcd 17663 (2011), *affirmed sub nom.*, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014). *See also* Connect America Fund, *Report and Order and Further Notice of Proposed Rulemaking*, 26 FCC Rcd 17663, 27 FCC Rcd 4040 (2011); Connect America Fund, *Report and Order*, 28 FCC Rcd 15060 (2013); Universal Service Implementation Progress Report, WC 10-90 (Wireline Comp. Bur. Mar. 24, 2014), https://apps.fcc.gov/edocs_public/attachmatch/DOC-326217A1.pdf.

105. “Instead, as the FCC suggests, it is reasonable to conclude that Congress left a gap to be filled by the FCC, i.e., for the FCC to determine and specify precisely how USF funds may or must be used. And, as the FCC explained in the Order, carriers ‘that benefit from public investment in their networks must be subject to clearly defined obligations associated with

deferred to the FCC's interpretation of its statutory authority, finding that the statute was ambiguous and the Commission acted reasonably in its interpretation of the statute.

The court affirmed the FCC decision to expand the USF mission to include fixed line and wireless broadband services without having qualified these ventures as conventional common carriers solely providing telecommunications services.¹⁰⁶ For example, the court closely examined the FCC's use of Section 254 of the Communications Act to grant it authority to redirect the USF mission largely to broadband information services:

[I]t is beyond dispute that subsection (c)(1) expressly authorizes the FCC to define "periodically" the types of telecommunications services that are encompassed by "universal service" and thus "supported by Federal universal service support mechanisms." Further, there is no question that the FCC, to date, has interpreted the term "telecommunications services" to include only telephone services and not VoIP or other broadband internet services. All that said, however, nothing in the language of subsection (c)(1) serves as an express or implicit limitation on the FCC's authority to determine what a USF recipient may or must do with those funds. More specifically, nothing in subsection (c)(1) expressly or implicitly deprives the FCC of authority to direct that a USF recipient, which necessarily provides some form of "universal service" and has been deemed by a state commission or the FCC to be an eligible telecommunications carrier under 47 U.S.C. § 214(e), use some of its USF funds to provide services or build facilities related to services that fall outside of the FCC's current definition of "universal service." In other words, nothing in the

the use of such funding." *In re FCC 11-161 (Universal Service Reform Affirmance)*, 753 F.3d at 1046, quoting JA at 418 (Order Id. 74).

106. "The fact remains, however, that in order to obtain USF funds, a provider must be designated by the FCC or a state commission as an "eligible telecommunications carrier" under 47 U.S.C. § 214(e). See 47 U.S.C. § 254(e) ("only an eligible telecommunications carrier designated under section 214(e) ... shall be eligible to receive specific Federal universal service support."). And, under the existing statutory framework, only 'common carriers,' defined as 'any person engaged as a common carrier for hire ... in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy,' 47 U.S.C. § 153(10), are eligible to be designated as 'eligible telecommunications carriers,' 47 U.S.C. § 214(e). Thus, under the current statutory regime, only ETCs can receive USF funds that could be used for VoIP support. Consequently, there is no imminent possibility that broadband-only providers will receive USF support under the FCC's Order, since they cannot be designated as 'eligible telecommunications carriers.' As a result, we agree with the FCC that the petitioners' argument 'will not be ripe for judicial review unless and until a state commission (or the FCC) designates ... an entity' that is not a telecommunications carrier as "an 'eligible telecommunications carrier' " under § 214(e). *In re FCC 11-161 (Universal Service Reform Affirmance)*, 753 F.3d at 1048-49, quoting FCC Br. 3 at 5.

statute limits the FCC's authority to place conditions, such as the broadband requirement, on the use of USF funds.¹⁰⁷

The court accepted the view that the Commission can allocate universal service funds for both services and facilities, the latter including advanced broadband facilities used by carriers to provide both telecommunications services, e.g., voice telephony and advanced services, including broadband Internet access that might fit into either telecommunication services or information services:

The FCC also, in our view, reasonably concluded that Congress's use of the terms "facilities" and "service" in the second sentence of § 254(e) afforded the FCC "the flexibility not only to designate the types of telecommunications services for which support would be provided, but also to encourage the deployment of the types of facilities that will best achieve the principles set forth in section 254(b)."¹⁰⁸

The court also examined whether and how Section 706(b) of the Communications Act granted the FCC an independent grant of authority to revise the USF mission to include broadband services without having to invoke other sections of the Act. The court confirmed that the FCC could use this authority, established in the Telecommunications Act of 1996, to make reasonable recalibrations of the universal service mission in light of the new mandate to promote timely access to advanced telecommunications capabilities¹⁰⁹ which the FCC has interpreted to include broadband Internet access:

107. *Id.* 753 F.3d at 1046. The court concluded that "the FCC's interpretation of § 254(e) is not 'arbitrary, capricious, or manifestly contrary to the statute.'" (citing *Chevron*, 467 U.S. at 844). Congress clearly intended, by way of the second sentence of § 254(e), to mandate that USF funds be used by recipients 'only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.' And it seems highly unlikely that Congress would leave it to USF recipients to determine what "the support is intended" for. Instead, as the FCC suggests, it is reasonable to conclude that Congress left a gap to be filled by the FCC, i.e., for the FCC to determine and specify precisely how USF funds may or must be used. And, as the FCC explained in the Order, carriers 'that benefit from public investment in their networks must be subject to clearly defined obligations associated with the use of such funding.' *Id.* (citations omitted).

108. *Id.* 753 F.3d at 1046-47; *see also* *Am. Family Ass'n, Inc. v. FCC*, 365 F.3d 1156, 1166 (D.C. Cir. 2004). "We must defer to the Commission's expert judgment in the absence of record evidence indicating that the Commission's assumption is a clear error of judgment, or a showing that the empirical assumption is facially implausible or inconsistent." *Id.* at 1165 (FCC's method for assigning noncommercial educational broadcast licenses among competing applicants deemed valid).

109. The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications

In contrast, section 706(b) requires the FCC to perform two related tasks. First, the FCC must conduct an annual inquiry to “determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.” Second, and most importantly for purposes of this appeal, if the FCC’s annual “determination is negative,” it is required to “take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.” Unlike section 706(a), section 706(b) does not specify how the FCC is to accomplish this latter task, or otherwise refer to forms of regulatory authority that are afforded to the FCC in other parts of the Act. As the FCC concluded in the Order, section 706(b) thus appears to operate as an independent grant of authority to the FCC “to take steps necessary to fulfill Congress’s broadband deployment objectives,” and “it is hard to see what additional work section 706(b) does if it is not an independent source of authority.”¹¹⁰

The court sequentially examined the numerous changes in universal service funding and in each instance affirmed the FCC’s actions. These actions include the Commission’s determination of USF support amounts, the decision to limit ongoing voice telephony subsidies to incumbent carriers, but to eliminate all support in locations, previously deemed high cost areas, where an unsubsidized competitor offers voice and broadband throughout the specified service area. The court also affirmed the FCC’s decision to use reverse auctions to determine which carrier will receive USF funding and how much it will receive.

In contrast to the FCC’s perceived need to make an explicit regulatory reclassification in its *2015 Open Internet Order*, the 10th Circuit Court of Appeals affirmed the FCC without requiring it to provide reasons for including information services to the array of services, qualifying for universal service subsidization. The FCC was able to mandate surcharges of basic telecommunications services to generate funds used to expand the reach and affordability of both voice and data service without any question whether the Commission had statutory authority to subsidize information service for which it then lacked jurisdiction to regulate.¹¹¹

capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology. 47 U.S.C. § 1302.

110. *Universal Service Reform Affirmance*, 753 F.3d at 1053-54.

111. The FCC also has established a subsidy mechanism to promote universal broadband access in schools and libraries. See *Modernizing the E-rate Program for Schools and Libraries*, WC Docket No. 13-184, Order and Further Notice of Proposed Rulemaking, 29 F.C.C. R. 8870 (2014); *Modernizing the E-rate Program for Schools and Libraries*, WC Docket No. 13-

On the other hand, the FCC twice failed to convince an appellate court that ancillary jurisdiction should apply to broadband Internet access, because the reviewing court considered the requirements as imposing illegal common carrier duties. While the Commission could readily demonstrate that unregulated broadband operators could harm competition and consumers, the appellate court rejected the nature and scope of the proposed safeguards. The D.C. Circuit Court of Appeals held that the FCC could not lawfully impose common carrier regulations on broadband service providers having previously determined that these ventures operate as private carriers offering information services.¹¹²

The FCC fails to pass muster with appellate courts when advocates can demonstrate a lack of reasonableness, point to flaws in the Commission's rationale, or show how it failed to comply with its administrative rules. Until the FCC reclassified broadband Internet access as a telecommunications service, the FCC could not stretch the largely unregulated information service classification to impose common carrier, nondiscrimination and neutrality requirements.¹¹³

Earlier, the FCC failed to convince appellate courts that a revised, more extensive regulatory regime made sense even if doing so would have protected children from coarse and potentially harmful content. In *FCC v. Fox Television Stations, Inc.*,¹¹⁴ the Supreme Court held that FCC violated broadcast networks' due process rights by failing to give them fair notice

184, Connect America Fund, WC Docket No. 10-90, Second Report and Order and Order on Reconsideration, 29 FCC Rcd 15538 (2014).

Recently the FCC proposed to revise its Lifeline universal service subsidy program to include access to wireless broadband services and handsets, for which the FCC has limited jurisdiction primarily focused on technical compatibility issues. See Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support, Connect America Fund, WC Docket Nos. 11-42, 09-197, 10-90, *Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order*, FCC 15-71, WL 3884807 (rel. June 22, 2015).

112. "We have little hesitation in concluding that the anti-discrimination obligation imposed on fixed broadband providers has 'relegated [those providers], pro tanto, to common carrier status.' In requiring broadband providers to serve all edge providers without 'unreasonable discrimination,' this rule by its very terms compels those providers to hold themselves out 'to serve the public indiscriminately.'" *Verizon v. FCC*, 740 F.3d at 655-56 (citations omitted); see also *FCC v. Midwest Video Corp.*, 440 U.S. 689, 99 S.Ct. 1435 (1979) (deeming as the functional equivalent of common carriage mandatory public access to cable television channels); *Nat'l Ass'n of Regulatory Util Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C.Cir.1976) (identifying the basic characteristic that distinguishes common carriers from "private" carriers); *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 608 (1976) (common carriers must have a quasi-public character arising out of the undertaking to carry for all people indifferently).

113. The FCC's ancillary jurisdiction of cable television operators does not extend to rules and regulations that impose the functional equivalent of common carriage. In *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979), the Supreme Court determined that compulsory public access to cable television channel capacity constituted common carriage unlike the limited carriage rights available only to broadcasters.

114. *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012).

that, in contrast to prior policy, a fleeting expletive, or a brief shot of nudity, could be deemed indecent and trigger regulatory sanctions.

In *American Radio Relay League, Inc. v. FCC*,¹¹⁵ the District of Columbia Circuit determined that even for complex technological issues regarding the potential for radio spectrum interference the FCC did not qualify for deference.¹¹⁶ The court agreed with arguments that the FCC selectively chose empirical research data to support a specific technical standard, despite evidence supporting an alternative summarily rejected by the Commission.¹¹⁷

A series of cases addressing interconnection of carrier competitors offered insights on how courts may first defer to FCC expertise, but eventually sided with stakeholders frustrated by the length of time in implementation, complexity and lack of narrowing application as competitive conditions improved. When Congress enacted the Telecommunications Act of 1996,¹¹⁸ it gave the FCC explicit statutory authority to require incumbent local exchange carriers to interconnect with market entrants.¹¹⁹ However, the law lacked specificity on how the FCC should proceed to maximize the potential for competition without micromanaging carriers' operations and removing incentives for both types of carriers to invest in new infrastructure. Predictably, incumbent operators grew weary of having to cooperate with market entrants,¹²⁰ particularly after having made significant accommodations that the '96 Act required as preconditions before these carriers could enter new markets such as long distance telephone service.¹²¹

The FCC initially achieved success in its policies and strategies to promote local telephone service competition. The Supreme Court validated the FCC's overall policy agenda including the requirement that incumbents use a pricing methodology that made access to their networks extraordinarily cheap.¹²² Eventually lower courts chided the FCC for the lack of follow through, particularly in light of the passage of time and the lack of a strategy for streamlining and reducing cooperation as competitive access alternatives became available, e.g., the ability to use cable television network facilities to

115. *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227 (D.C. Cir. 2008),

116. *See id.*

117. *See id.*

118. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified in scattered sections of* Title 47 of the United States Code.

119. *See* 47 U.S.C. §251, Interconnection.

120. *See e.g.*, 47 U.S.C. §251 (interconnection) 47 U.S.C. §252 (procedures for negotiation, arbitration, and approval of agreements); 47 U.S.C. § 253 (removal of barriers to entry).

121. *See* 47 U.S.C. §251(c) (additional obligations of incumbent local exchange carriers).

122. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *see also* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd 15499 (1996).

reach end users.¹²³ These courts rejected the FCC's rules that mandated access to incumbent telephone company plants on financial terms well below wholesale and on an unbundled basis so that competitors could pick and use only those network elements they needed.¹²⁴ The courts criticized the FCC for failing to calibrate rules so that compulsory infrastructure access was limited only to localities still lacking competition and to network elements for which no alternative option was available.¹²⁵

On balance, appellate courts appear willing to defer to agency expertise, particularly for quite complex technical and economic issues.¹²⁶ However the reluctance to second guess regulatory expertise wanes when stakeholders can assert, but not necessarily prove, that the agency's chosen course of action would create regulatory uncertainty, disincentives to additional investments, and other marketplace harms.¹²⁷ Eventually, courts held that the FCC lacked authority to require unbundled access to incumbent carrier facilities¹²⁸ and later the Commission abandoned any effort to

123. See *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (FCC failed to determine when competition would be impaired absent affirmative regulatory efforts); see also *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696 (1999).

124. See *U.S. Telecomm. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004); see also *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 16983 (2003); *Unbundled Access to Network Elements*, 20 FCC Rcd 2533, 2534 (2005) (order on remand).

125. "[A] rule is irrational in this context if a party has presented to the agency a narrower alternative that has all the same advantages and fewer disadvantages, and the agency has not articulated any reasonable explanation for rejecting the proposed alternative.

We therefore vacate the FCC's determination that ILECs must make mass market switches available to CLECs as UNEs, subject to the stay discussed in Part VI below, and remand to the Commission for a re-examination of the issue." *U.S. Telecomm. Ass'n v. FCC*, 359 F.3d at 571.

126. See *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (upholding Chevron deference to FCC decisions that identify the boundaries of its jurisdiction over wireless tower site authorization vis a vis state and local authorities);

"Agencies, as specialists in particular fields, possess superior expertise as compared to generalist courts." Claire R. Kelly, *The Brand X Liberation: Doing Away with Chevron's Second Step as Well as Other Doctrines of Deference*, 44 U.C. DAVIS L. REV. 151, 164 (Nov. 2010); see also J. Brad Bernthal, *Procedural Architecture Matters: Innovation Policy at the Federal Communications Commission*, 1 TEX. A&M L. REV. 615 (Spring, 2014).

127. "Chevron is so indeterminate that lower courts have plenty of room to tailor their interpretive approach to varied facts, using contractual interpretation as a familiar guidepost. This approach could make a real difference for agencies and interested parties. They might find Chevron more predictable at the court of appeals level where most cases end. It is even possible the Supreme Court will incorporate Chevron developments from lower courts." Christine Kexel Chabota, *Selling Chevron*, 67 ADMIN. L. REV. 481, 549 (Summer, 2015).

128. *Covad Communications Co. v FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006) ("The plain text of § 251(d)(2) permits unbundling *only* where the Commission receives evidence that UNEs are 'necessary' to prevent 'impair[ment]' of the CLECs' competitive aspirations. Thus, the 1996 Act does not obligate the ILECs to prove non-impairment—it forces the CLECs to prove impairment.").

stimulate local telephone service competition despite its statutory mandate to do so.¹²⁹

C. Re-Regulation

The FCC reclassification of broadband Internet access from a largely unregulated information service to a significantly regulated telecommunications service has the effect of reversing the Commission's prior decision not to regulate Internet access. The Commission will bear an extraordinarily high burden to prove the lawfulness of its decision, because re-regulation runs counter to prevailing economic and political doctrine supporting less government intervention, particularly in the telecommunications marketplace where technological innovations have the potential to support more competition in some segments even as it can favor market concentration in others.¹³⁰ Opponents of network neutrality and other types of muscular FCC regulatory oversight claim that such intervention harms the national interest, generates regulatory uncertainty, reduces

129. See Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services, WC Docket No. 06-125, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007), *aff'd sub nom. Ad Hoc Telecom. Users Comm. v. FCC*, 572 F.3d 903 (D.C. Cir. 2009) (granting AT&T forbearance from rules applicable to enterprise broadband services); Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-13, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533 (2005) (eliminating unbundled switching and significantly scaling back unbundling of other network elements); Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers. Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, and 98-147, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (eliminating line-sharing).

130. "Faced with the advent of new technologies, cheaper equipment and distribution methods, and an increasingly dynamic marketplace, federal policymakers responded at first by relaxing the rules that had long insulated the telephone monopoly. In addition, influential FCC proceedings like the Computer Inquiries would set a deregulatory precedent for "enhanced" services (i.e., communications services that were more advanced and interactive in nature than traditional telephony) by freeing them from common-carrier regulation in an effort to support continued experimentation in their development." Charles M. Davidson & Michael J. Santorelli, *Federalism in Transition: Recalibrating the Federal-State Regulatory Balance for the All-IP Era*, 29 BERKELEY TECH. L.J. 1131, 1149-50 (Fall. 2014); "The reconstitution of integrated local and long distance companies through mergers by firms that also dominate wireless and have joint-ventures with their closest cable rivals bears no resemblance to the 'sweet spot' that the pre-divestiture theory identified as the place where quasi-competition might produce 'voluntary' integration between independent networks. Special access services, which allow competitors to interconnect with the wireline telecommunications network, have been a source of constant complaint about abuse since the industry was deregulated." Mark Cooper, *The Long History and Increasing Importance of Public-Service Principles for 21st Century Public Digital Communications Networks*, J. on Telecomm. & High Tech. L. 1, 31 (2014).

incentives for investment, stifles innovation and offers a remedy where no problem exists.¹³¹

While Congress forces the FCC to interpret and apply statutory definitions, such as telecommunications and information service, the Commission unilaterally decided that these classifications are mutually exclusive.¹³² Nothing in the Telecommunications Act, or case precedent requires the FCC to establish an absolute dichotomy and shoe horn any existing or new Internet service into one category or the other.¹³³ In the

131. See, e.g., Babette E.L. Boliek, *FCC Regulation versus Antitrust: How Net Neutrality is Defining the Boundaries*, 52 B.C. L. REV. 1627 (2011); Shanika Chapman, *Hands Off My Internet! Why the FCC Should Refrain from Regulating the Internet*, 67 CONSUMER FIN. L. Q. REP. 375 (2013); Thomas W. Hazlett & Joshua D. Wright, *The Law and Economics of Network Neutrality*, 45 IND. L. REV. 767, 798 (2012); Hon. Maureen K. Ohlhausen, *Net Neutrality vs. Net Reality: Why an Evidence-Based Approach to Enforcement, and Not More Regulation, Could Protect Innovation on the Web*, 14 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 81 (2013); J. Gregory Sidak & David J. Teece, *Innovation Spillovers and the "Dirt Road" Fallacy: The Intellectual Bankruptcy of Banning Optional Transactions for Enhanced Delivery Over the Internet*, 6 J. COMP. L. & ECON. 521 (2010); Dennis L. Weisman & Robert B. Kulick, *Price Discrimination, Two-Sided Markets, and Net Neutrality Regulation*, 13 TUL. J. TECH. & INTELL. PROP. 81 (2010); Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO L. J. 1847, 1901 (2006); Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH. 1 (2005).

132. Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd 11501, 11522 (1998) (“[T]he language and legislative history of [the Communications Act of 1996] indicate that the drafters . . . regarded telecommunications services and information services as mutually exclusive categories.”). See also *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 994, 1000 (D. Minn. 2003) (applying the FCC’s dichotomy).

The telecommunications service/information service classifications “are best construed as mutually exclusive categories, and our classification ruling appropriately keeps them distinct. In classifying broadband Internet access service as a telecommunications service, we conclude that this service is not a functionally integrated information service consisting of a telecommunications component ‘inextricably intertwined’ with information service components. Rather, we conclude, for the reasons explained above, that broadband Internet access service as it is offered and provided today is a distinct offering of telecommunications and that it is not an information service.” *2015 Open Internet Order*, para. 385. ““To the extent that broadband Internet access service is offered along with some capabilities that would otherwise fall within the information service definition, they do not turn broadband Internet access service into a functionally integrated information service. To the contrary, we find these capabilities either fall within the telecommunications systems management exception or are separate offerings that are not inextricably integrated with broadband Internet access service, or both.” *Id.* para. 365.

133. Both the Telecommunications Act of 1996 and the Communications Act of 1934 provide service definitions that are not identified as mutually exclusive, nor do these laws prohibit a single operator from provider more than one service. The D.C. Circuit Court of Appeals underscored the lack of mutually exclusivity between the classification of services provided by the various ventures that cooperate in the creation, distribution and delivery of Internet-mediated content that ultimately reaches end users:

To pull the whole picture together with a slightly oversimplified example: when an edge provider such as YouTube transmits some sort of content—say, a video of a cat—to an end user, that content is broken down into packets of information, which are carried by the edge provider's local access provider to the backbone network, which transmits these packets to the

telecommunications marketplace, ventures embrace converging technologies and markets and offer consumers an inventory of services that fall within the telecommunications service and information service classifications while others combine the two.¹³⁴

Even the District of Columbia Circuit, which handled both prior appeals of FCC network neutrality orders, accepts the reality that convergence forecloses a bright line distinction between what the FCC can lawfully regulate and what it cannot:

[E]ven if a regulatory regime is not so distinct from common carriage as to render it inconsistent with common carrier status, that hardly means it is so fundamentally common carriage as to render it inconsistent with private carrier status. In other words, common carriage is not all or nothing—there is a gray area in which although a given regulation might be applied to common carriers, the obligations imposed are not common carriage per se.¹³⁵

By assuming the obligation to make an either/or determination of regulatory status, the FCC limited itself to binary decision-making when it could no longer avoid having to make the call.¹³⁶ It could declare Internet access an information service and abandon statutory authority to regulate, regardless of changed circumstances. Alternatively it could declare Internet access a telecommunications service as it did when initially assigning Digital Subscriber Line access to the telecommunications service category.¹³⁷ On grounds that it should avoid creating regulatory asymmetry, the FCC opted

end user's local access provider, which, in turn, transmits the information to the end user, who then views and hopefully enjoys the cat.

These categories of entities are not necessarily mutually exclusive.” *Verizon v. FCC*, 740 F.3d at 629.

134. For example, Voice over the Internet Protocol (“VoIP”) services combine software and broadband Internet access to offer functional equivalents of and competitive alternatives to conventional, common carrier regulated voice telephone service. Internet Protocol Television uses a similar combination to provide an increasingly viable alternative to broadcast, cable and satellite television.

135. *Cellco P’ship v. FCC*, 700 F.3d 534, 547 (D.C. Cir. 2012).

136. The FCC avoided having to make a definite regulatory classification of where broadband Internet fits until 2002. “To date, however, the Commission has declined to determine a regulatory classification for, or to regulate, cable modem service on an industry-wide basis.” Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, GN Docket No. 00-185, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, 17 FCC Rcd 4798, 4800-01 (2002), *vacated in part*, *National Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). Subsequently, the FCC established binding rules treating cable modem service as an information service. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd 14853 (2005), *petition for rev. den.*, *Time Warner Telecom, Inc. v. F.C.C.*, 507 F.3d 205 (3rd Cir. 2007).

137. *2015 Open Internet Order*, para. 39 (“[W]ireline DSL was regulated as a common-carrier service until 2005.”).

to treat all forms of broadband Internet access as information services, including DSL, which it reclassified.¹³⁸

Having classified all forms of broadband Internet access as information services, the FCC voluntarily relinquished the option of applying just about all regulatory safeguards, even if it came to realize that self-regulation would not suffice. The FCC received complaints detailing instances where unregulated ISPs appeared to operate in ways that harmed both competitors and consumers. Rather than acknowledge its mistake in eliminating the option of applying any common carrier nondiscrimination requirement, the Commission embarked on a twice-failed strategy of devising regulatory safeguards designed to achieve the same outcomes as common carrier oversight without reclassifying them and expressly regulating under Title II regulations.

In *Comcast v. FCC*, the District of Columbia Circuit rejected the FCC's attempts as unlawful.¹³⁹ The court first held that the FCC could not sanction Comcast for using software to disable peer-to-peer file sharing by subscribers, even though the company did not need to remedy congestion and had financial incentives to prevent subscribers from sharing movies it might otherwise lease on a pay per view basis.¹⁴⁰ The court then held that the FCC had no express statutory authority to impose network neutrality obligations on information service providers, nor could the Commission assert ancillary jurisdiction based on its duty to ensure that new technologies do not adversely impact regulated services.¹⁴¹

When reviewing the FCC's second attempt to establish jurisdiction over ISPs, the District of Columbia Circuit again rejected common-carrier style rules, mandating nondiscrimination and prohibiting traffic blocking.¹⁴² However, the court agreed with the FCC that it could impose non-common

138. *Id.*, para. 323 (“Following *Brand X*, the Commission issued the *Wireline Broadband Classification Order* [20 FCC Rcd 14853 (2005)], which applied the ‘information services’ classification at issue in the *Cable Modem Declaratory Ruling* [17 FCC Rcd 4798 2005]) to facilities-based wireline broadband Internet access services as well and eliminated the resulting regulatory asymmetry between cable companies and telephone companies offering wired Internet access service via DSL and other facilities.”).

139. *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

140. *See id.*

141. *See id.* at 644 (“The Commission may exercise this ‘ancillary’ authority only if it demonstrates that its action—here barring Comcast from interfering with its customers’ use of peer-to-peer networking applications—is ‘reasonably ancillary to the ... effective performance of its statutorily mandated responsibilities.’”) (citing *Am. Library Ass’n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005)).

142. *Verizon v. FCC*, 740 F.3d at 628 (“[E]ven though the Commission has general authority to regulate in this arena, it may not impose requirements that contravene express statutory mandates. Given that the Commission has chosen to classify broadband providers in a manner that exempts them from treatment as common carriers, the Communications Act expressly prohibits the Commission from nonetheless regulating them as such. Because the Commission has failed to establish that the anti-discrimination and anti-blocking rules do not impose *per se* common carrier obligations, we vacate those portions of the *Open Internet Order*.”).

carrier rules based on the FCC's reading of Section 706 of the Communications Act,¹⁴³ which authorizes the Commission to promote nationwide access to advanced telecommunications services such as the Internet.¹⁴⁴

Now, rather than find a way to achieve non-common carrier regulatory safeguards, the FCC has opted to reclassify broadband Internet access as common carriage.¹⁴⁵ The Commission could have bolstered its defense on appeal had it acknowledged its two prior classification mistakes: (1) its belief that anything Internet-related must be treated as either an information service or a telecommunications service and (2) its determination that all Internet broadband access fits squarely within the information service category.

Instead, the FCC offers multiple and conflicting justifications. At various points within the *2015 Open Internet Order*, the Commission appears to use the ancillary jurisdiction rationale, as least insofar as considering its statutory instructions to be ambiguous and therefore open to its expert interpretation.¹⁴⁶ In other places, the FCC has no problem using the statutory classifications to categorize broadband Internet access solely as common carriage.¹⁴⁷ By doing so, rather than bolstering the weight and rationale of its argument, the FCC offers conflicting, inconsistent, and not complementary justifications.

143. "As we explain in this opinion, the Commission has established that section 706 of the Telecommunications Act of 1996 vests it with affirmative authority to enact measures encouraging the deployment of broadband infrastructure. The Commission, we further hold, has reasonably interpreted section 706 to empower it to promulgate rules governing broadband providers' treatment of Internet traffic, and its justification for the specific rules at issue here—that they will preserve and facilitate the "virtuous circle" of innovation that has driven the explosive growth of the Internet—is reasonable and supported by substantial evidence." *Id.* at 628.

144. 47 U.S.C. § 1302 (2014).

145. 2015 Open Internet Order at ¶29.

146. "To be sure, with the Commission's exercise of both section 706 and ancillary authority, regulations must be within the Commission's subject matter jurisdiction. Indeed, this is the first prong of the test for ancillary jurisdiction. *American Library Ass'n v. FCC*, 406 F.3d 689, 703–04 (D.C. Cir. 2005). But we do not read the Verizon decision as applying the second prong—which requires that the regulation be sufficiently linked to another provision of the Act—to our exercise of section 706 authority. Section 706 "does not limit the Commission to using other regulatory authority already at its disposal, but instead grants it the power necessary to fulfill the statute's mandate." See *Verizon*, 740 F.3d at 641 (citing 2010 Open Internet Order, 25 FCC Rcd at 17972, para. 123)." 2015 Open Internet Order at n. 721.

147. "Based on this updated record, this Order concludes that the retail broadband Internet access service available today is best viewed as separately identifiable offers of (1) a broadband Internet access service that is a telecommunications service (including assorted functions and capabilities used for the management and control of that telecommunication service) and (2) various "add-on" applications, content, and services that generally are information services." 2015 *Open Internet Order* at ¶47.

IV. WHETHER AND HOW THE FCC CAN DEFEND THE 2015 OPEN INTERNET ORDER

By opting to reclassify broadband Internet access as common carriage, the FCC has imposed upon itself a challenging burden in securing judicial affirmance. Had the Commission opted solely to impose non-common carrier regulations, it would have enhanced the odds of affirmance by using less muscular regulation that did not necessitate reclassifying broadband Internet access as a telecommunications service. Arguably the FCC could have achieved its public policy goals by combining enhanced transparency requirements on ISPs with a complaint-resolution process for addressing problems as they arise. Additionally, the Commission could have bolstered its link to statutory authority by emphasizing its jurisdiction based on Section 706, Title III for wireless broadband, and the incremental extension of private carrier oversight, as recommended by the District of Columbia Circuit.¹⁴⁸ By seeking to maintain a bright line distinction between telecommunications services and information services, with ISPs reassigned to the former category, the FCC substantially added to its appellate woes. Ostensibly to remove uncertainty, the Commission opted to convert any and all types of broadband Internet access as telecommunications services, a category that links a new generation of technology and service with legacy technologies and services much more akin to public utility, monopoly service such as voice telephony. Additionally, the Commission muddied the logic and consistency of its legal rationale by offering multiple and contradicting tracks of case precedent.¹⁴⁹

A. *Extensive Reliance on Chevron Deference to Interpret Statutory Ambiguity*

The *2015 Open Internet Order* heavily relies on case law endorsing flexibility in regulatory agencies' interpretations and subsequent

148. "In striking down these rules, the court appeared to provide a roadmap showing a way to reconstitute nondiscrimination and anti-blocking rules that would withstand judicial scrutiny." Christopher S Yoo, *Wickard for the Internet? Network Neutrality After Verizon v. FCC*, 66 Fed. Comm. L.J. 415, 417 (June, 2014). The court appeared to suggest some requirements on ISPs are lawful provided they do not constitute common carriage, as was the case when the FCC ordered wireless carriers to negotiate data roaming on commercially based terms and conditions specific to each type of individual interconnection arrangement. The court also emphasized that absolute mutual exclusivity between the offering of telecommunications services and information services is not statutorily mandated: "Since it is clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one may be a common carrier with regard to some activities but not others." *Verizon v. FCC*, 740 F.3d at 653 (quoting *Nat'l Ass'n. Regl. Util. Comm'nrs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976)).

reinterpretations of their statutory authority.¹⁵⁰ Because it previously was unsuccessful in asserting ancillary jurisdiction over information services,¹⁵¹ the FCC instead opted to rely on repeated assertions of statutory ambiguity to achieve its new goal of justifying the reclassification of broadband Internet access as a telecommunications service.¹⁵² The FCC emphasizes how ambiguous statutory definitions in the Communications Act,¹⁵³ and even in the meaning of common words like “offer,”¹⁵⁴ “just,” “unjust,” “reasonable,” “unreasonable,”¹⁵⁵ “necessary,”¹⁵⁶ and “points specified by the user,”¹⁵⁷ justify its reclassification of broadband Internet access.

The FCC heavily relies on the *Chevron* deference to support its reclassification of broadband Internet access from an information service to a telecommunications service.¹⁵⁸ While agency expertise is owed no deference “if the intent of Congress is clear,”¹⁵⁹ courts should defer to reasonable exercises of regulatory agency expertise “if the statute is silent or

150. *2015 Open Internet Order*, para. 331 (“We both revise our prior classifications of wired broadband Internet access service and wireless broadband Internet access service, and classify broadband Internet access service provided over other technology platforms. In doing so, we exercise the well-established power of federal agencies to interpret ambiguous provisions in the statutes they administer.”).

151. *Comcast v. FCC*, 600 F.3d 642, 643 (D.C. Cir. 2010) (“The Commission may exercise this ‘ancillary’ authority only if it demonstrates that its action—here barring Comcast from interfering with its customers’ use of peer-to-peer networking applications—is ‘reasonably ancillary to the ... effective performance of its statutorily mandated responsibilities.’ The Commission has failed to make that showing.”) (quoting *Am. Library Ass’n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005)).

152. We “conclude that the application of sections 201 and 202 is appropriate to remove any ambiguity regarding our authority to enforce strong, clear open Internet rules.” *2015 Open Internet Order*, para. 448.

153. *2015 Open Internet Order*, para. 334 & n.868 (citing *Virgin Islands Tel. Comp. v. FCC*, 198 F.3d 921, 925-26 (D.C. Cir. 1999) (holding that “telecommunications service” is an ambiguous term)).

The FCC provides case law supporting its determination that telecommunications service and information service are ambiguous terms: “It is also well settled that we may reconsider, on reasonable grounds, the Commission’s earlier application of the ambiguous statutory definitions of ‘telecommunications service’ and ‘information service.’” *Id.* The Commission also provides case precedent supporting its determination that Sec. 706 is ambiguous: “Finding that provision ambiguous, the court [in *Verizon v. FCC*,] upheld the Commission’s interpretation as consistent with the statutory text, legislative history, and the Commission’s lengthy history of regulating Internet access.” *Id.*, para. 276 (citation omitted).

154. *2015 Open Internet Order*, n. 868. *See also id.*, para. 322 & n.983 (discussing ambiguity in “offering”).

155. *Id.*, n.1493 (citing *Capital Network Sys., Inc., v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994)).

156. *Id.*, n.1493 (citing *Cellco P’ship v. FCC*, 357 F.3d 88 (D.C. Cir. 2004)).

157. *Id.*, para. 361.

158. “[W]e exercise the well-established power of federal agencies to interpret ambiguous provisions in the statutes they administer.” *Id.*, para. 331. “The [Supreme] Court’s application of this *Chevron* test in *Brand X* makes clear our delegated authority to revisit our prior interpretation of ambiguous statutory terms and reclassify broadband Internet access service as a telecommunications service.” *Id.*, para. 332.

159. *Id.* 467 U.S. at 842.

ambiguous with respect to the specific issue, [. . .] [provided] the agency's answer is based on a permissible construction of the statute."¹⁶⁰

The 2015 *Open Internet Order* also heavily relies on the Supreme Court's application of *Chevron* Doctrine in *Brand X*,¹⁶¹ where the Court affirmed the Commission's decision to classify cable modem Internet access as an information service:

In *Chevron*, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts. If a statute is ambiguous, and the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.¹⁶²

The FCC links its invocation of statutory ambiguity with changed circumstances in the Internet ecosystem to justify its reclassification of broadband Internet access.¹⁶³ The Commission appears to assume that, having properly identified statutory ambiguity as the basis for taking on the task of statutory interpretation, it also can consider whether changed circumstances warrant reclassification of broadband Internet access.¹⁶⁴ In the absence of congressional action to clarify and remove statutory ambiguity,

160. *Id.* at 843. See also *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); John Blevins, *Jurisdiction as Competition Promotion: A Unified Theory of the FCC's Ancillary Jurisdiction*, 36 FLA. ST. U. L. REV. 585 (2009); Andrew Gioia, Note, *FCC Jurisdiction Over ISPs in Protocol-Specific Bandwidth Throttling*, 15 MICH. TELECOMM. & TECH. L. REV. 517 (2009); James B. Speta, *The Shaky Foundations of the Regulated Internet*, 8 J. ON TELECOMM. & HIGH TECH. L. 101 (2010).

161. "The Court's application of this *Chevron* test in *Brand X* makes clear our delegated authority to revisit our prior interpretation of ambiguous statutory terms and reclassify broadband Internet access service as a telecommunications service." 2015 *Open Internet Order* at para. 332.

162. *Id.*, para. 331 (quoting *Brand X*, 545 U.S. at 980) (citations omitted).

163. "As the record reflects, times and usage patterns have changed and it is clear that broadband providers are offering both consumers and edge providers straightforward transmission capabilities that the Communications Act defines as a 'telecommunications service.'" *Id.*, para. 43.

164. *Id.*, para. 47 ("Based on this updated record, this Order concludes that the retail broadband Internet access service available today is best viewed as separately identifiable offers of (1) a broadband Internet access service that is a telecommunications service (including assorted functions and capabilities used for the management and control of that telecommunication service) and (2) various "add-on" applications, content, and services that generally are information services. This finding more than reasonably interprets the ambiguous terms in the Communications Act, best reflects the factual record in this proceeding, and will most effectively permit the implementation of sound policy consistent with statutory objectives, including the adoption of effective open Internet protections.").

nothing has changed in terms of the nature, type and existence of the ambiguities in the Communications Act. What has changed is the nature, scope and reach of regulatory authority based on the persistence of statutory ambiguity.

To achieve its desired reclassification of broadband Internet access, the FCC undertakes a broad-ranging reassessment of the need for regulatory safeguards due to changes in the marketplace.¹⁶⁵ The Commission acknowledges this game plan:

Exercising our delegated authority to interpret ambiguous terms in the Communications Act, as confirmed by the Supreme Court in *Brand X*, today's Order concludes that the facts in the market today are very different from the facts that supported the Commission's 2002 decision to treat cable broadband as an information service and its subsequent application to fixed and mobile broadband services.¹⁶⁶

B. The FCC Applies the Statutory Classifications Without Modification

The *2015 Open Internet Order* explicitly identifies what types of broadband transmitting, switching, routing, caching and addressing functions fit solely within the telecommunications service and information service dichotomy. The Commission applies the existing statutory language contained in the service classifications and identifies no flaws that it believes Congress should remedy by amending the Communications Act. On the contrary, the FCC painstakingly explains why changed circumstances warrant its reclassification, not that these changes make it more difficult or impossible to interpret and apply the existing classifications.¹⁶⁷ The FCC explicitly reclassifies broadband Internet access:

Having determined that Congress gave the Commission authority to determine the appropriate classification of broadband Internet access service—and having provided sufficient justification of changed factual circumstances to warrant a reexamination of the Commission's prior classification—we find, upon interpreting the relevant statutory terms, that broadband Internet access service, as offered today,

165. *Id.*, para. 43.

166. *Id.*, para. 43.

167. "Changed factual circumstances cause us to revise our earlier classification of broadband Internet access service based on the voluminous record developed in response to the *2014 Open Internet NPRM*." *Id.* at para. 330.

includes “telecommunications,” and falls within the definition of a “telecommunications service.”¹⁶⁸

To justify its reclassification, the FCC reexamined the nature of what a retail ISP does and how it uses techniques it previously used to support the information service classification, but now support the provisioning of telecommunications services. The FCC simplifies its conceptualization of the work performed. Instead of providing complex and multifaceted information services, “broadband providers are offering both consumers and edge providers [which offer content, software and applications] straightforward transmission capabilities that the Communications Act defines as a ‘telecommunications service.’”¹⁶⁹ The Commission reverses its previous determination that ISP transmission capabilities are “inextricably intertwined” with various proprietary applications and services and now concludes that “it is more reasonable to assert that the ‘indispensable function’ of broadband Internet access service is ‘the connection link that in turn enables access to the essentially unlimited range of Internet-based services.’”¹⁷⁰

The FCC simplifies the role of retail ISPs to primarily acting as a conduit for access to and from the Internet,¹⁷¹ even though the technologies used rely on sophisticated data processing, temporary storage (caching)¹⁷² and address creation, lookup and resolution using the Domain Numbering System (“DNS”),¹⁷³ a mechanism far more complicated than processing telephone numbers. The Commission justifies this simplification based on:

168. *Id.* at para. 335. The FCC also provided a new definition for broadband Internet access, “[T]oday’s Order applies its rules to the consumer-facing service that broadband networks provide, which is known as ‘broadband Internet access service’ (BIAS) and is defined to be: 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.” *Id.*, para. 25.

169. *Id.*, para. 43.

170. *Id.*, para. 330 (citations omitted).

171. See William Jeremy Robison, *Free at What Cost?: Cloud Computing Privacy Under The Stored Communications Act*, 98 GEO L.J. 1195, 1199 (2010) (“The increasing functionality of the Internet is decreasing the role of the personal computer. This shift is being led by the growth of ‘cloud computing’—the ability to run applications and store data on a service provider’s computers over the Internet, rather than on a person’s desktop computer.”); see also Jake Vandelist, *Status Update: Adapting the Stored Communications Act to a Modern World*, 98 MINN. L. REV. 1536 (2014).

172. *2015 Open Internet Order*, n. 973 (“Caching is the storing of copies of content at locations in a network closer to subscribers than the original source of the content. This enables more rapid retrieval of information from websites that subscribers wish to see most often.”) (citing Cable Modem Declaratory Ruling, 17 FCC Rcd at 4810, n.76).

173. “DNS is most commonly used to translate domain names, such as ‘nytimes.com,’ into numerical IP addresses that are used by network equipment to locate the desired content.

(1) consumer conduct, which shows that subscribers today rely heavily on third-party services, such as email and social networking sites, even when such services are included as add-ons in the broadband Internet access provider's service; (2) broadband providers' marketing and pricing strategies, which emphasize speed and reliability of transmission separately from and over the extra features of the service packages they offer; and (3) the technical characteristics of broadband Internet access service.¹⁷⁴

Here, the FCC appears to understand the need to explain why certain technical functions performed by ISPs now support the telecommunications service classification having previously been considered by the Commission as integral to, and inseparable from the information service these technologies supported. It emphasizes that caching and DNS management now fit within the telecommunications systems management exception to the definition of information service,¹⁷⁵ because these are now considered separate,¹⁷⁶ standalone functions, or at least not "inextricably integrated with broadband Internet access service."¹⁷⁷

The FCC appears to state that caching and DNS management are supportive technologies that might be used by ISPs to provide access to a wide variety of services, but for regulatory purposes snugly fit within the telecommunications systems management exception to the information service definition. To achieve this new assignment, the FCC has to place far greater emphasis on a clause contained in the information service definition that the Commission hardly noticed before. Additionally, it has to give far greater credence to Justice Scalia's dissent in *Brand X*.

Bear in mind, when the FCC bore the incentive to justify its information service classification before appellate courts and to secure necessary judicial deference in light of statutory ambiguity, the Commission had every reason to ignore the telecommunications systems management

Id., n. 972 (citing Cable Modem Declaratory Ruling at 4810, n.74; *Brand X*, 545 U.S. at 987, 999).

174. *2015 Open Internet Order*, para. 330.

175. *Id.*, para. 356 ("We also find that domain name service (DNS) and caching, when provided with broadband Internet access services, fit squarely within the telecommunications systems management exception to the definition of 'information service.' Thus, when provided with broadband Internet access services, these integrated services do not convert broadband Internet access service into an information service."). The statutory definition of information service, 47 U.S.C. § 153(24), states that this category "does not include any use of any such capability for the management, control, or operation of a telecommunications system of the management of a telecommunications service." The FCC refers to this exclusion as the "telecommunications systems management" exception.

176. *Id.*, para. 370 ("Although we find that DNS falls within the telecommunications systems management exception, even if did not, DNS functionality is not so inextricably intertwined with broadband Internet access service so as to convert the entire service offering into an information service.").

177. *Id.*, para. 365.

exception¹⁷⁸ and to emphasize the tight integration of caching and DNS management with the provisioning of an information service. Suddenly the FCC can view caching and DNS management functions as standalone functions, even though the definitions of telecommunications service and information service have not changed.

In the *2015 Open Internet Order*, the FCC embraces Justice Scalia's view that a telecommunications function can be decoupled from other functions. However, Justice Scalia referred to the FCC's refusal to identify and decouple a telecommunications service as evidence that regulatory agencies can and will seek unconditional judicial deference to create new regulatory, deregulatory or re-regulatory schemes at the agency's discretion:

In other words, what the Commission hath given, the Commission may well take away—unless it doesn't. This is a wonderful illustration of how an experienced agency can (with some assistance from credulous courts) turn statutory constraints into bureaucratic discretions. The main source of the Commission's regulatory authority over common carriers is Title II, but the Commission has rendered that inapplicable in this instance by concluding that the definition of "telecommunications service" is ambiguous and does not (in its current view) apply to cable-modem service. It contemplates, however, altering that (unnecessary) outcome, not by changing the law (*i.e.*, its construction of the Title II definitions), but by reserving the right to change the facts. . . . Such Möbius-strip reasoning mocks the principle that the statute constrains the agency in any meaningful way.¹⁷⁹

In a nutshell, Justice Scalia has predicted what the FCC now seeks from appellate courts: maximum flexibility to regulate, deregulate, or re-regulate largely free of having to convince a skeptical judiciary that statutory authority exists, or ambiguity warrants such deference. A clever regulatory agency could exploit such flexibility to achieve welcomed deregulation, but it could just as easily seek to expand its regulatory "wingspan."

C. The FCC Can Generate a Persuasive Empirical Record of New Facts and Changed Circumstances

The FCC did not need to reclassify broadband Internet access to secure lawful authority to remedy existing and future problems that harm broadband consumers and competitors. The Commission could have

178. The FCC acknowledges that when it made its information services classification, it undertook no analysis on whether and how the telecommunications systems management exception applied. *See Id.* at 166 n. 1028.

179. *Brand X*, 545 U.S. at 1013-14; *see also* Rob Frieden, *What Do Pizza Delivery and Information Services Have in Common? Lessons From Recent Judicial and Regulatory Struggles with Convergence* 32 RUTGERS COMPUTER & TECH. L. J. 247 (2006).

followed the roadmap created by the D.C. Circuit Court of Appeals in *Verizon* case that supports limited private carrier oversight based primarily on direct statutory authority. Rather than to resurrect a “top-down” Title II regulatory regime, only to remove substantial portions as unnecessary and politically unpalatable, the Commission could have used a less aggressive “bottom up” strategy. The FCC could have combined already approved transparency requirements and Title III regulation of spectrum use with the direct statutory authority available from Section 706 of the Communications Act that authorizes the Commission to assess whether Americans have access to affordable and widespread broadband service and to impose safeguards designed to achieve these legislatively identified goals.

1. Curious Reluctance to Emphasize Direct Statutory Authority Conferred by Section 706

Section 706(a) of the Communications Act requires the FCC and state PUCs to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . .”¹⁸⁰ Section 706(b) of the Communications Act requires the Commission to conduct an annual inquiry “concerning the availability of advanced telecommunications capability” and if it determines that access is not available on “a reasonable and timely fashion” “to take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”¹⁸¹

The FCC initially stated that Section 706 did not confer a direct statutory conferral of statutory authority to enact measures encouraging the deployment of broadband infrastructure.¹⁸² It subsequently reversed itself¹⁸³ and the *Verizon* court accepted the Commission’s new rationale:

180. 47 U.S.C. § 1302(a) (2012).

181. 47 U.S.C. § 1302(b) (2012).

182. Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC Rcd 24012, 24044, ¶69 (1999) (“After reviewing the language of section 706(a), its legislative history, the broader statutory scheme, and Congress’ policy objectives, we agree with numerous commenters that section 706(a) does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods.”). ** quote is at 24044

183. “Section 706(a) accordingly provides the Commission a specific delegation of legislative authority to promote the deployment of advanced services, including by means of the open Internet rules adopted today. Our understanding of Section 706(a) is, moreover, harmonious with other statutory provisions that confer a broad mandate on the Commission.” 2010 Open Internet Order, 25 FCC Rcd at 17971, *vacated on other grounds sub nom.*, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014). “To the extent that the Advanced Services Order can be construed as having read Section 706(a) differently, we reject that reading of the statute for the reasons discussed in the text.” 2010 Open Internet Order, 25 FCC Rcd at 17969, n.370.

As we explain in this opinion, the Commission has established that section 706 of the Telecommunications Act of 1996 vests it with affirmative authority to enact measures encouraging the deployment of broadband infrastructure. The Commission, we further hold, has reasonably interpreted section 706 to empower it to promulgate rules governing broadband providers' treatment of Internet traffic, and its justification for the specific rules at issue here—that they will preserve and facilitate the “virtuous circle” of innovation that has driven the explosive growth of the Internet—is reasonable and supported by substantial evidence.¹⁸⁴

The FCC can lawfully interpret Section 706 as requiring an ongoing assessment of the broadband ecosystem and action to remedy market failure that has resulted in insufficient competition and infrastructure investment. With judicial approval, the Commission has invoked Section 706 as the statutory basis for requiring ISPs to operate with transparency and disclosure of specialized service arrangements. The Commission overstepped the bounds of its Section 706 authority only when it sought to create and enforce common carrier rules prohibiting unreasonable discrimination and blocking lawful content.

The District of Columbia Circuit has affirmed the FCC's lawful authority under Section 706 to take affirmative steps, short of imposing common carrier regulations, to remedy broadband market failure.¹⁸⁵ The options available to the Commission appear widespread as evidenced by its decision to increase what constitutes broadband transmission speeds that satisfy the legislative goal of widespread access to advanced services¹⁸⁶ and

184. *Verizon*, 740 F.3d at 628.

185. Equally important, the Commission has adequately supported and explained its conclusion that, absent rules such as those set forth in the Open Internet Order, broadband providers represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment. First, nothing in the record gives us any reason to doubt the Commission's determination that broadband providers may be motivated to discriminate against and among edge providers. The Commission observed that broadband providers—often the same entities that furnish end users with telephone and television services—“have incentives to interfere with the operation of third-party Internet-based services that compete with the providers' revenue-generating telephone and/or pay-television services.” *Verizon*, 740 F.3d at 645, (citing *2010 Open Internet Order*, 25 FCC Rcd 17916, para. 22).

186. “We can no longer conclude that broadband at speeds of 4 megabits per second (Mbps) download and 1 Mbps upload (4 Mbps/1 Mbps)—a benchmark established in 2010 and relied on in the last three Reports—supports the “advanced” functions Congress identified. Trends in deployment and adoption, the speeds that providers are offering today, and the speeds required to use high-quality video, data, voice, and other broadband applications all point at a new benchmark. . . . With these factors in mind, we find that, having ‘advanced telecommunications capability’ requires access to actual download speeds of at least 25 Mbps and actual upload speeds of at least 3 Mbps (25 Mbps/3 Mbps).” *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*

by proposals to allocate a larger percentage of universal service fund subsidies to broadband access.¹⁸⁷

In light of the tremendous opposition to the FCC reclassification of broadband Internet access as unlawful, the “mission creep” in expanding the Section 706 and broadband development mission comes across as both justifiable and prudent. Remarkably, the FCC has opted for a far more controversial and aggressive posture, despite having a less provocative strategy that could have provided the Commission with the regulatory reach and flexibility it considered necessary.

2. VoIP Regulation Presents a Workable and Legally Defensible Model

Despite wanting to maintain an absolute, bright line dichotomy between regulated telecommunications services and unregulated information services, the FCC already has confronted the consequences of marketplace and technological convergence that prevents mutual exclusivity. The Commission has developed a track record of first avoiding having to make a regulatory classification for as long as possible. However, during this period of classification uncertainty, the Commission can and does assert jurisdiction, respond to complaints and make incremental decisions that apply regulatory burdens.

For example, even as the FCC continues to avoid classifying most types of VoIP,¹⁸⁸ it has imposed a number of regulatory burdens on ventures that provide access to and from conventional wired and wireless telephone networks, commonly referred to as the Public Switched Telephone Network (“PSTN”). With unconditional judicial approval, the FCC has imposed a number of requirements previously borne only by common carrier, telecommunications service providers. Even though the FCC does not explicitly treat VoIP operators as telephone companies, it considers them as

in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, GN Docket No. 14-126, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, FCC 15-10, 2015 WL 477864 (Rel. Feb. 4, 2015).

187. See, e.g., FCC, Fact Sheet, *Chairman Wheeler Seeks Comment on Modernizing Lifeline for Broadband* (May 28, 2015), <https://www.fcc.gov/document/chairman-seeks-comment-modernizing-reforming-lifeline-broadband>; Connect America Fund ETC Annual Reports and Certifications, 29 FCC Rcd 8769 (2014)(implementing the Connect America Fund to advance the deployment of voice and broadband-capable networks in rural, high-cost areas); Connect America Fund, *Report and Order and Further Notice of Proposed Rulemaking*, 26 FCC Rcd 17663, 27 FCC Rcd 4040 (2011)(reforming and updating universal service funding), *aff'd sub nom.* In re FCC 11-161, 753 F.3d 1015 (10th Cir. 2014).

188. The FCC has classified only one type of VoIP service: computer-to-computer voice connections that do not have access to or from the PSTN. See *Petition for Declaratory Ruling That Pulver.Com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004).

competitive alternatives and functional equivalents regardless of which regulatory classification applies.

The FCC convinced an appellate court that the Commission did not first have to classify VoIP carriage before asserting exclusive jurisdiction and preempting state regulation.¹⁸⁹ Another court affirmed the FCC's direct statutory authority to require VoIP operators to contribute to universal service funding based on an interpretation of Section 254 of the Communications Act as requiring such payments from ventures that offer services that include a telecommunications component, even if the composite does not necessarily constitute a telecommunications service.¹⁹⁰

Additionally, VoIP operators with PSTN access must provide subscribers with the same type of emergency 911 access as conventional telephone companies.¹⁹¹ VoIP and conventional carriers must cooperate so that subscribers of a new service can retain their existing telephone number.¹⁹² Further, VoIP operators have similar FCC reporting requirements on service outages,¹⁹³ the same limits on using subscriber information for

189. "The first issue is whether the FCC arbitrarily or capriciously failed to classify VoIP service as either an "information service" or a "telecommunications service." The FCC concluded state regulation of VoIP service should be preempted regardless of its regulatory classification because it was impossible or impractical to separate the intrastate components of VoIP service from its interstate components. . . . The impossibility exception, if applicable, is dispositive of the issue whether the FCC has authority to preempt state regulation of VoIP services. It was therefore sensible for the FCC to address that question first without having to determine whether VoIP service should be classified as a telecommunication service or an information service." *Minnesota Public Utilities Com'n. v. FCC*, 483 F.3d 570, 577-78 (8th Cir. 2007)(affirming FCC preemption of state VoIP regulation) (citing *See Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 338, 122 S.Ct. 782, 151 L.Ed.2d 794 (2002)(affirming FCC jurisdiction of pole-attachment rates for Internet traffic without having to determine whether such service constitutes a cable, telecommunications, or information service).

190. "The Commission's application of section 254(d) to interconnected VoIP providers involved two discrete decisions: (1) that, unlike the verb "offer," the verb "provide" may apply to the act of supplying a component of an integrated product, and (2) that VoIP providers supply telecommunications as a component of their service. . . . Finding that the Commission has section 254(d) authority to require interconnected VoIP providers to make USF contributions, we have no need to decide whether the Commission could have also done so under its Title I ancillary jurisdiction. *Vonage Holding Corp. v. FCC*, 489 F.3d 1232, 1240-41 (D.C. Cir. 2007)(affirming direct statutory authority for the FCC to require regulatory VoIP with PSTN access to contribute to universal service funds).

191. *Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006).

192. Local Number Portability Porting Interval and Validation, *Report and Order*, 25 FCC Rcd 6953 (2010)(establishing fast deadlines for migrating a telephone service subscriber to and from VoIP service).

193. The Proposed Extension of Part 4 of the Commission's Rules Regarding Outage Reporting to Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers, *Report and Order*, 27 FCC Rcd 2650 (2012); *see also* Amendments to Part 4 of the Commission's Rules Concerning Disruptions to Communications, New Part 4 of the Commission's Rules Concerning Disruptions to Communications Notice of Proposed Rulemaking, *Second Report and Order and Order on Reconsideration*, PS Docket No. 15-80, ET Docket No. 04-35, FCC 15-39, WL 1442082 (rel. March 30, 2015).

marketing purposes,¹⁹⁴ obligations to make service available to people with hearing and speech disabilities,¹⁹⁵ and the duty to cooperate with law enforcement officials.¹⁹⁶

The FCC has found lawful ways to regulate VoIP without having to classify it as a telecommunications service. It appears that the Commission will use the same strategy to retain regulatory oversight of new voice telephone services that incumbent telephone companies will use as complete and total substitutes for common carrier, PSTN services.

The FCC likely will confront other instances of changed circumstances, triggered by convergence, which do not necessitate the use of common carrier regulation. For example, the Commission understands that broadband networks increasingly will become the primary media for all types of information, commerce, and entertainment (“ICE”). Leading trends show growing migration from old media, such as broadcasting, cable television and direct broadcast satellites, to new Over the Top¹⁹⁷ applications, including Internet Protocol Television (“IPTV”).¹⁹⁸ Despite this growing trend, the FCC knows better than to subject new video service providers as regulated carriers, or the functional equivalent of regulated cable television systems.

194. Implementation of the Telecommunications Act of 1996; Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927 (2007) (extending customer proprietary network information obligations to interconnected VoIP service providers), *aff’d sub nom. Nat’l Cable & Telecom. Assoc. v. FCC*, 555 F.3d 996 (D.C. Cir. 2009).

195. Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; E911 Requirements for IP-Enabled Service Providers, CG Docket No. 03-123, WC Docket No. 05-196, Report and Order, 23 FCC Rcd 5255 (2008).

196. Communications Assistance for Law Enforcement Act and Broadband Access and Services, First Report and Order and Further Notice of Proposed Rulemaking, ET Docket No. 04-295, RM-10865, 20 FCC Rcd 14989 (2005), Second Report and Order and Memorandum Opinion and Order, 21 FCC Rcd 5360 (2006).

197. “Over-the-top VoIP [and other] services require the end user to obtain broadband transmission from a third-party provider, and providers of over-the-top . . . [services] can vary in terms of the extent to which they rely on their own facilities.” 2010 Open Internet Order, n. 48.

198. “IPTV offers consumers with broadband connections options to download video files or view (streaming) video content on an immediate ‘real time’ basis.” Sky Angel U.S., LLC, Emergency Petition for Temporary Standstill, DA 10-679, 25 FCC Rcd 3879 (2010). Some of the available content duplicates what cable television subscribers receive therein triggering disputes over whether cable operators can secure exclusive distribution agreements and prevent an IPTV service provider from distributing the same content. “Sky Angel has been providing its subscribers with certain Discovery networks for approximately two and a half years, including the Discovery Channel, Animal Planet, Discovery Kids Channel, Planet Green, and the Military Channel. Sky Angel submits that these channels are a significant part of its service offering.” *Id.* at 3879-80; see also In-Sung Yoo, *The Regulatory Classification of Internet Protocol Television: How the Federal Communications Commission Should Abstain From Cable Service Regulation and Promote Broadband Deployment*, 18 COMMLAW CONSPPECTUS 199 (2009).

The FCC also has adjusted its universal service programs to include Internet access even through telecommunications service subscribers and VoIP customers provide the funds for subsidies.¹⁹⁹ It does not need to establish regulatory parity, or apply the same regulatory classification of broadband and telecommunications carriers to justify significant changes as to who pays and who receives universal service subsidies. In a nutshell, the FCC understands that the future Internet ecosystem will grow increasingly essential and versatile, largely free of the conventional old media regulation.

An additional decision by the District of Columbia Circuit supports an FCC strategy short of reclassification. In *Cellco Partnership v. FCC*,²⁰⁰ the court affirmed the FCC's decision requiring wireless carriers to negotiate commercial "roaming agreements," making it possible for subscribers located outside their local service area to access Internet services. The court reasoned that although wireless data access clearly constitutes an

199. "We begin by adopting support for broadband-capable networks as an express universal service principle under section 254(b) of the Communications Act, and, for the first time, we set specific performance goals for the high-cost component of the USF that we are reforming today, to ensure these reforms are achieving their intended purposes. The goals are: (1) preserve and advance universal availability of voice service; (2) ensure universal availability of modern networks capable of providing voice and broadband service to homes, businesses, and community anchor institutions; (3) ensure universal availability of modern networks capable of providing advanced mobile voice and broadband service; (4) ensure that rates for broadband services and rates for voice services are reasonably comparable in all regions of the nation; and (5) minimize the universal service contribution burden on consumers and businesses." In the Matter of Connect America Fund, WC Docket No. 10-90, A National Broadband Plan For Our Future, GN Docket No. 09-51, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663, 17672 (2011), *aff'd sub nom.*, *In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

"All telecommunications service providers and certain other providers of telecommunications must contribute to the federal Universal Service Fund (USF) based on a percentage of their interstate and international end-user telecommunications revenues. These companies include wireline phone companies, wireless phone companies, paging service companies and certain Voice over Internet Protocol (VoIP) providers."

Some consumers may notice a "Universal Service" line item on their telephone bills. This line item appears when a company chooses to recover its USF contributions directly from its customers by billing them this charge. The FCC does not require this charge to be passed on to customers. Each company makes a business decision about whether and how to assess charges to recover its Universal Service costs. Companies that choose to collect Universal Service fees from their customers cannot collect an amount that exceeds their contribution to the USF." FCC, FCC ENCYCLOPEDIA, *Contribution Methodology & Administrative Filings, Who Pays for Universal Service?*,

<https://www.fcc.gov/encyclopedia/contribution-methodology-administrative-filings>.

200. *Cellco Partnership v. FCC*, 700 F.3d 534, 541 (D.C. Cir. 2012),

information service provided by private carriers,²⁰¹ the FCC nevertheless can impose reasonable, non-common carrier duties to deal.²⁰²

The court noted that the FCC only required wireless carriers to negotiate commercially reasonable terms, meaning that terms and conditions need not be uniform and roaming need not be even offered if technically infeasible.²⁰³

V. CONCLUSION.

The FCC's decision to reclassify broadband Internet access as a telecommunications service significantly reduced the odds for affirmance by the District of Columbia Circuit. Rather than frame its regulatory intervention as non-common carriage safeguards needed to implement Section 706 of the Communications Act, the Commission opted for a more aggressive posture: reclassification of Internet access to qualify the service for a wide array of regulatory safeguards, many of which the Commission acknowledged as unnecessary. While the invocation of direct Title II statutory authority offers clarity and provides a large arsenal of available regulatory tools, the FCC increased the odds for reversal by going "all in" with such a forceful approach.

A. *A Cascade of Strategic Miscalculations.*

The decision to reclassify broadband Internet access as a telecommunications service adds to a sizeable list of flawed strategies and market assessments that began on or before 1988 and continue to the present. In 1988, the FCC submitted a Report to Congress that expressed the view that telecommunications services and information services constituted

201. *Cellco P'ship v. FCC*, 700 F.3d at 538 (D.C. Cir. 2012) ("The Commission has previously determined and here concedes that wireless internet service both is an "information service" and is not a [common carrier] 'commercial mobile service.' [citing Broadband Classification Order, 22 FCC Rcd at 5915–21 paras. 37–56] Accordingly, mobile-data providers are statutorily immune, perhaps twice over, from treatment as common carriers").

202. *Id.* at 537 ("[A]lthough the rule bears some marks of common carriage, we defer to the Commission's determination that the rule imposes no common carrier obligations on mobile-internet providers. In response to Verizon's remaining arguments, we conclude that the rule does not effect an unconstitutional taking and is neither arbitrary nor capricious. We therefore reject Verizon's challenge to the data roaming rule").

203. *Id.* at 548 ("The Commission has thus built into the 'commercially reasonable' standard considerable flexibility for providers to respond to the competitive forces at play in the mobile-data market. Although the rule obligates Verizon to come to the table and offer a roaming agreement where technically feasible, the 'commercially reasonable' standard largely leaves the terms of that agreement up for negotiation").

mutually exclusive, standalone services.²⁰⁴ As it had done so previously,²⁰⁵ the Commission sought the apparent ease and simplicity in establishing of a “bright line”²⁰⁶ difference between regulated and unregulated services.

The FCC could consider the two services mutually exclusive and completely separate at a time when telephone companies, traditionally regulated as Title II common carriers, offered dial tone voice service that subscribers could retrofit for Internet access using analog modems.²⁰⁷ The Commission could draw a plausible line of demarcation between conventional, basic service such as telephony and the enhancements achieved using dial tone. Before enactment of the Telecommunications Act of 1996, the FCC’s *Computer Inquiry* policy also established mutual exclusivity between basic and enhanced services with the former deemed common carriage and the later unregulated.²⁰⁸ The dichotomy worked,

204. Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd 11,501, 11,522–23 (1998) (“The language and legislative history of [the Communications Act of 1996] indicate that the drafters . . . regarded telecommunications services and information services as mutually exclusive categories”); see also *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm’n*, 290 F. Supp. 2d 993, 994, 1000-01 (D. Minn. 2003) (applying the FCC’s dichotomy).

205. Statement of Commissioner Anne P. Jones Reconsideration of the Final Decision in the Second Computer Inquiry, Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), Order on Reconsideration, 84 F.C.C.2d 50 (1980) (“I believe that our Basic/Enhanced definitional structure draws a bright line in the correct place between basic services, which we may continue to regulate, and enhanced services, which will be provided on an unregulated basis. Since I believe that competition should be relied upon to the fullest extent possible to meet the telecommunication needs of this country, I believe that a heavy burden of proof should be placed upon any carrier which wishes to modify any of the separation requirements imposed on the provision of enhanced services because such modifications would result in more services being subjected to varying degrees of regulation rather than being subjected to the test of the marketplace”).

206. 2015 Open Internet Order at para.288 (“[W]e have ample legal bases on which to adopt the three bright-line rules against blocking, throttling, and paid prioritization”). 2015 Open Internet Order at para.288.

207. Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket 98-146, Notice of Inquiry, 13 FCC Rcd 15280, 15286-87 (1998) (“The incumbent LECs possess wire facilities that go the last mile to nearly every home and business in the United States. The last part of these last miles generally consists of copper that, as now used, lacks advanced telecommunications capability. . . . This collection of facilities we have just described, as it is now used, is capable of providing ‘plain old telephone service’ (POTS) and data communications and Internet access via dial-up modems. They are the only facilities that go to almost every home in this country and now provide POTS. For these facilities to provide certain advanced services, they would need either expensive improvement by new last miles, probably consisting of fiber or wireless connections, or new software or technology that will derive increased bandwidth from the existing twisted pair copper cable”).

208. See Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), Final Decision, 77 F.C.C.2d 384 (1980), *aff’d sub nom. Computer and Commc’ns Indus. Ass’n. v. FCC*, 693 F.2d 198 (D.C. Cir. 1982); Amendment of Sections 64.702 of the Commission’s Rules & Regulations (Third Computer Inquiry), Report and Order, 104 F.C.C.2d 958 (1986), *vacated sub nom. California v. FCC*, 905 F.2d

because common carrier telephone companies operated bottleneck facilities needed by ventures seeking to offer unregulated information services.²⁰⁹ The FCC could apply nondiscriminatory requirements solely on the access link provider without regulation of service providers using the link.

Technological innovation soon augmented and all but replaced dial up access to the Internet.²¹⁰ Broadband access became available from ventures lacking a history of common carrier operations, e.g., cable television companies. Recognizing the heritage of non-common carriage in cable television company-provided Internet access, the FCC opted to classify cable modem access as an information service in 2002.²¹¹ Whatever political and public relations benefits the FCC accrued from its deregulatory posture quickly evaporated when it quickly realized that marketplace self-regulation would not resolve all disputes and foreclose harm to consumers. Unlike its strategic avoidance of making a definitive regulatory classification for VoIP, one of the “killer applications” of that time, the FCC willingly abandoned regulatory oversight.

The FCC clearly wants to reverse its 2002 mistake, but it has failed to come up with acceptable legal and factual rationales. In many instances, the Commission assumes the legal right—if not obligation—to use its expertise in fleshing out congressional intent and the interpretation of ambiguous statutory definitions. But when advantageous, the FCC has no problem interpreting the meaning of unmodified, service definitions, such as telecommunications service and information service. The problem lies in changed circumstances that the FCC considers the justification for switching,

1217 (9th Cir. 1990), on remand, Computer III Remand Proceedings: Bell Operating Co. Safeguards, Notice of Proposed Rulemaking & Order, 6 FCC Rcd 174 (1990), rule modification, 6 FCC Rcd 7571 (1991), vacated in part and remanded, *California v. F.C.C.*, 39 F.3d 919 (9th Cir. 1994), on remand, Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Servs., Order, 10 FCC Rcd 5692 (1995).

209. *NTCA v. Brand X*, 545 U.S. 967, 996 (2005) (“In the Computer II rules, the Commission subjected facilities-based providers to common-carrier duties not because of the nature of the ‘offering’ made by those carriers, but rather because of the concern that local telephone companies would abuse the monopoly power they possessed by virtue of the ‘bottleneck’ local telephone facilities they owned”).

210. “Cable modem service typically includes many and sometimes all of the functions made available through dial-up Internet access service, including content, e-mail accounts, access to news groups, the ability to create a personal web page, and the ability to retrieve information from the Internet, including access to the World Wide Web. Because of the broadband capability of the cable plant, however, cable modem service subscribers can access the Internet at speeds that are significantly faster than telephone dial-up service. As a result of that faster access, subscribers can often send and view content with much less transmission delay than would be possible with dial-up access, utilize more sophisticated ‘real-time’ applications, and view streaming video content at a higher resolution and on a larger portion of their screens than is available via narrowband.” Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4805 (2002); *aff’d in part and vacated in part sub nom. Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *reversed and remanded sub nom., National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967 (2005).

211. *Id.*

some but not all service classifications. For example, the *2015 Open Internet Order* prevents last mile ISPs from paid enhancements without extraordinary proof that such a quality of service option would cause no harm. Yet the Order evidences no similar concerns for paid prioritization from upstream ISPs and CDNs. Curiously, the FCC maintains the information service classification for CDNs, despite the fact that these ventures, operating upstream from last mile ISPs, work on an integrated basis with last mile ISPs to achieve a complete and seamless link from content source to content consumer. CDNs can offer premium “better than best efforts” traffic management for “mission critical,” “must see” video content, for any and all links until it reaches the last mile ISP. Apparently, information service providers and some yet unclassified ISPs, upstream from the last mile ISP, can provide enhancements consumers may want, but last mile ISPs cannot provide similar accommodations. The FCC does not adequately explain why paid prioritization for most of the Internet ecosystem would result in no harm to competition or consumers, but last mile enhancement all but guarantees it.

B. Handicapping the Odds for Affirmance.

The FCC nevertheless may succeed in convincing a reviewing court that circumstances have so changed that it needed to take radical steps to prevent calamity. Bear in mind that a reviewing court may affirm a regulatory agency’s action even if the court could identify better alternatives, including ones that do not require as much deference. The Supreme Court chose not to second guess the FCC’s initial classification of cable modem, broadband access even though some, or all of the justices might have considered the FCC’s “reading [of the Communications Act service classifications as] differ[ing] from what the court believes is the best statutory interpretation.”²¹²

On two prior occasions, the FCC received clear messages from the judiciary: 1) the Commission should not have classified broadband access an information service initially unless it had ample empirical evidence that the Internet access was a robustly competitive ecosystem capable of self-regulating forever; and 2) having learned that such self-regulation was not feasible, the Commission could not finesse its voluntary abandonment of direct statutory authority to impose the safeguards it now considered necessary.

The FCC compounded the harm from its first mistake, by making the second mistake which has generated over a decade of regulatory uncertainty. Notwithstanding the FCC’s mistake, the Internet has evolved and thrived with ample investment in software, applications and infrastructure. Competitors and consumers might have been better off had the FCC not committed these two mistakes, but these errors do not appear to have caused significant and measureable harm both in terms of consumer welfare and carrier profitability.

212. *Brand X*, 545 U.S. at 980.

Arguably, if an underestimation of the need for regulatory intervention has caused little harm, then the possibility exists that an overestimate of the need might have similarly negligible results. The state of FCC regulation of the wireless industry supports this premise as the Commission has available a large array of regulatory safeguards greater than what it claims it has reserved for broadband oversight.²¹³ No one can credibly assert that the actual degree of FCC oversight has reduced incentives for wireless common carriers to bid on spectrum and to make infrastructure investments. Perhaps the same real, or perceived, benign environment will continue in the Internet ecosystem.

The possibility exists that one or more reviewing courts will give the FCC the benefit of the doubt and refrain, this time, from second guessing the Commission. If the appellate court shows a willingness to ignore specious and counterproductive rationales, it might opt to concentrate on the Commission's direct statutory responsibilities created by Section 706 of the Communications Act. The court would have to ignore the warning given by Justice Scalia, in his *Brand X* dissent, that regulatory agencies regularly seek judicial deference based on superior skills in assessing changed circumstances. The court also would have to tolerate the FCC's new found ability to extract and regulate telecommunications services from services it previously considered as not worth regulating, even with an inseparable telecommunications component.

Put another way, the FCC has acted in a manner predicted by Justice Scalia in 2002. The Commission succeed in convincing a majority that it needed to ignore the telecommunications component to support a deregulatory regime. Now the Commission needs to convince an appellate court that the telecommunications component has become so important that it must be pulled from the deregulated safe harbor the FCC previously created. The Commission may not have sufficient persuasive power to finesse a changed regulatory classification based on a collection of conflicting factual and legal rationales.

213. See *supra*, n.24.