EDITOR'S NOTE

Welcome to the second issue of Volume 68 of the *Federal Communications Law Journal* (FCLJ), the nation's premier communications law journal and the official journal of the Federal Communications Bar Association. My name is Warren Kessler, and as the incoming Editor-in-Chief, I am humbled to serve the oldest communications law journal in the country as well as its influential and diverse readership. At a time of great change and debate in the communications field, I hope that our readers will see the Journal as a source of scholarship and conversation.

This issue serves as a transition from the previous FCLJ student board to the new one. We greatly appreciate our outgoing board's hard work and commitment. Their time and effort were vital in making this and the previous year's issues come to fruition. I am also thrilled to welcome our new board with whom I have the great pleasure of working. Our incoming board is made up of dedicated, creative, and hard-working individuals who all bring unique experiences and high expectations to the Journal. We are excited to work with the Federal Communications Bar Association, and we have already begun to collect thought-provoking and timely material for future issues.

This issue's first piece is by Jonathan Marashlian, Jacqueline Hankins, Seth Williams, and Keenan Adamchak. These practitioners present concerns over the FCC's use of informal adjudications to affect policy change, particularly in the context of the Universal Service Fund. The article discusses the importance of a more aggressive judiciary and alternatively proposes legislative solutions that would place procedural and precedential limitations on the use of informal adjudications.

This issue also includes three student Notes. In the first Note, Max Nacheman offers aggressive new tactics in the fight against pirate radio broadcasting. Our second Note by Sara Kamal discusses how the net neutrality debate and its corresponding regulatory scheme affect minority communities. Kamal reminds readers of how significantly underrepresented minority communities are in the broadcasting world and gives her thoughts as to why some minority groups may be split on how to solve the problem. In our final Note, Carolyn Lowry provides a comprehensive discussion on something that millions of Americans now partake in every day: mobile payments. Her Note introduces the current state of mobile payment technology, advises businesses on how to proactively allay consumer concerns, and analyzes the current patchwork of applicable regulations.

The Journal is committed to providing its readership with substantive and thoughtful coverage of important topics in communications law. Due to the dynamic and often contentious nature of this field, the Journal seeks to serve as an outlet for rigorous academic scholarship and thought leadership. To these ends, please direct submissions to be considered for publication to fcljarticles@law.gwu.edu, and all other questions or comments to fclj@law.gwu.edu. This issue and our archive are available at www.fclj.org.

Warren Kessler
Editor-in-Chief

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Federal Communications Law Journal

The *Federal Communications Law Journal* is published jointly by the Federal Communications Bar Association and the George Washington University Law School. The *Journal* publishes three issues per year and features articles, student notes, essays, and book reviews on issues in telecommunications, the First Amendment, broadcasting, telephony, computers, Internet, intellectual property, mass media, privacy, communications and information policymaking, and other related fields.

As the official journal of the Federal Communications Bar Association, the *Journal* is distributed to over 2,500 subscribers, including Association members as well as legal practitioners, industry experts, government officials and academics. The *Journal* is also distributed by Westlaw, Lexis, William S. Hein, and Bloomberg Law and is available on the Internet at http://www.fclj.org.

The *Journal* is managed by a student Editorial Board, in cooperation with the Editorial Advisory Board of the FCBA and two Faculty Advisors.

Federal Communications Bar Association

The Federal Communications Bar Association (FCBA) is a volunteer organization of attorneys, engineers, consultants, economists, government officials and law students involved in the study, development, interpretation and practice of communications and information technology law and policy. From broadband deployment to broadcast content, from emerging wireless technologies to emergency communications, from spectrum allocations to satellite broadcasting, the FCBA has something to offer nearly everyone involved in the communications industry. That is why the FCBA, more than two thousand members strong, has been the leading organization for communications lawyers and other professionals since 1936.

Through its many professional, social, and educational activities, the FCBA offers its members unique opportunities to interact with their peers and decision-makers in the communications and information technology field, and to keep abreast of significant developments relating to legal, engineering, and policy issues. Through its work with other specialized associations, the FCBA also affords its members opportunities to associate with a broad and diverse cross-section of other professionals in related fields. Although the majority of FCBA members practice in the metropolitan Washington, D.C., area, the FCBA has ten active regional chapters: Atlanta, Carolina, Florida, Midwest, New England, New York, Northern California, Pacific Northwest, Rocky Mountain, and Texas. The FCBA has members from across the U.S., its territories, and several other countries.

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ARTICLE

Confusion, Uncertainty, and Fear: How the FCC's Increased Reliance on Adjudication Is Harming Carriers, Competition, Consumers, and Investment

In recent years, the Federal Communications Commission has increasingly relied on informal adjudications to craft industry-wide regulatory policies, arguably creating new regulations in the process. This trend is particularly noticeable in the context of the Universal Service Fund contribution duties imposed on both interstate and international communications service providers. By legislating through informal adjudication, the FCC created a litany of challenges for the industry it regulates, including increased uncertainty, fear, and a slew of competitive harms caused by inconsistent and shifting regulatory positions adopted in ad hoc adjudications. In addition, the courts, which should otherwise operate as a "check" on the scope of the FCC's authority, have increasingly become ineffective by dismissing appeals of agency adjudicatory decisions having industry-wide impact on standing and procedural grounds. This has effectively given the FCC unbridled authority to utilize the informal adjudicatory process in a manner that leaves many regulated entities with little opportunity to participate in the process. The FCC's reliance on adjudications to move the regulatory goalposts is unmistakably manifested in the evolution of USF contribution policies.

This Article explores the phenomenon by tracing the slow, but steady erosion of the "contamination theory" from the *Computer II* decision to *Pulver.com*, *Brand-X*, *InterCall*, *WebEx*, and beyond. Recognizing the broad discretion enjoyed by the FCC in deciding whether to develop USF contribution policies via rulemaking or adjudication, this Article culminates in the conclusion that the industry and consumers it serves would greatly benefit from shifting the FCC's current predisposition towards adjudications in favor of increased use of the rulemaking process. Whether through increased judicial oversight or the implementation of new policymaking procedures, change is long overdue. A shift back to rulemaking or, minimally, opening the courtroom doors to a larger swath of aggrieved parties, would serve the public interest by promoting transparency, predictability, and participation in the regulatory process.

NOTES

dark. Further, conglomerates providing financial support to the same minority groups they are hurting raises concerns and taints the public's views in the process.

The courts have spoken: the FCC is within their authority to regulate Internet Service Providers as reclassified Title II common carriers. This leaves the decision entirely in the hands of the FCC and it is, without question, one of the most important the Commission has faced. It is time to protect the voices of the underrepresented.

What's in Your Mobile Wallet? An Analysis of Trends in Mobile Payments and Regulation

Mobile wallets have recently emerged as the latest development in the payments ecosystem. While these technology solutions are far from being universally used by consumers, use is growing rapidly. At the same time, the safety, soundness, and security of financial products like credit and debit cards are a concern of both consumers and businesses, particularly given the recent data breaches at several major companies. Mobile payments and their technological advances in the areas of tokenization and Near Field Communications (NFC) may lead to fewer fraudulent transactions and a decreased risk of large-scale data breaches.

This Note outlines the major issues surrounding mobile payments, starting with an overview of the different types of mobile payments as well as the existing regulations applicable to the payment sphere. The Note then goes on to analyze the application of existing regulations to new mobile payments technologies and concludes that current regulations are robust and sufficiently protect consumers from unauthorized and fraudulent transactions.

Confusion, Uncertainty, and Fear: How the FCC's Increased Reliance on Adjudication Is Harming Carriers, Competition, Consumers, and Investment

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I. INTRODUCTION

The rulemaking-adjudication dichotomy runs deep in the world of administrative law. While agencies enjoy broad discretion in deciding whether to proceed by adjudication or rulemaking, much ink has been spilled over the various advantages and disadvantages of each process. In general, commenters agree that the strengths of the rulemaking and the adjudicatory processes complement one another, and that one or the other process might better serve an administrative agency depending on the situation at hand. Therefore, there is significant divergence among federal agencies in determining when and how to use rulemaking and adjudication.

As one of the earliest federal agencies to embrace the rulemaking process, the Federal Communications Commission's (FCC or the Commission) recent increased reliance on informal adjudication for policymaking warrants attention. Unlike agencies that traditionally rely more heavily on adjudication (e.g., the National Labor Relations Board (NLRB)), the FCC regulates highly technical industries. Moreover, the FCC's decisions generally do not involve two discrete parties embroiled in a dispute. Rather, Commission decisions tend to carry immediate industry-wide impact. As a result, the FCC has historically turned to rulemaking proceedings to set policy because they foster input and buy-in by stakeholders across an industry.

The FCC's shift toward informal adjudication is most noticeable in its regulatory oversight of the Universal Service Fund (USF)—the pool of surcharges imposed by the FCC on carriers' interstate and international end-user telecommunications and interconnected Voice over Internet Protocol (I-VoIP) revenues to help support telecommunications services for low-income end users, and end users in hard-to-serve areas. As the USF supports one of the core objectives of the FCC (i.e., universal service), maintaining a stable USF contribution base is critical to the FCC's achievement of its policy goals. However, when confronted with rapidly evolving technologies, shrinking traditional telephone revenue (the primary funding source for the USF at its creation), and a Congress incapable of legislating quickly enough to cope with the changes in telecommunications technology, the FCC has been forced to both increase the USF contribution factor and broaden the Fund's contribution base to keep up with demand for USF support for newer communications technologies such as wireless and broadband.

While the FCC has the authority to extend USF contribution requirements beyond traditional telecommunications carriers to *any* provider of interstate telecommunications, its use of informal adjudication to do so presents a number of challenges for the telecommunications industry. First, the adjudicatory process is less predictable than rulemaking. Setting policy through adjudication makes planning more difficult for industry, particularly in a rapidly evolving and highly technical field. Second, adjudication limits the number of parties directly involved in a proceeding, which in turn restricts who can appeal the FCC's decision. Finally, adjudication tends to limit the public comment period, which disproportionately hurts small or new

companies lacking the financial means to participate in the process through an appeal alone.

Given these drawbacks, one might ask why the FCC has turned to informal adjudication to set USF contribution policy. Informal adjudication is often a more expedient way to set policy precisely because it limits both stakeholder participation in the process, and the appeal options for non-parties to the adjudication. The FCC's tendency to use informal adjudication in the USF context may also be symptomatic of its reliance on the Universal Service Administrative Company's (USAC)[1] role as the stalking horse in the FCC's attempt to expand the USF contribution base. USAC administers the USF, but is prohibited from making policy decisions or interpreting the FCC's rules. Yet the FCC consistently allows USAC to expand the USF contribution base by broadly interpreting FCC rules. The Commission then ratifies USAC's expanded interpretation through adjudication when a contributor appeals a USAC decision.

Ultimately, the FCC's motive for using adjudication to set USF policy may not matter as much as its impact on the industry. Part I of this Article juxtaposes rulemaking with adjudication in the context of setting USF policy by examining the FCC's recent *InterCall Order*,[2] which extended USF contribution obligations to audio bridging services. Part II evaluates rulemaking and adjudication, considering whether the proceeding: (1) involves a question of legislative or adjudicative fact; (2) directly impacts non-parties to the proceeding; and (3) lends itself to *ex ante* or *ex post* decision making.

Based on these criteria, this Article argues that both the FCC and industry would be better served by using rulemaking to expand the USF contribution base. The FCC's reliance on rulemaking would benefit industry stakeholders by facilitating industry participation in the decision-making process, and making regulatory compliance more predictable. The FCC would benefit from the predictability and clarity of rulemaking, as opposed to lurching from appeal to appeal, allowing the FCC to better control its own policymaking agenda and to create more coherent policy.

However, this Article recognizes that agencies enjoy broad discretion in determining whether to use rulemaking or adjudication. Therefore, Part III also focuses on the role the judiciary can play in ensuring full review of FCC adjudicatory decisions. The Conference Group appealed the FCC's *InterCall Order* decision to the United States Court of Appeals for the District of

1. USAC was created in 1997 as a nonprofit subsidiary of the National Exchange Carrier Association (NECA), when the FCC designated it as the interim USF Administrator in 1997. USAC became the permanent Fund Administrator in 1998. *See* Changes to the Bd. of Dirs. of the Nat'l Exch. Carrier Ass'n, *Report and Order and Second Order on Consideration*, 12 FCC Rcd 18400, para. 11 (1997); Changes to the Bd. of Dirs. of the Nat'l Exch. Carrier Ass'n, *Third Report and Order, Fourth Order on Reconsideration*, 13 FCC Rcd 25058, para. 20 (1998).

2. Request for Review by InterCall, Inc. of Decision of Universal Serv. Adm'r, *Order*, 23 FCC Rcd 10731 (2008) [hereinafter *InterCall Order*].

Columbia Circuit. In *Conference Group, LLC v. FCC*,[3] the District of Columbia Circuit failed to reach the substance of the FCC's decision because it found that the Conference Group did not have standing to challenge the FCC's determination, because the Group was not a party to the adjudication. The Court also rejected the Conference Group's procedural argument that the *InterCall Order* constituted a substantive rule change requiring notice-and-comment rulemaking under the Administrative Procedure Act,[4] instead concluding that the FCC lawfully exercised its discretion when deciding to proceed via informal adjudication.

This Article argues that the District of Columbia Circuit erred, abdicating its role as a check on the FCC's authority, when it declined to reach the merits of the Conference Group's substantive challenge to the *InterCall Order*. If the FCC continues to rely on adjudication to make substantive policy changes, federal appellate courts can and should review FCC decisions to ensure that the FCC does not cut off aggrieved third parties' access to judicial review. District of Columbia Circuit precedent recognizes that the imminent application of an agency's interpretation of a statute can cause a sufficiently cognizable injury to sustain a third party's standing to challenge an agency adjudication. This Article argues that, because the *InterCall Order* imposed immediate and costly requirements on audio bridging services, the court should have addressed the Conference Group's substantive challenge to the FCC's order, and it should hear similar future appeals.

Finally, Part IV of this Article discusses methods by which the FCC could be held to greater degree of accountability for its policymaking via adjudication and solutions enabling the judiciary to serve as a check on the power of the administrative state. These proposed solutions, if implemented, would go a long way toward limiting the ability of the FCC to move the goalposts on regulated telecommunications carriers and bring some long-needed transparency into the agency's decision-making policies and procedures. Accordingly, this Article ultimately aims to demonstrate why the FCC's policymaking requires a greater deal of transparency, and to address the methods by which such a goal can ultimately be achieved—to the benefit of both telecommunications service providers and the American consumer.

II. THE FCC'S USE OF ADJUDICATION UNNECESSARILY LIMITS STAKEHOLDER PARTICIPATION AND DISRUPTS DYNAMIC BUSINESS MODELS

A. Background

Three distinct areas of law dictate the manner in which federal administrative agencies develop policy: (1) the APA;[5] (2) the agency's

3. Conference Grp., LLC v. FCC, 720 F.3d 957 (D.C. Cir. 2013).
4. Administrative Procedure Act, 5 U.S.C. § 500-596 (2012).
5. Administrative Procedure Act, 5 U.S.C. §§ 551-706 (2012).

enabling act;[6] and (3) the Fifth Amendment's Due Process Clause.[7] Generally speaking, while the APA provides the general procedural requirements for administrative decision making,[8] the individual agency enabling act dictates the scope and specific methodologies an agency may use in its policymaking.[9] Ultimately, all agency decision making must comport with the Due Process Clause—sometimes requiring a reviewing court to interpret both the APA and an agency enabling act.[10]

The following provides a brief summary of the requirements of the APA with regards to agency decision making, and an overview of how the Communications Act dictates the method by which the FCC may carry out its decision making.

1. The APA: Rulemaking vs. Adjudication

At first blush, the APA appears to take a bipolar approach to agency decision making by defining the product of agency decision making as either a "rule" or an "order."[11] The process by which an agency makes a rule is known as a "rulemaking,"[12] whereas an order is the product of an

6. *See, e.g.*, Communications Act of 1934, Pub. L. 73-416, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

7. U.S. CONST. amend. V, cl. 4 ("No person shall be . . . deprived of life, liberty, or property, without due process of law.").

8. *See* Ronald A. Cass, *Models of Administrative Action*, 72 VA. L. REV. 363, 370 (1986) (stating that the APA was enacted to "serve as a general statute to govern federal administrative procedure"); Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1755-56 (2007) ("The APA applies to all federal agencies and acts as a default rule, supplying procedures when organic statutes do not.").

9. M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1387 (2004) ("Statutes that authorize agency action often confer . . . power to promulgate legislative rules, conduct administrative adjudication, and enforce the relevant statute in federal courts. But sometimes Congress declines to permit an agency to use one or more of the standard policymaking tools identified here.").

10. *See, e.g.*, Londoner v. City & County of Denver, 210 U.S. 373, 386 (1908) (holding that when agency policy is made on an individual basis, due process requires the agency to hold a hearing to allow individuals to present their case); Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo., 239 U.S. 441, 445-46 (1915) (holding that when agency policymaking applies to an entire class of people, less due process norms must be adhered to).

11. *See* Cass, *supra* note 8, at 367 (discussing the "bipolar model" to analyzing agency decisions). The APA defines "Order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing." 5 U.S.C. § 551(6) (2012). "Rule" is defined by the APA as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing." 5 U.S.C. § 551(4).

12. 5 U.S.C. § 551(5) ("'[R]ule making' means agency process for formulating, amending, or repealing a rule").

"adjudication."[13] However, both rulemaking and adjudication are further divided between informal and formal methodologies[14]—creating, in practice, roughly four distinct forms of agency decision making.[15]

a. Formal Rulemaking

Formal rulemaking procedures are governed by Sections 556 and 557 of the APA.[16] Generally, this method requires the agency to hold a legislative hearing after notice of the proceeding is published in the Federal Register.[17] Parties affected by the rulemaking proceeding must be provided with the opportunity to present witness testimony and cross-examine opposing witnesses at the hearing.[18] However, given the burdensome nature of having to provide numerous affected parties with the opportunity to present and cross-examine witnesses, Congress rarely requires agencies to pursue formal rulemaking proceedings, and courts are loath to interpret an agency's enabling act to require it.[19] Instead, if Congress intends for an agency to proceed via formal rulemaking, it must explicitly enact a statute with the words "on the record after opportunity for an agency hearing."[20] Therefore, agencies rarely use formal rulemaking proceedings to institute new policies and regulations.

b. Informal Rulemaking

The far more common method of agency rulemaking is informal rulemaking implemented pursuant to Section 553 of the APA.[21] Also known as "notice-and-comment rulemaking," informal rulemaking generally follows

13. *Id.* § 551(7) ("'[A]djudication' means agency process for the formulation of an order").

14. *See id.* § 553(c) (defining the formal decision-making process as one "required by statute to be made on the record after opportunity for an agency hearing").

15. *See* Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 106 (2003) (describing the APA's procedural methodologies as a "classic four box grid[:] . . . formal rulemaking, informal rulemaking, formal adjudication, and informal adjudication."). *But see* Magill, *supra* note 9, at 1390-92 (describing three forms of agency decision making: (1) "notice-and-comment procedures"; (2) "formal administrative adjudication"; and (3) "guidance documents").

16. *See* 5 U.S.C. §§ 556, 557 (2012).

17. *See id.* § 556(d).

18. *See id.*

19. *See* Rubin, *supra* note 15, at 107 (describing a hearing held pursuant to the Federal Food, Drug and Cosmetic Act "which spanned a nine-year period and produced a 7,736 page [sic] transcript" in order to "determine whether the peanut content of peanut butter should be 87.5% or 90%").

20. *Id.* at 106. *See also* United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 225 n.1, 241 (1973) (finding that a statute requiring the Interstate Commerce Commission to proceed only "after hearing" did *not* trigger formal rulemaking). *But see* United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 757 (1972) (stating that specific language in the agency's enabling act is not always necessary to require an agency to proceed via formal rulemaking).

21. 5 U.S.C. § 553 (2012).

a three-step process, whereby an agency: (1) provides public notice of the proceeding through publication in the Federal Register; (2) allows interested parties the opportunity to comment on the subject of the rulemaking; and finally, (3) provides a brief statement in its final order explaining the reasoning for its adoption.[22] Given that the "most minimal and vague provisions apply" to informal rulemaking, this method generally tends to be the most frequently employed by agencies in their decision-making processes.[23]

c. Formal Adjudication

Formal adjudication provides for some of the most stringent policymaking procedures used by federal agencies.[24] Formal adjudication proceedings are governed by Sections 554, 556, and 557 of the APA.[25] These proceedings tend to focus on a limited number of interested persons and/or entities, and thus are akin to a judicial trial.[26] Accordingly, affected parties are served notice of the proceeding, and are "entitle[d] to present [their] case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of facts."[27] Furthermore, similar to a judicial trial, the presiding judge, or "administrative law judge," serves as a neutral arbiter insulated from either the prosecutorial or policymaking arms of the agency.[28] Thus, given the trial-like nature of formal adjudications, they tend to be used by agencies in enforcement proceedings, where retroactive penalties are imposed upon a regulated entity.[29]

d. Informal Adjudication

The final administrative procedure is informal adjudication; which, although it forms the "vast bulk of federal agency action," nevertheless "flies under the radar screen of the APA."[30] Although the APA's framers arguably

22. *See id.*
23. *See* Bressman, *supra* note 8, at 1756.
24. *See id.*
25. 5 U.S.C. §§ 554, 556-557 (2012).
26. *See* Magill, *supra* note 9, at 1391.
27. 5 U.S.C. § 556(d).
28. Magill, *supra* note 9, at 1391.
29. *See id.*
30. Ronald J. Krotoszynski, Jr., *Taming the Tail That Wags the Dog: Ex Post and Ex Ante Constraints on Informal Adjudication*, 56 ADMIN. L. REV. 1057, 1058 (2004). *See also* Rubin, *supra* note 15, at 108 ("[T]he APA does not actually use the term informal adjudication at all, and barely acknowledges the concept [because] . . . [t]he drafters . . . did not conceptualize it as an identifiable category of government action."); PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE 142 (1989) ("Yet informal adjudications constitute the great bulk of government actions meeting the statutory definition of "adjudication," perhaps as much as 95% of those actions."); Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 744 (1975) (quoting ATT'Y GEN.'S COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S.

"intentionally omitted" informal adjudications from the act,[31] the Supreme Court has interpreted Section 555 of the APA to provide "minimal requirements" for such proceedings.[32] These minimal requirements include: (1) procedures for the issuance of administrative subpoenas; (2) an agency's obligation to provide transcripts of any proceeding or hearing; (3) an interested party's right to representation; and (4) the requirement that agencies notify affected parties of any grant or denial of a petition or other request, with a brief statement supporting the agency's reasoning for its action.[33]

However, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* effectively precludes courts from imposing informal adjudication procedures beyond those required by Section 555.[34] Instead, agencies employing informal adjudication procedures are generally free to develop their methods as they please and largely borrow from other forms of administrative decision making.[35] Nevertheless, agency decisions rendered via informal adjudication remain subject to judicial review pursuant to the APA, and aggrieved parties may also challenge the constitutionality of such agency decisions.[36]

The use of each of these four methods of agency decision making is largely up to the preferences of each agency—subject to any limits imposed by statute, regulation, or the Constitution.[37] However, once the agency chooses to follow an administrative methodology, it must abide by the APA's

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DOC. NO. 77-8, at 35 (1941)) ("[I]nformal adjudication is largely unaddressed by the APA, even though those decisions have long been considered 'truly the life blood of the administrative process.'").

31. Krotoszynski, *supra* note 30, at 1059 (quoting DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 41 (1947)) (alterations in original) ("It has been pointed out that 'limiting application of the sections [on adjudication] [sic] to those cases in which statutes require a hearing is particularly significant, because thereby are excluded the great mass of administrative routine as well as pensions, claims, and a variety of similar matters in which Congress has usually intentionally or traditionally refrained from requiring an administrative hearing.'").

32. *See* Pension Benefit Guar. Corp. v. LTV Corp., Inc., 496 U.S. 633, 655 (1990) (citation omitted) ("The determination in this case, however, was lawfully made by informal adjudication, the minimal requirements for which are set forth in the APA."). *But see* Krotoszynski, *supra* note 30, at 1059 (quoting DEP'T OF JUSTICE, *supra* note 31, at 41) ("'[Section 555] [sic] defines various procedural rights of private parties which may be incidental to rule making, adjudication, or the exercise of any agency authority' . . . [t]hus . . . it would be something of an overstatement to suggest that the APA itself addresses, in a direct fashion, the procedural requirements associated with informal adjudications.").

33. *See* 5 U.S.C. § 555 (2012).

34. *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524, 543 (1978); *see also* Krotoszynski, *supra* note 30, at 1059-60.

35. *See* Rubin, *supra* note 15, at 107-09.

36. Krotoszynski, *supra* note 30, at 1060 (citing Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 414-15, 419-20 (1971)) (noting that all agency decisions are subject to judicial review under the APA).

37. *See* 1 CHARLES H. KOCH, JR. & RICHARD MURPHY, ADMINISTRATIVE LAW AND PRACTICE § 2:12 (3d ed.) (discussing factors bearing on agencies' choice between adjudication and rulemaking).

requirements governing the procedure's usage.[38] Yet, in practice, the APA's broad, often vague procedural requirements allow agencies to individually craft their own methodologies.[39]

The FCC is empowered to use either rulemaking or adjudication in its decision-making processes.[40] Traditionally, the FCC utilized rulemaking rather than adjudication to implement new policies[41] by generally proceeding as follows:

1. *Notice of Inquiry* (NOI)—Although not required or mentioned by the APA, the FCC sometimes initiates a rulemaking proceeding by issuing an NOI, which usually raises policymaking issues without proposing any specific rules.[42]

2. *Notice of Proposed Rulemaking* (NPRM)—The FCC institutes an NPRM to define the boundaries of the policymaking initiative, and solicit comments from the public and industry on the proposed action.[43]

3. *Report and Order* (R&O)—Pursuant to the APA, the FCC responds to comments, issues final rules, and explains the basis and purpose for those rules through an R&O. However, the R&O often does not answer all issues raised by the NPRM or the comments, and may be accompanied by the issuance of a further NPRM (FNPRM) or an additional NOI.[44]

4. *Petition for Reconsideration*—While a party is permitted to petition the FCC to reconsider a decision made in an R&O, the FCC rarely grants such petitions.[45]

Nevertheless, the FCC does not always, nor is it required to, proceed in the above fashion. Pursuant to the APA, the FCC is only required to issue an NPRM.[46] Therefore, the FCC at times will begin its rulemaking proceedings

38. *See id.* §§ 2:13, 2:33.

39. *See* Rubin, *supra* note 15, at 124-25 (discussing fairness problems arising from APA's limitations and omissions).

40. SEC v. Chenery Corp., 332 U.S. 194, 202 (1947) (stating that federal agencies have broad discretion in proceeding with either rulemaking or adjudication); *see also* 47 C.F.R. §§ 1.201-1.364, 1.399-1.430 (2015) (provisions governing FCC adjudicative proceedings and those governing FCC rulemaking proceedings).

41. *See* STUART M. BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 28 (3d ed. 2012).

42. 47 C.F.R. § 1.430 (2015).

43. 47 C.F.R. §§ 1.412-1.415 (2015).

44. 47 C.F.R. §§ 1.421-1.427 (2015).

45. *See* 47 C.F.R. § 1.429 (2015).

46. *See* 5 U.S.C. § 553(b) (2012).

without issuing an NOI.[47] And, the agency sometimes will take no further action in a proceeding beyond issuing an NPRM.[48]

In practice, however, the FCC's rulemaking proceedings are rarely conducted as smoothly as outlined above. Indeed, many commenters have noted that the complexity of the FCC's rulemaking proceedings has allowed the agency to cook the books, and avoid meaningful review by the federal appellate courts.[49]

Furthermore, emphasizing its heavy reliance on rulemaking, the FCC rarely uses formal adjudicatory procedures, and only employs two administrative law judges at any one time.[50] In fact, the FCC's formal adjudication process looks nothing like the traditional adjudicatory process employed by its sister agencies, in large part, because the FCC often does not "provide opportunity for discovery, submission of evidence under oath, the open section of witnesses, or cross-examination."[51] Thus, in practice, FCC adjudications are conducted informally, and focus on actions by specific actors, rule violations, and licensing disputes.[52]

However, it appears that the FCC is increasingly moving away from a heavy reliance upon rulemaking towards informal adjudication to implement potentially unpopular policies affecting entire industries without the threat of public opposition. As neither the Communications Act nor the FCC's rules explicitly define what forms of proceedings are construed to be informal adjudications,[53] it is clear that the FCC considers any proceeding not falling within the other three forms of administrative proceedings (i.e., formal adjudication, formal rulemaking, and informal rulemaking) to be informal adjudication. Accordingly, such proceedings must only comport with the APA and general FCC regulations governing practices and procedures.[54] The FCC's recent predisposition towards utilizing informal adjudications is prominently on display in the context of USF contribution-related matters, primarily arising from the audit decisions of the independent USF administrator, USAC.

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47. BENJAMIN ET AL., *supra* note 41, at 28.

48. *Id.*

49. *See* Philip J. Weiser, *Institutional Design, FCC Reform, and the Hidden Side of the Administrative State*, 61 ADMIN. L. REV. 675, 702 (2009) (citing MAJORITY STAFF OF H. COMM. ON ENERGY & COMMERCE, 110TH CONG., DECEPTION AND DISTRUST: THE FEDERAL COMMUNICATIONS COMMISSION UNDER CHAIRMAN KEVIN J. MARTIN 14 (2008)).

50. *See id.* at 702, 704.

51. *Id.* at 704.

52. BENJAMIN ET AL., *supra* note 41, at 28.

53. The only mention of "informal adjudication" in the FCC's rules lies within Section 1.17's provisions regarding truthful and accurate statements made to the FCC. *See* 47 C.F.R. § 1.17(a) (2015) (emphasis added) ("In any investigatory or adjudicatory matter within the Commission's jurisdiction [including, but not limited to, any *informal adjudication* or informal investigation but excluding any declaratory ruling proceeding] and in any proceeding to amend the FM or Television Table of Allotments [with respect to expressions of interest] or any tariff proceeding . . . ").

54. *See, e.g.*, 47 C.F.R. §§ 1.21-1.52 (2015).

2. Review of USAC Audit Decisions

With regard to appeals of USAC audit decisions, it is clear from the *InterCall Order* that the FCC considers such proceedings to be informal adjudications[55]—thus largely freeing the agency to devise specific procedures for such proceedings as it sees fit.

USAC decisions are reviewable on multiple levels: (1) within USAC; (2) the FCC's Wireline Competition Bureau; (3) the full Commission; and, ultimately, (4) the federal appellate courts. On the first level, parties may appeal decisions of USAC divisions to a USAC committee, the Board, or the Administrator.[56] Until recently, parties aggrieved by a USAC audit determination could appeal the decision directly to the FCC, thus bypassing the Board and/or the Administrator.[57] However, as of September 2014, appeals of USAC decisions must first be submitted to USAC, and only after USAC issues a decision on a request for review may the aggrieved party appeal to the FCC.[58] Reviews of USAC decisions by the FCC must first be brought to the attention of the FCC's Wireline Competition Bureau (WCB), unless they raise "novel questions of fact, law or policy."[59] Furthermore, the carrier may seek the full Commission's review only after the WCB issues a decision.[60] Finally, once the full Commission has reviewed the USAC decision, the carrier may appeal the decision to a federal appellate court.[61]

However, aggrieved USF contributors must abide by USAC's "pay and dispute" policy while seeking review of USAC decisions, thus requiring contributors to pay the disputed USF contribution obligation prior to disputing the amount with either USAC or the FCC, to avoid the accrual of late fees and penalties on unpaid contributions.[62] Additionally, USAC will not waive late payment penalties unless the dispute is determined to be the result

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55. *See* Brief for Respondent at 30, Conference Grp., LLC v. FCC, 720 F.3d 957 (D.C. Cir. 2013) (No. 12-1124) ("The [*InterCall Order*] on review was a classic informal adjudication not subject to the APA's notice-and-comment requirements for rulemakings.").

56. 47 C.F.R. § 54.719 (2015). In practice, however, there is no difference between a USAC committee, the Board, and the Administrator—parties simply bring appeals before USAC.

57. *See id.*; *see also* Wireline Competition Bureau Reminds Parties of Requirements for Requests for Review of Decisions by the Universal Serv. Admin. Co., *Public Notice*, 29 FCC Rcd 13874, 13874 (WCB 2014) [hereinafter *USAC Review Public Notice*].

58. *See* Modernizing the E-rate Program for Sch. & Libraries, *Report and Order and Further Notice of Proposed Rulemaking*, 29 FCC Rcd 8870, paras. 250-52 (2013) (revising sections 54.719 and 54.720 of the FCC's rules to, among other things, require parties seeking appeal of a USAC decision to first seek review with USAC); *see also* 47 C.F.R. § 54.719(b) (2015). However, requests for waiver of the FCC's rules must be brought directly to the Commission. *See* 47 C.F.R. § 1.3 (2015).

59. 47 C.F.R. § 54.722(a) (2015).

60. *See USAC Review Public Notice*, *supra* note 57 at 13874.

61. *See id.*

62. *See Billing Disputes*, USAC, http://www.usac.org/cont/payers/billing-disputes.aspx (last visited Feb. 13, 2016); *see also Appeals & Audits*, USAC, http://www.usac.org/about/about/program-integrity/appeals.aspx (last visited Feb. 13, 2016) [hereinafter *USAC Pay and Dispute Policy*].

of a USAC error.[63] The FCC has upheld USAC's pay and dispute procedure, finding that "[a]bsent enforcement of the pay and dispute procedure . . . contributors may choose to engage in . . . nonpayment or underpayment of invoices with which they disagree, thereby harming the predictability of the fund."[64] However, from the viewpoint of USF contributors, the pay and dispute policy can be quite burdensome as it effectively requires contributors "to make interest free loans to USAC for extended periods or pay late fees, interest and penalties on monies not truly owed to USAC."[65] As aggrieved contributors are now required to appeal USAC decisions through an extremely protracted process, such contributors could find themselves remitting fees on the basis of disputed facts for almost a decade until the issue is finally resolved.

Therefore, as the FCC is largely bound by neither regulation nor statute regarding its review of USAC audit decisions, it is effectively able to determine how much, or how little, process is necessary for such proceedings—subject, of course, to the provisions of the APA, and norms of constitutional due process. The consequences of the FCC's unfettered control over the form of its administrative proceedings are especially apparent in the *InterCall Order*.

B. The InterCall Order

In 2007, USAC commenced an audit of InterCall, Inc.[66] USAC concluded that InterCall was required to contribute to the USF based on international and interstate end-user revenues from its audio bridging conferencing services, which it determined were assessable streams of telecommunications revenue, and not unregulated and non-assessable information services as InterCall had claimed.[67] Moreover, USAC ordered

63. *USAC Pay and Dispute Policy*, USAC, *supra* note 62.

64. Requests for Waiver of Decisions of the Universal Serv. Adm'r by ComScape Telecomm. of Raleigh-Durham, Inc. & Millennium Telecom, LLC, *Order*, 25 FCC Rcd 7399, para. 7 (2010); Universal Serv. Contribution Methodology, Emergency Request for Review of Universal Service Adm'r Decision by Level 3 Comm., LLC et al., *Order*, 25 FCC Rcd 1115, para. 9 (2010) (finding that the carrier "could have avoided incurring late fees, penalties, and interest charges from which it seeks relief by paying the full invoiced amount in compliance with USAC's 'pay and dispute' policy"); Fed.-State Joint Bd. on Universal Serv., Request for Review of Decision of the Universal Serv. Adm'r by Global Crossing Bandwidth, Inc., *Order*, 24 FCC Rcd 10824, para. 18 (2009) (explaining that "to ensure the sufficiency of the universal service fund, contributors are required to pay disputed invoices under the 'pay and dispute' policy" and finding that the carrier should have paid its disputed invoices while its appeal was pending with the FCC").

65. Comments of Comptel at 1, Universal Serv. Contribution Methodology, Requests for Waiver of Decisions of the Universal Serv. Adm'r by Achieve Telecom Network of Mass., LLC et al., WC 06-122 (Apr. 20, 2009), https://ecfsapi.fcc.gov/file/6520214243.pdf.

66. *InterCall Order*, *supra* note 2, at para. 5.

67. Request of InterCall, Inc., Appeal of Decision of the Universal Serv. Admin. Co. & Request for Waiver, CC 96-45 (Feb. 1, 2008) [hereinafter InterCall Request for Review], https://ecfsapi.fcc.gov/file/6519839045.pdf (citing Letter from USAC to Steven A. Augustino, Kelley Drye & Warren LLP, Counsel to InterCall Inc. 3 (Jan. 15, 2008) [hereinafter InterCall Decision]).

InterCall to retroactively pay USF fees going back to when InterCall began its operations.[68]

InterCall appealed USAC's decision to the FCC on the grounds that: (1) USAC exceeded its authority by making a decision on a vague rule without seeking FCC guidance; (2) audio bridging services were not subject to USF assessment; and that alternatively, (3) InterCall should not be required to retroactively pay back fees for services provided prior to USAC's decision.[69] Although the FCC ultimately reversed USAC's decision requiring InterCall to remit USF contributions based on past revenues,[70] it nevertheless found that audio bridging service revenues were subject to USF contribution obligations.[71]

The main issue in the *InterCall Order* was whether audio bridging services qualified as either telecommunications or telecommunications services—and not information services;[72] with the former classifications subjecting the services to direct USF contribution obligations on retail revenue, and the latter exempting InterCall from said USF contributions.[73] InterCall's audio bridging service facilitates conference calls.[74] The service connects multiple users into a single call and has conference control features including: "recording, delayed playback, mute and unmute of callers, and operator assistance."[75] The FCC held that the entirety of InterCall's audio

68. InterCall Request for Review, *supra* note 67, at 6 (citing InterCall Decision, *supra* note 67, at 3).

69. *See InterCall Order*, *supra* note 2, at para. 6; InterCall Request for Review, *supra* note 67, at 6-25.

70. *See InterCall Order*, *supra* note 2, at paras. 1, 24.

71. *See id.*

72. *See id.*, paras. 1, 12. The Communications Act defines "telecommunications service" as "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(53) (2012). The Act, in turn, defines "telecommunications," as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(50). Finally, the Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving utilizing, or making available information via telecommunications . . . 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(24).

73. *See* 47 C.F.R. § 54.706 (2015) ("Entities that provide interstate telecommunications to the public, or to such classes of users as to be effectively available to the public, for a fee will be considered telecommunications carriers providing interstate telecommunications services and must contribute to the universal service support mechanisms. Certain other providers of interstate telecommunications, such as payphone providers that are aggregators, providers of interstate telecommunications for a fee on a non-common carrier basis, and interconnected VoIP providers, also must contribute to the universal service support mechanisms."); *see also* Universal Serv. Contribution Methodology, A Nat'l Broadband Plan for Our Future, *Further Notice of Proposed Rulemaking*, 27 FCC Rcd 5357, para. 10 (2012) (citing Appropriate Framework for Broadband Access to the Internet over Wireline Facils. et al., *Report and Order and NPRM*, 20 FCC Rcd 14853, para. 102 (2005)) ("[R]evenues from information services . . . have never been included in the contribution base.").

74. *See* InterCall Request for Review, *supra* note 67, at 4.

75. *Id.*

conferencing service should be classified as telecommunications because the main function of the service is to connect specific users through the use of telephone lines.[76] The FCC reasoned that since "'the heart of 'telecommunications' is transmission,'"[77] InterCall's audio conferencing service was telecommunications as it allowed users to "transmit a call (using telephone lines), to a point specified by the user (the conference bridge), without change in the form or content of the information as sent and received (voice transmission)."[78]

The FCC rejected InterCall's claims that its audio bridging service was an information service, and that InterCall was the end user of a telecommunications service, and its customers were end users of an information service.[79] In addressing InterCall's claims, the FCC found audio bridging services simply facilitated the routing of customers' calls without changing the form or content of the information sent via the service.[80] Thus, audio bridging results in "'no more than the creation of the transmission channel chosen by the customer.'"[81] Since the FCC had already determined that automatic routing functions are an adjunct to basic service, InterCall's service offering did not constitute a non-USF-assessable information service.[82]

Furthermore, the FCC dismissed InterCall's argument that the existence of its non-integrated conference validation services alongside its audio bridging service transformed the entire offering into an information service.[83] The FCC did not consider InterCall's ancillary features (i.e., conference validation services) to be sufficiently integrated with its call transmission service so as "to convert the offering into an information service" because "the customer can still conduct its conference call with or without accessing these features."[84] Thus, the ancillary features did not sufficiently alter InterCall's audio bridging service for the entire offering to be categorized as an information service exempt from USF contribution obligations.[85]

Despite finding that InterCall's audio bridging services qualified as telecommunications, the FCC reversed USAC's decision requiring InterCall

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76. *InterCall Order*, *supra* note 2, at para.11.

77. *Id.* (quoting Universal Serv. Contribution Methodology, *Report and Order and Notice of Proposed Rulemaking*, 21 FCC Rcd 7518, para. 49 (2006)).

78. *InterCall Order*, *supra* note 2, at para. 11.

79. *Id.* at para. 13. *See also* Notice of Ex Parte of InterCall, Inc. at slide 1, Fed.-State Joint Bd. On Universal Serv., WC 96-45 (Feb. 29, 2008), https://ecfsapi.fcc.gov/file/6519863754.pdf.

80. *Id.* at para. 11.

81. *Id.*

82. *Id.* (citing N. Am. Telecomms. Ass'n, *Memorandum Opinion and Order*, 101 F.C.C.2d 349, para. 31 (1985)) (finding that adjunct to basic service simply creates the transmission channel chosen by the customer).

83. *Id.* at para. 12.

84. *Id.* (citing Reg. of Prepaid Calling Card Servs., *Declaratory Ruling and Report. and Order*, 21 FCC Rcd 7290, paras. 14-15 (2006) [hereinafter *Prepaid Calling Card Order*]).

85. *Id.*

to make retroactive USF contributions.[86] The FCC admitted that "actions (or the lack thereof) in certain Commission proceedings may have contributed to the industry's unclear understanding of stand-alone audio bridging providers' direct contribution obligation."[87] Though the FCC maintained that the rules have always subjected audio bridging providers to USF contribution requirements, the FCC admitted that there was little evidence supporting that conclusion.[88] Because it was reasonable for InterCall to believe that audio bridging services did not require USF contribution, the FCC found that there should be no retroactive payments for service offered before the *InterCall Order*.[89] Accordingly, the FCC ordered InterCall to make only prospective USF contributions.[90]

The FCC mandated only prospective USF contributions by InterCall, thus sparing the company from potentially massive retroactive financial exposure.[91] As Michael Corleone in *The Godfather* might have uttered, the FCC "made an offer [the company] couldn't refuse."[92] Yet as this Article will go on to explain in detail, these types of one-sided offers accompanied by the threat of severe economic distress—offers which only arise in the adjudication setting—are a major problem for the communications industry regulated by the FCC. They are a major problem for the investment community as well, as the uncertainty created by a shifting regulatory landscape is antithetical to investment in any industry.[93] This is even more pronounced when the changes announced by an adjudicatory decision do more than just shift the landscape gently, but—as was the case with InterCall—the adjudication results in a seismic shift, one that arguably toppled three decades of regulatory and judicial precedent commonly embodied by the expression, "the contamination theory."[94]

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86. *Id.* at para. 24. The Commission merely found that "the service described by InterCall is telecommunications" and did not address whether InterCall was classified as a common or private carrier. *Id.* at para. 11.

87. *Id.* at para. 23.

88. *Id.*

89. *Id.* at para. 24. *But see* Request for Review of a Decision of the Universal Serv. Adm'r by MeetingOne.com, Corp., *Order*, 26 FCC Rcd 15464, para. 1 (2011) [hereinafter *MeetingOne Order*] (holding that MeetingOne.com was subject to retroactive USF contribution obligations following USAC's reclassification of its services because the company failed to demonstrate that being subject to retroactive USF obligations would result in "manifest injustice" as the *InterCall Order* placed the company "on notice" of its USF contribution obligations as an audio bridging service provider).

90. *InterCall Order*, *supra* note 2, at para. 24.

91. *Id.* at para. 24.

92. THE GODFATHER (Paramount Pictures 1972).

93. *See infra* Section II.B.3.

94. Not to be confused with the FCC's similarly-named "Contamination Doctrine," or "Ten-Percent Rule," which states that if a mixed-use line carries more than ten percent of interstate traffic, the interstate traffic is deemed to "contaminate" the entire service, even if the facilities used to carry the traffic are located entirely intrastate. *See* MTS and WATS Mkt. Structure, Amendment of Part 36 of the Comm'n's Rules & Establishment of a Joint Bd., *Decision and Order*, 4 FCC Rcd 5660, para. 1 (1989); MTS and WATS Mkt. Structure, Amendment of Part 36 of the Comm'n's Rules & Establishment of a Joint Bd., *Recommended Decision and Order*, 4 FCC Rcd 1352, para. 5 n.14 (1989).

When the FCC issued its decision resolving the InterCall matter, it did not announce a narrow ruling tied solely to the specific facts presented by InterCall's audio bridging technology and service. Instead, the FCC went exponentially further, holding and announcing that *all* providers of audio bridging services are providers of telecommunications and must therefore contribute to the USF.[95] The FCC directed USAC to enforce the USF contributors' registration, contribution, and annual and quarterly filing obligations on all audio bridging providers going forward.[96]

Although InterCall believed that its audio conferencing service offering was an information service,[97] the company begrudgingly accepted the FCC's reclassification by refraining from appealing the decision to a federal circuit court. By requiring InterCall to comply only prospectively with its decision, the FCC strongly disincentivized InterCall from appealing the *InterCall Order* to a federal circuit court. This was an "offer [InterCall] couldn't refuse." Because USF fees are recoverable from end-user customers, InterCall could collect prospectively, avoiding any "out of pocket" expenses.[98] In contrast, had InterCall been required to pay retroactively, it may have considered seeking judicial review since past fees would not have been recoverable from its end-user customers.[99] Therefore, accepting the FCC's reclassification of its audio bridging services was an economically sensible decision for InterCall to make given the circumstances.

As a result, the FCC limited the audio bridging industry's ability to appeal the *InterCall Order* to the unlikely situation in which an audio bridging service provider decided to outright ignore the now-settled FCC precedent regarding USF contribution obligations. This also demonstrates the limited opportunities available for non-parties to object to an FCC informal adjudication; which in turn spurs the FCC to continually use such proceedings as a means of promulgating unpopular policy decisions with minimal input from the public by incentivizing parties to accept the FCC's policy changes.

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95. *InterCall Order*, *supra* note 2, at para. 24.

96. *Id.* at paras. 25-26. ("We therefore direct USAC to implement the findings in this order with respect to all audio bridging service providers, regardless of whether the service is provided on a stand-alone or an integrated basis. We find that, to the extent audio bridging and teleconferencing service providers have end user revenues sufficient for direct contribution obligations, USAC should instruct the providers to register for an FCC Filer ID, and begin submitting quarterly and annual FCC Form 499s consistent with this decision.").

97. *See* InterCall Request for Review, *supra* note 67, at 1 ("Since the inception of the Universal Service Fund ('USF'), standalone providers of audio bridging services have not been classified as telecommunications service providers and have not filed FCC Form 499s as direct contributors to the Fund."); Letter from Steven A. Augustino, attorney for InterCall, Inc., to Marlene H. Dortch, Sec'y, FCC (May 5, 2008), https://ecfsapi.fcc.gov/file/6520008246.pdf ("[T]he Commission heretofore has not treated audio bridging services as telecommunications services for any purpose.").

98. FCC, 2015 TELECOMMUMICATIONS REPORTING WORKSHEET INSTRUCTIONS (FCC FORM 499-A) at 20 (2014), http://www.usac.org/_res/documents/cont/pdf/forms/2015/2015-FCC-Form-499A-Form-Instructions.pdf.

99. *See* Fed.-State Joint Bd. on Universal Serv., *Report and Order*, 12 FCC Rcd 8776, paras. 854-57 (1997).

1. How the *InterCall Order* Eroded the Contamination Theory, and How the FCC's Use of Adjudication Allowed the Change to Go Uncontested

Although the FCC began chipping away at the contamination theory long before the *InterCall* decision, the *InterCall Order* marked the first time that the FCC expanded its efforts to a broad section of the communications industry. The contamination theory was introduced by the FCC in the 1980 *Computer II* decision, and states that when telecommunications is provided as part of an information service, the underlying transmission component is "contaminated"—rendering the entire service an information service.[100] The contamination theory was created by the FCC in reaction to the unworkable framework implemented in the 1966 *Computer I* decision: the classification of "hybrid services" (i.e., combined communications and data processing services) by the FCC "on an ad hoc, case-by-case basis."[101] The FCC subsequently affirmed the application of the contamination theory to the classification of regulated communication services in 1987 in *Computer III*,[102] and again in its 1998 *Stevens Report*.[103]

The application of the contamination theory was straightforward: a determination as to whether the entire service offering "constitutes a single

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100. *See* Amendment of Section 64.702 of the Comm'n's Rules & Regs. (Second Computer Inquiry), *Final Decision*, 77 F.C.C.2d 384, paras. 106-114 (1980) [hereinafter *Computer II*]; *see also* Robert Cannon, *The Legacy of the Federal Communications Commission's Computer Inquiries*, 55 FED. COMM. L.J. 167, 190 n.109 (2003) ("Contamination theory is the argument that when an enhanced service provider acquires telecommunications services, combines it with enhanced services, and then sells to consumers, the enhanced service "contaminates the basic service, making the service as a whole and enhanced service. The enhanced service provider by "reselling" telecommunications service, does not thereby become a carrier.").

101. Cannon, *supra* note 100, at 174 (citing Reg. & Policy Problems Presented by the Interdependence of Computer & Comm. Serv., *Tentative Decision*, 28 F.C.C.2d 291, para. 15 (1970) [hereinafter *Computer I*]; *see also Computer I*, para. 15 (defining "hybrid services" as "an offering of service which combines Remote Access data processing and message-switching to form a single integrated service").

102. *See* Amendment to Sections 64.702 of the Comm'n's Rules & Regs. (Third Computer Inquiry), *Report and Order*, 2 FCC Rcd 3072, para. 19 (1987) [hereinafter *Computer III*] (stating that an offering "might be subject to Title II regulation because the contamination theory might not be applicable if certain [services] . . . were removed from the enhanced category"); *see also* Amendment to Sections 64.702 of the Comm'n's Rules & Regs. (Third Computer Inquiry), *Memorandum Opinion and Order on Reconsideration*, 3 FCC Rcd 1150, para. 14 n.23 (1988) ("Under the 'contamination theory' developed in the course of the *Computer II* regulatory regime . . . [the] offer[ing] [of] enhanced protocol processing services in conjunction with basic transmission services are treated as unregulated enhanced service providers. The enhanced component of their offerings 'contaminates' the basic component, and the entire offering is therefore considered to be enhanced.").

103. Fed.-State Joint Bd. on Universal Serv., *Report to Congress*, 13 FCC Rcd 11501, para. 58 (1998) [hereinafter *Stevens Report*] (citing *Computer II*, supra note 100, at paras. 97-114) ("An offering that constitutes a single service from the end user's standpoint is not subject to carrier regulation simply by virtue of the fact that it involves telecommunications components.").

service from the end user's standpoint."[104] The FCC explained in the *Stevens Report* that the test did "not depend on the type of facilities used,"[105] but rather it stated that "if the user can receive nothing more than pure transmission, the service is a telecommunications service. If the user can receive enhanced functionality [(i.e., enhanced services)], the service is an information service."[106] However, the contamination theory was limited to non-facilities-based carriers, i.e., resellers, where the distinction between wholesale and resale telecommunications services was immaterial to the end-user customer as it perceived the offering to be a single service.[107]

Moreover, the FCC explained that its end-user approach to the contamination theory eschewed a "facilities-type analysis," as *Computer II* and *III* were intended to reject the hybrid service approach promulgated earlier in *Computer I*.[108] Instead, the FCC found that "an approach in which "telecommunications" and "information service" are mutually exclusive categories is most faithful to both the 1996 Act and the policy goals of competition, deregulation, and universal service."[109] In other words, the resolution to the problems espoused by *Computer I*'s *ad hoc* service classification approach was a simple, straightforward way to make the distinction between telecommunications and information services: "If the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service."[110]

The communications industry relied upon *Computer II's* simple model for over thirty years—a period which saw an ever-increasing integration of telecommunications and computer processing technologies. This technological convergence has allowed entire industry sectors to spring up at the intersection of computer processing and telecommunications services—largely in reliance upon the regulatory certitude provided by *Computer II*.[111] Indeed, some industry members observed that the FCC's *Computer* decisions

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104. *Id.*; *see also* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 976 (2005) ("The *Computer II* rules defined both basic and enhanced services by reference to how the consumer perceives the service being offered.").

105. *Stevens Report*, *supra* note 103, at para. 59 (citing 47 U.S.C. § 3(46) (2012)) (defining "telecommunications service" as "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used.").

106. *Id.*

107. *Id.* at para. 60. *See also* Policy & Rules Concerning the Interstate, Interexchange Marketplace, *Report and Order*, 16 FCC Rcd 7418, para. 47 n.146 (2001) (quoting Fed.-State Joint Bd. on Universal Serv., *Fourth Order on Reconsideration and Report and Order*, 13 FCC Rcd 55318, para. 272 (1997)) ("The Commission has stated that merely combining telecommunications service with an enhanced service does not automatically deem the combined service enhanced. Rather, 'the issue is whether, functionally, the consumer is receiving two separate and distinct services.'").

108. *Id.* at para. 6; *see also* Cannon, *supra* note 100, at 174 (stating that the "gray area" between telecommunications and information services "was the exception that subsumed the [hybrid service approach] and quickly became the undoing of *Computer I*").

109. *Stevens Report*, *supra* note 103, at para. 59.

110. *Id.*

111. *See* Richard S. Whitt, *A Horizontal Leap Forward: Formulating a New Communications Public Policy Framework Based on the Network Layers Model*, 56 FED. COMM. L.J. 587, 598-99 (2004).

"contributed strongly towards the commercial introduction, rise, and incredible success of the Internet."[112] Thus, any upsetting of the delicate balance established by the *Computer* decisions could be detrimental and economically devastating to businesses, such as InterCall, that structured their service offerings based in part on the regulatory certainty created by these decisions.

Nevertheless, at the dawn of the twenty-first century, the FCC gradually moved away from the established conceptualization of the contamination theory in pursuit of supporting its newest policy objectives (e.g., universal service). Yet, seemingly wary that an abrupt reversal of the *Computer* decisions could cause entire industry sectors to come tumbling down like a house of cards, the FCC proceeded to dismantle the *Computer* regime in an *ad hoc*, piecemeal fashion over the course of the 2000s. The following section discusses the FCC's gradual departure from the original understanding of the contamination theory by dismantling its legacy on a case-by-case basis, culminating in its watershed decision in the *InterCall Order*. In doing so, the FCC revealed the adverse consequences of relying upon informal adjudication to promulgate policies with industry-wide impact.

a. Rewriting the Contamination Theory: the Pulver.com, Brand X, *and* Prepaid Calling Card *Orders*

Over the course of the 2000s, the FCC slowly weakened the contamination theory through a series of informal adjudications focused on specific industry sectors. Initially, in the 2004 *Pulver.com Order* it seemed that *Computer II's* understanding of the contamination theory would continue to remain applicable in an era increasingly dominated by Internet service offerings.[113] Even when the Supreme Court in *National Telecommunications Association v. Brand X Internet Services*[114] upheld the FCC's 2002 *Cable Modem Order*, which introduced the "integrated services test" to the contamination theory,[115] it appeared that any alterations of the doctrine would be limited to Internet service providers.

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112. Letter from Vinton G. Cerf, Senior Vice-President, WorldCom, Inc., to Donald Evans, Sec'y, U.S. Dep't of Commerce, and Michael Powell, Chairman, FCC (May 20, 2002), https://ecfsapi.fcc.gov/file/6513391377.pdf.

113. Petition for Declaratory Ruling that Pulver.com's Free World Dialup Is Neither Telecomms. nor a Telecomms. Serv., *Memorandum Opinion and Order*, 19 FCC Rcd 3307, para. 1 (2004) [hereinafter *Pulver.com Order*] ("This [Order] is designed to bring a measure of regulatory stability to the marketplace and therefore remove barriers to investment and deployment of Internet applications and services.").

114. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 976 (2005).

115. *See* Inquiry Concerning High-Speed Access to the Internet over Cable & Other Facils., *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798, para. 39 (2002), *aff'd. sub nom. Brand X*, 545 U.S. at 978 [hereinafter *Cable Modem Order*] (emphasis added) (citations omitted) ("Consistent with the statutory definition of information service, cable modem service provides the capabilities described above 'via telecommunications.' That

The FCC's piecemeal approach was again seen in the 2006 *Prepaid Calling Card Order*,[116] wherein the FCC found that prepaid calling card offerings were telecommunications services in accordance with the integrated services test.[117] Nevertheless, by veiling its evolving perspectives on the contamination theory behind the informal adjudicatory process, the FCC rope-a-doped the communications industry into believing that the agency's efforts to erode the doctrine's broad application would be limited to specific industry sectors.

i. The *Pulver.com Order*

The *Pulver.com Order* seemed to indicate an initial willingness by the FCC not to upset the delicate balance of the *Computer* decisions during the momentous rise of IP-enabled services during the early 2000s. In the Order, which was later cited by the petitioners of the *InterCall Order*,[118] the FCC concluded that Pulver.com's IP-based conference bridging services qualified as an information service despite: (1) "facilitate[ing] disintermediated voice communication[s]";[119] and (2) the fact that it "'use[d]' some telecommunications to provide its [services]" by connecting to the Internet to ultimately provide its service to customers."[120] Thus, it appeared that the original understanding of the contamination theory would remain intact with the FCC's efforts in classifying these new IP-enabled communications services.

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telecommunications component is not, however, separable from the data-processing capabilities of the service. As provided to the end user the telecommunications is part and parcel of the cable modem service and is integral to its other capabilities.").

116. Reg. of Prepaid Calling Card Servs., *Declaratory Ruling and Report and Order*, 21 FCC Rcd 7290, para. 1 (2006) [hereinafter *Prepaid Calling Card Order*] (stating that the order focused on the regulatory classification of "certain prepaid calling card service providers").

117. Petition of AT&T Corp. at 1, AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Servs., WC 03-133 (May 15, 2003) [hereinafter AT&T Petition for Declaratory Ruling], https://ecfsapi.fcc.gov/file/6514183828.pdf ("This Petition seeks a declaratory ruling to clarify the jurisdictional status of enhanced prepaid calling card services.").

118. Petition for Reconsideration of Global Conference Partners at 10, InterCall, Inc. Appeal of Decision of the Universal Serv. Admin. Co. & Request for Waiver, CC 96-45 (July 30, 2008) [hereinafter GCP Petition for Partial Reconsideration], https://ecfsapi.fcc.gov/file/6520036332.pdf; Petition for Reconsideration of A+ Conferencing, Ltd., Fee Conferencing Corporation, and the Conference Group at 14, Request for Review by InterCall, Inc. of Decision of Universal Serv. Adm'r, CC 96-45 (July 30, 2008) [hereinafter A+ Conferencing, Ltd. et al. Petition for Reconsideration], https://ecfsapi.fcc.gov/file/6520036359.pdf.

119. *Pulver.com Order*, *supra* note 113, at para. 12 ("The fact that the information service Pulver [offered] . . . facilitie[d] a direct disintermediated voice communication, among other types of communications, in a peer-to-peer exchange cannot and does not remove it from the statutory definition of information service and place it within . . . the definition of telecommunications service.").

120. *Id.* at para. 9 ("[T]he fact that Pulver's server is connected to the Internet via some form of transmission is not in and of itself, as some commenters argue, relevant to the definition of telecommunications. Pulver may "use some telecommunications to provide its [services] but that does not make [the conference service] itself telecommunications.").

It is significant that the FCC addressed in the Order both Pulver.com's facilitation of voice communications and its method of connecting to clients. The FCC, following the *Computer II* precedent, could have merely declared that Pulver.com was a non-facilities-based provider of information services since its customers provided the crucial transmission component necessary to access the company's services.[121] Thus, as Pulver.com did not directly offer its customers a transmission service, the FCC could have easily classified the provider's services as information services.[122] Instead, by addressing the telecommunications components of Pulver.com's services *beyond* what was merely essential for its customers to access the provider's services, the FCC indicated that the scope of the contamination theory was broader than its *Computer II* findings: the doctrine necessitated a consideration of *all* telecommunications and transmission components necessary for a service provider to deliver a service to a customer no matter how seemingly ancillary they were to the principal connection between the two parties.[123]

In other words, the *Pulver.com Order* indicated to the IP industry that the application of the contamination theory would remain straightforward and broad: *any* presence of both information and telecommunications services in a service offered to an end user contaminated the product such that the entire service offering was considered an information service.[124] However, with the help of the Supreme Court, the FCC quickly reversed *Pulver.com* and *Computer II's* simplistic understanding of the contamination theory in its subsequent applications of the doctrine to the other sectors of the communications industry.[125]

ii. *Brand X*

In its 2005 *Brand X* decision, the Supreme Court upheld the FCC's decision in the 2002 *Cable Modem Order* that cable companies offering broadband Internet access service were information services.[126] Specifically, the Court upheld the FCC's introduction of the integrated services test to the contamination theory jurisprudence.[127] According to the Court, the key question in classifying offerings with both telecommunications and information service capabilities is whether the telecommunications

121. *Id.* (stating that Pulver.com's customers "bring their own broadband transmission to interact with" Pulver.com's server) (internal quotations omitted).

122. *See id.*

123. *See id.* at para. 12.

124. *See id.* at paras. 13-14.

125. *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1002 (2005); *see also Prepaid Calling Card Order*, *supra* note 116, at para. 15.

126. *Brand X*, 545 U.S. at 987.

127. *Id.*; *see also id.* at 997 (quoting *Cable Modem Order*, *supra* note 115, at para. 39) (alterations in original) ("The Commission said" in the *Cable Modem Order* "that a telecommunications input used to provide an information service that is not 'separable from the data-processing capabilities of the service' and is instead 'part and parcel of [the information service] and is integral to [the information service's] other capabilities' is not a telecommunications offering.").

transmission capability is "*sufficiently integrated*" with the information service component "*to make it reasonable to describe the two as a single, integrated offering*."[128] In other words, merely packing two services together does not create a single integrated service.[129] Thus, *Brand X* reinterpreted the contamination theory to mean not that any presence of information services with an underlying transmission service rendered the offering an information service; but that, according to the new integrated services test, the bundling of basic and enhanced services can be regarded as a single, integrated information service *only if* the basic and enhanced services could be considered *non-severable* "from the end user's perspective."[130]

However, there was no indication at the time that the *Brand X* decision's reinterpretation of the contamination theory was applicable beyond Internet service providers. Indeed, the narrowness of the decision is emphasized by the fact that the Court refused to address NCTA's argument that the *Cable Modem Order* applied to other forms of Internet service providers, such as DSL providers.[131] In fact, the Court acknowledged that the *Cable Modem Order* "appears to be a first step in an effort to reshape the way the Commission regulates information-service providers," and "[i]t apparently has decided to revise its longstanding *Computer II* [decision] . . . incrementally."[132] Like the Court, the communications industry as a whole viewed the *Brand X* decision as applicable to the Internet service provider sector—but not much beyond that. After all, the case arose as a reaction to an FCC declaratory ruling specifically involving Internet service providers.[133]

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128. *Brand X*, 545 U.S. at 990 (emphasis added).

129. *Id.* at 997 (quoting *Cable Modem Order*, *supra* note 115, at para. 39) (alterations in original) (emphasis added) ("As we understand . . . the Commission did not say that any telecommunications service that is priced or bundled with an information service is automatically unregulated under Title II. The Commission said that a *telecommunications input used to provide an information service that is 'not separable from the data processing capabilities of the service'* and is instead '*part and parcel of [the information service] and is integral to [the information service's] other capabilities*' is not a telecommunications offering."). Interestingly, despite introducing the integrated services test to the application of the contamination theory in the *Cable Modem Order*, it appears that the Commission intended to actually *broaden* the application of the doctrine by specifically declining to extend to cable modem service providers *Computer II's* separate requirement that common carriers offer transmission services on a stand-alone basis from its enhanced services. *Cable Modem Order*, *supra* note 115, at para. 43. Instead, seemingly in lieu of such a requirement, the FCC introduced the integrated services test finding that "cable modem service providers" typically "offer subscribers an integrated combination of transmission and the other components of cable modem service." *Id.* The FCC based its decision on the fact that: (1) the *Computer II* obligations were traditionally applied only to wireline services and facilities; and (2) extending the *Computer II* obligations would be contrary to the broadband investment and innovation goals laid out in Section 706 of the Communications Act. *See id.* at paras. 43-44, 47. Thus, the FCC's reasoning here appears to indicate a willingness to apply the contamination theory on a sector-by-sector basis, thus leading to the creation of multiple versions of the doctrine.

130. *Brand X*, 545 U.S. at 1000.

131. *Id.* at 1002. ("Respondents argue, in effect, that the Commission's justification for exempting cable modem service providers from common-carrier regulation applies with similar force to DSL Providers. We need not address that argument.").

132. *Id.*

133. *See id.* at 974 (citing *Cable Modem Order*, *supra* note 115, at para. 9).

Also, industry members believed that a specific proceeding in the future, if at all, would address the doctrine's application to other industry sectors. Although the FCC would later apply the Court's analysis in the *Brand X* decision to its conclusion in the *Prepaid Calling Card Order* that AT&T's prepaid calling services were telecommunications services, that Order nevertheless demonstrated the FCC's willingness to alter the contamination theory on an *ad hoc*, sector-specific basis through informal adjudication.[134]

iii. The *Prepaid Calling Card Order*

In the 2006 *Prepaid Calling Card Order*, the FCC addressed the regulatory treatment of certain AT&T prepaid calling cards that appeared to signal the FCC's growing acceptance of a new approach to the application of the contamination theory upheld by the Supreme Court in *Brand X*.[135] The FCC ruled that both menu-driven and IP-based transmission prepaid calling cards were properly classified as telecommunications services, and thus subject to USF contribution obligations.[136] In doing so, the FCC relied heavily upon the Supreme Court's ruling in *Brand X*, which seemingly applied only to certain Internet service providers, although the *Prepaid Calling Card Order* concerned a petition by AT&T regarding the regulatory classification of its prepaid calling card services—*not* Internet service providers.[137]

The FCC took the *Brand X* decision and ran with it in the *Prepaid Calling Card Order*. For the FCC, *Brand X* reversed the course of the contamination theory—even for prepaid calling cards—by requiring the examination of the "functional integration" of the basic and enhanced service components of a single service offering:

> [T]here is simply no *functional integration* between the information service features and the use of the telephone calling capability with menu-driven prepaid calling cards . . . But even if those additional capabilities are classified as an information service, the packing of these multiple services does not by itself transform the telecommunications component of these cards into an information service.[138]

No longer was the mere presence of enhanced services in a single service offering sufficient to render the entire offering an information service.[139] Yet

134. *See Prepaid Calling Card Order*, *supra* note 116, at para. 41.

135. *See id.* at paras. 10, 22.

136. *Id.*

137. AT&T Petition for Declaratory Ruling, *supra* note 117, at 1.

138. *Prepaid Calling Card Order*, *supra* note 116, at para. 15 (emphasis added).

139. It may be possible to read the *Brand X* holding as applying the sufficiently integrated test to *only* facilities-based service providers, leaving the original contamination theory applicable to non-facilities-based providers. *Compare* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 993-94 (2005) (quoting *Stevens Report*, *supra* note 103, at para. 60) ("[T]he Commission did not subject to common-carrier regulation those service providers that offered enhanced services over telecommunications facilities, but that did not

in the *Prepaid Calling Card Order*, the FCC neglected to clearly explain what degree of integration was adequate to render the services sufficiently integrated so as to become an information service.[140] Nevertheless, in relying squarely upon the Supreme Court's *Brand X* ruling, the FCC in the *Prepaid Calling Card Order* clearly established that the contamination theory was to be applied through the use of the "integrated services test."[141] However, it appeared at the time that the FCC's new interpretation of the doctrine was limited to certain forms of Internet service and prepaid calling card providers.[142]

Thus, the *Prepaid Calling Card Order* failed to signal to industry members that the FCC's incremental disassembly of the contamination theory would have an industry-wide effect at any one time. Industry members took little note of the FCC's actions, assuming that they were limited to specific industry sectors that did not quite fit the mold of the *Computer II* decisions.[143]

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themselves own the underlying facilities—so called "non-facilities-based" providers. . . . These services 'combin[ed] communications and computing components,' yet the Commission held that they should 'always be deemed enhanced' and therefore not subject to common-carrier regulation."); *with id.* at 997-98 (applying sufficiently integrated test to facilities-based providers). However, the Court also states that the Communications Act did *not* "unambiguously freeze[] in time the *Computer II* treatment of facilities-based carriers." *Id.* at 996. Instead, the Court believes that the FCC has the discretion to interpret the scope of both *Computer II* and the Communications Act's definitions of regulated services due to the inherent ambiguity associated with the scope of both the FCC's ruling and the applicable statutory language. *See id.* at 996-97 (emphasis added) ("[I]f the Act fails unambiguously to classify nonfacilities-based information service providers that use telecommunications inputs to provide an information service as 'offer[ors] of telecommunications,' then it also fails unambiguously to classify facilities-based information-service providers as telecommunications-service offerors; *the relevant definitions do not distinguish facilities-based and nonfacilities-based carriers. That silence suggests, instead, that the Commission has the discretion to fill the consequent status quo*."). Arguably the logic here flows backwards, but given the ample discretion courts give federal agencies in their interpretations of both agency regulations and their enabling acts, *Brand X's* holding casts a wide shadow over the contamination theory. *See infra* Section III.B.2.b.

140. The only explanation as to the application of the sufficiently integrated test in the *Prepaid Calling Card Order* was that the FCC did not consider menu-driven prepaid calling card services to be information services because "[t]he customer may use only one capability at a time and the use of the telecommunications transmission capability is completely independent of the various other capabilities that the card makes available." *Prepaid Calling Card Order*, *supra* note 116, at para. 15.

141. *See id.* at para. 14 (citing *Brand X*, 545 U.S. at 990) ("In its recent *Brand X* decision, the Supreme Court made a similar distinction, stating that the key question in classifying offerings with both telecommunications and information service capabilities is whether the telecommunications transmission capability is 'sufficiently integrated' with the information service component 'to make it reasonable to describe the two as a single, integrated offering.'").

142. *See generally id.* (analyzing Internet service and prepaid calling card providers).

143. *Cf. AT&T Files Lawsuit to Prevent the Use of DIDs for Prepaid Calling Card Calls*, COMMPLIANCE GROUP (Oct. 27, 2009), http://www.commpliancegroup.com/news/153-att-files-lawsuit-prevent-use-dids-prepaid-calling-card-calls (explaining a pending lawsuit regarding expanding effect of the *Prepaid Calling Card Order*).

However, these assumptions were dramatically altered when the FCC released its decision in the *InterCall Order*.

b. The InterCall Order

The *InterCall Order* was a seismic shift in the FCC's application of the contamination theory because industry members could no longer assume that the FCC's efforts in rolling back the application of the doctrine would be limited to specific forms of communications services (e.g., Internet and prepaid calling card services).[144] For the first time in the *InterCall Order*, the FCC struck directly at services lying at the heart of the *Computer II* decision: mixed-service offerings lying squarely at the intersection of computer processing and telecommunications transmission (e.g., audio conferencing services).[145] However, *InterCall* was hardly some natural outcrop of the FCC's earlier decisions concerning the contamination theory. Instead, the FCC had taken a very disjunctive and opaque path from the *Computer* decisions to finding that the basic and enhanced components of *all* audio-bridging services were insufficiently integrated for the entire service offering to constitute an information service.[146]

By the time of the *InterCall Order*, the FCC had created diametrically opposite understandings of the contamination theory. On one hand, the *Pulver.com Order* seemed to establish that the mere presence of *any* enhanced services with *any* basic services in a single product offered to an end user—no matter the customer's exposure to and usage of each—rendered the entire service offering an information service.[147] On the other hand, the *Prepaid Calling Card Order* appeared to take this analysis a step further: an entire service offering could only be considered sufficiently integrated if the customer was *unable* to use either the basic or enhanced services component *separately*.[148] In 2008, USAC's reclassification of InterCall's conference bridging services presented the FCC with the opportunity to reconcile these separate lines of precedent—yet it failed to do so.[149] Accordingly, the *InterCall Order's* mishandling of contamination theory precedent is indicative of the FCC's problematic usage of informal adjudication to develop new policies affecting entire swaths of the communications industry.

144. *See InterCall Order*, *supra* note 2, at paras. 13, 23-26.

145. *See id.* at para. 12.

146. *See, e.g.*, *id.* at paras. 23-24 ("[A]ctions (or the lack thereof) in certain Commission proceedings may have contributed to the industry's unclear understanding . . . [i]n part because of the lack of clarity.").

147. *See Pulver.com Order*, *supra* note 113, at para. 17.

148. *See Prepaid Calling Card Order*, *supra* note 116, at para. 15.

149. *See generally InterCall Order*, *supra* note 2 (discussing *Prepaid Calling Card Order* but not *Pulver.com Order)*.

c. InterCall's Treatment of the Pulver.com Order

In is petition for reconsideration of the *InterCall Order*, Global Conference Partners argued that the *InterCall Order* was arbitrary and capricious because, *inter alia*, it neglected to adequately explain why the FCC failed to address the *Pulver.com Order* given that both InterCall and Pulver.com's services facilitated calls.[150] The FCC dismissed Global Conference Partners' petition as being "without merit," claiming that it "overstate[d] the decision in *Pulver.com Order*" because: (1) Pulver.com "did not provide a transmission service or capability"; and (2) Pulver.com's service, unlike InterCall's audio bridging service, did not permit users to connect to the public switched telephone network (PSTN).[151] Therefore, the FCC argued *Pulver.com's* holding was inapplicable to its ruling in the *InterCall Order*.[152]

It is unclear what the FCC intended to convey when distinguishing the *Pulver.com Order* from its holding in the *InterCall Order*—which more closely followed the FCC's reasoning in the *Prepaid Calling Card Order*. Moreover, it is uncertain whether the *InterCall Reconsideration Order* completely overturned the *Pulver.com Order*, or merely limited its application to the facts in that Order. Given this ambiguity, it is difficult to understand what, if anything, remains of the *Pulver.com* precedent and the original understanding of the contamination theory following the *InterCall Reconsideration Order*.[153] Accordingly, the FCC's treatment of the *Pulver.com Order* is indicative of the FCC's uncanny ability to simultaneously apply *and* obscure the impact of agency precedent in order to further its latest policymaking endeavors through the use of informal adjudication.

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150. *GCP Petition for Reconsideration*, *supra* note 118, at 11 (emphasis added) (quoting *InterCall Order*, *supra* note 2, at para. 11; *Pulver.com Order*, *supra* note 113, at para. 12) (stating that while InterCall's services "*facilitate* the routing of ordinary calls" and were considered telecommunications, the Commission found that "[t]he fact that the information service Pulver[']s [sic] offering happens *to facilitate a direct and disintermediated voice communication . . . cannot and does not remove it from the statutory definition of information service*.").

151. Universal Serv. Contribution Methodology, *Order on Reconsideration*, 27 FCC Rcd 898, para. 10 (2012) [hereinafter *InterCall Reconsideration Order*].

152. *See id.* ("We find that these material characteristics differentiate the services that were the subject of the *Pulver.com Order* from the audio bridge conferencing services that were the subject of the *InterCall Order*.").

153. However, in a footnote to the *InterCall Order*, the FCC does seem to refute the holistic approach advocated by the *Pulver.com Order* by choosing not to consider whether InterCall's ancillary features were information services: "We do not make a finding here regarding whether the ancillary features enumerated by InterCall are information services. There is no need to make this determination, because, as stated above, these services are not integrated into InterCall's underlying provision of telecommunications." *InterCall Order*, *supra* note 2, at para. 13 n.38.

d. InterCall's Treatment of the Prepaid Calling Card Order

In contrast, the FCC's interpretation of the contamination theory in the *InterCall* proceeding appears to follow the line of reasoning established by *Brand X* and the *Prepaid Calling Card Order*. In its application of the contamination theory to InterCall's audio bridging services, the FCC stated:

> [T]he classification of a service as either information or telecommunications hinges on whether the transmission capability is "sufficiently integrated" with the information service capabilities to make it reasonable to describe the two as a single, integrated offering and classify the entire integrated service as an information service.[154]

However, as it did in the *Prepaid Calling Card Order*, the FCC failed to adequately explain the application of the integrated services test to the contamination theory. On one hand, the FCC states that InterCall's audio bridging services were not sufficiently integrated because the enhanced features "do not alter the fundamental character of InterCall's telecommunications offering" so as to render the entire service an information service.[155] On the other hand, the FCC seems to state that the test is whether "the customer can . . . conduct its conference call with or without accessing these features."[156] Thus, while it is clear that the FCC intended to apply the integrated services test as understood in the *Prepaid Calling Card Order*, it nevertheless failed to: (1) elaborate as to exactly how the test was applied; and (2) how its application now differed from its previous applications in the *Prepaid Calling Card* and *Cable Modem Orders* as they were distinguishable on a factual basis.

Moreover, the *InterCall Reconsideration Order*, wherein the FCC denied two petitions for reconsideration of the *InterCall Order*,[157] appears to

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154. *InterCall Reconsideration Order*, *supra* note 151, at para. 12 (citing *Prepaid Calling Card Order*, *supra* note 116, at para. 14). *See also InterCall Order*, *supra* note 2, at paras. 12-13 (citing *Prepaid Calling Card Order*, *supra* note 116, at paras. 14-15).

155. *InterCall Order*, *supra* note 2, at para. 13.

156. *Id.* (citing *Prepaid Calling Card Order*, *supra* note 116, at para. 15). *See also InterCall Reconsideration Order*, *supra* note 151, at para. 13 (citing *Prepaid Calling Card Order*, *supra* note 116, at para. 15). *But see Cable Modem Order*, *supra* note 115, at para. 38 (stating that contamination theory applies "regardless of whether subscribers use all of the functions provided as part of the service.").

157. *InterCall Reconsideration Order*, *supra* note 151, at para. 1 (denying the petitions for reconsideration filed by Global Conferencing Partners and A+ Conferencing Ltd. et al.); *see also* GCP Petition for Partial Reconsideration, *supra* note 118, at 1-2 (requesting the FCC's reconsideration of the *InterCall Order*'s conclusion that audio conferencing services qualified as telecommunications and not information services); A+ Conferencing, Ltd. et al. Petition for Reconsideration, *supra* note 118, at 3-4 (asserting that the *InterCall Order* should be reconsidered by the FCC because it failed to provide sufficient notice to non-party audio conferencing service providers as to the scope of the proceeding).

refute the contamination theory in its entirety. After affirming its application of the *Prepaid Calling Card Order's* integrated service test to InterCall, the FCC oddly goes on to state that:

> Accordingly, we confirm that under our existing requirements, a provider offering a *bundled service* comprised of *telecommunications services* and *information services* may not treat the entire bundled service as an information service for purposes of USF, but must instead *apportion its end user revenues between telecommunications and non-telecommunications sources*.[158]

In applying this exception to InterCall, the FCC substantially eroded the contamination theory, as it is a short leap to later holding that these same providers are also subject to the full gamut of Title II regulatory obligations as telecommunications service providers.

However, it is also conceivable that the substantial erosion of the contamination theory was not the FCC's intention in referencing the *CPE Bundling Order*.[159] Instead, it is possible to read the FCC's discussion of bundled service offerings as a distinct analysis from the integrated services test—i.e., since InterCall offered bundled telecommunications and information services, it was required to follow the FCC's revenue allocation guidelines as its audio bridging services were previously determined to be subject to USF contributions. However, contextually, this is at the very minimum unclear—especially for service providers not entirely aware of the minutiae surrounding the FCC's USF contribution policies.[160]

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158. *InterCall Reconsideration Order*, *supra* note 151, at para. 13 (citing Policy and Rules Concerning the Interstate, Interexchange Marketplace, *Report and Order*, 16 FCC Rcd 7418, paras. 50, 52-53 (2011) [hereinafter *CPE Bundling Order*]) (discussing permissible methods of allocating revenues between assessable and non-assessable services).

159. In the *CPE Bundling Order*, the FCC eliminated the bundling restriction imposed in *Computer II* which limited the ability of common carriers to offer bundled service offerings of telecommunications services and customer premises equipment ("CPE") at discounted prices. *CPE Bundling Order*, *supra* note 158, at para. 1. *See also id.*, para. 3 (citing *Computer II*, at 420) (stating that the FCC concluded in *Computer II* that "carriers providing both basic telecommunications services and enhanced services could discriminate against competitive enhanced service providers that sought to purchase underlying transmission capacity from the carrier"). *Compare id.* at para. 4 (citing *Computer II*, para. 231) (essentially limiting competitive concerns with bundled service offerings to facilities-based providers); *with Stevens Report*, *supra* note 103, at para. 60 (stating that *Computer II* intended to limit the contamination theory to non-facilities-based providers).

160. In fact, in the following year, the FCC proposed a rule requiring "any interstate information service or interstate telecommunications is assessable if the provider also provides the transmission (wired or wireless) directly or indirectly through an affiliate, to end users." Universal Serv. Contribution Methodology, *Further Notice of Proposed Rulemaking*, 27 FCC Rcd 5357, para. 75 (2012). Interestingly, the FCC justified its proposed rule by stating that it was intended to clarify the regulatory uncertainty surrounding the USF contribution obligations of service providers who did not provide transmission capabilities to its end users—such as Pulver.com. *Id.* at para. 76 (citing *Pulver.com Order*, *supra* note 113, at para. 14) ("The rule set forth above is intended to include entities that provide transmission capability to their users,

It was this multi-faceted aura of uncertainty, *inter alia*, that led Global Conferencing Partners and A+ Conferencing Ltd. et al. to petition for review of the *InterCall Order* to no avail.[161] In the *InterCall Reconsideration Order*, the FCC simply regurgitated its reasoning from the underlying Order without providing further explanation of the application of the integrated services test to the contamination theory.[162] This uncertainty led the Conference Group, *inter alia*, to appeal both Orders to the District of Columbia Circuit.[163]

Therefore, while the *InterCall* and *InterCall Reconsideration Orders* affirmed the FCC's commitment to the *Prepaid Calling Card Order's* version of the contamination theory, the FCC nevertheless failed to explain exactly how the integrated service test is applied. Moreover, as subsequent FCC decisions demonstrate, the FCC has not fully explained whether the *InterCall* decisions were truly the death knell of *Pulver.com*'s version of the contamination theory or merely the establishment of multiple branches of the doctrine. These uncertainties have led to widespread confusion and frustration among industry participants, who now are no longer able to predict how the FCC will apply the contamination theory in any given case—in stark contrast to the bright-line test envisioned by *Computer II*.[164]

2. FCC's Application of the *InterCall Order*

Following the *InterCall Order*, the FCC continued its practice of using informal adjudication to define the scope of the contamination theory's application to USF contribution obligations in an *ad hoc* manner. This disjunctive method of policymaking has inhibited industry members from adequately predicting, let alone understanding, the FCC's current interpretation of the contamination theory. Furthermore, adding to this confusion, the FCC continues to rely upon the *Pulver.com Order* as binding authority since the release of the *InterCall Order*.[165] However, on balance, it

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whether through their own facilities or through incorporation of services purchased from others, but not to include entities that require their users to bring their own transmission capability in order to use a service."). Thus, this proposed rule may indicate uncertainty among the FCC's staff as to the current status of the contamination theory.

161. *See* GCP Petition for Partial Reconsideration, *supra* note 118, at 1; *see also* A+ Conferencing, Ltd. et al. Petition for Reconsideration, *supra* note 118, at 1.

162. *See InterCall Reconsideration Order*, *supra* note 151, at para. 8 ("Reconsideration of a Commission's decision may be appropriate when the petitioner demonstrates that the original order contains a material error or omission, or raises additional facts that were not known or did not exist until after the petitioner's last opportunity to present such matters. If a petition simply repeats arguments that were previously considered and rejected in the proceeding, the Commission may deny them for the reasons already provided."). *See also* 47 C.F.R §1.106 (c) (2015); Toll Free Service Access Codes, *Order on Reconsideration*, 22 FCC Rcd 22188, para. 13 (2007).

163. *See* Final Brief for Petitioner at 1, Conference Grp., LLC v. FCC, 720 F.3d 957 (D.C. Cir. 2013) (No. 12-1124).

164. *See* Cannon, *supra* note 100, at 198 (stating that *Computer II* "established a bright-line test and amplified the separation of the communications facility from the enhancement").

165. *See, e.g.*, Protecting & Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601, para. 370 n.1046 (citing *Pulver.com Order*,

appears that since the release of the *InterCall Order*, the FCC considers the *Prepaid Calling Card Order's* amended version of the integrated services test to be the authoritative application of the contamination theory across industry sectors. What follows is a summary of several proceedings applying the *InterCall* precedent.

a. MeetingOne Order

On November 3, 2011, the WCB affirmed USAC's reclassification of MeetingOne.com Corp.'s services as telecommunications pursuant to the FCC's reasoning in the *InterCall Order*.[166] In the *MeetingOne Order*, the WCB found that Meeting One's audio bridging services qualified as telecommunications because they were "functionally identical" to InterCall's audio bridging service for several reasons.[167] First, end users of both InterCall and MeetingOne's services accessed each provider's platform by dialing a toll-free number allowing the end user to participate in a conference call.[168] Second, like InterCall, MeetingOne's audio bridging services utilized IP-in-the-Middle, which the FCC previously found to qualify an entire service as telecommunications.[169] Finally, the Bureau concluded that since InterCall's enhanced features were insufficient to render the entire audio bridging service an information service, MeetingOne's additional offerings of call recording and playback were also insufficient pursuant to the integrated services test.[170] Thus, since InterCall and MeetingOne's services were functionally identical, the WCB concluded that MeetingOne's audio bridging services were properly classified by USAC as telecommunications.

Interestingly, the Bureau declined to consider MeetingOne's argument that its computer-to-computer audio conferencing service component rendered the entire offering an information service on the grounds that

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supra note 113, at para. 13) ("[W]hen computer processing functions falling within the telecommunications systems management exception are offered on a stand-alone basis, they are not 'transformed into telecommunications services[.]'"); Universal Service Contribution Methodology, *supra* note 160, at para. 76 (citing *Pulver.com Order*, *supra* note 113, at para. 14) ("In the past, the Commission has found that the telecommunications component may be provided by the information services provider *or* the customer."); Caller Identification Information in Successor or Replacement Technologies, *Report to Congress*, 26 FCC Rcd 8643, para. 26 (2011) [hereinafter *2011 Report to Congress*] (citing *Pulver.com Order*, *supra* note 113, at paras. 11-17) (citing *Pulver.com Order* as an example of the FCC's classification of an IP-based service not interconnected with the PTSN as an information service); Implementation of Section 224 of the Act, *Report and Order and Order on Reconsideration*, 26 FCC Rcd 5240, para. 154 n.464 (2011) [hereinafter *Section 224 Report and Order*] (same).

166. *MeetingOne Order*, *supra* note 89, at para. 1.

167. *Id. at* para. 11.

168. *Id.*

169. *Id. at* para. 12 (citing Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Servs. Are Exempt from Access Charges, *Order*, 19 FCC Rcd 7457 (2004) [hereinafter *IP-in-the-Middle Order*]).

170. *Id.* at para. 14 (citing *InterCall Order*, *supra* note 2, at paras. 12-13; *Prepaid Calling Card Order*, *supra* note 116, at para. 15).

MeetingOne had yet to offer this service.[171] The Bureau's mention of this argument by MeetingOne is significant for two reasons. First, the prospective effect of USAC's reclassification of MeetingOne's services was effectively binding because once the provider was deemed a direct USF contributor, USAC would probably refuse to reclassify MeetingOne as an information service provider when the company began offering its direct IP audio conferencing service. This in turn would place MeetingOne in the situation of choosing to appeal USAC's position pursuant to its pay-and-dispute policy, or continuing to operate as a direct USF contributor—avoiding a costly and prolonged appeals process. In effect, by neglecting to rule on the future nature of MeetingOne's services, the Bureau called MeetingOne's bluff.

Second, the WCB's focus on the company's connectivity with the PSTN may indicate that this aspect of a service is essential to determining whether a provider's entire service offering satisfies the integrated service test. Indeed, the FCC has seemed to indicate this in other contemporaneous discussions regarding whether an IP-based communications service was properly classified as a telecommunications or an information service.[172]

At bottom, the *MeetingOne Order* demonstrates that at least the WCB considers the integrated services test to be the proper application of the contamination theory. Yet, the significance of the Bureau's decision remains uncertain as the FCC has yet to rule upon MeetingOne's application for review of the WCB's ruling.[173]

b. Vast Communications Consent Decree

The FCC has applied *InterCall* not only through the informal adjudication process, but through consent decrees as well. On April 11, 2014, the FCC's Enforcement Bureau announced that it had reached a consent decree with Vast Communications, LLC, a provider of teleconferencing services, in which the Bureau agreed to terminate its investigation into Vast

171. Specifically, MeetingOne argued that its proposed computer-to-computer audio conferencing service demonstrated that the "PTSN is not a necessary component" of its entire service offering, its audio bridging service was properly classified as an information service. *Id.* at para. 13. *See also* Request of MeetingOne.com at 14, Request for Review by MeetingOne.com Corp. of Decision of Universal Serv. Adm'r, CC 96-45 (May 3, 2010), https://ecfsapi.fcc.gov/file/7020444551.pdf ("[T]he PSTN is not a 'necessary' component of MeetingOne's IP audio conferencing technology . . . In contrast, the technology of InterCall and other audio conferencing service providers is totally dependent on the PSTN and services of the telecommunications providers.").

172. *See, e.g.*, *2011 Report to Congress*, *supra* note 165, at para. 26 (citing *Pulver.com Order*, *supra* note 113, at paras. 11-17) (citing *Pulver.com Order* as an example of the FCC's classification of an IP-based service not interconnected with the PTSN as an information service); *Section 224 Report and Order*, *supra* note 165, at para. 154 n.464.

173. *See generally* Comment Sought on MeetingOne.com Corp. App'n for Review of a Decision of the WCB, *Public Notice*, 26 FCC Rcd 16798 (2011); App'n for Review of MeetingOne.com Corp., App'n for Review of WCB Order, WC 06-122 (Dec. 5, 2011), https://ecfsapi.fcc.gov/file/7021749353.pdf. Arguably, MeetingOne.com was incentivized to appeal the WCB's ruling as it did not make it an "offer it couldn't refuse": prospective-only liability for USF contribution obligations.

Communications' non-compliance with FCC rules in exchange for the company making a "voluntary contribution" to the U.S. Treasury.[174] Accordingly, the consent decree presented Vast with an "offer it couldn't refuse": accept payment of a voluntary contribution in lieu of continued investigation by the Bureau, which could possibly result in the imposition of retroactive USF contribution obligations among other fines and penalties.

In reaching the consent decree, the Enforcement Bureau stated that Vast self-disclosed its failure to comply with its USF contribution obligations "because it had been unaware of the *InterCall Order*."[175] Since Vast Communications' customers accessed the provider's teleconferencing services by "dialing toll-free numbers and entering an access code," Vast determined that it was bound by *InterCall's* provisions.[176] Based on Vast's admission, the Enforcement Bureau stated that the *InterCall Order* unequivocally held that Vast's, and *all* audio bridging services, were telecommunications subject to direct USF contributions.[177]

Thus, the Enforcement Bureau used the opportunity presented by the Vast consent decree to announce the FCC's view that *all* audio bridging services were USF-assessable telecommunications no matter the service provider's specific configuration of such services. While courts have made it clear that consent decrees lack any precedential effect upon third parties,[178] the Bureau's usage of the consent decree to state Commission policy is, at a minimum, confusing given the FCC's tendency to cite to proceedings resulting in consent decrees as authoritative precedent.[179] Thus, it is unclear whether the consent decree is an affirmative announcement by the Enforcement Bureau that, following the *InterCall Order*: (A) *all* audio bridging service providers must contribute to the USF *without* being subject

174. Vast Comm., LLC, *Order*, 29 FCC Rcd 3769, para. 1 (2014); Vast Comm., LLC, *Consent Decree*, 29 FCC Rcd 3771, para. 18 (2014) [hereinafter *Vast Comm. Consent Decree*]

175. *Vast Comm. Consent Decree*, *supra* note 174, at para. 5.

176. *See id.*

177. *See id.* at para. 4 (citing *InterCall Order*, *supra* note 2, at para. 24) ("On June 30, 2008, the Commission clarified that audio bridging services are 'telecommunications' under the Act, and that audio bridging service providers are required to contribute directly to the USF. The Commission directed audio bridging service providers to comply prospectively with the registration and reporting requirements" associated with USF direct contributors.).

178. *See* N.Y. State Dept. of Law v. FCC, 984 F.2d 1209, 1219-20 (D.C. Cir. 1993); Beatrice Foods Co. v. FTC, 540 F.2d 303, 312 (7th Cir. 1976) (stating that consent decree likewise is not a decision on the merits "[n]or is a consent decree a controlling precedent for later commission action"). *See also* Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) (citations omitted) ("The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy."); Bechtel v. FCC, 10 F.3d 875, 877 (D.C. Cir. 1993) (citations omitted) (rejecting the FCC's attempt to apply "an undefended policy in adjudications simply on the basis of a hypothetical future rulemaking").

179. *See, e.g.*, Locus Telecomms., Inc., *Forfeiture Order*, 30 FCC Rcd 11805, para. 10 n.44 (2015) (citing NOS Comm., Inc., *Notice of Apparent Liability for Forfeiture*, 16 FCC Rcd 8133, para. 9 (2001) [hereinafter *NOS NAL*]) (citing as authoritative the "NOS Standard" which was subsequently resolved via consent decree). *See also* NOS Comm., Inc., *Order*, 22 FCC Rcd 19396, para. 1 (2007) (stating that the *NOS NAL* was subsequently resolved by consent decree in lieu of a forfeiture order).

to the integrated services test; or (B) merely that the regulatory classification of providers would continue to be subject to scrutiny on a case-by-case basis—which was not the case here since the dispute was resolved via consent decree before such a thorough, provider-specific examination could occur. Therefore, it is difficult to say what significance industry members should gather from the Vast consent decree as to the regulatory classification of their own service offerings.

Indeed, policymaking by consent decree presents several of the same issues seen with the FCC's usage of informal adjudication. As observed by Bryan Tramont, FCC consent decrees "often reach[] far beyond the traditional scope of its jurisdiction, impose[] conditions that are detailed and often unwieldy to enforce, and create[] numerous and distinct company specific regulatory requirements."[180] Furthermore, consent decrees are typically immune from judicial scrutiny as parties are required to waive any rights to appeal in exchange for a settlement.[181] Thus, as with informal adjudications, consent decrees are riddled with "procedural loopholes" allowing the FCC to pursue policymaking outside of public scrutiny.[182] This in turn allows the agency to gradually move the goalposts on regulated parties by developing new policies in an "opaque and ultimately arbitrary" manner.[183]

However, one arguable benefit of the FCC's application of the *InterCall Order's* interpretation of the contamination theory through both informal adjudications and consent decrees is that it has prompted many industry members to seek guidance from the FCC as to the scope of the decision. This is especially true given the fact that USAC has since demonstrated a willingness to apply the *InterCall* ruling to providers offering services other than audio conferencing, as evidenced by the pending Cisco WebEx LLC proceeding.

c. Cisco WebEx LLC's Request for Review

Cisco WebEx LLC's pending request for review of USAC's decision to reclassify the provider's online collaboration service as a USF-assessable service highlights the present uncertainty among service providers concerning the proper application of the contamination theory following the *InterCall Order*. The comments in the proceeding also confirm that despite seeking to set expectations for industry members, the FCC's significant departure from the *Computer II* proceeding in the *Cable Modem*, *Prepaid Calling Card*, and *InterCall Orders* has fomented a profound amount of uncertainty and fear among service providers lying at the intersection of computer processing and telecommunications services. For these providers,

180. Bryan N. Tramont, *Too Much Power, Too Little Restraint: How the FCC Expands Its Reach Through Unenforceable and Unwieldy "Voluntary" Agreements*, 53 FED. COMM. L.J. 49, 65 (2000).

181. *Id.* at 65 n.61 (citing MCI WorldCom Comm., Inc., *Order*, 15 FCC Rcd 12181, para. 7 (2000)).

182. *Id.* at 52.

183. *Id.* at 50.

the FCC's new interpretation of the contamination theory places their businesses in a state of economic uncertainty.

i. WebEx's Position

On April 8, 2013, Cisco WebEx LLC (WebEx) submitted a request for review of USAC's decision that its online collaboration service was a "bundle of collaboration features and separable telecommunications."[184] WebEx described its online collaboration service as a platform allowing its end-user customers to "share information and collaborate on work product through the integration of audio, video, and computing capabilities."[185] Thus, according to WebEx, its online collaboration service was an information service.[186]

Instead, in its November 2012 audit report, USAC determined that WebEx's online collaboration service functioned not as a single, integrated service, but as a "bundle of collaboration features and separable telecommunications."[187] Accordingly, USAC concluded that WebEx should have claimed a portion of its revenue as USF-assessable because it was generated from telecommunications.[188] USAC reasoned that although the enhanced features of WebEx's offering (i.e., desktop and document sharing services, active talker features) were information services, they were "separable" from the basic service components of the online collaboration service because WebEx's end-user customers could use third-party audio services in lieu of those offered by the provider.[189] Accordingly, USAC concluded that WebEx's entire service offering was merely a "bundle of telecommunications services and non-telecommunications services," which the FCC considers USF-assessable telecommunications.[190]

In its request for review, WebEx argued that "USAC improperly interpreted and applied Commission precedent" by using *ex post facto* reasoning in determining that WebEx's online collaboration service was not a single, integrated service.[191] According to WebEx, "USAC's telecommunications classification rests on its determination that WebEx users *could* substitute a third-party audio service and . . . *could* forego use of

184. Request of Cisco WebEx LLC at i, Cisco WebEx LLC Request for Review of a Decision of the Universal Serv. Adm'r, WCB 06-122 (Apr. 8, 2013), https://ecfsapi.fcc.gov/file/7022161526.pdf [hereinafter WebEx Request for Review]. *See also* WCB Seeks Comment on Cisco WebEx LLC Request for Review of a Decision by the Universal Service Admin. Co., *Public Notice*, 28 FCC Rcd 04710, 04710 (2013) (soliciting public comment on the WebEx Request for Review).

185. WebEx Request for Review, *supra* note 184, at i, 2 (complete description of WebEx's service offerings).

186. *Id.* at i.

187. *Id.* (characterizing findings from USAC's audit).

188. *See id.* at ii (explaining conclusion drawn from USAC's audit).

189. *See id.* at 6-7 (citing Letter from Dennis Fischer, Senior Internal Auditor, USAC, to Bill Hodkowski, Cisco WebEx LLC, Attachment at 12, 13 (Feb. 7, 2013) [hereinafter USAC Audit Report]).

190. *Id.* at 7 (quoting USAC Audit Report, at 30).

191. *Id.* at 1.

the information service components."[192] Instead, both *Brand X* and the *Cable Modem Order* made it clear that the integrated services test focused on what the end-user customer perceives the provider was *offering*, not what the customer does with the product after purchase.[193] Thus, for WebEx, FCC and Supreme Court precedent should have required the integrated service test to be applied at *the point of sale*—regardless of whether or not the end-user customer chose to utilize the entire service offering *after* purchase.[194] Accordingly, USAC was attempting to further narrow the scope of the contamination theory even after the FCC significantly curtailed the doctrine in the *InterCall Order*.

WebEx argues that fifteen years of FCC precedent has held that "where telecommunications is an 'inseparable part' of an information service, the entire offering is an information service."[195] In other words, the *Stevens Report* and *Brand X*'s affirmation of the FCC's *Cable Modem Order* serve as the authoritative line of precedent concerning what was left of the contamination theory. The *Prepaid Calling Card* and *InterCall Orders* did not change that. Instead, these cases were distinguishable both from WebEx's services and authoritative precedent because the decisions concerned "'separate and distinct telecommunications service[s] . . . packaged with additional capabilities,'"[196] or services "allow[ing] basic voice communications with a few extra bells and whistles."[197] Thus, WebEx asserts that if the FCC allowed the *Prepaid Calling Card* and *InterCall Orders* to establish the core of the contamination theory, "every information service . . . would also be a telecommunications service, which would conflict with clear [c]ongressional intent to create two distinct service-classification categories."[198]

Moreover, WebEx asserted that if the FCC indeed wanted to implement such a policy, doing so via an *ad hoc* set of supposedly sector-specific informal adjudications was not the proper way. Instead, WebEx advised the FCC that in order to reclassify service offerings, the agency should do so through the ongoing USF contribution rulemaking where the FCC had already sought "comment on precisely these issues."[199] Thus, according to WebEx, the FCC could appropriately make such a fundamental policy shift only through notice-and-comment rulemaking.[200] Doing otherwise would

192. *Id.* at 7 (emphasis added).

193. *Id.* at 10 (stating that FCC (1) refused to find that telecommunications and information services were offered separately by cable providers because the transmission component was "part and parcel" to the entire offering, and (2) applied information service classification "regardless of whether subscribers use all of the functions provided as part of the service.") (citing *Cable Modem Order*, *supra* note 115, at para. 39 (noting that *Brand X* held that a service qualifies as information service if provider "offers" customers information service "capabilities" that are "inextricably intertwined" with transmission component of entire offering)).

194. *See id.*

195. *Id.* at 9 (citing *Stevens Report*, *supra* note 103, at para. 56).

196. *Id.* at 15 (quoting *Prepaid Calling Card Order*, *supra* note 116, at para. 15).

197. *Id.* at 17 (referencing InterCall's services).

198. *Id.* at 10 (citing *Stevens Report*, *supra* note 103, at para. 58).

199. *Id.* at 16.

200. *Id.*

only perpetuate the existing pattern of conflicting and confusing policymaking.

ii. Industry Comments on WebEx's Request for Review Illustrate the Confusion and Uncertainty Caused by the FCC's Development of the Contamination Theory Through Ad Hoc Adjudications

Many industry members filed comments supporting WebEx's request for review. The commenters highlighted the widespread confusion and frustration with the contamination theory's new application within the USF policymaking framework, and echoed WebEx's advocacy for the need for greater certainty in such decision making.[201]

For example, in its reply comments, AT&T stated that the "ensuing delays" created by USAC waiting years for FCC guidance concerning USF contributions "have created or have the potential to create market distortions between competitors."[202] These market distortions are further enhanced by the fact that "service providers make different, good-faith decisions about how to classify revenue in the face of Commission silence" regarding USF contribution requirements.[203] Because of these effects, AT&T concluded that the FCC's piecemeal approach to USF policymaking was unsustainable and "ill-suited to providing bright line guidance to service providers whose offerings are feature rich" and frequently change due to rapid technological developments—which was the FCC's intent in developing the contamination theory in *Computer II*.[204]

Similarly, Sprint argued in its comments that the FCC's utilization of informal adjudication in developing USF contribution policy prevented the

201. *See* Ex Parte Notice of Cisco WebEx LLC at 1, Cisco WebEx LLC Request for Review of a Decision of the Universal Serv. Adm'r, WCB 06-122 (Nov. 12, 2015), https://ecfsapi.fcc.gov/file/60001335618.pdf ("WebEx believes that resolution of its Petition would likewise benefit the telecom and information services industries alike by removing uncertainty and making clear that information services like WebEx are not subject to Title II regulation.").

202. Reply Comments of AT&T at 6, Cisco WebEx LLC Request for Review of a Decision of the Universal Serv. Adm'r, WCB 06-122 (May 30, 2013) [hereinafter AT&T Reply Comments], https://ecfsapi.fcc.gov/file/7022419466.pdf.

203. *Id.*

204. *Id.* at 7. *See also* Comments of Generic Conferencing, LLC at 9, Cisco WebEx LLC Request for Review of a Decision of the Universal Serv. Adm'r, WCB 06-122 (May 15, 2013) [hereinafter Comments of Generic Conferencing], https://ecfsapi.fcc.gov/file/7022314078.pdf ("Given the speed of technological innovations and development of new technologies, new questions will continue to arise just as quickly as new technologies are developed . . . . [S]ervice providers and customers are harmed while they wait years for clarification from the FCC as to the proper treatment of revenue from services that they continue to provide to customers.").

agency from issuing "clear, transparent rules to all."[205] Specifically, Sprint argued that expanding USF contribution requirements "through individual adjudications is only creating greater uncertainty . . . and is, in effect, implementing a fundamental policy change without a full and frank assessment of the impact of these decisions."[206] Moreover, the result of USAC's reclassification scheme is "arbitrary, and the flexibility and expansiveness of USAC's reasoning sows deep uncertainty" among service providers.[207] Instead, such fundamental changes should be implemented via a "fully vetted rule making" [sic], rather than having USAC reclassify services on an *ad hoc* basis.[208] Accordingly, both USAC and the FCC's usage of the informal adjudicatory process to apply the contamination theory to USF contribution obligations of enhanced service providers was an unacceptable method of policymaking for the industry.

Indeed, Sprint's argument that the FCC should use more transparent forms of policymaking was voiced by other commenters.[209] As one commenter put it, if the FCC provided USF contributors with "clear, timely guidance" via rulemaking, the FCC would instead "improve the stability of the Fund and ensure that all providers can compete on an even playing field."[210] Moreover, a movement away from decision-making practices like the *InterCall Order* would ensure continued innovation and investment in the rapidly evolving telecommunications industry due to the regulatory certainties that tend to be created by a more transparent policymaking process.[211]

Thus, the commenters in the WebEx proceeding demonstrate that the FCC's abrupt departure from longstanding *Computer II* precedent through the

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205. Comments of Sprint Nextel Corp. at 2, Cisco WebEx LLC Request for Review of a Decision of the Universal Serv. Adm'r, WCB 06-122 (May 15, 2013) [hereinafter Comments of Sprint Nextel Corp.], https://ecfsapi.fcc.gov/file/7022314234.pdf.

206. *Id.* at 2.

207. *Id.* at 11.

208. *Id.* at 2-3.

209. *See, e.g.*, AT&T Reply Comments, *supra* note 202, at 7 ("[T]he Commission should pursue contribution reform through its open rulemaking and devote the necessary resources to pursuing a non-revenues-based methodology."); Comments of Generic Conferencing, *supra* note 204, at 9 ("The FCC should adopt a process that allows USAC or service providers to request clarification on the application of USF contribution obligations to specific services. This process should be streamlined and specific staff delegated to handle all such requests in a timely manner.").

210. Comments of Generic Conferencing, *supra* note 204, at 2.

211. Reply Comments of the Voice on the Net Coalition at 1, Cisco WebEx LLC Request for Review of a Decision of the Universal Serv. Adm'r, WCB 06-122 (May 30, 2013), https://ecfsapi.fcc.gov/file/7022419512.pdf ("The USAC decision [concerning Cisco WebEx LLC] undermines the distinction between information services and telecommunications services that is essential to innovation and the development of new consumer offerings."); Comments of TechNet at 3, Cisco WebEx LLC Request for Review of a Decision of the Universal Serv. Adm'r, WCB 06-122 (May 15, 2013), https://prodnet.www.neca.org/publicationsdocs/wwpdf/51513technet.pdf ("If left standing, USAC's decision [concerning Cisco WebEx LLC] . . . would stifle innovation in the Internet ecosystem, harming the economy and undercutting the competitiveness of American information technology and communications providers.").

use of informal adjudication would only serve to destroy the agency's commitment to technological innovation and investment in the telecommunications industry. Instead, given the reliance upon regulatory certitude for continued industry growth, a gradual evolution of policymaking enabled by notice-and-comment rulemaking was the appropriate form of FCC policymaking.

3. Impact of the *InterCall Order* on Industry

Indeed, as highlighted by the WebEx proceeding, FCC decisions like the *InterCall Order* can have a profound, systemic impact on regulated industries. Regulatory uncertainty has been recognized by business leaders across multiple industries as a "key decision environment . . . that can make or break both companies and their leaders."[212] Profound regulatory uncertainty can affect decision-making practices among business leaders including such fundamental decisions as market entry, resource allocation, and both short- and long-term financial and business planning.[213] Therefore, without a stable regulatory environment, businesses are disincentivized from market participation due to an inability to predict with any certainty the growth and evolution of market forces largely dictated by government regulations.

Furthermore, regulatory uncertainty hinders innovation and industry investment. For example, a 2014 study concerning market investment rates among Internet service providers (ISPs) under either a light-touch regulatory environment or a Title II regulatory regime concluded that years of uncertainty as to whether the FCC would impose more stringent regulatory obligations upon ISPs stifled industry investment.[214] "The prospect of the FCC imposing Title II regulation on ISPs . . . leads to delays or suspensions of investments in innovations that could be affected by the new regulation, or diverts resources to compliance efforts before-the-fact."[215] Therefore, in contrast, an ability to predict regulatory developments in industries such as telecommunications is essential to ensure the continuation of investment and innovation necessary to maintain desirable levels of competitiveness in these industries.

Accordingly, the FCC's abrupt departure from thirty years of certitude among service providers concerning the distinction between information and telecommunications services, and its usage of informal adjudications to effect such departures, will only serve to mitigate the competitiveness of the communications industry—to the detriment of the USF. Instead, as will be

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212. Andrew B. Whitford, *The Reduction of Regulatory Uncertainty: Evidence from Transfer Pricing Policy*, 55 ST. LOUIS U.L.J. 269, 269-70 (2010).

213. *See id.* at 270, 272-73.

214. KEVIN A. HASSETT & ROBERT J. SHAPIRO, THE IMPACT OF TITLE II REGULATION OF INTERNET PROVIDERS ON THEIR CAPITAL INVESTMENTS 17 (2014), http://www.sonecon.com/docs/studies/Impact_of_Title_II_Reg_on_Investment-Hassett-Shapiro-Nov-14-2014.pdf.

215. *Id.*

discussed below, the FCC's usage of rulemaking methodologies could potentially mitigate the adverse effects of such abrupt policy changes.

C. Framework for Evaluating Agency Decision Making and Application to the InterCall Order

As indicated by the widespread uncertainty and frustration among industry members following the *InterCall Order*, the FCC's use of the informal adjudicatory process to narrow the contamination theory was clearly not the most appropriate policymaking method for doing so. While agencies enjoy broad discretion in deciding whether to use rulemaking or adjudication, an agency's decision to use one process or the other can and should be evaluated to ensure that agencies use the most appropriate policymaking tools. At the outset, it is important to note that this Article reviews the FCC's recent *InterCall Order* from a normative standpoint. Therefore, it considers what decision-making process the FCC *should* have used in reversing the contamination theory, not whether it was required by law to use such procedural methods.

Prior scholarship offers a framework within which to evaluate the choice that agencies routinely face between proceeding by adjudication or rulemaking. Even before the passage of the APA, much thought had gone into whether and how to distinguish agency rulemaking from adjudication,[216] and much thought has continued to go into this issue since the passage of the APA.[217] This body of scholarship provides a framework within which agency decisions can be evaluated, and it suggests a set of best practices that, if followed, promotes full stakeholder engagement in an agency's decision-making process. This section discusses the framework this Article will use to evaluate the FCC's recent shift towards the informal adjudication process, and applies that framework to the FCC's decision in the *InterCall Order*.

Juxtaposing rulemaking with adjudication remains the most prominent model for evaluating agency decision making. While it has been criticized often, this bipolar model reflects the core issue involved with agency decision making: whether to proceed by rulemaking or adjudication. Criticisms of this model point out that the paradigm fails to address other issues important to the legitimacy of agency action, including political accountability[218] and

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216. *See* ATT'Y GEN.'S COMM. ON ADMIN. PROCEDURE, *supra* note 30; *see also* Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935) (discussing the "quasi-legislative" and "quasi-judicial" role played by the Federal Trade Commission prior to the passage of the APA); Cass, *supra* note 8, at 370-71 nn.26-30, 380 nn.93-96. *See also generally* David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965) (discussing generally the advantages and disadvantages of rulemaking and adjudication).

217. *See, e.g.*, Cass, *supra* note 8; William T. Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, 1980 DUKE L.J. 103 (1980); Magill, *supra* note 9.

218. *See, e.g.*, Louis L. Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183 (1973); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

stakeholder participation.[219] Other criticisms focus on the simplistic approach of the bipolar model,[220] and suggest that the approach does not fully reflect the diverse set of policy and regulatory issues confronted by administrative agencies.[221]

Yet, the bipolar approach of comparing "quasi-legislative" action (i.e., rulemaking) to "quasi-judicial" action (i.e., adjudication) remains the conventional method because it reflects a critical aspect of agency decision making for stakeholders and administrators alike.[222] Rulemaking and adjudication provide separate procedural protections to stakeholders and offer different decision-making tools to administrators.[223] Therefore, from the standpoint of both administrative agencies and industry stakeholders, the procedural form of an agency's decision making carries significant weight.[224] Moreover, as will be discussed below, many of the concerns voiced by critics of the bipolar model can be grafted onto the model in the form of factors to be considered when an agency decides what administrative process best serves its policymaking priorities.

Therefore, notwithstanding the limitations of a bipolar approach, this Article follows the general bipolar framework by considering the merits of rulemaking versus adjudication. However, this Article also proposes that an agency consider the following three criteria in making its decision, analyzing whether the proceeding: (1) involves a question of legislative or adjudicative fact; (2) directly impacts non-parties to the proceeding; and (3) lends itself to *ex ante* or *ex post* decision making. Based on these criteria, this Article assesses the FCC's recent use of adjudication in limiting the contamination theory's application to the USF contribution framework and considers whether the FCC, industry, and other stakeholders would be better served if the FCC implemented its policy changes through a rulemaking proceeding.

1. Legislative Fact

a. Framework

A key consideration in determining whether an agency should use adjudication or rulemaking in a specific proceeding is whether the record involves legislative or adjudicative facts. As the names suggest, legislative and adjudicative facts lend themselves to different types of fact finding, and

219. *See, e.g.*, Robert S. Summers, *Evaluating and Improving Legal Process—A Plea for "Process Values"*, 60 CORNELL L. REV. 1 (1974); Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978).

220. *See, e.g.*, Cass, *supra* note 8, at 391-395.

221. *See, e.g.*, *id.* at 395-398.

222. *See id.* at 367-69.

223. *See* Magill, *supra* note 9, at 1396-97.

224. *See id.* at 1397.

are useful in supporting different conclusory forms.[225] Therefore, in determining what type of proceeding would best serve an agency's purpose, it is often helpful to consider what types of facts are at issue. A proceeding involving questions of adjudicative fact is often best served by adjudication, while rulemaking tends to be the best method for resolving questions of legislative fact.

Generally, adjudicative facts pertain to a party's rights and duties, and the actions of a party that affect those rights and duties.[226] They tend to involve past events[227] and lend themselves more easily to proof by testimony or other direct evidence about a party's actions.[228] For example, in the context of a judicial proceeding, adjudicative facts are traditionally left to the jury or the finder of fact.[229]

In the context of an agency action, it then becomes clear why adjudication is often viewed as an exercise of the agency's quasi-judicial role. Agency adjudication typically involves a dispute between parties to be resolved by the agency or an investigation by an agency of the actions of a regulated party.[230] In either case, a court-like record can be created that allows the agency to establish the actions of a party to the adjudication and make a decision based on those actions. Also like a court proceeding, adjudications are adversarial in nature, and come with similar adversarial procedures including: (1) service of documents filed by an opposing party; and (2) an opportunity to respond to opposition filings.[231] As a result of this litigation-like nature, agencies that hear disputes between discrete parties often rely on adjudication more heavily. For example, the NLRB (labor versus management) and the Federal Trade Commission (consumers versus

225. *See* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404-407 (1942) (introducing the concepts of "adjudicative facts" and "legislative facts").

226. *See* Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1216 (2012); *see also* Kenneth Culp Davis, *Official Notice*, 62 HARV. L. REV. 537, 549 (1949); *see also* FED. R. EVID. 201(a) advisory committee's notes (discussing Davis's distinction between adjudicative and legislative facts).

227. Mulligan & Staszewski, *supra* note 226, at 1216; *see also* Davis, *supra* note 225, at 549.

228. *See, e.g.*, FED. R. EVID. 201(a) advisory committee's notes.

229. Mulligan & Staszewski, *supra* note 226, at 1216 (citing FED. R. EVID. 201(a); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 244 n.52 (5th Cir. 1976)).

230. *See* City of Arlington v. FCC, 668 F.3d 229, 242 (5th Cir. 2012) (stating that adjudications typically "resolve disputes among specific individuals in specific cases."); *see also* Brendan Mahoney & Steven E. Sessions, *Administrative Law*, 21 N.M.L. Rev. 481, 500-01 (1991); Magill, *supra* note 7, at 108; Mulligan & Staszewski, *supra* note 226, at 1209 (citing MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 193-94 (3d ed. 2009)) ("In adjudication . . . an agency's agenda may be dictated by the happenstance of whatever cases come before it [and] . . . the facts of any particular test case may not turn out as the agency had anticipated.").

231. *See* 5 U.S.C. §§ 554, 556 (2012) (governing notice requirements and setting guidelines for affected party's opportunity to submit rebuttal evidence).

business) both use adjudication routinely in their decision-making processes.[232]

On the other hand, legislative facts are "general and do not concern merely the immediate parties" to an action or dispute.[233] Rather, they assist a decision maker in the process of creating law, or determining policy for an entire industry or industry sector.[234] Despite the use of the word "facts," legislative facts often involve a degree of judgment by the decision maker in extrapolating from a single principle or piece of evidence to create a broadly applicable rule, law, or policy.[235] For example, in upholding the spousal privilege, the Supreme Court in *Hawkins v. United States* concluded that "[a]dverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage."[236] In reaching its decision, the Court relies on a mix of general facts unrelated to the case at issue (e.g., the reluctance of states and other common law jurisdictions to do away with the spousal privilege), and a normative judgment "that the law should not force or encourage testimony which might alienate husband and wife."[237]

Likewise, agency action that creates new policy or implements new rules is often thought of in quasi-legislative terms and is typically enacted through rulemaking. No amount of fact finding will indisputably support most policy decisions, yet an agency must eventually weigh the facts before it, and make a judgment as to the best policy. In such a situation, legislative facts provide the best support for an agency action. Therefore, notice-and-comment rulemaking is widely considered to be the better procedure because it allows the agency to explore more general questions, develop a comprehensive record, and solicit information from all relevant stakeholders.[238] This is especially important in proceedings in which an agency intends to reverse longstanding and relied upon regulatory norms, such as the FCC's substantial degradation of the contamination theory through the *InterCall Order*.

b. Application to the InterCall Order

As noted above, the distinction between adjudication and rulemaking is not ironclad. Thus, the factors this Article proposes as a means of determining when to use one of the procedures can also overlap.

232. *See* Magill, *supra* note 9, at 1399.

233. *See* Davis, *supra* note 225, at 537.

234. *See* Mulligan & Staszewski, *supra* note 226, at 1216.

235. "My opinion is that judge-made law would stop growing if judges, in thinking about questions of law and policy, were forbidden to take into account the facts they believe, as distinguished from facts which are 'clearly within the domain of indisputable.' Facts most needed in thinking about difficult problems of law and policy have a way of being outside the domain of the clearly indisputable." Kenneth Culp Davis, *A System of Judicial Notice Based on Fairness and Convenience*, PERSPECTIVES OF LAW 69, 82 (1964) (quoting Edmund M. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 293 (1944)).

236. Hawkins v. United States, 358 U.S. 74, 78 (1958).

237. *Id.* at 79.

238. *See* Mulligan & Staszewski, *supra* note 226, at 1207; *see also* RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.8, 369 (4th ed. 2002).

Undoubtedly, the FCC could argue that its *InterCall Order* turns on adjudicative facts, specifically whether InterCall's service fits the definition of telecommunications,[239] and is not an information service as InterCall claims.[240] On the other hand, the *InterCall* proceeding concerned much more than InterCall's audio bridging services considering that the Order's precedential effect upon the entire industry indicated that the contamination theory could no longer be relied upon by mixed-service providers in avoiding USF contribution obligations.[241]

In the case of adjudicative fact, the FCC uses its examination of InterCall's services as the basis of its decision in the Order. "InterCall's service allows end users to transmit a call (using telephone lines), to a point specified by the user (the conference bridge), without change in the form or content of the information as sent and received (voice transmission)."[242] The FCC therefore concludes that InterCall's service results in a "transmission channel chosen by the customer" similar to other services it has previously determined to be USF-assessable telecommunications.[243] Outwardly, this is an example of adjudicative fact finding: (1) InterCall is alleged to have violated the FCC's rules; (2) the FCC investigates InterCall's service; and (3) the FCC then makes a decision specific to InterCall.

However, in reaching its conclusion, the FCC makes several conclusory leaps that suggest the FCC's examination of InterCall's service is a substitution for a broader policymaking exercise. "The existence of a bridge that users dial into does not alter [InterCall's classification]. Rather, the purpose and function of the bridge is simply to facilitate the routing of ordinary telephone calls."[244] This determination cannot be supported by examining InterCall's audio bridging service alone. Rather, it requires the FCC to exercise its judgment in extending its rules from the specific (i.e., InterCall's service), to the general (i.e., the functionality of an audio bridge). This is precisely the type of judgment which legislative facts and the procedural record are designed to support.

For the purposes of this Article, the key question is not whether the FCC correctly concluded that an audio bridge provides telecommunications.[245] Rather, the FCC takes an end-to-end approach in the

239. *InterCall Order*, *supra* note 2, at para. 11. Telecommunications is defined as "the transmission, between or among points specified by the, user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43) (2012).

240. *InterCall Order*, *supra* note 2, at para. 9.

241. *See id.* at para. 25.

242. *Id.* at para. 11.

243. *Id.* (citing N. Am. Telecomm. Ass'n Petition for Declaratory Ruling Under Section 64.702 of the Comm'n's Rules Regarding Integration of Centrex, Enhanced Servs., & Customer Premise Equip., *Memorandum Opinion and Order*, 101 F.C.C. 2d 349, para. 31 (1985)).

244. *InterCall Order*, *supra* note 2, at para. 11.

245. In fact, a strong argument can be made that the FCC did make the correct decision in the *InterCall Order*. An audio bridge permits two or more people to communicate over a voice platform. The bridge is often a virtual location where hardware or software is used to

InterCall Order to prevent audio bridging service providers from attempting to avoid or minimize USF contribution obligations.[246] Yet, in arriving at its conclusion, the FCC had only a single example of an audio bridging service on which to base its decision to overturn thirty years of FCC precedent. InterCall was not an outlier among audio bridging providers, brazenly flouting its USF obligations. As the FCC concedes, "[I]t was unclear to InterCall *and to the industry* that stand-alone audio bridging providers have a direct USF contribution obligation."[247] Across the audio bridging industry, providers viewed themselves as information service providers.[248] As information service providers, audio bridging providers argued that an audio bridge did not route calls as the FCC concluded. Rather, calls made to an audio bridge actually terminated at the bridge.[249] Moreover, not all audio bridging providers offer end-to-end transmission. An audio bridging customer may purchase the telecommunications inputs used to reach the bridge, which would likely require that customer to make indirect USF contributions as an end user of the telecommunications service that the customer purchased. Also, where an audio bridging provider did provide the telecommunications inputs for a customer, the audio bridging provider typically made indirect USF contributions as an end user of a telecommunications service.

None of the arguments advanced by the audio bridging industry preclude the FCC from determining that an audio bridge simply "facilitate[s] the routing of ordinary telephone calls."[250] By treating the questions raised by the industry as narrow questions of adjudicative fact, however, the FCC short-circuited the opportunity for the industry to fully explain its position.[251] The FCC also deprived itself of a comprehensive record upon which to base its decision.[252] Furthermore, sloppy policymaking, even if it does not result in a negative outcome with respect to regulated entities, increases the chances that the FCC would have to resolve the issue in a later proceeding.

The FCC's use of InterCall as a stand-in for all audio bridging service providers negatively affects the industry as well. Instead of hearing from a diverse range of industry members, the public, and any other interested

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allow parties to link multiple calls together. The FCC has previously held that telephone providers, such as AT&T, cannot disaggregate the transmission aspects of a call from routing, switching, or other functions central to the completion of a call. *See IP-in-the-Middle Order*, *supra* note 169, at paras. 12-13.

246. *InterCall Order*, *supra* note 2, at para. 11.

247. *Id.* at para. 7 (emphasis added).

248. *See, e.g.*, Final Brief for Petitioner, *supra* note 163, at 5 (emphasis added) ("Both prior to the 1996 amendment of the Act and after that time, stand-alone conference bridge service providers, like [t]he Conference Group, operated as end users, or purchasers of telecommunications service . . . It was understood that stand-alone conference bridge providers were not providers of telecommunications services, but rather purchasers of such service, *so that their end user customers could access the enhanced functionality of the information services provided by the conference bridge*.").

249. *Id.* at 43.

250. *InterCall Order*, *supra* note 2, at para. 11.

251. *Id*. at para. 7.

252. *Id*. at paras. 7-8.

commenters, the FCC limited its consideration to the arguments raised by InterCall, putting other industry participants in the position of relying on InterCall to carry the flag for an entire industry.[253] This is unfair to both InterCall, which bears the cost burden of representing the industry, and other industry members, which cannot easily advance alternative arguments before the FCC with respect to an adjudication.[254] As discussed below, this approach also enables the FCC to limit judicial review of its decision by opting not to apply USF contribution obligations on InterCall retroactively.[255]

2. Impacts of Agency Action on Nonparties to a Proceeding

a. Framework

A second consideration in deciding between rulemaking and adjudication is the impact of a decision on non-parties to a proceeding. Because any interested party can participate in a rulemaking proceeding, rulemaking is widely considered the fairer approach for decisions that will directly impact a number of parties.[256] In fact, the APA requires an agency to give public notice of a rulemaking and invite the public to comment on the proceedings,[257] meaning that rulemaking proceedings almost always enjoy more attention than individual adjudications.[258] The "hard look" doctrine also forces an agency to genuinely consider the material in the administrative record.[259] Otherwise, a court may overturn the agency's decision as arbitrary and capricious.[260] Rulemaking gives the public, interest groups, industry groups, and government officials the most information about policy decisions

253. *Id.* at para. 8.

254. *Id.*

255. *Id.* at para. 24. By overturning USAC's retroactive application of USF contribution obligations for InterCall, the FCC gave InterCall a strong incentive not to appeal the *InterCall Order*. As attorneys representing clients, we would be hard-pressed to advise a client to continue to carry the flag, and the costs, for its industry in appealing a decision that ultimately will not put the company at a disadvantage vis-à-vis its competitors. However, it also illustrates why adjudication was likely the wrong policymaking tool in this situation, and if the FCC decided to make such a decision as a strategic tool to discourage appeal, it reflects a type of gamesmanship that undermines democratic processes.

256. *See* 5 U.S.C. § 553(c) (2012).

257. *See id.*

258. One need not look further than the FCC's Open Internet proceeding to see just how much attention a major rulemaking can attract. *See* Jacob Kastrenakes, *FCC Received a Total of 3.7 Million Comments on Net Neutrality*, THE VERGE (Sept. 16, 2014, 6:06 PM), http://www.theverge.com/2014/9/16/6257887/fcc-net-neutrality-3-7-million-comments-made (stating that over 3.7 million comments were filed in the FCC's Open Internet proceeding).

259. *See* Motor Vehicle Mfrs.' Assn. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

260. *See id.*

facing an agency,[261] therefore providing such groups with the opportunity to influence—or at least participate in—the decision-making process.[262]

Conversely, an adjudication is limited to the parties involved in the proceeding but creates precedent that binds parties in subsequent cases—even if that party did not have an opportunity to participate in the original adjudication.[263] Moreover, third parties to an adjudication generally cannot appeal the decision.[264] Therefore, a similarly situated party may find itself constrained by a decision issued in a proceeding in which it could not participate. The limits on third-party participation in adjudicatory proceedings can also result in somewhat unpredictable decisions based on the unique concerns of a party or agency involved.[265] This is not unique in American law. As a common law country, many litigants have found themselves bound by precedent they played no role in setting.[266] As noted above, some agencies rely on the case-by-case nature of adjudication because their decisions can turn on highly specific facts and/or directly impact a limited number of parties.[267]

However, when an agency decision directly impacts a large number of parties, the tools exist, in the form of rulemaking, to maximize the opportunities for stakeholders to participate in the process of setting policy, and making rules. By maximizing stakeholder participation, an agency encourages compliance with its rules and policies.[268] Moreover, encouraging participation in the rulemaking process promotes other goals that legitimize agency actions, such as political accountability and deliberative democracy.[269]

Because all agency decisions potentially affect third parties, considerations concerning the impact of an agency decision on third parties turn on how directly the decision impacts such parties. In answering this question, standing principles can help guide an agency when the APA does not compel an agency to use notice-and-comment rulemaking.[270] As will be discussed more completely below, "an agency's imminent application of its established interpretation of a statute" is sufficient to support standing,[271] and

261. Shapiro, *supra* note 216, at 930 (stating that one of the advantages of rulemaking is that all those affected by the rule can participate in its creation).

262. *See* ASIMOW & LEVIN, *supra* note 230, at 192.

263. *Id.* at 192-93.

264. *See infra* Section III.A.

265. *See* PIERCE, *supra* note 238, at § 6.8.

266. *See id*.

267. *See supra* Section II.C.3.a (discussing NLRB and FTC use of adjudication).

268. *See* CARY COGLIANESE ET AL., TASK FORCE ON TRANSPARENCY & PUB. PARTICIPATION, TRANSPARENCY AND PUBLIC PARTICIPATION IN THE RULEMAKING PROCESS 2 (2008), http://www.hks.harvard.edu/hepg/Papers/transparencyReport.pdf ("Public participation promotes legitimacy by creating a sense of fairness in rulemaking.").

269. *See* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 61-64 (1985); *see also* STRAUSS, *supra* note 30, at 663 (criticizing the bipolar model for its failure to account for value of political accountability and participation in agency decision-making process).

270. Teva Pharm. USA, Inc. v. Sebelius, 595 F.3d 1303, 1313 (D.C. Cir. 2010).

271. *See id.*

an agency should view imminent application of its statutory interpretation as directly affecting any entity to which the statute applies. In such cases, consideration of the impact of an agency's decision on a third party would weigh in favor of proceeding by rulemaking—especially in circumstances where an agency reverses course on decades of relied-upon regulatory norms by a wide sect of regulated entities.

b. Application of the InterCall Order

Unlike the consideration of legal facts above, the FCC would likely take the position that the *InterCall Order* applies to all audio bridging service providers, but only InterCall would have standing to challenge the precedential effect of the Order.[272] Accordingly, the FCC could use informal adjudication to advance its policy of expanding USF contribution levels without having to deal with industry-wide challenges.

The FCC's position regarding the Conference Group's lack of standing—despite being beholden to the *InterCall* ruling—appears to be shared by the District of Columbia Circuit, which dismissed the Conference Group's appeal of the *InterCall Order* for a lack of standing.[273] "The court has rejected the view that 'the mere potential precedential effect of an agency action affords a bystander to that action a basis for complaint'" when the agency rendered its decision via adjudication.[274] The Court specifically rejected the Conference Group's claim that the FCC's direction to USAC to "implement the findings in this order with respect to all audio bridging services providers"[275] was sufficient to meet the standing requirements for the Conference Group to challenge the merits of the *InterCall Order*—even if it was an adjudication to which the Conference Group was not a party.[276] Therefore, the *InterCall Order* affirmed that the FCC's informal adjudications were essentially judgment proof on appeal for two reasons: (1) third parties lack standing to appeal the agency's decision; and (2) as it did with InterCall, the FCC could successfully entice directly-affected parties not to appeal its decision by "making them an offer they couldn't refuse" (e.g., by limiting the scope of the ruling to prospective USF contribution obligations).

However, as this Article will later discuss, in the District of Columbia Circuit's analysis in *Conference Group*, failed to account for a key aspect of the FCC's direction to USAC—that it implement the *InterCall Order* with

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272. Indeed, the FCC's position as to a third party's standing to challenge the *InterCall Order* is indeterminate as evidenced by the fact that the agency refrained from litigating the issue during the *Conference Group* litigation. *See infra* Section III.B.1.b.

273. *See* Conference Grp., LLC v. FCC, 720 F.3d 957, 963 (D.C. Cir. 2013).

274. *See id.* (citing Shipbuilders Council of Am. v. United States, 868 F.2d 452, 457 (D.C. Cir. 1989)).

275. *InterCall Order*, *supra* note 2, at para. 25.

276. *See Conference Grp.*, 720 F.3d at 963-64.

respect to *all* "similarly situated" audio bridging providers.[277] This instruction to USAC converted the *InterCall Order* from a mere individualized adjudication, which *may* have a precedential effect on the entire audio bridging industry, to the "imminent application of [the FCC's] established interpretation of a statute" at significant cost to regulated entities.[278] While it is settled law that mere precedential effects typically do not rise to the level of an injury-in-fact, the District of Columbia Circuit has articulated certain situations in which future harm is sufficient to meet Article III's standing requirements.[279]

The imposition of an ongoing compliance filing and surcharge remittance requirements are concrete future harms, and the FCC unambiguously imposes those costs on the audio bridging industry in the *InterCall Order*. However, because the FCC opted to impose USF obligations on audio bridging providers via adjudication, and then gave the party to that adjudication every incentive not to appeal the decision, the FCC prevented the audio bridging industry from full participation in the decision. Therefore, the District of Columbia Circuit's solution to the industry's inability to directly challenge the *InterCall Order* was for a specific service provider to ignore the rule, and to then bring an appeal of an adverse FCC enforcement action.[280]

This is precisely the outcome that rulemaking avoids. Ignoring for a moment that the FCC explicitly directed USAC to implement the *InterCall Order* with respect to other audio bridging providers, waiting for the FCC to take action against another audio bridging provider poses problems for the industry, the FCC, and the courts.

For the industry, the wait makes planning more difficult and risks creating an uneven playing field. Adjudication is necessarily more unpredictable than rulemaking.[281] An audio bridging provider cannot know when the FCC will prosecute another case involving it or another audio bridging provider. Therefore, a provider faces two options: (A) comply with the explicit instructions of the FCC's *InterCall Order*; or (B) ignore the Order and wait to see if the FCC and/or USAC react. Regardless of the approach a

277. *See InterCall Order*, *supra* note 2, at para. 25 ("USAC should instruct [audio bridging providers] to register for an FCC Filer ID, and begin submitting quarterly and annual FCC Form 499s consistent with this decision.").

278. Teva Pharm. USA, Inc. v. Sebelius, 595 F.3d 1303, 1313-14 (D.C. Cir. 2010).

279. *Id.* at 1314. *See also* Sea-Land Service, Inc. v. Dept. of Transp., 137 F.3d 640, 648 (D.C. Cir. 1988) (stating that merely foreseeable litigation resulting from a statutory interpretation adopted by an agency is "alone" too speculative to satisfy the injury-in-fact requirement); Int'l Bhd. of Elec. Workers v. ICC, 862 F.2d 330, 334 (D.C. Cir. 1988) (allowing a party to challenge in advance agency policy adopted by adjudication where the threatened harm was effectively certain); Ass'n of Bituminous Contractors v. Andrus, 581 F.2d 853, 858-59 (D.C. Cir. 1978) (permitting preemptive challenges where the imminent application of the new agency policy was about to inflict injury).

280. *See Conference Grp.*, 720 F.3d at 964 ("Finally, if the Commission decides to apply the rule of decision in the *InterCall Order* to [t]he Conference Group, [t]he Conference Group has the option to raise its substantive arguments in its own adjudication.").

281. Mulligan & Staszewski, *supra* note 226, at 1208.

provider picks, it faces serious challenges. The provider that complies with the *InterCall Order* hamstrings itself compared to a competitor that ignores the Order. And, because adjudications are unpredictable, a future Commission might accept that competitor's position, resulting in an uneven playing field and inconsistent enforcement. On the other hand, the provider that ignores the Order also risks the unknown timing of a future enforcement action and faces potentially ruinous retroactive USF obligations, which would unlikely be waived by the FCC following the *InterCall Order*.[282] Moreover, a future appeal may take years or even decades to work its way through the FCC before a provider could get back to the courts on appeal.

While the possibility of inconsistent enforcement always exists, the FCC's choice of policymaking procedures in the *InterCall Order* increased the likelihood of inconsistent enforcement for audio bridging providers. "[R]ulemaking tends to promote the similar treatment of similarly situated persons and reduce arbitrary discrimination, thereby promoting values underlying the Equal Protection and Due Process Clauses of the Constitution."[283] Absent those safeguards, the FCC undermines its own authority, and makes it more likely that an audio bridging provider will attempt to avoid regulation. As a result, the FCC may spend more time addressing new questions raised by providers and their attorneys on a piecemeal basis via multiple adjudications, many of which could have been avoided had the FCC conducted a single rulemaking proceeding.

Finally, waiting for a new appeal to bubble up through the FCC comes at the cost of judicial economy. While the standing doctrine is partially related to the principles of judicial economy, the courts should strive to address legitimate concerns of a party appearing before the court. Failure to do so wastes the time and resources of both the litigants and the court. Instead, both the FCC and the Conference Group would have been better served by a definitive answer from the District of Columbia Circuit on the substantive questions before the Court. Also, the Court could have prevented future litigation regarding the same issue by answering the questions raised by the Conference Group—instead of dodging most of the substantive questions on a standing decision.

Nevertheless, the District of Columbia Circuit's ruling in *Conference Group* effectively enshrined the FCC's ability to ignore industry concerns and frustrations in promulgating unpopular and damaging policies through informal adjudication. Instead, when choosing its procedural method the FCC should have considered both the retroactive and prospective impacts of its decision to reverse the longstanding contamination theory that could have been provided by industry input into the Commission's decision-making process through rulemaking.

282. *See supra* Section II.B.2.

283. Mulligan & Staszewski, *supra* note 226, at 1211.

3. *Ex Ante* vs. *Ex Post* Decision Making

a. Framework

As indicated by the FCC's failures in the *InterCall* proceeding, an agency should consider whether it is engaged in *ex ante* or *ex post* decision making when it decides whether to use rulemaking or adjudication. Adjudications are used most often to address conduct that occurred *before* the agency's action (i.e., *ex post* decision making).[284] The case-by-case approach of adjudication works well in this context because, as discussed above, a complete record of a party's actions can be developed, and the party can address any alleged wrongdoing.[285] Additionally, adjudications typically apply retroactively,[286] making them ideal for addressing violations of preexisting rules or precedent. However, relying on adjudication limits the agency's control of its policy priorities because the agency's agenda will be dictated by the cases that happen to come before it. And, even if an agency exercises careful discretion over which cases to pursue, the facts of the case may take the agency in an unanticipated direction.[287]

On the other hand, rulemaking makes *ex ante* decision making easier. When looking into the future, an agency necessarily faces some uncertainty. However, by using rulemaking to make *ex ante* decisions, an agency can maintain more control over its agenda, allowing the agency to implement policy in a more rational and predictable manner.[288] Moreover, rulemaking allows an agency to develop a more diverse, in-depth record than adjudication, giving the agency a better opportunity to fully evaluate forward-looking policy decisions.[289] As a result, rulemaking is generally considered the fairer, more effective policymaking tool.[290]

Similar to the dilemma of determining when an agency's action may directly impact a third party, determining when an agency is engaged in *ex ante* or *ex post* decision making can sometimes be challenging. An agency may use an adjudication primarily to set precedent, and to place other regulated entities on notice of the agency's policies. However, a key distinguishing feature of adjudication is its retroactive application. Therefore, when an agency finds that its actions cannot or should not apply retroactively, the agency should view its action in an *ex ante* context, and strongly consider proceeding by rulemaking. As will be discussed in the next section, the impact of reversing the contamination theory on the entire industry, and the economic and regulatory uncertainties created by doing so, is exactly why the FCC

284. *See* ASIMOW & LEVIN, *supra* note 230, at 193.

285. *See supra* Section II.A.1.

286. *See* Abner S. Greene, *Adjudicative Retroactivity in Administrative Law*, 8 SUP. CT. REV. 261, 261-62 (1991).

287. *See id.*

288. *See* Mulligan & Staszewski, *supra* note 226, at 1209 (citing ASIMOW & LEVIN, *supra* note 230, at 193-94). As a knock-on effect, that predictability also helps regulated entities plan for and comply with an agency's rules.

289. *See id.*; *see also supra* Section II.A.1.

290. *See* PIERCE, *supra* note 238, at § 6.8, 370-72.

should have proceeded by rulemaking instead of adjudication in reclassifying audio bridging services as USF-assessable telecommunications.

b. Application to the InterCall Order

The FCC was unambiguously engaged in *ex ante* decision making in the *InterCall Order*. Indeed, the FCC even stated in the Order that, "[i]n part because of the lack of clarity regarding direct contribution obligations of stand-alone audio bridging service providers that these actions may have created, we find that [only] prospective application of our decision is warranted."[291] By failing to apply the USF contribution obligations retroactively, the FCC undercuts its argument that requiring audio bridging service providers to contribute to the USF is merely an application of its existing rules, and not a dramatic alteration of entrenched FCC precedent.[292]

As noted above, the interpretive policymaking involved in *ex ante* decisions benefits greatly from the rulemaking process. Extending USF contributions to audio bridging providers through a rulemaking would have allowed the FCC to more carefully weigh the potential consequences of its decision on the industry and consumers. Moreover, by implementing its policy changes through adjudication, the FCC turned control of its policymaking priorities over to USAC, an organization that is not democratically accountable and is explicitly prohibited from interpreting unclear provisions of the Communications Act or the FCC's rules.[293] Instead of seeking guidance from the FCC as is required, USAC effectively drove the Commission's policymaking priorities by auditing InterCall and determining that it provided USF-assessable telecommunications.

Unfortunately, the FCC's abdication of its USAC oversight responsibilities does not appear to be an oversight. Rather, the FCC appears content to let USAC do the heavy lifting of expanding the USF contribution base through audits, then later ratifying USAC's decisions through adjudications concerning the audit's appeal to the FCC. In effect, the FCC acted as the referee in a dispute between itself and InterCall. While InterCall's appeal is nominally of USAC's audit decision, the FCC is responsible for making universal service contribution policy and overseeing USAC's purely administrative responsibilities. By ceding the first round of the policymaking process to USAC, the FCC appears to be mediating a dispute between a petitioner and USAC. However, such a view of the FCC's current policymaking procedure ignores the FCC's sole authority to interpret the Communications Act and its rules when setting universal service policy. As

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291. *InterCall Order*, *supra* note 2, at para. 24.

292. Epilepsy Found. v. NLRB, 268 F.3d 1095, 1102 (D.C. Cir. 2001) (citing Williams Nat. Gas Co. v. FERC, 3 F.3d 1544, 1554 (D.C. Cir. 1993)) ("In considering whether to give retroactive application to a new rule, '[. . .] retroactive effect is appropriate for "new applications of [existing] law, clarifications, and additions.'").

293. *See* 47 C.F.R. § 54.702(c) (2015) ("[USAC] may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Communications Act or the Commission's rules are unclear, or do not address a particular situation, [USAC] shall seek guidance from the Commission.").

a result, USAC ends up playing the bad cop (by interpreting the FCC's universal service contribution rules expansively) to the FCC's good cop (by reasonably agreeing not to impose the obligation retroactively). In the end, however, the FCC advances its likely policy objective of expanding the USF base.

In addition to limiting the FCC's ability to develop a record supporting difficult forward-looking policy decisions, using adjudications to set USF policy has resulted in USAC taking *de facto* control over USF policymaking. Because USAC is not democratically accountable, stakeholders cannot engage in dialogue with USAC in the same way they can with the FCC. Given the current political difficulty in USF policymaking—particularly in maintaining a sufficient contribution base amid rapid technological changes in the telecommunications industry—permitting USAC to take the lead in USF policymaking is, perhaps, understandable. However, it undermines the FCC's policymaking responsibility with respect to the USF and fosters uncertainty on the part of USF contributors.

D. Takeaways

Stated succinctly, the FCC's decision to expand USF contribution obligations to audio bridging providers via adjudication forced the FCC to: (1) extrapolate an industry-wide rule from the examination of a single provider; (2) apply the results of the FCC's review of that single provider to all other similarly situated providers; and (3) enforce its ruling on a prospective-only basis—despite the fact that the FCC claimed its rules had always required audio bridging providers to contribute directly to the USF. Each of these outcomes illustrates the shortcomings of the FCC's decision to address the reclassification of all audio bridging service providers' regulatory and USF contribution statuses through adjudication.

Moreover, such outcomes harm the industries that the FCC is charged with regulating. By relying on the adjudicative facts established in the InterCall proceeding to create USF contribution rules for the entire audio bridging industry, the FCC robbed itself of the opportunity to develop a clearer picture for the industry by charting a new course for the contamination theory. An audio bridge can be used in a variety of configurations: some perhaps more similar to the end-to-end transmission service the FCC has classified as telecommunications, and some more akin to a simple piece of software providing an information service. Because the FCC reached a legislative-like conclusion based on the findings of an audit of a single company, however, it limited its own ability to study these distinctions. This shortsightedness can negatively impact both the FCC and the industry. For the FCC, it increases the likelihood that its regulations will create unforeseen consequences. For the industry, it forces all audio bridging providers to contend with regulations premised on the evaluation of a single provider's service. In turn, certain business models may be precluded based on an incomplete understanding of the industry by the regulator—which arguably is the unintended effect upon mixed-service providers of destroying the delicate balance of the *Computer I* and *Computer II* decisions.

Alternatively, companies may attempt to avoid regulation by classifying their service as something other than audio bridging (either by pushing USF contribution obligations to other links in the communications chain or by diminishing the contribution base of the USF as a whole). In either case, the USF contributions will likely have to be made up through increased USF rates or through payment by other telecommunications users or providers in the communications chain. Unfortunately, as discussed above, such increased regulatory costs will only serve to mitigate investment in the telecommunications industry.

While the use of adjudicative facts in a rulemaking-like context limits both the FCC's and industry's ability to regulate and respond to regulation based on a fully developed record, expanding the direct application of an adjudication to third parties and making *ex ante* decisions via adjudication have more pernicious effects on the FCC's policymaking process. In the case of setting policy on an adjudicative record rather than a rulemaking record, the FCC simply lacks the full breadth of information it could have collected in making a decision. However, in directly applying an adjudication to third parties and using an adjudication to make *ex ante* decisions, the FCC cedes control over its policymaking agenda to the happenstance of the adjudicatory process—limiting the ability of affected parties to either participate in the regulatory process, or to challenge the results of that process. This in turn allows the FCC to move the goalposts for industry members, by preventing them from being able to anticipate—let alone participate in—fundamental policy decisions impacting the very existence of their industries.

III. JUDICIAL REVIEW OF THE FCC DECISIONS

While the *InterCall Order* exemplifies how inappropriate policymaking choices weaken the FCC decision-making process and sow confusion within industry, the federal courts, particularly the District of Columbia Circuit, have aided the FCC in this misadventure by effectively preventing judicial review of the decision. This section discusses how the District of Columbia Circuit has accomplished this by examining its recent decision in *Conference Group, LLC v. FCC*, and discussing the profound negative impacts it has upon the communications industry's ability to challenge damaging and short-sighted FCC policies.

A. Background

Sections 701 through 706 of the APA[294] permit federal courts to review final agency actions—including both affirmative actions, and an agency's failure to act.[295] However, Section 701 excludes judicial review of decisions

294. *See* Government Organization and Employment Act, Pub. L. No. 89-554, 80 Stat. 378 (1966) (codified at 5 U.S.C. §§ 701-706 (2012)).

295. 5 U.S.C. § 551(13) (2012) (defining "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to

that are either "committed to agency discretion by law" or exempted from review by other statutory provisions.[296] Furthermore, the scope of review is circumscribed by the standing doctrine, and Section 706 of the APA. Accordingly, an examination of the current jurisprudence concerning standing and standards of judicial review is essential to understanding how the District of Columbia Circuit's decision in *Conference Group, LLC v. FCC* has ensured that the FCC's informal adjudications are effectively shielded from appeal, thereby enshrining the agency's ability to develop industry-wide policies without consideration of its negative impacts upon affected industry members.[297]

1. Standing

Section 702 of the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[298] However, a plaintiff relying upon Section 702 for standing must still demonstrate constitutional and prudential standing.[299]

To establish constitutional standing under Article III,[300] a plaintiff has the burden of showing: (1) injury in fact; (2) causation; and (3) redressability.[301] First, injury in fact requires an injury to be concrete, particularized, and actual or imminent.[302] Next, a plaintiff must demonstrate causation by showing that: (a) the plaintiff's injury is "fairly traceable" to the challenged action;[303] and (b) the challenged action has a "determinative or coercive effect" in causing the injury.[304] In other words, there must be a

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act"); *see also* Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 464 (2008) (stating that the APA sets out a broad scope of judicial review of agency decisions).

296. 5 U.S.C. § 701(a) (2012).

297. *See supra* Section II.B.3.

298. 5 U.S.C. § 702 (2012).

299. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

300. Art. III limits judicial review of federal courts to "cases and controversies." *See* U.S. CONST. art. III, § 2; *see also* 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 430 (rev. ed. 1937) (regarding statement of James Madison to federal Constitutional Convention delegates urging that federal courts be restricted to "cases of a Judiciary Nature.").

301. *See* Allen v. Wright, 468 U.S. 737, 751 (1984); *Lujan*, 504 U.S. at 560-61.

302. *Lujan*, 504 U.S. at 560; *see also* Baker v. Carr, 369 U.S. 186, 204 (1962) (stating that the "gist" of standing is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends").

303. *Lujan*, 504 U.S. at 560; *see also* Kevin A. Coyle, Comment, *Standing of Third Parties to Challenge Administrative Agency Actions*, 76 CALIF. L. REV. 1061, 1072 n.62 (1988) (stating that the "concrete adverseness" language is "somewhat of a red herring, perhaps an unfortunate choice of words"). *Cf.* Patricia Wald, *The District of Columbia Circuit: Here and Now*, 55 GEO. WASH. L. REV. 718, 723 (1987) (finding courts' application of vagueness requirement inconsistent).

304. Bennett v. Spear, 520 U.S. 154, 169 (1997).

"logical nexus" between the plaintiff's injury and claim;[305] where "the party seeking judicial review be himself among the injured,"[306] and have a "distinct and palpable injury."[307] Finally, redressability requires that the plaintiff show that "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"[308]

In addition to constitutional standing, plaintiffs mounting APA challenges to agency decisions must demonstrate that they possess prudential standing under Section 702 of the APA.[309] Prudential standing encompasses three elements: (1) the prohibition against litigating generalized grievances;[310] (2) the prohibition against litigating the rights of a third party;[311] and (3) the requirement that the plaintiff's interest falls within the zone of interests that the statute was designed to protect.[312] A plaintiff can generally demonstrate prudential standing when its statutory and personal interests intertwine.[313] Justice White stated in *Clarke v. Security Industries Association* that the zone of interests test is understood as a "gloss" on the meaning of Section 702 of the APA—meaning that while an explicit grant of standing by Congress is not required, the underlying policies of a statute may be brought to bear in determining whether a plaintiff has standing.[314]

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305. Flast v. Cohen, 392 U.S. 83, 102 (1968). *But see generally id.* at 111-14 (Douglas, J., concurring) (advocating for use of "private attorney generals" to enforce constitutional rights of others).

306. Sierra Club v. Morton, 405 U.S. 727, 735 (1972).

307. Warth v. Seldin, 422 U.S. 490, 501 (1975). *See also* United States v. Students Challenging Reg. Agency Procedures (*SCRAP*), 412 U.S. 669, 689 (1973) (noting that the Court looked for "specific and perceptible harm that distinguished [plaintiffs] from other citizens").

308. *Lujan*, 504 U.S. at 560.

309. *See* Allen v. Wright, 468 U.S. 737, 751 (1984); *see also* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp (*ADAPSO*), 397 U.S. 150, 153 (1970).

310. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974); *Flast*, 392 U.S. at 106; *see also* United States v. Richardson, 418 U.S. 179 (1974) (stating that permitting generalized grievances "would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts."); Hollingsworth v. Perry, 133 S. Ct. 2652, 2659 (2013) (citations omitted) ("Refusing to entertain generalized grievances ensures that . . . courts exercise power that is judicial in nature, and ensures that the Federal Judiciary respects 'the proper—and properly limited—role of the courts in a democratic society.'"). *But see* Coyle, *supra* note 303, at 1075 n.85 (stating that the generalized grievances prohibition is "probably best seen as a gloss on the particularized injury requirement").

311. *Allen*, 468 U.S. at 751. *But see* Coyle, *supra* note 281, at 1076 n.85 (stating that there have been many cases permitting litigants to raise the rights of others).

312. Micah J. Revell, Student Comment, *Prudential Standing, The Zone of Interests, and the New Jurisprudence of Jurisdiction*, 63 EMORY L.J. 221, 223 n.4 (2013) (citing *Allen*, 468 U.S. at 751).

313. *See* Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 417 F.3d 1272, 1287 (2005).

314. Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 400 n.16 (1987).

However, the Court's reliance on the causation, traceability, and redressability requirements has prevented a broader conception of standing.[315] The strict requirements of constitutional and prudential standing, as currently understood by the judiciary, enable the standing doctrine to operate "in favor of the executive branch by restricting the ability of private parties to enforce duties that are owed to the public at large."[316] Thus, as the theory goes, standing maintains the separation of powers by ensuring that judicial review does not encroach on the powers of the other branches, and ensures that decision making occurs in one of the "accountable political branches"[317]—at the expense of an individual plaintiff seeking redress for agency misconduct.[318]

Issues of constitutional and prudential standing commonly arise in administrative law cases, especially where the distinction between agency rulemaking and adjudication is at issue.[319] Generally, courts are more willing to grant standing to a third-party plaintiff when the agency proceeds by rulemaking rather than by adjudication.[320] Essentially, this means that when a court finds that an agency's decision impacts an entire industry or class of people, the court is more willing to find standing for the plaintiff.[321] This is most likely due to the fact that the plaintiff can easily demonstrate that it falls within the broad scope of the agency's rulemaking decision.[322]

In contrast, courts are less willing to grant standing to a third-party plaintiff appealing an agency adjudication.[323] For example, the District of Columbia Circuit has rejected the notion that "the mere *potential precedential effect* of an agency action affords a bystander to that action a basis for

315. *Cf.* Coyle, *supra* note 303, at 1078 ("[R]eliance on causation for that conceptual connection is unsatisfactory because it is an easily manipulable test that has led to several poorly reasoned opinions.").

316. *See* John Harrison, *The Relation Between Limitations on and Requirements of Article III Adjudication*, 95 CALIF. L. REV. 1367, 1371 (2007).

317. Jerret Yan, *Standing as a Limitation on Judicial Review of Agency Action*, 39 ECOLOGY L.Q. 593, 596 (2012). For a detailed explanation of the separation of powers doctrine as the justification for strict requirements of standing, *see generally* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

318. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 589-607 (1992) (Blackmun, J., dissenting) (discussing how stringent standing limits availability of redress).

319. *See* Coyle, *supra* note 303, at 1063 (describing administrative state's rise and accompanying standing hurdles in federal court litigation); *see also* Conference Grp., LLC v. FCC, 720 F.3d 957, 962 (D.C. Cir. 2013) ("We hold that [t]he Conference Group has standing to challenge the FCC's decision as procedurally unlawful rulemaking, but lacks standing to challenge the merits of the decision . . . if it was an adjudication.").

320. *See*, *e.g.*, Conference Grp., 720 F.3d at 962.

321. *See* Sea-Land Serv., Inc. v. Dep't of Transp., 137 F.3d 640, 648 (D.C. Cir. 1998) (holding that, where plaintiff identified cognizable harm as a result of agency action resulting in additional financial costs and regulation, he possessed standing); *see also* Warth v. Seldin, 422 U.S. 490, 507 & n.17 (1975).

322. *See* The Conference Grp., 720 F.3d at 962.

323. *See* Yan, *supra* note 317, at 595 (stating that extensive judicial review of agency action "can undermine the executive's ability to enforce the law and prevent the executive from being held accountable for its enforcement decisions").

complaint."[324] This is because when a nonparty plaintiff appeals such a decision, its "plea is essentially, a request for judicial advice—a declaration that a line of agency rulings should henceforth have no precedential effect."[325] However, a third-party plaintiff has standing to review an adjudication "when the prospect of impending harm was effectively certain."[326] In other words, there must be a cognizable injury to the plaintiff caused by the agency's decision *beyond* a showing that the plaintiff merely falls within the zone of interests of the relevant statute.[327] Exactly how a plaintiff must make this showing remains subject to debate—most notably within the District of Columbia Circuit.[328]

Over the years, judges and academic scholars have hacked away at the notion that standing is an essential component of judicial review. The doctrine has been notably criticized as: (1) having "no constitutional basis";[329] (2) being "extraordinarily inconsistent";[330] and (3) abused by judges as a tool to "vindicate their view of the merits" of a given case.[331] Furthermore, some scholars argue that standing is unnecessary to ensure an actual dispute exists between opposing parties.[332] Indeed, even Justice Scalia conceded that an ideological plaintiff, otherwise lacking the formal requirements of standing, might litigate more vigorously than a plaintiff who merely was injured as a result of the defendant's conduct.[333] In fact, personal injury "usually does

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324. Shipbuilders Council of Am. v. United States, 868 F.2d 452, 456-57 (D.C. Cir. 1989) (emphasis added); *see also* Am. Family Life Assurance Co. v. FCC, 129 F.3d 625, 629 (D.C. Cir. 1989); Gulf Oil Corp. v. Brock, 778 F.2d 834, 838 (D.C. Cir. 1985). *But see infra* Section III.B.2.a.ii.

325. Shipbuilders Council of Am., 868 F.2d at 456.

326. *See* Teva Pharm. USA, Inc. v. Sebelius, 595 F.3d 1303, 1314 (D.C. Cir. 2010).

327. *See id.*

328. *See, e.g.*, *infra* Section III.B.2.a.ii.

329. *See* Amy J. Wildermuth & Lincoln L. Davies, *Standing, On Appeal*, 2010 U. ILL. L. REV. 957, 995; *see also* Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1142-43 (1988); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 166 (1992).

330. *See* Coyle, *supra* note 303, at 1081; *see also* PIERCE, *supra* note 238, § 16.1, at 1401 (5th ed. 2010) ("[S]tanding law suffers from inconsistency, unreliability, and inordinate complexity."); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221 (1988) (footnotes omitted) ("[S]tanding law in the federal courts has long been criticized as incoherent . . . as 'permeated with sophistry,' [and] as 'a word game played by secret rules . . . .").

331. *See* Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742-43 (1999); *see also* Amy J. Wildermuth, *Why State Standing in* Massachusetts v. EPA *Matters*, 27 J. LAND RESOURCES & ENVTL. L. 273, 289-94 (2007); Fletcher, *supra* note 330, at 221 ("[S]tanding law in the federal courts has long been criticized . . . as a largely meaningless 'litany' recited before 'the Court . . . chooses up sides and decides the case.'").

332. *See* David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 819 (2004).

333. *See* Scalia, *supra* note 317, at 891 ("[O]ften the very best adversaries are national organizations [with] a keen interest in the abstract question at issue in the case"); *see also* Driesen, *supra* note 332, at 820 ("[S]incere ideological plaintiffs experiencing no personal injury [do not] present sham litigation if they seek a judgment against an adverse opponent."); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1385 (1973) ("[T]here is no reason to believe that litigants with a 'personal interest' will present constitutional issues any more sharply or ably than the Sierra Club or the ACLU");

nothing to make litigation more concrete."[334] Thus, the notion that standing doctrine ensures the adverseness essential to effective judicial review is likely illusory.[335]

In cases involving administrative law, the plaintiff's injury in fact is *rarely* essential to resolving the merits of a case.[336] For example, in *Lujan v. Defenders of Wildlife*, Justice John Paul Stevens parted from the majority opinion by finding that the plaintiffs had standing, but nevertheless ruled against the plaintiffs on the merits.[337] Stevens' concurrence in *Lujan* demonstrates that injury does not necessarily "illuminate" the court in how to rule on the merits of a case, contradicting the assertion made in *Baker v. Carr* that such "illumination" is the essential purpose of standing.[338] The one exception to this general notion is that injury-in-fact requirements "frequently do make merits adjudication concrete"[339] where a plaintiff's injury is an essential factor in the agency's decision-making process.[340] However, such an effect does not demonstrate that the concreteness of a plaintiff's injury is *always* necessary to demonstrate standing, rather, barring such exceptions, merely sufficient.

Furthermore, in the realm of administrative law, the causation requirement has effectively made third-party challenges to agency actions a rarity.[341] Federal agencies have raised successful standing challenges based

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Mark V. Tushnet, Comment, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1704 (1980) ("[T]he Court recognizes that in reality an organization will often be a more effective litigant than a single individual.").

334. *See* Driesen, *supra* note 332, at 840.

335. *See id.* at 820 (arguing that Supreme Court's prohibition on advisory opinions renders standing requirements superfluous to ensuring Article III Cases and Controversies requirement); *see also* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 442-44 (1996) (asserting that long-standing prohibition of advisory opinions misleadingly evolved into a "prohibition against rendering decisions in litigated cases because of standing, ripeness, or mootness concerns"); Fletcher, *supra* note 330, at 221 ("The root of the problem is, rather, that the intellectual structure of standing law is ill-matched to the task it is asked to perform.").

336. Driesen, *supra* note 332, at 865.

337. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 585-89 (1992) (Stevens, J., concurring).

338. Driesen, *supra* note 332, at 815 (citing Baker v. Carr, 369 U.S. 186, 204 (1962)); *see also* Coyle, *supra* note 303, at 1065 ("[R]ecognition of standing in a given case is not tantamount to a trial on the merits").

339. Driesen, *supra* note 332, at 843 (citing Adamo Wrecking Co. v. United States, 434 U.S. 275, 277-79 (1978)).

340. *Id.* at 865. Earlier standing doctrines focused on whether the defendant's actions infringed upon the legal rights of the plaintiff. *See* Tenn. Elec. Power Co. v. Tenn. Valley Auth., 306 U.S. 118, 137-38 (1939) (standing based on the legal rights of the plaintiff—"one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege"); *see also* Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 433 (1974) (stating that common law of private actions to resolve disputes with government officials were the origins of the principles governing nonstatutory review by federal courts). *But see* Coyle, *supra* note 303, at 1069, 1070 (stating that "[t]he rise of the regulated state . . . began to test the limits of the private rights model" and that the legal interest test was formally abandoned by the Supreme Court in 1970 in favor of the modern injury-in-fact test).

341. Coyle, *supra* note 303, at 1096.

on a third party's lack of concrete injury.[342] This has allowed agencies "to insulate the *substance* of their decision making based on standing" through "basically[] a *procedural* device."[343] Yet, some scholars have noted that, in cases such as *FEC v. Akins*,[344] *Bennett v. Spear*,[345] and *Friends of the Earth v. Laidlaw Environmental Systems, Inc.*,[346] the Supreme Court demonstrated a willingness to permit challenges to *non-final* agency actions where the plaintiff's standing would otherwise be lacking.[347]

Federal courts have implemented a strict interpretation of standing while seemingly disregarding the harm that it causes,[348] "unnecessarily shut[ting] the courthouse doors when the judiciary is needed to keep the Executive Branch in check."[349] Accordingly, standing principles have evolved in such a way that courts assume ensuring the separation of powers is best accomplished by keeping the *judicial* branch in check as opposed to the executive.[350]

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342. *See* Wildermuth & Davies, *supra* note 329, at 960.

343. *Id.* (stating that when "on judicial review, the standing of parties whose very involvement [the agencies] invited in the proceeding below is disputed, a kind of public participation bait-and-switch occurs"); Bressman, *supra* note 8, at 1796 (stating that federal agencies are more likely to "involve and accommodate" parties with judicial standing in their decision making as "[f]ear of reversal is a strong motivator" in agency decision making). *Cf.* 47 C.F.R. § 1.223(b) (2015) (the FCC has the discretion to allow "[a]ny . . . person" so long as the person's "interest" is identified, an explanation is given as to how the person's "participation will assist the Commission" in resolving the case, and the intervenor identifies the issues it will add to the proceeding); Ritchie v. Simpson, 170 F.3d 1092, 1095 (Fed. Cir. 1999) (emphasis added) ("[T]he starting point for a standing determination for a litigant before an administrative agency is not Article III, but is *the statute that confers standing before that agency*.").

344. FEC v. Akins, 524 U.S. 11 (1998).

345. Bennett v. Spear, 520 U.S. 154 (1997).

346. Friends of the Earth v. Laidlaw Envtl. Sys., Inc., 528 U.S. 167 (2000).

347. *See* Bressman, *supra* note 8, at 1804 (2007) (arguing that following these decisions, the Court is more willing to find standing for the plaintiff: (1) to sue for information access; (2) to challenge agency inaction even where injury is widely shared; (3) to challenge agency action even in the absence of ongoing injury; and (4) to challenge agency action based on agency advisory decisions).

348. *See* Wildermuth & Davies, *supra* note 329, at 967; *see also, e.g.*, Hydro Res., Inc. v. EPA, 562 F.3d 1249, 1259 (10th Cir. 2009) ("Standing must be established even though the [statutory authority for review] provides an expansive avenue for petitions for review."); Inner City Press v. Bd. of Governors of the Fed. Reserve Sys., 130 F.3d 1088, 1089 (D.C. Cir. 1997) ("[P]articipation before an agency does not, without more, satisfy a petitioner's Article III injury-in-fact requirement."); United States v. Fed. Mar. Comm'n, 694 F.2d 793, 800 n.25 (D.C. Cir. 1982) (emphasis added) ("Although participation in the [administrative] proceeding below may be an inflexible prerequisite to be a '*party* aggrieved' . . . , it does not follow that participation in and of itself provides a springboard for judicial review.").

349. Wildermuth & Davies, *supra* note 329, at 996; *see also* Flast v. Cohen, 392 U.S. 83, 111 (1968) (Douglas, J., concurring) ("The judiciary is an indispensable part of our federal system. With the growing complexities of government it is often the one and only place where effective relief can be obtained . . . But where wrongs to individuals are done by violation of specific guarantees, it is abdication for courts to close their doors.").

350. *See* Warth v. Seldin, 422 U.S. 490, 501 (1975) (stating that standing prevents courts from being "called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions"); Yan, *supra*

Therefore, it appears that ensuring the separation of powers is far more important to the judiciary than opening the courthouse doors to aggrieved plaintiffs, despite the Court's observation in *ADAPSO* that "the trend is toward enlargement of the class of people who may protest administrative action."[351] In reality, since *ADAPSO*, the Court has interpreted the prudential zone of interest test in a pro-plaintiff manner, while simultaneously interpreting the Article III injury-in-fact requirement restrictively.[352] Thus, the overall direction of the judiciary's interpretation of third-party standing is currently unclear. But it appears, on balance, to be increasingly restrictive of a third party's ability to challenge agency misconduct.

2. Appeals of FCC Decisions

As demonstrated by the InterCall proceeding, FCC decisions are subject to review by: (1) petition for reconsideration to the FCC; and (2) appeal of a decision to a federal court. Each of these processes is discussed below.

a. Petition for Reconsideration

Any person or entity may petition the FCC to reconsider an action within thirty days of public notice of the decision.[353] The effect of this mechanism is limited as the FCC has no obligation to respond to a petition for reconsideration of a rulemaking.[354] It must, however, respond to adjudicative proceedings under Sections 204(a) and 208(b) of the Communications Act (i.e., formal adjudications).[355] Section 1.429(b) of the Commission's rules allows for petitions for reconsideration of rulemakings, yet limits the grounds upon which the FCC would grant a petition to the following: (1) facts or circumstances have changed since the decision; (2) the facts relied on were unknown to the petitioner until after the FCC rendered a decision; or (3) the FCC determines that a grant of the petition would serve the public interest.[356] The FCC maintains that it may deny a petition for reconsideration where "a petition simply repeats arguments that were previously considered and rejected in the proceeding . . . for the reasons

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note 317, at 596 ("[L]imiting the power of the judiciary . . . ensures that . . . decisions are made by the accountable political branches rather than the unaccountable judiciary.").

351. Ass'n of Data Processing Serv. Orgs., Inc. v. Camp (*ADAPSO*), 397 U.S. 150, 154 (1970).

352. Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1671 (2004).

353. 47 U.S.C. § 405(a) (2012). *But see* 47 C.F.R. § 1.106(b)(1) (2015) (requiring petitioners not party to the underlying proceeding to establish how the "person's interests are adversely affected by the Communications Action taken," and to "show good reason why it was not possible for him [sic] to participate in the earlier stages of the proceeding").

354. *See id.* at § 405(b)(1).

355. *See also* 47 C.F.R. §§ 1.276-.282 (2015).

356. 47 C.F.R. § 1.429(b)(1)-(3) (2015).

already provided."[357] Thus, given the limited scope in which a petition of reconsideration can be filed, and given the great discretion the FCC has in granting and reviewing such petitions, they have little effect on influencing FCC decision-making behavior as they are rarely granted by the FCC.[358]

b. Review by the Federal Courts of Appeals

In contrast, appeals to the federal appellate courts are slightly more effective in checking the FCC's expansive discretion. Final FCC orders may be appealed to any of the federal circuit courts in which venue is proper.[359] On appeal, the court may determine "the validity of, and enjoin[], set[] aside, or suspend[], in whole or in part" an FCC decision.[360] An order is final even if a petition for reconsideration has not been filed unless either: (1) the petitioner was not a party to the proceedings resulting in the underlying action; or (2) the appeal relies on questions of fact or law upon which the FCC "has been afforded no opportunity to pass."[361] In those cases, a party seeking judicial review of a FCC decision is required to timely file a petition for reconsideration before it can seek judicial review of the order.[362] Because only final agency orders are appealable, a court will not entertain a petition for review of nonfinal actions such as a FCC nonhearing or interlocutory action.[363]

Generally, Section 402(a) of the Communications Act permits federal circuit courts[364] to review all forms of FCC decisions, except those decisions

357. *InterCall Reconsideration Order*, *supra* note 151, at para. 8 n.23 (citing Fed.-State Joint Bd. on Universal Serv. Bus. Serv. Ctr, Inc., Mobile Phone of Tex., Inc., & 3 Rivers PCS, Inc., *Order*, 19 FCC Rcd 22305, para. 4 (2004) [hereinafter *Mobile Phone of Tex. Petition for Reconsideration Order*]).

358. *See* BENJAMIN ET AL., *supra* note 41, at 28; *see also* STUART MINOR BENJAMIN & JAMES B. SPETA, TELECOMMUNICATIONS LAW AND POLICY § 2.E (4th ed. 2015).

359. *See* 28 U.S.C. §§ 2342(1), 2343 (2012) (committing "exclusive jurisdiction to enjoin, set aside, suspend . . . , or to determine the validity of all final orders" of the FCC to the circuit courts, except the Federal Circuit and that venue is proper "in the judicial circuit in which the petitioner resides or has its principal office, or the . . . District of Columbia Circuit"); *see also* 47 U.S.C. § 402(b) (2012) (stating that the District of Columbia Circuit has exclusive jurisdiction over certain FCC final decisions).

360. 28 U.S.C. § 2349(a) (2012).

361. *See* 47 C.F.R. § 405(a) (2015).

362. *See id.*; *see also* Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (citations omitted) ("As a general matter, two conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation' of the agency's decision-making process . . . it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'").

363. *See* 47 C.F.R. §§ 1.102(b)(1)-(2), 1.106(a)(1) (2015); *see also Bennett*, 520 U.S. at 177-178.

364. Except the Federal Circuit, as noted before. *See* 28 U.S.C. § 2342(1) (2012) (committing "exclusive jurisdiction to enjoin, set aside, suspend . . . , or to determine the validity of all final orders" of the FCC to the circuit courts, except the Federal Circuit).

reviewable only by the District of Columbia Circuit under Section 402(b).[365] Despite this, most appeals of FCC decisions wind up in front of the District of Columbia Circuit given the District of Columbia Circuit's proximity to the FCC (and, by extension, the majority of the federal communications bar), the Circuit's expertise in reviewing FCC matters, and its exclusive appellate jurisdiction over certain FCC actions.[366] Thus, it is often the case that litigants craft their arguments early on in the FCC's decision-making process so that they would be looked upon favorably by the District of Columbia Circuit on a potential appeal.[367]

B. Conference Group, LLC v. FCC

The District of Columbia Circuit's decision in *Conference Group, LLC v. FCC* exemplifies how federal courts have applied standing doctrine and the standards of review to the detriment of an aggrieved third-party plaintiff. Specifically, by holding the Conference Group lacked standing to challenge the *InterCall Order*, the Court effectively allowed the FCC to pursue its policy objectives unchecked, using the informal adjudication without having to consider its harmful effects upon industry members bound by such decisions.

On February 29, 2012, the Conference Group filed a petition for review of the *InterCall Order* with the District of Columbia Circuit, arguing that the FCC violated: (1) Section 553 of the APA by failing to provide proper notice-and-comment procedures; and (2) Section 706 of the APA because the FCC's determination that InterCall's audio bridging services were subject to USF contribution obligations was contrary to factual evidence and prior FCC precedent.[368] However, the District of Columbia Circuit concluded that the Conference Group, as a third party, lacked standing to challenge an FCC informal adjudication, and found that the FCC was not required to abide by Section 553's provisions to implement the *InterCall Order*.[369] This holding shielded the FCC's decision from meaningful judicial scrutiny, allowing the agency to reverse regulatory norms such as the contamination theory without fully developing a factual record and without having to account for the

365. *See* 47 U.S.C. § 402(a)-(b) (2012); *see also* Cook, Inc. v. United States, 394 F.2d 84, 86 (7th Cir. 1968) (stating that 47 U.S.C. § 402(a) and § 402(b) are "mutually exclusive").

366. *See* Michael J. Hirrel, *Oil and Vinegar: The FCC and the D.C. Circuit*, 3 COMMLAW CONSPECTUS 121, 121, 127-129, 132-33 tbls. 2, 3 (1995) (explaining that "[a]n overwhelming majority of appeals from FCC decisions are taken to the D.C. Circuit . . . the Court possesses a striking familiarity with FCC matters. Observers see this familiarity in action at almost any oral argument in an FCC case. The Court gains this knowledge because of the great number of FCC cases it hears and because of the longevity of its judges. Most D.C. Circuit judges serve far longer than do FCC Commissioners. Thus, by the time they retire, many D.C. Circuit judges have spent more time on FCC matters than many Commissioners.").

367. *See* Michael Botein, *Judicial Review of FCC Action*, 13 CARDOZO ARTS & ENT. L.J. 317, 320-323 (1995).

368. *See generally* Petition for Review at 2, Conference Grp., LLC v. FCC, 720 F.3d 957 (D.C. Cir. 2013) (No. 12-1124).

369. *See Conference Grp.*, 720 F.3d at 966.

potential impact of its decision across an industry that had relied on previous FCC precedent.

1. The Arguments

a. The Petitioner's Argument

In its brief, the Conference Group argued that the *InterCall Order* was "the product of the FCC's failure to adhere to settled principles of administrative procedure and legal precedent" (i.e., the contamination theory).[370] This resulted in "a decision that rests on material errors of both fact and law"[371] because the Order: (1) violated Section 553 of the APA by ruling that all audio bridging services qualified as telecommunications services without adequate notice-and-comment procedures; and (2) was arbitrary and capricious because it ignored both facts stated in the record, and prior Commission orders.[372] The Conference Group also argued that it had standing to appeal the *InterCall Order* because it suffered a concrete injury as a regulated audio bridging services provider for having to make USF contributions following the decision.[373] Finally, the Conference Group alleged that while the FCC may be afforded *Chevron* deference for its interpretation of the Communications Act, its misconduct in the *InterCall Order* demonstrated that it should not be accorded any *Auer* deference for its interpretation of existing FCC rules and regulations.[374] Accordingly, the Conference Group ultimately argued that the FCC could not misuse the informal adjudicatory process to implement fundamental policy shifts such as those radically changed by the *InterCall Order*.[375]

i. Violation of Section 553 of the APA

The Conference Group argued that the FCC violated Section 553 of the APA by "impos[ing] new legislative rules on an entire industry without providing notice-and-comment safeguards."[376] The FCC's decision to extend

370. Final Brief for Petitioner, *supra* note 163, at 8.

371. *Id.*

372. *See id.* at 9, 11.

373. *Id.* at 14-15.

374. *Id.* at 15-18. The *Chevron* doctrine applies where a court reviews an agency's interpretation of its own statute. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (2007). In doing so, the doctrine establishes a two-prong test: (1) when congressional intent is clear, the court must reject agency interpretations that are contrary to such clear intent, or would otherwise frustrate congressional policy; or (2) when a statute is silent as to congressional intent, the court may defer to the agency's interpretation. Such a determination must be reviewed *de novo* by the court. *Id*. The *Auer* doctrine guides a reviewing court's evaluation of an agency's interpretation of its own rules and regulations, and states that such an interpretation must be upheld unless "it is plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461 (1997). *See also* Bowles v. Seminole Rock, 325 U.S. 410, 414 (1945).

375. *See* Final Brief for Petitioner, *supra* note 163, at 30.

376. *Id.* at 25.

its holding to the entire audio bridging industry qualified as the promulgation of a new, substantive legislative rule as defined by Section 551(4) of the APA.[377] Agency decisions qualify as legislative rules whenever they make substantive changes in prior regulations "hav[ing] a substantive adverse impact" on the challenging party,[378] or "'create new law, rights, or duties.'"[379] Accordingly, the FCC's decision to classify audio bridging services had a substantial adverse impact on the Conference Group as "the stand-alone conference bridge industry had operated for decades under the reasonable understanding that [audio bridging services] were "information services" and not subject to USF obligations" in accordance with *Computer II's* established understanding of the contamination theory.[380] Moreover, the FCC indicated that it was aware that the *InterCall Order* imposed new regulatory obligations upon that industry because the agency refrained from retroactively imposing USF obligations on InterCall—citing a "'lack of clarity' regarding the industry's regulatory obligations."[381]

Thus, according to the Conference Group, the *InterCall Order* was not merely the product of the FCC's re-interpretation of existing regulations, but the promulgation of a brand new rule.[382] As the FCC could not be accorded any deference for its interpretation of the APA, the Conference Group argued that the FCC's decision was within the "plain meaning" of Section 551(4)'s definition of a "rule" for being: (1) "a statement of general . . . applicability" (i.e., applied to all audio bridge service providers); (2) "designed to . . . prescribe new law or policy" (i.e., audio bridge services qualify as telecommunications services); and (3) included the "'prescription for the future of . . . services . . . or practices bearing on' that industry" (i.e., ordering USAC to approach audio service providers regarding their USF obligations within thirty days of the effective date of the order).[383] Thus, the FCC's decision in the *InterCall Order* was actually a rulemaking and not an adjudication regarding the regulatory classification of a single provider.

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377. *Id.* at 25; *see also* 5 U.S.C. § 551(4) (2012) (defining a "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . and includes the approval or prescription for the future of . . . services . . . or practices bearing on any of the foregoing").

378. Final Brief for Petitioner, *supra* note 163, at 26 (quoting Minard Run Oil Co. v. U.S. Forest Serv., 670 F.3d 236, 255 (3d Cir. 2011)).

379. *Id.* (quoting Fertilizer Inst. v. EPA, 935 F.2d 1303, 1307-08 (D.C. Cir. 1991)).

380. *Id.*

381. *Id.* at 27-28 (citing *InterCall Order*, *supra* note 2, at para. 8) (stating that the FCC admitted in the *InterCall Order* the "industry's unclear understanding" may have resulted from the fact that the Commission refrained from pursuing enforcement actions against similarly-situated providers in the past).

382. *Id.* at 29. The Conference Group emphasized it was challenging the FCC's argument in the *InterCall Reconsideration Order* that the agency "clarified the existing obligations of InterCall—and other similarly situated audio bridge service providers—based upon existing Commission rules and requirements" in its examination of solely InterCall's services in the *InterCall Order*. *See id.* (quoting *InterCall Reconsideration Order*, *supra* note 151, at para. 15).

383. *Id.* at 29-30 (quoting 5 U.S.C. § 551(4) (2012)).

Furthermore, the Conference Group argued that the FCC's decision was not an interpretation of an existing FCC rule as it "'shift[ed] the rights or interests of the parties,'"[384] and did not "simply state[] what the administrative agency thinks the statute means" by merely "*remind[ing] affected parties of existing duties*"[385] under the conventional understanding of the contamination theory. This was indicated by the FCC's admission in the *InterCall Order* that its prior unwillingness to take action against similarly situated audio conferencing providers "may have contributed" to the lack of clarity regarding the industry's regulatory obligations.[386] Therefore, the FCC knew it was reversing the entrenched understanding of the regulatory classification of audio bridging service providers through merely an examination of a single service provider.

Additionally, the FCC's argument that the *InterCall Order* was merely a re-interpretation of existing FCC precedent, despite an entire industry seemingly being in violation of the agency's rules, did not hold water in light of the Supreme Court's opinion in *Christopher*:

> While it may be "possible for an entire industry to be in violation of [particular statutory requirements] for a long time without the [agency charged with administering and enforcing those requirements] noticing," the "more plausible hypothesis" is that the [agency] did not think the industry's practice was unlawful.[387]

Thus, for the Conference Group, the *InterCall Order* "undeniably resulted in a new substantive rule" as the order was "preceded by a very lengthy period of conspicuous inaction" as opposed to following a trend of several Commission decisions concerning the same issue.[388] Accordingly, the abrupt nature of the FCC's departure from the established understanding of the contamination theory indicated that *InterCall* was actually a rulemaking proceeding subject to the APA's notice-and-comment requirements.[389]

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384. *Id.* at 30 (quoting Chao v. Rothermel, 327 F.3d 223, 227 (3d Cir. 2003)).

385. *Id.* at 30 (citation omitted) (quoting Fertilizer Inst. v. EPA, 935 F.2d 1303, 1307 (D.C. Cir. 1991)).

386. *Id.* at 31 (quoting *InterCall Order*, *supra* note 2, at para. 23). The Conference Group further stated that prior to the *InterCall Order*, the FCC had at least twice found that similarly-situated standalone conference bridge providers were considered to be *end users*, and not *providers*, of telecommunications services. *Id.* (citing Qwest Comm. Corp. v. Farmers & Merchs. Mut. Tel. Co., *Memorandum Opinion and Order*, 22 FCC Rcd 17973, para. 7 (2007) (finding a conference bridge provider to be a telecommunications service end user); AT&T v. Jefferson Tel. Co., *Memorandum Opinion and Order*, 16 FCC Rcd 16130, para. 3 (2001) (noting "multiple voice bridging service" providers to be information service providers, and end users of telecommunications services)).

387. Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2168 (2012) (quoting Yi v. Sterling Collision Ctrs., Inc., 480 F.3d 505, 510-11 (2007)).

388. Final Brief for Petitioner, *supra* note 163, at 33 (quoting *Christopher*, 132 S. Ct. at 2168).

389. *Id.* (citing 5 U.S.C. §§ 553(b)-(c)).

Finally, the Conference Group argued that the FCC's Public Notice announcing InterCall's request for review violated Section 553 of the APA because it was "incurably vague as to whether or how an individual adjudication of InterCall's specific rights could be applied to the entire stand-alone conference bridge industry."[390] Instead, the Public Notice merely suggested that the InterCall proceeding was an "informal adjudication involving one carrier's service offering,"[391] and "failed to give any indication of the scope and import of the informal adjudication of a singular company's services."[392] Consequently, the Public Notice was improper, and conflicted with the Supreme Court's decision in *Christopher* as it: (1) "undermined the principle that agencies should provide regulated parties fair warning of the conduct [a regulation] prohibits or requires"; and (2) "result[ed] in precisely the kind of 'unfair surprise' against which [the Supreme Court's] cases have long warned."[393] Thus, for the Conference Group, the *InterCall Order* had to be overturned as it was adopted without proper notice-and-comment procedures.[394]

ii. Violation of Section 706(2)(a) of the APA

In addition to violating Section 553 of the APA, the Conference Group argued that the *InterCall Order* was arbitrary and capricious because the FCC ignored facts, and prior precedent in rendering its decision.[395]

The Conference Group argued that, despite the FCC's purported telecommunications expertise, the *InterCall Order* rested upon one "significant factual error": finding that the conference bridge routes traffic, and operates like a switch or router.[396] Instead, the conference bridge service did *not* facilitate ordinary telephone calls, but "rather provide[d] a computer processing function."[397] And, the record did not provide "a single shred of evidence" supporting the FCC's conclusion.[398] Therefore, the FCC "ignored" InterCall's statement that the audio bridging service providers did not route calls.[399] Accordingly, for the Conference Group, the *InterCall Order* was

390. *Id.* at 33-34. Additionally, the Conference Group indicated that the FCC failed to publish the Public Notice of InterCall's Request for review in the Federal Register, in violation of Section 553(b) of the APA. *Id.* at 34-35.

391. *Id.* at 36.

392. *Id.* at 35.

393. *Id.* at 37-38 (citation omitted) (quoting *Christopher*, 132 S. Ct. at 2167).

394. *See id.* at 38.

395. *Id.*

396. *Id.* at 39 (citing *InterCall Order*, *supra* note 2, at para. 11).

397. *Id.* at 40-42. The Conference Group proceeded to state that the underlying telecommunications carrier provided such routing services, but also asserted that the FCC incorrectly conflated the audio bridging service and the underlying telecommunications service as the same service. *Id.* at 39, 42-44.

398. *Id.* at 39.

399. *Id.* at 40-41 (citing Reply Comments of InterCall, Inc. at ii, InterCall, Inc., Appeal and Request for Stay of Decision of the Universal Serv. Admin. Co., CC 96-45 (Mar. 3, 2008), https://ecfsapi.fcc.gov/file/6519862336.pdf).

arbitrary and capricious as it did not account for the actual technical capabilities of audio bridging services.[400]

In addition to ignoring the established technical capabilities of audio conferencing services, the FCC disregarded long-standing agency precedent (i.e., the contamination theory) that would have found InterCall's services to be information services.[401] First, the Conference Group argued that the FCC's application of the integrated services test was inexplicably narrower in the *InterCall Order* than previously applied by the agency or any court.[402] Specifically, the Supreme Court's decision in *Brand X* required the FCC to determine, in viewing the service holistically, whether a customer would reasonably consider the entire service offering to be a unitary service.[403] Instead, the FCC used the *InterCall* proceeding to narrow the scope of the test to a determination of whether the customer could use the service "with or without accessing" enhanced features[404]—effectively voiding the test of any practical application.

Second, the Conference Group asserted that the FCC clearly ignored its holding in the *Pulver.com Order* because the *InterCall Order* inexplicably narrowed the application of the integrated service test. According to the Conference Group, the FCC's analysis of InterCall's services conflicted with the *Pulver.com Order*'s application of the contamination theory.[405] While *Pulver.com* held that a service offered with additional enhanced features was considered an information service *whether or not such services are optional to the participant*,[406] the *InterCall Order* focused on whether customers were *obligated to use both the basic and enhanced components* of the offering.[407] Therefore, since the FCC ignored both factual distinctions present in the record and existing agency precedent, the Conference Group requested relief on the grounds that the *InterCall Order* was arbitrary and capricious.[408]

iii. Standing

As required for petitions for relief from agency decisions,[409] the Conference Group argued that it had standing as a third-party plaintiff to

400. *See id.* at 44.

401. *Id.*. at 47.

402. *Id.* at 48 (stating that the "with or without accessing" language of the "integration" legal standard had not been seen under the *InterCall Order*).

403. *Id.* at 50 (discussing Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 990 (2005)). The Conference Group also argued that the FCC "ignore[d] undisputed and unquestioned facts in the record" because there was evidence in the record that conference bridge end users can only make a conference call after their passcode is verified against the conference bridge providers' database—a service clearly qualified as an enhanced service feature. *See id.* at 50-51.

404. *Id.* at 50.

405. *Id.* at 53.

406. *Id.* (citing *Pulver.com Order*, *supra* note 113, at para. 6).

407. *Id.* at 50.

408. *Id.*

409. *See, e.g.*, Am. Library Ass'n v. FCC, 401 F.3d 689, 696 (D.C. Cir. 2005) (stating that petitioner's standing must be addressed as a threshold matter).

challenge the FCC's order. First, the Conference Group had suffered an injury in fact because the *InterCall Order* "erroneously require[d] [t]he Conference Group now to make direct payments to the USF as a provider of 'telecommunications service' . . . , an obligation that has significantly increased the cost of [t]he Conference Group's overhead."[410] Second, the company argued that it fell within the zone of interests of the Communications Act because "[t]he *InterCall Order* . . . exposed [t]he Conference Group, as well as the entire conference bridge service industry, to additional [FCC] regulations as a provider of 'telecommunications services.'"[411] Although the Conference Group did not cite any legal precedent bolstering its standing argument, the company nevertheless argued that this met the standing requirement to appeal the *InterCall Order* as it clearly pointed out that it met both the constitutional and prudential requirements of standing as a party immediately bound by the precedential effect of the Order for having to commence contributions to the USF.[412]

b. The FCC's Argument

The FCC's final brief argued that the *InterCall Order* violated neither Section 553 nor 706 of the APA.[413] Importantly, the FCC failed to contest—at least in its brief—the Conference Group's claim of standing to challenge the agency's decision, and focused instead upon the agency's right to use informal adjudication to promulgate fundamental policy shifts affecting entire industries.

i. No Violation of Section 553 of the APA

In its response, the FCC dismissed the Conference Group's allegation that the *InterCall Order* violated Section 553 of the APA by contending that: (1) notice-and-comment provisions were not required for informal agency adjudications;[414] and (2) the Order did not adopt a substantive rule requiring proper observance of any notice-and-comment provisions.[415] Nevertheless, the FCC maintained that it had provided adequate notice-and-comment opportunities prior to issuing the *InterCall Order*.[416]

410. Final Brief for Petitioner, *supra* note 163, at 14-15.
411. *Id.* at 15.
412. *See id.* 14-15.
413. *See* Brief for Respondent, *supra* note 55, at 59.
414. *See id.* at 30 (citing FCC v. Fox Television Stations, Inc., 556 U.S. 502, 529 n.8 (2009); U.S. Telecom Ass'n v. FCC, 400 F.3d 29, 34 n.9 (D.C. Cir. 2005); Occidental Petrol. Corp. v. SEC, 873 F.2d 325, 337 (D.C. Cir. 1997)).
415. *See id*. at 37.
416. *See id.* at 41-42.

ii. The *InterCall Order* was an Informal Adjudication

The FCC argued that the *InterCall Order* was "a classic case of agency adjudication,"[417] with a subject matter that the District of Columbia Circuit had previously recognized as being appropriately resolved by the FCC through such a proceeding.[418] Additionally, the FCC opposed the Conference Group's contention that the *InterCall Order's* general applicability to all similarly-situated audio bridging service providers transformed the decision into a rulemaking.[419] This was because the "basic tenets of administrative law *require* the FCC to apply its rules consistently in adjudicatory proceedings."[420] Hence, the *InterCall Order* had *automatic* precedential effect for the entire audio bridging industry—even though it was not a rulemaking proceeding.[421]

Furthermore, the FCC claimed that the Conference Group's depiction of the *InterCall Order* as a rulemaking was flawed for two reasons.[422] First, the Conference Group incorrectly stated that the decision applied to *all* audio bridging service providers since the order applied only to providers *similarly situated* to InterCall.[423] Second, petitioner's argument that the FCC could only issue a broadly applicable order via rulemaking was incorrect as judicial precedent clearly established that an agency decision could have broad application without being classified as a rulemaking.[424]

Accordingly, the FCC challenged the Conference Group's contention that the agency's characterization of the *InterCall Order* as an adjudication was "accorded no deference by a reviewing court,"[425] on the grounds that "[t]he courts have long held that an agency's characterization of its decision as an adjudicatory ruling 'in itself is entitled to a significant degree of credence.'"[426] As the *InterCall Order* was clearly an adjudication, Section

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417. *Id.* at 31 (quoting HarborLite Corp. v. ICC, 613 F.2d 1088, 1093 n.11 (D.C. Cir. 1979)).

418. *See id.* at 31 (citing AT&T v. FCC, 454 F.3d 329, 333 (D.C. Cir. 2006)) ("FCC's rulings in classifying services as telecommunications or information services 'reflect a highly fact-specific, case-by-case style of adjudication.'").

419. *See id.* at 31.

420. *Id.* at 32 (quoting Gen. Am. Transp. Corp v. ICC, 872 F.2d 1048, 1060 (D.C. Cir. 1989)).

421. *See id.* (citing NLRB v. Bell Aerospace Co., 416 U.S. 267, 292 (1974); NLRB v. Wyman-Gordon Co., 394 U.S. 759, 765-66 (1969); Goodman v. FCC, 182 F.3d 987, 994 (D.C. Cir. 1999)).

422. *See id.* at 35-37.

423. "Rather, the *Order* states only that InterCall and '*similarly situated* stand-alone audio bridging service providers' are subject to a direct contribution obligation." *Id.* at 35 (quoting *InterCall Order*, *supra* note 2, at para. 14).

424. The FCC noted, "It is well-established that an 'adjudication can affect a large group of [persons] without becoming a rulemaking.'" *Id.* at 36 (quoting *Goodman*, 182 F.3d at 994) (citing British Caledonian Airways, Ltd. v. CAB, 584 F.2d 982, 989 (D.C. Cir. 1978)).

425. *Id.* at 34 (quoting Final Brief for Petitioner, *supra* note 163, at 29).

426. *Id.* at 34-35 (quoting *British Caledonian Airways*, 584 F.2d at 992; Am. Airlines, Inc. v. Dep't of Transpo., 202 F.3d 788, 797 (5th Cir. 2000)) (alterations in original) ("[C]ourts

553(b) of the APA's notice-and-comment provisions was inapplicable.[427] Interestingly, in its discussion of whether the *InterCall Order* was an adjudication or a rulemaking, the FCC failed to discuss the impact of *Christopher* on the FCC's characterization of the order as an adjudication as doing so could subject to judicial scrutiny the convoluted logic underlying the FCC's efforts to whittle away the contamination theory.[428]

iii. The *InterCall Order* Did Not Propose a Substantive Rule

The FCC also argued that notice-and-comment procedures were not required for the *InterCall Order* because: (1) the order was an informal adjudication; and (2) the order lacked any characteristics of a substantive rule.[429] The FCC argued that the *InterCall Order* did not qualify as a substantive rule[430] because the decision merely clarified the existing obligations of InterCall, and similarly-situated audio bridge service providers "based upon existing rules and requirements."[431] Thus, the decision did not amend an existing FCC rule or order, but merely clarified the existing obligations of an audio bridge service provider.[432] However, the FCC made no mention of the apparent disparity between the *Pulver.com*, *Prepaid Calling Card*, and *InterCall Orders* in its argument.[433]

The FCC also claimed that the Conference Group erred in asserting that the *InterCall Order* was a rulemaking because it had a "substantive adverse impact" upon the audio bridging industry.[434] Such a contention was meaningless because the District of Columbia Circuit had recognized that an agency's interpretation of its rules "'always' has 'real consequences.'"[435] Additionally, the FCC asserted that an agency's decision is not a substantive rule simply because it "spells out a duty fairly encompassed within the regulation that the interpretation purports to construe."[436] Instead, "the proper

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accord 'significant deference to the agency's characterization of its own action [as adjudicatory]'").

427. *See id.* at 34.

428. *See id.*

429. *Id.* at 37.

430. "A rule is considered substantive if the agency 'intends to create new law, rights, or duties,' or 'effectively amends a prior legislative rule.'" *Id.* (quoting Fertilizer Inst. v. EPA, 935 F.2d 1303, 1307-08 (D.C. Cir. 1991); Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993)).

431. *Id.* (quoting *InterCall Order*, *supra* note 2, at para. 15).

432. *See id.* at 38.

433. Later in its brief, while defending the *InterCall Order* as not arbitrary and capricious, the FCC addressed the issue, arguing that it was sufficient that the *InterCall Reconsideration Order* distinguished the *Pulver.com Order* as inapplicable because it "addressed very different facts from those here." *See id.* at 50 (citing *InterCall Reconsideration Order*, *supra* note 151, at para. 10).

434. *Id.* at 38 (quoting Final Brief for Petitioner, *supra* note 163, at 26).

435. *Id.* (quoting Paralyzed Veterans of Am. v. D.C. Arena, LP, 117 F.3d 579, 588 (D.C. Cir. 1997)).

436. *Id.*

focus in determining whether an agency's act is legislative is the source of the agency's action, not the implications of [the] action."[437] Yet, the FCC failed to respond directly to the Conference Group's analysis of how the *InterCall Order* reflected Section 551(4)'s rule requirements.[438]

Finally, the FCC argued that the Conference Group's "suggestion of an inconsistency between the FCC's identification in two prior cases of 'stand-alone conference bridging providers' as end users, and its ruling that InterCall offers telecommunications," was inconsequential as the two rulings involved materially different services and factual circumstances.[439] Instead, the FCC merely insinuated that the Conference Group was incapable of understanding why "the FCC changed course based on an alleged 'inconsistency' between the *Order* and the lack of any previous FCC enforcement action"[440] because "an agency's enforcement decisions are informed by a host of factors, some bearing no relation to the agency's views regarding whether a violation has occurred."[441]

iv. Sufficient Notice-and-Comment Procedures

Nevertheless, the FCC argued that its Public Notice announcing InterCall's request for review provided the necessary notice-and-comment procedures for an informal agency adjudication.[442] Section 4(j) of the Communications Act provided the FCC with ample discretion to determine procedures for its own proceedings because Congress clearly recognized that "the Commission is 'in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved.'"[443] Accordingly, Section 4(j) reflected the "very basic tenet of administrative law that agencies should be free to fashion

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437. *Id.*

438. *See* Final Brief for Petitioner, *supra* note 163, at 26.

439. Brief for Respondent, *supra* note 55, at 39-40 (quoting Final Brief for Petitioner, *supra* note 163, at 31). *See also* Final Brief for Petitioner, *supra* note 163, at 31 n.57 (citing enforcement actions resulting in opposite findings as the *InterCall Order*: Qwest Comm. Corp. v. Farmers & Merchs. Mut. Tel. Co., *supra* note 386, at para. 7 (2007) (finding that a conference bridge provider was an end user of telecommunications service); AT&T v. Jefferson Tel. Co., *supra* note 386, at para. 3 (2001) (finding that providers of "multiple voice bridging service" are information service providers)). However, the FCC refrained from directly responding to the Conference Group's assertion that such FCC decisions, coupled with the agency's own admission that "its own action or inaction 'may have contributed' to the lack of clarity regarding the conference bridging industry's regulatory obligations." Final Brief for Petitioner, *supra* note 163, at 31 (quoting *InterCall Order*, *supra* note 2, at para. 23).

440. Brief for Respondent, *supra* note 55, at 40 n.12 (citing Final Brief for Petitioner, *supra* note 163, at 28, 31).

441. *Id.* (quoting Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2168 (2012)).

442. *See id.* at 40-41.

443. *Id.* at 41 (quoting FCC v. Schreiber, 381 U.S. 279, 289-90 (1965)). *See also* 47 U.S.C. § 147(j) (2012) (authorizing the FCC to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice").

their own rules of procedure."[444] Furthermore, "[t]he Supreme Court has long held that the APA establishes the maximum procedural requirements a reviewing court may impose on an administrative agency, except where the due process clause or the agency's governing statute mandates otherwise."[445] In other words, the FCC appears to argue here that since Section 4(j) provided the FCC with the discretion to select the appropriate administrative procedures for its policymaking endeavors, it was free to ignore any provision of the APA conflicting with its procedural choices.[446]

Additionally, the FCC challenged the contention that its Public Notice deprived the Conference Group of "a meaningful opportunity to participate and deprived the record of facts and legal argument."[447] Instead, the Public Notice provided sufficient notice-and-comment procedures as "[a] number of persons[] recognize[ed] the possible precedential impact of a Commission adjudicatory ruling on companies providing audio bridging services similar to those of InterCall," and filed comments and/or reply comments in that proceeding.[448] Moreover, the Conference Group "fail[ed] to identify any relevant facts or legal arguments that were excluded from the administrative record."[449]

Both of these assertions are perplexing. First, the Conference Group did not just contend that it was "impossible to discern that the FCC was poised to impose USF reporting and contribution requirements on an entire industry,"[450] but also that the FCC failed to provide sufficient notice-and-comment procedures by failing: (1) to publish the Public Notice in the Federal Register;[451] and (2) to *explicitly* announce that a decision in the proceeding could have an industry-wide impact.[452] Second, the Conference Group clearly stated in its petition that the FCC ignored relevant facts and precedent in formulating its decision, including: (1) the technical capabilities of audio

444. *Id.* (quoting Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 544 (1978)).

445. *Id.* at 42 (citing Pension Benefit Guar. Corp v. LTV Corp., 496 U.S. 633, 653-56 (1990); Vt. Yankee, 435 U.S. at 524-25).

446. *But see id.* at 4 (quoting FCC v. Nat'l Citizens Comm. for Broadcasting, 436 U.S. 775, 808 n.29 (1978)) ("The Supreme Court . . . has specifically recognized the Commission's 'substantial discretion as to whether to proceed by rulemaking or adjudication.'"). Thus, at a minimum, it is unclear whether in accordance with Supreme Court precedent and Section 4(j) of the Communications Act, the FCC is free to make *any* determination about the quality of its policymaking procedures—including the breadth of its notice-and-comment proceedings—or merely has the discretion to select between usage of rulemaking or adjudication while being required to observe the requirements of the APA.

447. *Id.* at 42 (quoting Final Brief for Petitioner, *supra* note 163, at 34).

448. *Id.* at 42-43.

449. *Id.* at 43. *See also* Final Brief for Petitioner, *supra* note 163, at 34 (contending that the FCC's procedures in the *InterCall* proceeding "deprived the record of facts and legal argument").

450. Final Brief for Petitioner, *supra* note 163, at 37.

451. *Id.* at 35.

452. *Id.* at 37. *See also* Reply Comments of InterCall, Inc., *supra* note 399, at ii-iii (summarizing comments filed in the InterCall proceeding and stating that only Verizon's comments concerned the regulatory classification of the audio bridging services while most commenters focused on the unlawful nature of USAC's decision regarding InterCall).

bridging services,[453] and (2) an adequate explanation of how the *Pulver.com* and *Prepaid Calling Card Orders* were distinguishable from the *InterCall Order*.[454] Thus, at the very least, the FCC's notice prevented the FCC from developing a more robust record by failing to convey the breadth of the FCC's decision in the then-pending *InterCall* proceeding to the industry, which unnecessarily limited the information on which the Commission could rely in making its decision. In contrast, a rulemaking proceeding would have done much to eliminate these deficiencies in the record.

v. No Violation of Section 706(2)(a) of the APA

The FCC also argued that the *InterCall Order* was not arbitrary and capricious because the agency: (1) "reasonably classified" InterCall's services as telecommunications; and (2) "reasonably determined" that InterCall's audio bridging service was not sufficiently integrated.[455] Thus, according to the FCC, its finding in the *InterCall Order* was a sound decision resting upon a reasoned and thorough analysis of a single provider's services.

vi. InterCall's Services Were Reasonably Classified as Telecommunications

In its response, the FCC ducked the Conference Group's charges that the agency ignored evidence in the record contrary to its conclusion that InterCall's services facilitated voice calls.[456] Confusingly in its brief, the FCC asserted that it did not make such a factual error in the *InterCall Order* because it never concluded that the audio bridge "was a router or provided the functionality of a router,"[457] but that "the purpose . . . of the bridge is simply to facilitate the routing of ordinary calls."[458] Instead, the phrase "facilitate routing" was used only to "denote that the audio bridge facilitates the provision of basic telecommunications by linking together multiple calls"[459]—notwithstanding the fact that this is exactly the function of a router.[460]

The FCC argued that the Conference Group mistakenly concluded that the *InterCall Order* found audio bridging services to be telecommunications services.[461] "[T]he Commission did *not* find that audio bridging companies

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453. *See* Final Brief for Petitioner, *supra* note 163, at 40-41 (stating that the FCC failed to address InterCall's contention that audio bridging services simply do not route calls).

454. *See id.* at 43-44, 47-52.

455. *See* Brief for Respondent, *supra* note 55, at 44-45.

456. *See id.* at 45.

457. *Id.* at 47 (quoting *InterCall Reconsideration Order*, *supra* note 151, at para. 9).

458. *Id.* (quoting *InterCall Order*, *supra* note 2, at para. 11).

459. *Id.*

460. *Router*, NEWTON'S TELECOM DICTIONARY (26th ed. 2011) ("A router is a device that forwards information").

461. Brief for Respondent, *supra* note 55, at 46.

'are providers of telecommunications services'"[462] because "[t]he Commission made clear that the 'the record does *not* permit a clear determination' as to whether or not InterCall provides *telecommunications services* . . . and thus determined only that InterCall at a minimum provided *telecommunications*."[463]

Finally, the FCC defended its decision that the *Pulver.com Order* had no precedential effect on the *InterCall Order* because"[c]hief among the differences" between the two decisions is that the *Pulver.com Order* involved a service that was not classified as telecommunications.[464] Yet, as the FCC did in the *InterCall Reconsideration Order*, the FCC argued that although the contamination theory was intended to have general applicability, the *Pulver.com Order* had no precedential effect on the *InterCall Order* as the services were functionally different, thus warping *Computer II's* creation of a bright line rule regarding the regulatory classification of mixed-service offerings.[465] In effect, the FCC stated that the contamination theory's application depended on a facilities-based approach, which was specifically rejected by the FCC in *Computer II*.[466] Furthermore, the FCC again missed an opportunity to explain whether the *Prepaid Calling Card* and *Pulver.com Orders* either created alternative versions of the contamination theory, or merely that the *Pulver.com Order* lacked any precedential effect because it had been subsequently overturned in FCC's *Prepaid Calling Card* decision. Accordingly, the FCC was able to take advantage of the court's inherent deference to couch its analysis in the *InterCall Order* in a way that avoids judicial review without addressing either the shift in the FCC's interpretation of the contamination doctrine, or the apparent inconsistency in FCC precedent.

vii. InterCall's Services Were Reasonably Determined to be Insufficiently Integrated

By defending the *InterCall Order* on the grounds that InterCall's service was insufficiently integrated to render the entire offering an information service,[467] the FCC again stretched precedent in order to succeed on appeal.

The FCC asserted that InterCall's services failed the integrated service test because the service could be used by the customer with or without accessing its associated enhanced features.[468] Yet, as it did in the *Prepaid Calling Card Order*, the FCC failed to adequately explain how the integrated service test was to be applied in practice—i.e., exactly to what degree of integration is necessary for the services to be sufficiently integrated. As a

462. *Id.* (quoting Final Brief for Petitioner, *supra* note 163, at 39).
463. *Id.* at 46 (emphasis added) (quoting *InterCall Order*, *supra* note 2, at para. 7).
464. Brief for Respondent, *supra* note 55, at 50.
465. *See id.*
466. *See supra* Section II.B.1.
467. *See* Brief for Respondent, *supra* note 55, at 50.
468. *See id.* at 51-54.

result, the FCC missed a valuable opportunity to clarify the regulatory landscape. Once again, had the FCC proceeded by rulemaking in extending USF contribution requirements to audio bridging service providers, the Commission likely could have more thoroughly considered industry concerns and more clearly articulated the Commission's reasoning.

Accordingly, the FCC moved the goalposts by voiding the contamination theory of much of its remaining practical meaning and dismissed both the petitioners' and interveners' concerns over vagueness as stemming "from its own misunderstanding of the Commission's ruling rather than any lack [of] clarity or failure by the agency to sufficiently explain its reasoning."[469] In other words, the FCC felt that it did not need to provide a better explanation of reasoning for diminishing the contamination theory's applicability to mixed-service offerings—despite clear indication from the industry as to uncertainty regarding the continued effect of the doctrine.

Additionally, the FCC dismissed the fact that InterCall's audio bridging customers could only participate in the conference call by entering a code (i.e., enhanced service) as irrelevant to determining whether the service was sufficiently integrated.[470] Because "the audio bridge merely facilitates the provision of a basic transmission service without altering its fundamental character," the FCC concluded that it was "therefore . . . not an enhanced service."[471] Never before had the FCC argued that the features offered in conjunction with InterCall's services were not enhanced services.[472]

2. The Court's Opinion

The District of Columbia Circuit released its decision in *Conference Group, LLC v. FCC* on July 2, 2013, holding that the Conference Group lacked standing to challenge the *InterCall Order*.[473] The court concluded that:

> Because the decision was an adjudication and [t]he Conference Group was not a party, it lacks standing to challenge the merits of that adjudication. Although the Commission stated its decision would apply to "similarly situated" providers, that is true of all precedents. And this court has held that the mere fact than an adjudication creates a precedent that could harm a non-

469. *Id.* at 53.

470. *Id.* at 57.

471. *Id.* at 57.

472. In fact, the FCC appears to have admitted in the *InterCall Reconsideration Order* that InterCall's additional features *were* enhanced services. *See InterCall Reconsideration Order*, *supra* note 151, at para. 12 ("We therefore reiterate the Commission's determination in the *InterCall Order* that the additional enhanced conferencing features of the type described by the Petitioners do not create a single integrated information service.").

473. Conference Grp., LLC v. FCC, 720 F.3d 957, 958 (D.C. Cir. 2013).

> party does not create the injury-in-fact required for Article III standing.[474]

As a threshold matter, the District of Columbia Circuit addressed the Conference Group's standing to challenge the Order.[475] The Court held that the Conference Group had standing to challenge the *InterCall Order* as a "procedurally unlawful rulemaking, but lack[ed] standing to challenge the merits of the decision adopted in the *InterCall Order* if it was an adjudication."[476]

In addressing the Conference Group's Section 553 argument, the District of Columbia Circuit found that the FCC did not violate Section 553 of the APA because the *InterCall Order* "was simply an interpretation given in the course of an informal adjudication."[477] Thus, the court rendered its decision without having to reach the merits of the case.

a. The Conference Group Lacked Standing

i. The Court's Reasoning

The court found that the Conference Group had standing as a similarly situated provider if the *InterCall Order* was a rulemaking.[478] The Conference Group had constitutional standing because it "identified a cognizable harm to it as a result of the *InterCall Order* in the form of additional financial costs and regulation."[479] Additionally, the Conference Group had prudential standing because "'the interest it seeks to protect is arguably within the zone of interests to be protected or regulated by the statute . . . in question' or by any provision 'integral[ly] relat[ed]' to it."[480]

Yet, the District of Columbia Circuit found that the Conference Group lacked standing if the *InterCall Order* was an adjudication.[481] "The court has rejected the view that 'the mere potential precedential effect of an agency action affords a bystander to that action a basis for complaint.'"[482] If this action was an adjudication, then the Conference Group could not establish Article III injury merely due to "unfavorable precedent," as doing so was "essentially[] a request for judicial advice . . . ."[483] The Court recognized that "there are circumstances where the court has 'allowed a party to challenge in

474. *Id.* at 958-59.

475. *See id.* at 962 ("As a threshold matter the court must address whether petitioner . . . [has] standing to challenge the *InterCall Order*, as it implicates our jurisdiction.").

476. *Id.*

477. *Id.* at 965.

478. *Id.* at 962-63.

479. *Id.* at 963 (citing Sea-Land Serv., Inc. v. Dep't of Transp., 137 F.3d 640, 648 (D.C. Cir. 1998)).

480. *Id.* (quoting Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169, 179 (D.C. Cir. 2012)).

481. *Id.* at 963-65.

482. *Id.* at 963 (quoting Shipbuilders Council of Am. v. United States, 868 F.2d 452, 457 (D.C. Cir. 1989)).

483. *Id.* (quoting Shipbuilders, 868 F.2d at 456).

advance an agency policy adopted via adjudication *when the prospect of impending harm was effectively certain*.'"[484] However, "merely foreseeable future litigation resulting from a statutory interpretation that an agency has adopted in an adjudication is 'alone'—i.e., without more—too speculative to satisfy Article III's injury-in-fact requirement."[485] Consequently, if the *InterCall Order* was an adjudication, the Conference Group's injury was merely speculative since the company: (1) "[did] not identify any imminent enforcement action against it"; (2) "has the option to raise its substantive arguments in its own adjudication"; and (3) "can raise its substantive argument" to the FCC "before being forced to contribute to the USF."[486]

In other words, the Conference Group could not argue that it was injured by the *InterCall Order* because the company: (1) was not appealing a decision of the FCC as a direct party to the order; and (2) could allegedly challenge the order before commencing USF contributions. Yet, the District of Columbia Circuit ignored the fact that, in reality, due to the FCC's acquiescence to USAC's pay-and-dispute policy, the Conference Group *would* have to begin contributing to the USF in order to challenge its contribution status.[487] Accordingly, due to the District of Columbia Circuit's lack of familiarity with the intricacies of FCC appellate procedure, the court wrongly assumed that any reclassification of a service provider's USF contribution status through an FCC adjudication would not *directly* affect a similarly situated third party—otherwise creating an injury in fact.[488] Therefore, it appears that the Court believed that *InterCall* would only affect the Conference Group *indirectly* through the application of FCC precedent—which was insufficient in and of itself to create an injury in fact. In doing so, the Court ignored its own third-party standing precedent that would have otherwise allowed the Conference Group to reach the merits of its appeal of the *InterCall Order*.

ii. The Court's Departure from District of Columbia Circuit Precedent

The District of Columbia Circuit's conclusion that the Conference Group lacked an injury in fact sufficient for Article III standing since the *InterCall Order* was an adjudication conflicts with the court's own precedent regarding that specific issue. The court cited *Teva Pharmaceuticals v.*

484. *Id.* (emphasis added) (quoting Teva Pharm. USA, Inc. v. Sebelius, 595 F.3d 1303, 1314 (D.C. Cir. 2010)).

485. *Id.* (quoting Teva Pharm., 595 F.3d at 1314).

486. *Id.* at 964.

487. The court did not address whether the Conference Group had commenced USF contribution obligations prior to filing its petition.

488. The District of Columbia Circuit also conveniently ignored the fact that the Conference Group was a party to the Petition for Reconsideration of the *InterCall Order*, which the Conference Group was also appealing. *See generally* A+ Conferencing, Ltd. et al. Petition for Reconsideration, *supra* note 118; Petition for Review at 1-2, *Conference Grp.*, 720 F.3d 957 (No. 12-1124).

Sebelius to support its contention that the Conference Group's injury was speculative as the company was not an immediate party to the *InterCall Order*.[489] However, this is arguably a misapplication of *Teva Pharmaceuticals*, wherein the court concluded that Teva had standing despite *not* being a party to the agency adjudication below: "The FDA embraced the statutory interpretation that Teva now seeks to challenge *not in a rulemaking but in two adjudications to which Teva was not a party* . . . Any imminent deprivation of Teva's allegedly deserved exclusivity would be directly attributable to the FDA's statutory interpretation."[490] However, the District of Columbia Circuit ignored this fact in *Conference Group*: "Notably, in *Teva*, the FDA's policy had been announced in previous adjudications but *Teva was not appealing the adjudication of another party*, as [t]he Conference Group seeks to do here."[491]

Furthermore, the District of Columbia Circuit did not extend the broad understanding given to an "imminent application of disputed agency policy"[492] in *Teva Pharmaceuticals* to the Conference Group. While the court found that Teva faced "an imminent threat of . . . allegedly unlawful competition in the relevant market"[493] as a result of the FDA's new policy,

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489. Conference Grp., LLC v. FCC, 720 F.3d 957, 963-64 (D.C. Cir. 2013) (citing Teva Pharm. USA, Inc. v. Sebelius, 595 F.3d 1303, 1312-14 (D.C. Cir. 2010)). The court found that the Conference Group differed from that of Teva, which had standing to seek a declaratory judgment in District Court for a mandatory injunction that the Food and Drug Administration (FDA) grant its generic drug application because: (1) "[a]bsent that grant Teva faced immediate competition from other generic drug manufacturers with no possibility of adequate remedy on appeal"; (2) such deprivation was "directly attributable" to the FDA's conduct; (3) "Teva was not appealing the adjudication of another party" but challenging direct harm by the FDA; (4) "the imminent threat was not the FDA's decision but third-party competition whose effects on the market a reviewing court would be unable to unscramble"; and (5) "it seems unlikely that Teva could have obtained a stay to stop this presumably lawful third-party conduct that the FDA declined to block." *See id.*

490. *Teva Pharm.*, 595 F.3d at 1311-12, 1315 (emphasis added) ("We see no basis for concluding that this court has created an exception to the Supreme Court's constitutional standing doctrine excising cases like Teva's from the class of otherwise justiciable matters. Teva presents a valid Article III case or controversy.").

491. *Conference Grp.*, 720 F.3d at 963-64 (emphasis added). Technically, the court was correct that Teva was not appealing "the adjudication of another party" but rather an appeal of its "own action in the district court," wherein Teva sought a declaratory ruling and injunction barring the FDA's application of is new statutory interpretation to the company—a proceeding that Teva was *not* a party to. *See id.*; *see also Teva Pharm.*, 595 F.3d at 1305, 1308. Therefore, the basis of the District of Columbia Circuit's conclusion that *Teva Pharmaceuticals* was distinguishable from *Conference Group* came down to a meaningless technicality—the direct or indirect appeal of an agency adjudication as a third-party plaintiff. Instead, both Teva and the Conference Group ultimately were appealing the imminent effect of an agency adjudication as third parties to such a decision—regardless of how the disputes ended up before the District of Columbia Circuit.

492. *Teva Pharm.*, 595 F.3d at 1313.

493. *Id.* at 1312; *see also* Bristol-Meyers Squibb Co. v. Shalala, 91 F.3d 1493, 1497 (D.C. Cir. 1996) (citing Hardin v. Ky. Utils. Co., 390 U.S. 1, 6-7 (1968)) ("[W]here . . . a statutory provision reflects a legislative purpose to protect a competitive interest, the protected competitor has standing to require compliance with that provision."); Ranbaxy Labs. Ltd. v. Leavitt, 469 F.3d 120, 122-23 (D.C. Cir. 2006) (adjudicating a dispute in which the only injury

the court did not find such an imminent threat against the Conference Group, reasoning that the company failed to "identify any imminent Commission enforcement action against it."[494] The District of Columbia Circuit perplexingly found, on one hand, that further agency action was unnecessary in *Teva* to demonstrate the imminent threat required to demonstrate injury-in-fact,[495] but in *Conference Group*, the court deemed it essential for a third party to demonstrate that an FCC enforcement action was effectively certain.[496] Therefore, in *Conference Group*, the required commencement of USF contribution obligations and registration with the FCC immediately following the *InterCall Order* was insufficient to establish standing.

In fact, District of Columbia Circuit precedent indicates that the FCC's direction in the *InterCall Order* to USAC to actively pursue *all* audio bridging service providers similarly situated to InterCall for their USF contributions is sufficient to demonstrate an injury in fact. Such a demonstration should be sufficient for the Conference Group to challenge FCC policy in advance, as the threat of impending harm resulting from an agency adjudication was "effectively certain."[497] For example, in *International Brotherhood of Electrical Workers v. ICC*, the court found that the standing requirements were satisfied "[b]ecause of the ICC's decision to review arbitration awards, the union will be subject to agency review in future cases involving disputes [of the same type]."[498] In contrast, the District of Columbia Circuit found that the petitioner lacked standing in *Aeronautical Radio, Inc. v. FCC* because there was no indication in the record that the FCC had any intention to enforce a new statutory interpretation against the plaintiff.[499] Surely, the FCC's direction to USAC in the *InterCall Order* to "implement the findings in this order with respect to *all audio bridging service providers*" is an indication in the record that the FCC intended to seek enforcement action against audio bridging providers such as the Conference Group.[500]

Therefore, the Conference Group was incorrectly barred from seeking redress on judicial review due to the court's unfamiliarity with FCC procedure, coupled with its willingness to defer to an agency's narrative in an area where agencies are not entitled any level of deference (e.g., standing). This is antithetical to the true purpose of judicial review: a check on administrative overreach. And it was not accomplished in *Conference Group* due to the court's erroneously redundant perspective on the standing

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at issue was the prospective loss of a generic manufacturer's 180-day period of marketing exclusivity).

494. *Conference Grp.*, 720 F.3d at 964.

495. *Teva Pharm.*, 595 F.3d at 1312.

496. *Conference Grp.*, 720 F.3d at 963-64.

497. *Teva Pharm.*, 595 F.3d at 1314 ("We have . . . allowed a party to challenge in advance an agency policy adopted via adjudication when the prospect of impending harm *was* effectively certain.").

498. Int'l Bhd. of Electrical Workers v. ICC, 862 F.2d 330, 334 (D.C. Cir. 1988).

499. Aeronautical Radio, Inc. v. FCC, 983 F.2d 275, 284 (D.C. Cir. 1993) ("There is no indication in the record . . . that the Commission is likely to attempt to [enforce the challenged interpretation against the party seeking review]. TRW's alleged injury is therefore merely conjectural.").

500. *InterCall Order*, *supra* note 2, at para. 25 (emphasis added).

doctrine—a check on the power of the judiciary. Thus, the District of Columbia Circuit's conclusion that the Conference Group lacked standing demonstrates that having an overly restrictive standing doctrine shields an agency decision from any sort of meaningful check on administrative overreach; allowing such an agency to pursue policy objectives without consideration of its negative impacts upon regulated parties.

b. The InterCall Order *Did Not Violate Section 553 of the APA*

Although the District of Columbia Circuit found that the Conference Group did not have standing to challenge the *InterCall Order*, the court nevertheless found that the FCC did not violate Section 553 of the APA for failing to implement adequate notice-and-comment procedures.[501] The court, noting that the FCC had "very broad discretion to decide whether to proceed by adjudication or rulemaking,"[502] concluded that the *InterCall Order* "was neither legislative nor an interpretative rule," but was "simply an interpretation given in the course of an informal adjudication."[503] Accordingly, the *InterCall Order* had "none of the hallmarks of legislative rulemaking" such as: (1) "amending a prior legislative rule"; or (2) "explicitly invoking the Commission's general legislative authority."[504] Therefore, the District of Columbia Circuit correctly stated that the FCC had broad discretion to select its policymaking methodology,[505] but incorrectly extended this broad discretion to the question of whether the FCC actually was amending a prior legislative rule—a matter subject to a different standard of review.[506]

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501. *Conference Grp.*, 720 F.3d at 964-66.

502. *Id.* at 965; *see also* 47 U.S.C. § 154(j) (2012); Qwest Servs. Corp. v. FCC, 509 F.3d 531, 536 (D.C. Cir. 2007); Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1141 (D.C. Cir. 2001).

503. *Conference Grp.*, 720 F.3d at 965.

504. *Id.* at 965 (citing Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993); Fertilizer Inst. v. EPA, 935 F.2d 1303, 1308 (D.C. Cir. 1991)).

505. *Conference Grp.*, 720 F.3d at 965.

506. Here, the court stated that the FCC merely applied existing FCC precedent to its analysis of InterCall's services. *Compare id.* (citing *InterCall Order*, *supra* note 2, at paras. 2-3) (stating that "the Commission relied primarily on the statutory definitions of "telecommunications" and "information service" as interpreted in its *Universal Service Orders*" in "concluding that InterCall, Inc. was required to make direct payments to the USF") *with id.* (citing *InterCall Order*, *supra* note 2, at para. 13) (stating that "[t]he Commission also relied on its relevant classification precedent, including that addressing when add-on features change 'transmission service' into an 'information service.'"). Instead, the court should have separately examined whether the FCC was merely reinterpreting existing regulations, or actually issuing new regulations by applying *Auer* deference—allowing for an examination of the convoluted decision making leading to the the FCC's treatment of the contamination theory in the *InterCall Order*. By not doing so, the District of Columbia Circuit indicated that such an examination was unnecessary once it had concluded that the agency had the discretion to choose between rulemaking and adjudication—obviating any need for separate standards of judicial review when there is more than one legal issue under consideration by the Court.

Furthermore, the District of Columbia Circuit analogized the FCC's decision in the *InterCall Order* to the FCC's decision at issue in *AT&T v. FCC*.[507] In *AT&T*, the court concluded that the *Prepaid Calling Card Order* was an adjudication because the decision reflected "'a highly fact-specific, case-by-case style of adjudication.'"[508] Thus, since the FCC followed similar procedures in the *InterCall Order*, it was also an adjudication as "simply the latest application of this approach."[509]

Finally, the District of Columbia Circuit dismissed the Conference Group's argument that the phrase "similarly situated" in the *InterCall Order* "transmute[d] that adjudication into a rulemaking."[510] The court found that "[w]ithout the phrase, the precedential effect of the order would be the same"[511] because it is the "nature of adjudication . . . that similarly situated non-parties may be affected by the policy or precedent applied, or even merely announced in dicta."[512] Additionally, the extension of USF contribution obligations to all standalone audio bridge service providers was "no more than an interpretative precedent for the Commission to apply" via adjudication.[513] Therefore, "[t]he fact that an order rendered in an adjudication 'may affect agency policy and have general prospective application'"[514] did not render the decision a "rulemaking subject to APA section 553 notice and comment."[515]

Accordingly, the court found that it was permissible for the FCC to proceed by adjudication in "addressing for the first time" the classification of InterCall's audio bridging services, and "was not required to provide more notice than it did" as Section 553 did not apply to agency decisions like the *InterCall Order*.[516] However, the District of Columbia Circuit did not directly find that agency adjudications were exempt from the APA's notice-and-comment requirements, but only that Section 553 applied to "'interpretative rules' or 'general statements of policy.'"[517]

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507. *Conference Grp.*, 720 F.3d at 965 (citing AT&T v. FCC, 454 F.3d 329, 333 (D.C. Cir. 2006)).

508. *Id.* (quoting AT&T, 454 F.3d at 333).

509. *Id.* (quoting AT&T, 454 F.3d at 333).

510. *Id.*

511. *Id.*

512. *Id.* (quoting Goodman v. FCC, 182 F.3d 987, 994 (D.C. Cir. 1999)).

513. *Id.* at 965–66.

514. *Id.* at 966 (quoting N.Y. State Comm'n on Cable TV v. FCC, 749 F.2d 804, 814 (D.C. Cir. 1984)).

515. *Id.*

516. *Id.*

517. *Id.* (citing 5 U.S.C. § 553(b)(3)(A) (2012)). For the reasons previously stated, the Court erroneously reached this conclusion by failing to examine whether the *InterCall Order* was merely a reinterpretation of existing FCC rules, or actually implemented a brand-new understanding of the regulatory classification of mixed-service offerings under both the *Auer* Doctrine (i.e., interpretation of FCC precedent), and the doctrine of *de novo* review (i.e., interpretation of the APA). *See* Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 415-16(1971) (stating that the doctrine of de novo review applies when agencies interpret statutes and laws that they do not have a responsibility to administer (e.g., the Constitution, APA, or Title VII)). *See also supra* note 506 (discussing *Auer* Doctrine).

Conference Group highlights how a court's demonstrated willingness to find agency actions proper, coupled with a strict interpretation of standing requirements, arguably violates the separation of powers doctrine by effectively removing an essential check on the powers of the administrative state. In doing so, the District of Columbia Circuit provided a method for the FCC and other agencies to shield themselves from judicial scrutiny as the court indicated a willingness to defer completely to agency informal adjudications. Therefore, without the threat of effective judicial review, agencies like the FCC are able to move the goalposts by implementing new regulations without regard to agency precedent, the APA, or its negative impacts upon regulated parties, in order to bolster their latest policy initiatives.

IV. SOLUTIONS

As indicated by the District of Columbia Circuit's decision in *Conference Group*, a reassertion of the judiciary's role as a check on the administrative state would deter the FCC from implementing industry-wide rules via informal adjudication, allowing the industry to meaningfully gauge and predict FCC regulatory developments affecting them. In addition, restricting the FCC's ability to develop industry-wide policies without notice-and-comment rulemaking would lead to greater transparency of the FCC's policymaking initiatives, and would prevent the FCC from implementing fundamental policy shifts affecting entire industries. Below is a summary of some suggestions on how these goals may be achieved.

A. Broadening the Understanding of the Standing Doctrine

As discussed earlier, many scholars have noted that the judiciary's strict interpretation of the standing doctrine has prevented many aggrieved plaintiffs from redressing agency misconduct, allowing agencies to proceed in an unfettered and arbitrary manner. Indeed, as one commenter noted, "Deference to agency views, when added to the limited standing . . . rules, [has made] courts less available" for review of agency decisions.[518] And, given the judiciary's reliance upon the standing doctrine for preservation of the separation of powers, it is up to Congress to open channels of judicial review.[519] Indeed, many scholars have asserted that Congress has the power—and, more importantly, the responsibility—to provide the judiciary with guidance regarding the standing doctrine.[520] In addition to judges embracing

518. Marla Mansfield, *Standing and Ripeness Revisited: The Supreme Court's "Hypothetical" Barriers*, 68 N.D. L. Rev. 1, 5 (1992).

519. *See id.*

520. *See, e.g.*, Kimberly N. Brown, *What's Left Standing? FECA Citizen Suits and Battle for Judicial Review*, 55 U. KAN. L. REV. 677, 688, 690-94 (2007) (arguing that Congress still has significant power to define standing); Scalia, *supra* note 317, at 885 ("[The] existence [of standing] in a given case is largely within the control of Congress."); Dru Stevenson & Sonny Eckhart, *Standing as Channeling in the Administrative Age*, 53 B.C. L. REV. 1357, 1358-59 (2012) (stating that Congress can amend the standing doctrine to enable citizen suits).

a broadened understanding of the standing doctrine, some of the most effective ways of doing this are through amending the APA and the Communications Act.

1. Amendment of the APA

Section 702 of the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[521] However, courts have imposed rigorous causation, traceability, and redressability requirements upon Section 702—in contrast with Justice White's notion in *Clarke v. Security Industries Ass'n*[522] that the zone of interests test was merely a "gloss" upon the APA's standing provisions.[523] Instead, in cases involving review of agency actions, the focus of the inquiry into a plaintiff's standing should be simply whether the plaintiff's interests are within the zone of interests of the relevant statute—*without* any inquiry into the "concrete adverseness" of the plaintiff's injury.[524] This affirms the notion asserted by many scholars that Congress has the ability to control standing by creating or destroying a legal right, while ensuring that judicial review remains limited to claims asserting a violation of a legal right.[525] Also, a lower standing threshold ensures that the courthouse doors remain open to aggrieved plaintiffs, as opposed to existing solely as a tool for preserving the separation of powers.

Instead of amending numerous agency enabling statutes in a piecemeal fashion, Congress can broaden third-party standing by revision of a single statute: Section 702 of the APA.[526] A revised Section 702 could be formulated as follows (changes italicized):

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. Any inquiry into a person's entitlement to judicial review thereof shall be limited to a determination as to whether the aggrieved person's asserted interest is protected by the relevant statute. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is

521. 5 U.S.C. § 702 (2012).

522. Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 400 n.16 (1987).

523. Coyle, *supra* note 303, at 1077.

524. *See id.* at 1082 (contending that "the standing of a plaintiff requesting adjudication of an issue of statutory interpretation should depend solely on whether the plaintiff's asserted interest is protected by that statute); Gene H. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 70 (1984) ("[S]tanding law has been made to serve too many masters.").

525. *See* Coyle, *supra* note 303, at 1083 (citing Scalia, *supra* note 317, at 885-86).

526. 5 U.S.C. § 702 (2012).

> against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, that any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein:
> (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground *other than as explicitly stated in this section*; or
> (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Furthermore, even with the proposed amendments, Section 702 still ensures that judicial review is limited to cases involving harm to a plaintiff's legal rights.[527] Thus, amending Section 702 to enable standing for all plaintiffs falling within the zone of interests of the relevant statute is a balanced approach—ensuring that agency misconduct can be redressed by the courts, while limiting such claims to legitimate legal disputes as required by Article III.

In the case of challenging the FCC's repeal of the contamination theory, a recognition of a broadened understanding of third-party standing in the APA would allow aggrieved service providers to appeal the FCC's decision solely based on the fact that they are bound to immediately comply with the decision as USF contributors. Accordingly, amending the APA in this fashion would allow for the FCC's decision, as well as its negative impact upon industry members, to be scrutinized in a neutral forum—rather than through the FCC's biased adjudication process.

2. Amendment of the Communications Act

Similarly, the current parameters of third-party standing involving FCC informal adjudications could be overhauled by amending the Communications Act's provisions regarding judicial review of agency decisions. Section 405(a) of the Communications Act prohibits the appeal of an FCC decision, unless the plaintiff was a party to the decision or had filed a petition for reconsideration within thirty days of the FCC's decision.[528] Realistically speaking, Section 405(a) bars third parties from seeking review of an FCC adjudication because such parties rarely file a petition for reconsideration unless they are well aware that it has direct precedential effect on their conduct.[529] This, coupled with the fact that courts like the District of

527. Scalia, *supra* note 295, at 885-886.

528. 47 U.S.C. § 405(a) (2012).

529. Section 405(a) of the Communications Act does not specifically preclude a third-party from filing a petition of consideration regarding a Commission's adjudicative decision.

Columbia Circuit are reluctant to find that an informal adjudication has a precedential effect on third parties (precluding any demonstration of standing), incentivizes the FCC to pursue all policymaking via such measures because they are essentially "judgment proof."

Section 405(a) of the Communications Act can be amended to reflect a broader understanding of the standing doctrine for purposes of judicial review of Commission decisions. Section 405(a) can be amended by adding a subsection (3) that states as follows (changes italicized):

> . . .
> The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review:
> . . .
> *(3) is requesting relief from compliance with a binding Commission decision rendered via an order, decision, or action where the aggrieved party's asserted interest is protected by the relevant statute, and the Commission has not specified the precedential effect of such a decision upon a third party.*

This proposed amendment to Section 405(a) of the Communications Act does not conflict with Article III's Cases and Controversies requirement as it would not require a reviewing court to render an advisory opinion.[530] as the plaintiff would presume, for purposes of standing, the FCC's decision has a binding precedential effect on the plaintiff's conduct, and the plaintiff can demonstrate compliance with the decision.[531] Thus, a plaintiff's legal interest protected by the relevant statute has demonstrably been harmed, and the FCC would simultaneously be forced to clearly indicate the impact of its decision upon third parties. Finally, for the reasons stated above, the plaintiff would not need to demonstrate an injury in fact separately, as the plaintiff's injury falls within the zone of interests of the relevant statute.

Accordingly, such an amendment of the Communications Act would afford the same benefits of a similar change to the APA as discussed above for industry members finding themselves in the untenable position created by the *InterCall Order*.

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530. *See* Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 605, 643-44 (1992) (arguing that the doctrine of mootness, *not* standing, is designed to prevent courts from issuing advisory opinions and defining advisory opinions as "a judicial decision incapable of changing anything in the real world); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.2, 45 (1989) ("[I]n order for a case to be justiciable and not an advisory opinion, there must be substantial likelihood that a federal court decision in favor of a claimant will bring about some change or have some effect.").

531. Unless the FCC's decision explicitly states the precedential effect of such a decision.

B. Creation of Limited Notice-and-Comment Procedures for Informal Adjudication

Alternatively, requiring an agency to conduct limited notice-and-comment procedures when implementing prospective policy decisions via informal adjudication could lessen the shock of such decisions on affected third parties. Establishing limited notice-and-comment procedures for informal adjudication might also discourage the FCC and other agencies from utilizing such policymaking measures by requiring the agency to acknowledge the potential effects that its decision could have on third parties *before* such consequences come to fruition. Faced with such a requirement, agencies might turn to rulemaking proceedings more frequently when faced with long-term, forward-looking policy choices.

1. Amendment of the APA

Section 555 of the APA (the informal adjudication provisions) does not impose any concrete notice-and-comment procedures on such proceedings.[532] Accordingly, Congress could amend Section 555 to require agencies to provide minimal notice to interested parties and the opportunity to comment on how the outcome of the proceeding may affect them. Amending the provision to provide for notice-and-comment procedures would not have to be drastic, and requiring only limited notice-and-comment procedures would differentiate such proceedings from more formal measures required of agencies. Rather, the amendment would merely require agencies to provide minimal notice to interested parties, and an opportunity to respond as to how the proceeding would possibly affect them. Of course, such a requirement would also require an agency to address any comments it received as to the decision's potential effect on interested third parties, but the authors believe the added burden on decision making via informal adjudication is outweighed by the increased transparency and development of the record fostered by industry-wide participation in prospective-looking decisions.

2. Amendment of the Communications Act

Congress could amend the Communications Act to require the FCC to implement limited notice-and-comment proceedings for informal adjudication. Neither the Communications Act nor the FCC's rules contain any provisions governing notice of informal adjudication, nor do they provide widespread opportunity for interested parties to comment. Therefore, as the FCC's rules do not provide for notice-and-comment procedures for informal adjudication, the FCC may currently promulgate industry-wide rules without notice and/or input from affected parties. As noted above, limited notice-and-comment procedures could strengthen the informal adjudication process, but

532. 5 U.S.C. § 555 (2012).

Congress may decide that adding such procedures through the APA sweeps too broadly across all agencies. As an alternative, it could implement such procedures specifically for the FCC by amending the Communications Act.[533]

V. CONCLUSION

Both a reassertion of the judiciary's role as a check on the powers of the administrative state and a curtailment of the FCC's ability to implement broad new policies without notice would allow telecommunications service providers to meaningfully gauge and predict regulatory developments affecting them. The District of Columbia Circuit's abdication of its responsibility as a necessary check on agency misconduct in *Conference Group* demonstrates the need for embracing a broader understanding of the standing doctrine as well as a complete reformation of the standards of judicial review of agency actions. Moreover, change must be effected within the FCC itself by adopting notice-and-comment provisions for informal adjudication. This would prevent the agency from promulgating harmful decisions, such as the *InterCall Order*, in the future.

Given the increased ubiquity of telecommunications in Americans' daily lives, it is important that industry stakeholders remain key players in the development of telecommunications policy. Agencies cannot be free to pursue their latest policy objectives without giving due consideration to the negative consequences that such decisions may have. This can only be ensured by implementing procedures at both the agency and federal court levels that will prevent the FCC from continuing to move the goalposts on the regulatory obligations of telecommunications service providers in an unfettered and furtive manner. Otherwise, agencies like the Federal Communications Commission will be able to regulate with impunity to the detriment of both service providers and American consumers alike.

533. Congress could add notice-and-comment procedures for informal adjudications on an agency-specific basis as it deems appropriate by amending the authorizing legislation of other federal agencies as well.

Arrr! Sever Thee Transmitters! Making Radio Pirates Walk the Plank with Aiding and Abetting Liability

Max Nacheman *

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I. INTRODUCTION

Since the dawn of broadcasting, interference has been the Achilles' heel of wireless technology. A 1907 report decried the resulting chaos and difficulty of management:

> WIRELESS AND LAWLESS—According to advices from Washington, the apparent condition that there is no law giving authority to government officers to protect official wireless stations in the exchange of messages is giving a great deal of trouble to the station at the Washington navy yard. A youth living near by . . . has set up a station of his own, and takes delight in interpolating messages during official exchanges . . . The local police authorities were appealed to, but said they had no power to interfere with the young man's experiments. A possible remedy, justified by the political situation, would be to declare a state of war to be existing in the vicinity of the White House.[1]

The first third of the 20th century was marked by a series of experiments in radio regulation, punctuated by the sinking of the Titanic, World War I, and the birth of the Federal Communications Commission (FCC).[2] While in the United Kingdom, regulations secured government control and censorship of the airwaves,[3] in the United States, regulations evolved according to an inverse priority: access.[4] To this day, the fundamental obstacle to efficient use of wireless spectrum is interference from broadcasters competing for access to the airwaves.[5]

At the time of the first broadcast regulations, radio was a newer technology than the Internet is today,[6] yet more than 100 years later, the same physical limitation impedes wireless broadcasting: two signals cannot occupy the same frequency, at the same time, in the same geographic space without causing interference – one signal degrading or destroying the other.[7] To guard against such interference, the FCC was founded with the mandate to "maintain control of the United States over all channels of radio

1. *Current News and Notes: Wireless and Lawless*, 49 ELECTRICAL WORLD 1023, 1023 (1907), https://archive.org/stream/electricalworld49newy#page/1022/mode/2up.

2. *See generally* JIM COX, AMERICAN RADIO NETWORKS: A HISTORY 116-21 (2009).

3. BURTON PAULU, BRITISH BROADCASTING: RADIO AND TELEVISION IN THE UNITED KINGDOM 3 (1956).

4. HUGH R. SLOTTEN, RADIO AND TELEVISION REGULATION: BROADCAST TECHNOLOGY IN THE UNITED STATES 6 (2000).

5. Christian Herter, *The Electromagnetic Spectrum: A Critical Natural Resource*, 25 NAT. RESOURCES J. 651, 658 (1985).

6. The "World Wide Web" as we know itcame into being in the 1990s. *The Invention of The Internet*, http://www.history.com/topics/inventions/invention-of-the-internet (last visited Apr. 8, 2015).

7. Herter, *supra* note 5, at 655.

transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time."[8] By establishing the jurisdiction of a federal agency to manage access to the wireless spectrum, Congress sought to ameliorate pervasive interference.[9] The Communications Act further mandated that "No person shall operate any apparatus for the transmission of . . . communications signals by radio . . . except with a license . . . granted under the provisions of this chapter."[10] In so doing, Congress restricted access to the wireless spectrum to only those broadcasters with express consent from the FCC.

Once, unauthorized access was limited by high costs of entry and the physical requirement of proximity of the broadcaster to a transmission source. Neither barrier exists today. A radio transmitter can be installed cheaply and quickly with off-the-shelf parts, while the pirate himself is located well out of range of detection or the jurisdiction of United States law and regulatory enforcers.[11] With barriers to entry low and likelihood of detection slim, there is little to deter pirates from transmitting their unauthorized broadcasts. In circumstances where agents do locate illegal broadcasters, they may be met with judgment-proof defendants who are unable or unwilling to comply with imposed sanctions.[12] Just as the barriers to unauthorized AM-FM broadcasting have decreased as the technology has matured, so too are more advanced wireless technologies progressing toward an enforcement quagmire. Two looming challenges are cellular phone service and mobile broadband.

To reassert its regulatory control of the wireless spectrum, the FCC should seek authority to hold aiders and abettors of unauthorized radio broadcasting liable for violations of the Communications Act. Aiding and abetting has long been a staple of criminal law enforcement, with roots in American law tracing back to 1790.[13] Judge Learned Hand articulated the foundational test for such liability in 1938: the defendant must "in some sort associate himself with the venture, that he participate in it as in something he wishes to bring about, [and] that he seeks by his action to make it succeed."[14] Despite its ubiquity in criminal law, secondary liability has infrequently been included in civil statutes, and the Supreme Court has forbade general application of the modern criminal aiding and abetting provision to civil violations.[15]

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8. 47 U.S.C. § 301 (2012).

9. SLOTTEN, *supra* note 4, at 15.

10. 47 U.S.C. § 301.

11. *See* PIRATE RADIO USA 00:22:35 (Deface the Nation Films 2008) (discussing broadcast strategy to prevent the FCC or law enforcement from discovering the origin of an unauthorized radio broadcast).

12. *See, e.g.*, Brandon Watson, *FCC to Radio Pirates: $15,000 Arrgh!*, AUSTIN CHRON. (July 11, 2014), www.austinchronicle.com/news/2014-07-11/fcc-to-radio-pirates-15000-arrgh.

13. United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938) (citing Act of Apr. 30, 1790, § 10, 1 Stat. 112, 114).

14. *Id.*

15. Central Bank of Denver v. First Interstate Bank, 511 U.S. 164, 190 (1994).

This Note will argue that mechanisms to bring enforcement actions or prosecutions against aiders and abettors of Section 301 violations are within reach. Part II provides an overview of the history and necessity of structural broadcast regulations. Part III explains the challenge of holding unauthorized broadcasters accountable, and how secondary liability would undermine pirates' ability to stay on the air. Finally, Part IV explores three avenues to establish secondary liability for violations of Section 301, including: (1) a statutory grant of authority by Congress, (2) exercise of rulemaking authority by the Commission, and (3) application of existing criminal law to prosecute violations of Section 301, thereby making aiders and abettors subject to the Criminal Code's general provision for secondary liability.

II. THE INTERTWINED FATE OF BROADCAST REGULATION AND PIRATE RADIO

For the first several decades of wireless broadcasting, the field was unregulated.[16] Initially, there was sufficient spectrum for all broadcasters to experiment with the new technology.[17] But as the wireless spectrum's utility became evident and demand for access grew, it became crowded, and interference quickly evolved from an afterthought, to a nuisance, to an obstruction.[18] The regulatory experiments of the early 20th century culminated in the modern system of spectrum management and the birth of a class of subversive broadcasters later known as "pirates."

A. Origins of Radio Broadcast Regulation in the United States

Electromagnetic spectrum is a unique natural resource.[19] It exists whether or not organized broadcasts of electricity and magnetism are transmitted through it.[20] While it can be neither created nor destroyed, it can be degraded by irresponsible use like water and air.[21] For that reason, spectrum is known as a "scarce" resource.[22] However, unlike water or air, the moment spectrum stops being used, it reverts to its natural state.[23] Without regulation, spectrum suffers from the tragedy of the commons.[24] Individual users have no incentive to use spectrum efficiently because to do

16. *See* SLOTTEN, *supra* note 4, at 7.
17. *Id.* at 2.
18. *Id.* at 15.
19. Herter, *supra* note 5, at 653.
20. *Id.*
21. *Id.* at 655.
22. *Id.*
23. *See id*. at 653.
24. Kevin Werbach, *Supercommons: Toward a Unified Theory of Wireless Communications*, 82 TEX. L. REV. 863, 944 (2004). Some spectrum intentionally remains unregulated, but this resource is not the focus of this Note. *See* 47 C.F.R. § 90.473 (2015); 47 U.S.C. § 307(c) (2012).

so earns them no savings or advantage.[25] A rational self-interested actor would instead seek to secure maximum use of the spectrum for himself.[26]

The first attempt at spectrum regulation, the 1910 Wireless Ship Act, granted priority access to spectrum for public safety applications, but did not address the burgeoning crisis of scarcity and interference.[27] Two years later, the Titanic sank along with 1,500 passengers.[28] When it was discovered that rescue efforts were delayed by interference with the Titanic's radio distress calls, Congress responded by passing the Radio Act of 1912, which required the Commerce Department to license radio operators.[29] The Act assigned portions of the spectrum to certain uses and authorized the Department to allocate frequencies to avoid interference.[30] During World War I private radio transmissions were prohibited, and in 1917 the military temporarily acquired complete control over the spectrum.[31] When the public regained access in 1919, the Commerce Department, which had authority only to manage allocation of spectrum but not restrict access to it, was ill-suited to manage the surge in demand.[32]

In 1927, Congress responded to the overwhelming demand for spectrum access with the Radio Act of 1927, which reflected a philosophical shift in U.S. spectrum management.[33] Unlike the 1912 Act, which presumed that all citizens had a right to a license, the 1927 Act emphasized that broadcasting was a privilege given to individuals based on their commitment to "public interest, convenience, and necessity."[34] The Act established the Federal Radio Commission (FRC), and imbued it with authority to issue broadcast licenses only to stations that could demonstrate they were broadcasting in the public interest.[35] In 1934 President Roosevelt urged Congress to consolidate communications regulation in a single agency.[36] Later that year, Congress passed the Federal Communications Act, which merged the FRC and the remaining communications-by-wire regulatory functions of the Commerce Department in the FCC, instituting the spectrum regulatory regime in place today.[37]

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25. NAT'L TELECOMMS. & INFO. ADMIN., REGULATING THE USE OF THE SPECTRUM, http://www.ntia.doc.gov/book-page/regulating-use-spectrum (last visited Apr. 8, 2015).

26. *Id.*

27. *See* SLOTTEN, *supra* note 4, at 6.

28. *See id.* at 7.

29. *See id.* at 8.

30. *See id.*

31. COX, *supra* note 2, at 117-18.

32. *See* SLOTTEN, *supra* note 4, at 39 ("[T]he lack of legal authority for the regulation of radio broadcasting resulted in near chaos of the spectrum.").

33. *Id.* at 40.

34. *Id.*

35. *Id.*

36. FRANKLIN D. ROOSEVELT, RECOMMENDING THAT CONGRESS CREATE A NEW AGENCY TO BE KNOWN AS THE FEDERAL COMMUNICATIONS COMMISSION, S. DOC. NO. 73-144 (1934).

37. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified as amended in scattered sections of 47 U.S.C.).

B. Pirates of the (Air)waves: The Swell of Unauthorized Broadcasting

The technology of pirate radio is similar to that of authorized broadcasting. Every radio station needs a live or recorded content source, an amplifier to boost electric current, a transmitter to organize current into radio waves, and an antenna to broadcast the signal.[38] Unlike unauthorized broadcasting in the United Kingdom (U.K.), which peaked in the 1960s in response to a government-sanctioned monopoly on broadcasting, pirate radio in the United States did not become common until the 1990s, emerging as rebellion to corporate dominance of the airwaves.[39] To this day, the FCC's licensing system includes a renewal expectancy – leaving little opportunity for new entrants in markets where all available spectrum has been allocated.[40]

Although pirates in the 1990s claimed a First Amendment right to broadcast, it is long settled doctrine that there is no "unabridgeable . . . right to broadcast."[41] The Supreme Court held in the 1943 case *NBC v. United States* that "the right to free speech does not include . . . the right to use the facilities of radio without a license."[42] In *Red Lion Broadcasting v. FCC*,[43] the Supreme Court held that "it is the right of viewers and listeners, not the right of broadcasters, which is paramount."[44] In the 1990s, a group of pirates challenged the authority of the FCC to enjoin "micro broadcasters" from unauthorized transmission, but in *United States v. Dunifer*,[45] the United States District Court for the Northern District of California rejected their assertion, affirming the FCC's authority to impose a licensing system to manage the wireless spectrum.[46]

In these cases, which challenged the Commission's authority limit access to the spectrum, courts recognized that without regulation of the wireless commons, the radio spectrum would fail for everybody—broadcasters and consumers alike. In an attempt to alleviate tension between micro broadcasters and regulators, in 2000 the FCC issued the first set of Low Power FM ("LPFM") licenses.[47] LPFM established a new category of broadcasting, limited to non-commercial stations, and restricted to

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38. *See generally* ZEKE TEFLON, THE COMPLETE MANUAL OF PIRATE RADIO (Sharp Press, 4th ed, 1994).

39. *See generally* PIRATE RADIO USA, *supra* note 11.

40. *Id.* (discussing the "perpetual licensing cycle"); *see also* 47 C.F.R. § 90.473 (2015); 47 U.S.C. § 307 (2012).

41. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388 (1969).

42. *See* Nat'l Broad. Co. v. United States, 319 U.S. 190, 227 (1943).

43. Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

44. *Id.* at 390.

45. United States v. Dunifer, 997 F. Supp. 1235 (N.D. Cal. 1998).

46. *See id.* at 1238; *see also* Ted M. Coopman, *U.S. v. Dunifer: A Case Study of Micro Broadcasting*, 7 J. RADIO STUDIES 287, 299 (2000).

47. ERIC KLINEBERG, FIGHTING FOR AIR 255 (2007); *see also* FCC, LOW POWER FM RADIO SERVICE, http://transition.fcc.gov/mb/policy/lpfm/ (last accessed Apr. 8, 2015).

broadcasting at 100 watts or less, sufficient for a 3.5 mile range.[48] The conundrum of LPFM is that any applicant found to have previously made unauthorized broadcasts is ineligible for a LPFM license, shutting out the most zealous community of micro broadcasters.[49]

C. From Radio Pirates to Cellular Ninjas: The Future of Unauthorized Broadcasting

Although AM-FM radio is a mature technology and Internet radio offers an appealing alternative to clandestine broadcasting, the FCC's enforcement challenge remains as relevant today as it was at pirate radio's peak. The FCC's authority to license wireless spectrum derives from Section 301 of the Communications Act, which authorizes the FCC to "maintain control . . . over all channels of radio transmission" and prohibits any person from "operat[ing] any apparatus for the transmission of energy or communications or signals by radio . . . except . . . with a license."[50] Therefore, traditional radio regulation is not all that Section 301 authorizes. It is the source of authority for regulation of all licensed wireless technology, including broadcast and satellite television, cellular phone service, mobile broadband, and other technologies that rely on wireless spectrum to transmit information.[51]

The wireless devices that connect our society depend on reliable access to spectrum that is free from interference.[52] Initiatives like the digital television transition, spectrum incentive auctions, and innovative mobile broadband technologies are only possible because of compliance by licensees with the regulatory framework enforced by the FCC.[53] Until now financial and technological barriers have deterred pirates from encroaching on these advanced frequency ranges.[54] However, just as cheap and common equipment enables radio pirates to broadcast on AM-FM bands, as the technology needed to construct and maintain advanced wireless networks decreases in price and complexity, it becomes more and more likely that unauthorized broadcasting will spread to these previously unencumbered bands.

The seeds of unauthorized broadcasting in spectrum allocated to advanced wireless services have already been planted. The 2012 "Def Con"

48. FCC, *supra* note 47.

49. KLINEBERG, *supra* note 47, at 256; *see also* PIRATE RADIO USA, *supra* note 11, at 00:40:15, 01:08:20.

50. 47 U.S.C. § 301 (2012).

51. *Id.* ("all channels of radio transmission"). It is important to distinguish regulated wireless technology from *unregulated* wireless technology, such as Wi-Fi, Bluetooth, cordless telephones, and "microbroadcasting," which is not the focus of this Note. *See generally* 47 C.F.R. § 15 (2015).

52. Interview with David Donovan, President, New York Association of Broadcasters, in Washington, D.C. (Apr. 10, 2015) (for example: cellular telephones, mobile broadband internet, broadcast television, digital broadcast satellites, and broadcast radio).

53. *Id.*

54. *Id.*

hacker convention in Las Vegas, Nevada featured a homemade cellular network called "Ninja-Tel," which provided cellular services to nearly 650 convention attendees.[55] The equipment was entirely contained within a single van.[56] In Mexico, a nonprofit called Rhizomatica has been installing local cellular networks; each capable of providing service to remote villages for a total cost less than $6,000.[57] The towns where Rhizomatica has invested are too small to attract speculation by traditional providers and would otherwise be left behind as the rest of their nation becomes connected.[58]

Ninja-Tel and Rhizomatica are the inevitable products of the decreasing barriers to developing advanced wireless networks that are independent of existing providers.[59] It is only a matter of time before consumers begin seeking alternatives to established providers, and unauthorized broadcasters using cheap technology, step in to meet the demand, bringing with them the same interference challenges that plagued radio broadcasting for decades. The FCC should assert its authority and develop strategies to enforce its regulatory system now, in preparation for the next generation of unauthorized broadcasters.

III. UNAUTHORIZED BROADCASTING POSES A UNIQUE ENFORCEMENT CHALLENGE THAT MAY BE ADDRESSED BY ESTABLISHING AUTHORITY TO CRACK DOWN ON AIDERS AND ABETTORS OF PIRATE BROADCASTERS

Pirate radio poses a unique enforcement challenge. Unlike many resources, which risk permanent depletion with use, wireless spectrum cannot be destroyed, yet its value can still be diminished by overuse.[60] Employing new technology, accessing the spectrum requires minimal investment and rudimentary technical knowledge.[61] But doing so can cause interference, severely degrading the value of licenses acquired by authorized broadcasters at great expense and hampering the ability of fledging stations to garner investment necessary to acquire licenses in the first place.[62] Pirates

55. Elinor Mills, *Hackers Build Private 'Ninja Tel' Phone Network at Defcon*, CNET (July 28, 2012, 5:47 PM PDT), http://www.cnet.com/news/hackers-build-private-ninja-tel-phone-network-at-defcon/.

56. *Id.*

57. Lizzie Wade, *Where Cellular Networks Don't Exist, People are Building Their Own*, WIRED (Jan. 14, 2015, 6:30 AM), http://www.wired.com/2015/01/diy-cellular-phone-networks-mexico/.

58. *Id.*

59. *See* 47 U.S.C. § 307(c) (2012); *see also* ROBERT BRITT HORWITZ, THE IRONY OF REGULATORY REFORM: THE DEREGULATION OF AMERICAN TELECOMMUNICATIONS 167 (1989).

60. *See* Herter, *supra* note 5, at 653, 655.

61. *See* TEFLON, *supra* note 38, at 1.

62. *See, e.g.*, Letter from National Association of Black Broadcasters (letter on file with author) ("It is patently unfair for NABOB members to invest substantial sums

themselves need not be in close proximity to the apparatus transmitting their signals, and the equipment used to transmit can be replaced economically enough to make forfeiture a viable alternative to capture.[63] However, as evasive as pirate operators themselves may be, they rely on resources that are not so elusive: landlords supply space and electricity, advertisers purchase airtime and publicize the station, content providers supply broadcast material, and manufacturers produce equipment modifiable for unauthorized use. Unlike pirate operators, this support network is exposed and vulnerable to enforcement action.

A. The FCC's Enforcement Procedure for Unauthorized Broadcasters Is an Inadequate Deterrent to Pirates

From the first days of radio until the turn of the 21st century limited technology tethered pirates to their transmitters by wires carrying electricity from source, to amplifier, to transmitter. If the transmission source could be identified, the operator likely was nearby. Today however, with Internet access, a radio pirate can construct his transmitter in one place and operate the station from anywhere in the world.[64] Furthermore, because of notification procedures mandated by the Communications Act and carried out by the Enforcement Bureau, there is little to deter an aspiring radio pirate from setting up and broadcasting from a location until being discovered by FCC agents.[65] Once warned, a determined pirate can comply temporarily, only to resume broadcasting from a new location or on a different frequency.[66]

Section 301 of the Communications Act authorizes the FCC to issue broadcast licenses and prohibits certain transmissions without one.[67] The FCC has only three general remedies for violations of provisions of the Act: license suspension,[68] denial of license renewal,[69] or sanctions issued pursuant to Section 501, including monetary forfeiture and imprisonment.[70]

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purchasing and operating radio stations only to discover that they must compete against illegal operators who do not live the by the same rules. These operators do not have to build or purchase a facility that meets the Commission's engineering or operating standards.").

63. PIRATE RADIO USA, *supra* note 11, at 00:37:35 (separating the transmitter from the studio site and connecting them using the internet allows a radio pirate to avoid capture by the FCC or law enforcement).

64. *Id.*

65. *See* 47 C.F.R. § 1.80(d) (2015); 47 U.S.C. § 503(b)(5) (2012).

66. C*ompare, e.g.*, 17 Webster Place Association, LLC, *Notice of Unlicensed Operation*, EB-09-NY-0237 (2009), https://apps.fcc.gov/edocs_public/attachmatch/DOC-292938A1.pdf (broadcasting from 17 Webster Place, Clifton, N.J. on 99.9 MHz), *with* 17 Webster Place Association, LLC, *Notice of Unlicensed Operation*, EB-09-NY-0358 (2009), https://apps.fcc.gov/edocs_public/attachmatch/DOC-295358A1.pdf (broadcasting from 17 Webster Place, Clifton, N.J. on 107.9 MHz). There is no indication that either warning resulted in further enforcement action.

67. *See* 47 U.S.C. § 301 (2012).

68. *See* 47 U.S.C. § 303(m) (2012); *see also* 47 U.S.C. § 312(a) (2012).

69. *See* 47 U.S.C. § 307 (2012).

70. *See* 47 U.S.C. § 501 (2012).

Pirate broadcasters have no license to suspend or revoke, leaving sanctions as the only remedial option.[71] Before action is taken against a pirate, the FCC's rules instruct the Enforcement Bureau to issue a warning.[72] Only after a pirate ultimately refuses to comply does the Act direct the FCC to refer the matter to the Department of Justice (DOJ) for litigation.[73]

Under Commission rules, the Enforcement Bureau is responsible for resolving "complaints regarding unauthorized . . . operation of communications facilities."[74] The procedure for a violation of Section 301 follows a four-step process, which can be terminated upon compliance at any stage: (1) Notice of Unauthorized Operation (NOUO), (2) Notice of Apparent Liability (NAL), (3) Forfeiture Order, and ultimately (4) referral to DOJ for litigation.[75] The FCC has published online a data set of enforcement actions taken between January 8, 2003, and May 26, 2016.[76] It is referred to below to illustrate the progression.

The process generally begins with a warning delivered by field agents or an NOUO issued by the Enforcement Bureau.[77] Although this informal notice is required for individuals who do not already "hold a license . . . issued by the Commission,"[78] the Act does not require a such a warning if the pirate "is engaging in activities for which a license . . . is required . . . [and] the . . . [pirate] is transmitting on frequencies assigned for use [by an authorized station]."[79] Rather than relying entirely on compulsory action against pirates who interfere with assigned frequencies as authorized, the Enforcement Bureau evidently relies largely on the voluntary compliance option. During the sample period 1,469 NOUOs were issued, "informing a party that radio stations must be licensed . . . and directing the party to discontinue operation . . . immediately."[80] According to data in the sample, 90 percent of proceedings did not advance beyond this stage.[81] It is important to note that of the 1,469 NOUOs issued in the sample period, roughly 200 were issued to the same 89 unique parties.[82] These pirates' recurrent violations illustrate the potentially ephemeral nature of NOUO compliance.

71. *See* Sonderling Broad. Corp., *Memorandum Opinion and Order*, 69 F.C.C.2d 289, 292 (1977).
72. *See* 47 C.F.R. § 1.80 (2015).
73. 47 U.S.C. § 504(a) (2012).
74. 47 C.F.R. § 0.111(a)(9) (2015).
75. 47 C.F.R. § 1.80.
76. FCC, FCC ENFORCEMENT ACTIONS AGAINST PIRATE RADIO BY LOCATIONS (last visited June 12, 2016), http://www.fcc.gov/maps/fcc-enforcement-actions-against-pirate-radio-location [hereinafter *Enforcement Map*].
77. *Id.*
78. 47 C.F.R. § 1.80(d) (2015).
79. 47 U.S.C. § 503(b)(5) (2012).
80. *See Enforcement Map*, *supra* note 76.
81. *Id.*
82. *Id.*

Next, if the party fails to comply with the NOUO, the Enforcement Bureau issues a NAL, as required by both the Act and the FCC's rules.[83] The NAL is "a preliminary decision . . . proposing a monetary forfeiture against a party that has apparently willfully or repeatedly violated the . . . Act."[84] At this stage, the respondent is expected to pay the fine or to submit an explanation for why the penalty should be revoked or reduced.[85] The FCC reports having issued 159 NALs to alleged radio pirates during the sample period, with proposed penalties totaling $1,995,000.[86] Of these, about half were evidently resolved before proceeding to the forfeiture stage.[87]

If a pirate does not comply with the NAL, the Commission issues a Forfeiture Order, "concluding that the party has willfully or repeatedly violated the . . . Act . . . and imposing a monetary forfeiture."[88] During the sample period, 88 Forfeiture Orders were issued, assessing a total of $975,850 in fines.[89] Once an Order is issued, if the forfeiture is not paid voluntarily, FCC rules direct the case to be referred to DOJ for judicial enforcement and collection under Section 504(a) of the Act.[90] The FCC itself does not possess litigation authority to compel compliance.[91] Instead, Section 504(a) instructs that "[i]t shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures."[92]

This published enforcement data suggests that for some unauthorized broadcasters, the Enforcement Bureau's voluntary compliance procedures are effective. For many, however, these numbers may not show the whole picture. In a 2015 letter to Congressman Chris Collins, a member of the House Energy and Commerce Committee, FCC Chairman Tom Wheeler explained:

> [P]irate radio presents persistent enforcement issues. Although some pirate operators cease operations after receiving an initial warning letter, they are often quickly replaced by other pirates. Many other pirate operators may ignore the warning or resume broadcasting from another location. Even monetary penalties and equipment seizures do not deter the most aggressive pirate

83. 47 U.S.C. § 503(b)(4); 47 C.F.R. § 1.80(f) (2015).

84. *See Enforcement Map*, *supra* note 76.

85. *See* 47 C.F.R. § 1.80(f)(3).

86. *Enforcement Map*, *supra* note 76.

87. *See id.* (reflecting the disparity between the fines proposed in NALs and the total forfeitures ordered in lieu of publicly available information regarding how many proposed fines were paid, reduced, or revoked).

88. *Id.*

89. *Id.* (although the *Enforcement Map* indicates the total dollar amount of fines assessed, there is no indication of how much was actually collected at this, or subsequent stages of the proceeding).

90. 47 C.F.R. § 1.80(f)(5).

91. 47 U.S.C. § 504(a) (2012).

92. *Id.*

> operators, who simply refuse to pay the FCC forfeitures and obtain cheap replacement equipment online.[93]

An alternate possible explanation for the dramatic reduction, from 1,469 NOUOs to only 159 NALs, is a strategic decision not to pursue enforcement proceedings against every unauthorized broadcaster with the knowledge that many will not be litigated to completion.[94] Of the pirates who are served Forfeiture Orders, those that do not comply are referred to the DOJ.[95] Unlike other regulatory enforcement issues, the DOJ lacks a division dedicated to litigating broadcast violations.[96] Instead, responsibility for prosecution is distributed to United States Attorneys' offices, which exercise prosecutorial discretion over whether and how to litigate.[97] Of the Forfeiture Orders that are litigated at all, many result in default judgments against the pirate broadcasters, rather than compliance and payment of penalties resulting from primary proceedings.[98] This final group is the hard core of judgment-proof pirates who might finally be thwarted using aiding and abetting liability, dissuading curious unauthorized broadcasters from dipping a toe into the sea of illegal pirate radio.

B. Aiding and Abetting Liability Would Cut the Supply Chain of Essential Resources to Unauthorized Broadcasters

While unauthorized broadcasters themselves may be elusive or judgment-proof, like any enterprise they rely on external resources, including space, utilities, equipment, content, and revenue. The people who provide the resources constitute an exposed flank in the pirates' defenses. While a pirate can abandon his transmitter when agents investigate an illegal

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93. Letter from Tom Wheeler to Rep. Chris Collins (July 27, 2015) (letter on file with author).

94. *See generally* Interview with David Donovan, *supra* note 52; *see also* Comm. Ajit Pai, Remarks at the PLI/FCBA 33rd Annual Institute on Telecommunications Policy & Regulation, Washington, D.C. (Dec. 3, 2015) ("[T]he FCC currently has little interest in doing bread-and-butter enforcement work . . . Indeed, a whistleblower within the Enforcement Bureau gave me an October 28, 2014 email from the Bureau's Northeast Regional Director to field agents that included the following instructions: 'We are scaling back on our response to pirate operations.'").

95. 47 U.S.C. § 504(a) (2012).

96. *See, e.g.*, DEP'T OF JUSTICE, AGENCY LISTING (including the Antitrust Division, Environment and Natural Resource Division and Tax Division), http://www.justice.gov/agencies.

97. Heckler v. Chaney, 470 U.S. 821, 831-32 (1985) (explaining that the decision not to prosecute is the result of a "complicated balancing of a number of factors within its expertise," including "whether a violation has occurred, how to allocate agency resources, likelihood of success, overall agency policies, whether agency has sufficient resources to prosecute at all.").

98. *See, e.g.*, United States v. Watkins, Docket No. 1:14-cv-04173 (S.D.N.Y. June 10, 2014) (default judgment); United States v. Morris, Docket No. 1:13-cv-12384 (D. Mass. Sept. 26, 2013) (default judgment); United States v. Toussaint, Docket No. 1:08-cv-11870 (D. Mass. Nov. 07, 2008) (default judgment).

signal or choose to risk prosecution for noncompliance, the pirate's support network may not be capable of such evasion. Two key examples provide insight into the use of aiding and abetting liability to quash resilient radio pirates: the response of British Parliament to the first generation of pirate radio in the 1960s,[99] and the evolution of aiding and abetting liability for violations of the Securities Exchange Act.[100] Each provides a relevant point of comparison.

1. How the United Kingdom Sank Pirate Radio

The term "radio pirate" first appeared in the British Parliament in the 1960s to describe the armada of ships broadcasting without authorization off the English coast.[101] From radio's inception, the United Kingdom maintained a legal monopoly over the airwaves.[102] Their regulatory method was influenced by observing two afflictions of American broadcasting: chaos and commercialism.[103] In 1922, the British Post Office, to which Parliament had delegated radio regulation, received 24 license applications.[104] Rather than choosing between applicants, the Post Office—for the sake of administrative convenience and to avoid American pitfalls, persuaded the applicants to form a single company: the British Broadcasting Company ("BBC").[105]

By the 1960s, public tolerance for government monopoly was waning.[106] In 1964, the first pirate radio station dropped anchor three miles off the British coast to fill the vacuum, close enough to broadcast into the United Kingdom, but beyond the reach of Parliament's territorial control.[107] At its height, more than a dozen stations were broadcasting from the "high seas" off the coast of England.[108] At first the United Kingdom found itself powerless to take action. Parliament was bound by its own centuries old tradition as protector of "freedom of the high seas."[109] England had never claimed authority over any other nation's vessels at sea, with only two exceptions: pirates (i.e., the swashbuckling, gold-thieving kind) and slavers.[110] Despite frustration with the radio pirates, Parliament remained

99. Kimberly Peters, *Sinking the Radio "Pirates": Exploring British Strategies of Governance in the North Sea, 1964-1991*, 43 AREA 281 (2011).

100. Richard C. Mason, *Civil Liability for Aiding and Abetting*, 61 BUS. LAW. 1135 (2006).

101. Peters, *supra* note 99, at 281.

102. PAULU, *supra* note 3, at 13-14.

103. *Id*.

104. *Id.*

105. *Id*.

106. Peters, *supra* note 99, at 282.

107. *Id.*

108. *Id.*

109. J. C. Woodliffe, *The Demise of Unauthorized Broadcasting from Ships in International Waters*, 1 INT'L J. ESTUARINE & COASTAL L. 402, 402 (1986).

110. Peters, *supra* note 99, at 283.

averse to "strong-arm action," which it feared could undermine England's foreign policy of non-intervention at sea.[111]

Instead, the United Kingdom concentrated on gathering international support for intervention, culminating in the 1965 Strasburg Agreement "for the prevention of broadcasts transmitted from stations outside national territories." [112] The agreement obligated signing nations, including the United Kingdom, to take domestic action against broadcasts emanating from extraterritorial sources, including steps to make collaboration with pirates an offense, including providing and maintaining equipment, transportation, content production, and advertising.[113]

Although it did not go so far as to enable regulation of the offshore pirate broadcasters, the new obligation gave Parliament the justification it needed to impose sanctions on its own citizens who supported the radio pirates.[114] In 1967, Parliament passed the Marine Broadcasting Offenses Act (MBO), which severed lifelines between broadcast ships and the shore.[115] Modeled on the Strasburg Agreement, the MBO prohibited British citizens from providing services or supplies to unauthorized broadcasters.[116] One commenter noted: "By these means the stations, cut off from the nearest and most convenient source of equipment, supplies, transport and . . . advertising-revenue, would be dealt a rapid deathblow." [117] In the end, Parliament's deathblow sank nearly all of the radio pirates.[118]

2. Aiding and Abetting Liability for Securities Violations

Secondary liability is an evolving component of American securities regulation. While the SEC has long acted with the assumption that it had authority to bring enforcement actions against aiders and abettors of violations, the authority was made explicit only recently. [119] Two key controversies shaped secondary liability for securities enforcement and serve as guideposts for similar liability under the Communications Act. First, in 1994, the Supreme Court held that there is no implied liability for

111. Woodliffe, *supra* note 109, at 403.

112. European Agreement for the Prevention of Broadcasts Transmitted from Stations outside National Territories, Council of Europe, Jan. 22, 1965, E.T.S. No. 53, http://conventions.coe.int/Treaty/en/Treaties/Html/053.htm.

113. *Id.*

114. Peters, *supra* note 99, at 283.

115. *Id.; see also*, Marine Broadcasting Offences Act 1967, c. 41 (UK) [hereinafter *MBO*].

116. Peters, *supra* note 99, at 284.

117. Woodliffe, *supra* note 109, at 403.

118. The only station that survived the *MBO* was "Radio Caroline" which continued broadcasting until 1991. Peters, *supra* note 99, at 286.

119. R. Daniel O'Connor et al., *Dodd-Frank, Aiding-and-Abetting Scienter, and Principles Fairness: Why the SEC Should Not be Allowed to Apply Section 20(e) Retroactively*, 43 SEC. REG. & L. REP. 1422 (2011).

aiding and abetting securities violations.[120] More recently, after action by Congress, the Second Circuit offered clarification about the elements of secondary liability in SEC enforcement actions.[121]

In response to the 1929 stock market crash, Congress adopted new securities legislation, including Section 10(b) of the Securities Exchange Act, making it "unlawful for any person, directly, or indirectly… [to] purchase or [sell] any security . . . in contravention of such rules and regulations as the SEC may prescribe."[122] For decades this provision acted as the foundation to assert aiding and abetting liability for SEC violations.[123] In 1994, the Supreme Court considered whether such liability could properly be implied in *Central Bank of Denver v. First Interstate Bank*.[124] The Court concluded that the Act provided neither a private right of action against aiders and abettors nor generally authorized the SEC to take enforcement action against them.[125] The Court reached its conclusion by reviewing provisions of other financial regulatory statutes, many of which explicitly provided secondary liability, and held that "the fact that Congress chose to impose some forms of secondary liability, but not others, indicates a deliberate congressional choice with which the courts should not interfere."[126] The Court held that in such circumstances "it is not plausible to interpret the statutory silence as tantamount to an implicit congressional intent to impose . . . aiding and abetting liability."[127]

In 1995, in response to *Central Bank*, Congress passed the Private Securities Litigation Reform Act (PSLRA), amending the Exchange Act and explicitly restoring the SEC's previously-implied authority to bring aiding and abetting enforcement actions against a defendant who "knowingly provides substantial assistance to another person in violation of [the Act]."[128] The PSLRA, however, did not establish a private cause of action against aiders and abettors—despite calls to do so—confirming congressional intent to limit aiding and abetting liability to enforcement actions by the SEC.[129]

When the United States economy stalled again in 2007, Congress responded by passing the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), which among many provisions, expanded the secondary liability intent requirement for securities violations from knowledge to "knowingly or recklessly"—substantially broadening the

120. Central Bank of Denver v. First Interstate Bank, 511 U.S. 164 (1994).

121. SEC v. Apuzzo, 689 F.3d 204 (2d Cir. 2012).

122. *Central Bank of Denver*, 511 U.S. at 170-71 (citing Securities Exchange Act of 1934, 15 U.S.C. § 78j).

123. *See id.*

124. *Id.* ("We granted certiorari to resolve the continuing confusion over the existence and scope of the § 10(b) aiding and abetting action.").

125. *Id.* at 183-84.

126. *Id.* at 184.

127. *Id.* at 185.

128. Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, § 104, 109 Stat. 737, 757 (codified as amended at 15 U.S.C § 78t(e) (2000)).

129. O'Connor, *supra* note 119, at 2.

scope of liability.[130] Congress had dismissed suggestions by the SEC to include recklessness in 1995, but inclusion of the standard in Dodd-Frank reflects Congress' evolving view on secondary liability.[131] The lower bar for prosecution has lead commentators to deem the role of Chief Financial Officer the "Most Dangerous Job in Corporate America."[132]

In 2012, the Second Circuit addressed a remaining point of contention in *SEC v. Appuzzo.*[133] It was well established, even before *Central Bank*, that the elements of aiding and abetting liability for a securities violation enforcement were: the existence of a violation by the primary party; the aider and abettor's knowledge of the primary violation; and substantial assistance by the aider and abettor in the achievement of the primary violation.[134] In *Apuzzo*, the Second Circuit evaluated the third element—the meaning of "substantial assistance."[135] The Court noted that, unlike a private action in which a plaintiff seeks damages from the defendant, in an enforcement action, the purpose is deterrence, not compensation.[136] Relying on that distinction, the Court determined that "proximate cause" was not the appropriate standard for substantial assistance.[137] Instead, the Court looked to the origins of aiding and abetting liability, adopting Judge Hand's three-part standard.[138] To satisfy the substantial assistance element, the Second Circuit held that the SEC must prove that a defendant had: (1) associated himself with the venture, (2) participated in it as in something he wished to bring about, and (3) sought by his action to make it succeed.[139] While the holding of *Appuzzo* may lower the bar for SEC enforcement action against aiders and abettors, its decision is still limited by *Central Bank's* conclusion that secondary liability cannot be implied where Congress has foreclosed secondary liability in private actions.[140]

130. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, §§ 933, 1036, 124 Stat. 1883-84, 2010-11 (2010).

131. O'Connor, *supra* note 119, at 2.

132. John Carney, *CFO: Most Dangerous Job in Corporate America*, CFO.COM (Feb. 26, 2013), http://ww2.cfo.com/regulation/2013/02/cfo-most-dangerous-job-in-corporate-america/.

133. SEC v. Apuzzo, 689 F.3d 204, 206 (2d Cir. 2012).

134. *Id.*

135. *Id.*

136. *Id.* at 212.

137. *Id.* at 206.

138. *Id.* at 212. The *Peoni* formulation had already been adopted by the Supreme Court. Nye & Nissen v. United States, 336 U.S. 613, 619 (1949).

139. *Id.*

140. Central Bank of Denver v. First Interstate Bank, 511 U.S. 164, 184 (1994).

IV. THREE WAYS TO CRACK DOWN ON AIDERS AND ABETTORS OF UNAUTHORIZED BROADCASTING: STATUTE, RULEMAKING, AND EXISTING CRIMINAL LAW

Although the FCC currently possesses neither the United Kingdom's MBO-based primary liability authority, nor the SEC's secondary liability authority, the Commission is not without recourse to crack down on pirate radio aiders and abettors. There are two routes through which the FCC could acquire new authority to hold pirate radio aiders and abettors liable: congressional statute or agency rulemaking. Alternatively, the FCC could coordinate with DOJ to hold broadcasters who violate Section 301 of the Act criminally liable for conversion of public property, thereby exposing aiders and abettors to the secondary liability provision of the Criminal Code (as described in Section IV.C, *infra*).

A. Congress Should Grant Statutory Authority to the FCC to Bring Primary or Secondary Liability Enforcement Actions Against Aiders and Abettors of Pirate Radio

The most straightforward solution would be for Congress to pass a statute augmenting the authority of the FCC to crack down on pirate radio aiders and abettors.[141] There are two ways Congress could address the issue. First, borrowing from the model employed by the United Kingdom, Congress could establish primary liability for certain behaviors known to enable pirate broadcasters. Alternatively, Congress could replicate the SEC enforcement provisions of the PSLRA, establishing similar secondary liability for aiders and abettors of Communications Act violations.

1. Primary Liability: The United Kingdom Model

Rather than imposing aiding and abetting liability, Congress could adopt a statute modeled on the MBO, later incorporated into the United Kingdom Broadcasting Act, which effectively terminated the original radio pirates off the coast of England.[142] Unlike the PSLRA, which accomplishes

141. On March 22, 2016, FCC Chairman Wheeler delivered a statement to the House Subcommittee on Communications and Technology during an oversight hearing, requesting legislation from Congress to aid the FCC's enforcement mission by amending the Communications Act to specifically authorize the FCC to take action against landlords that aid and abet pirate radio operators. *Oversight of the Federal Communications Commission: Hearing Before the Subcomm. on Commun. & Tech. of the H. Comm. of Energy & Commerce*, 114th Cong. (2016) (statement of Tom Wheeler, Chairman, Federal Communications Commission), http://docs.house.gov/meetings/IF/IF16/20160322/104714/HHRG-114-IF16-Wstate-WheelerT-20160322.pdf.

142. Broadcasting Act 1990, c. 42, part VII (UK) (incorporating key provisions of the *MBO*).

its objective through secondary liability for the offenses of a principle offender, the MBO makes it a primary offense to take actions known to support unauthorized broadcasting.[143] Congress could develop a specific list of offenses similar to the U.K. prohibitions, or delegate to the FCC authority to define infractions.

The MBO successfully forced unauthorized broadcasters off the air, despite the broadcasters themselves being out of range of the U.K.'s territorial control, by cutting off access to necessary inputs from within the U.K.'s jurisdiction.[144] All of the MBO's prohibitions include a scienter requirement that a party have "reasonable cause to believe," that their action is supporting an unauthorized station.[145] While the MBO includes a prohibition on unauthorized broadcasting, the bulk of the legislation is dedicated to prohibitions on activities *supporting* such broadcasting.[146] Prohibited activities include: managing, operating, or financing an illicit station; supplying or maintaining equipment; supplying content or participating in a broadcast; and advertising, including buying and selling air time, as well as promoting the station itself.[147]

The benefit of a solution of this nature is that it does not rely on the successful conviction of a radio pirate before legal action can be taken against supporters. In the case that litigation against a judgment-proof pirate is not pursued, action could still be taken against a landlord, advertiser, or other enabler. The downside to such a system, delineating specific violations, is that it is vulnerable to "loopholing."[148] Radio pirates are resourceful. If obvious resources are cut off, they may resort to harder to detect alternatives, potentially driving the industry underground.[149]

2. Secondary Liability: The SEC Model

Alternatively, if Congress would prefer to enact a method more familiar to United States regulators, it could amend the Communications Act to explicitly authorize the FCC to take enforcement actions based on secondary liability. Congress could model the provision on the aiding and abetting liability established by the PSLRA and bolstered by Dodd-Frank.[150] Dodd-Frank explicitly grants to the SEC authority to bring secondary liability claims for aiding and abetting securities violations, establishing that

143. *Id.*

144. Woodliffe, *supra* note 109, at 403.

145. *See, e.g.*, Broadcasting Act 1990, c. 42, §§ 168, 169, 170 (UK).

146. Broadcasting Act 1990, c. 42, § 170 (listing more than a dozen specific instances of prohibited activities).

147. *Id.*

148. *See* Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 482-83 (1996) (stating that common law systems help prevent loopholes by not specifying or defining certain provisions).

149. *See, e.g.*, Mary Meehan, *Outlaws Making Air Waves*, ORLANDO WEEKLY (July 9, 1998), www.orlandoweekly.com/orlando/outlaws-making-air-waves/Content?oid=2264182.

150. *See generally* 15 U.S.C. § 78t(e) (2012) (consisting of the PRSLA and Dodd-Frank). *See also supra* text accompanying notes 130 and 132.

"any person that knowingly or recklessly provides substantial assistance to another person in violation of any provision of this chapter . . . shall be deemed to be in violation . . . to the same extent as the person to whom such assistance is provided."[151]

A point of contention regarding the authority granted to the SEC by Dodd-Frank is whether "recklessness" is an appropriate standard for aiding and abetting liability in enforcement actions.[152] Nevertheless, in the context of FCC enforcement actions against aiders and abettors of pirate radio broadcasting, even if the "recklessness" standard was omitted and secondary liability applied only to those who "knowingly" assist, that limited standard likely would be sufficient.[153] While a recklessness standard would strengthen the provision, encouraging diligence and caution by possible aiders and abettors, if the FCC continues its current procedure of providing NOUO warnings before proceeding with enforcement actions, there likely would be sufficient grounds to satisfy the knowledge standard.

If Congress grants authority to the FCC to take enforcement actions against aiders and abettors of unauthorized broadcasting – either via a system of primary liability modeled on the MBO, or secondary liability modeled on the PSLRA – it would alter the risk analysis for the network of pirate radio support industries. In addition to delivering a "deathblow" to America's remaining radio pirates, as the MBO did U.K. radio pirates, either approach would supply the FCC with enforcement tools to repel the next wave of potential unauthorized broadcasters.

B. The FCC's Rulemaking Authority Is Sufficient to Support a Regulation Holding Pirate Radio Aiders and Abettors Secondarily Liable for Violations of Section 301 of the Communications Act

If Congress does not act, the FCC has sufficient rulemaking authority to adopt regulations to similar effect. The Commission's rulemaking authority comes from two sources: a specific statutory grant from Congress and the Communications Act's "ancillary authority."[154] Whether a rule cracking down on pirate radio aiders and abettors relies on statutory or ancillary authority depends on whether such a rule is deemed to be an interpretation of the Act's statutory command that the FCC "maintain

151. *Id.*

152. O'Connor, *supra* note 119, at 2.

153. *See, e.g.*, Michael O'Rielly, *A Draft Pirate Radio Policy and Enforcement Statement*, FCC BLOG (Sept. 24, 2015, 12:12 PM) (remarking on educational and enforcement efforts to "those entities that may knowingly or unknowingly assist pirate radio operations in any capacity"), https://www.fcc.gov/news-events/blog/2015/09/24/draft-pirate-radio-policy-and-enforcement-statement.

154. Am. Library Ass'n v. FCC, 406 F.3d 689, 692 (D.C. Cir. 2005).

control,"[155] or whether reining in aiders and abettors is deemed an ancillary measure, necessary to accomplishing that assignment.[156]

The Communications Act assigned to the FCC "the purpose of regulating . . . communication by wire and radio."[157] Recognizing that communications was a field of rapid growth and innovation, the 1934 Congress built flexibility into the Communications Act.[158] Shortly after its adoption, in *FCC v. Pottsville Broadcasting*, the Supreme Court observed, "[u]nderlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors."[159] To accomplish its regulatory mission, the FCC's enforcement scope must evolve to include aiders and abettors of modern radio pirates.

1. The FCC Has Two Sources of Authority to Take Action Against Radio Pirates: Statutory and Ancillary Authority

Until the 1980s, most administrative agencies were left to their wits to prove that administrative actions – whether adjudication or rulemaking – were within the authority granted to them by Congress. According to the then-reigning standard of *Skidmore v. Swift*, a court was to review agency action by considering thoroughness, validity, consistency, and "all those factors which give it power to persuade."[160] Under the *Skidmore* rule, the burden was on the agency to justify its action and outcomes were uncertain.[161] In 1984, the Supreme Court offered a new barometer by which to assess the authority of an agency to act: *Chevron* deference.[162] In *Chevron v. NRDC* the court formulated a new two-step test. Step one: had Congress spoken unambiguously with respect to the challenged action? If so, "that is the end of the matter."[163] If not, proceed to step two: if Congress's express intent does not foreclose the exercised authority, the court considers whether the agency action was reasonable.[164] Under this deferential standard the

155. 47 U.S.C. § 301 (2012)
156. United States v. Sw. Cable Co., 392 U.S. 157, 178 (1968).
157. 47 U.S.C. § 151 (2012).
158. FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940).
159. *Id.*
160. Skidmore v. Swift, 323 U.S. 134, 140 (1944).
161. United States v. Mead, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) ("The Court has largely replaced *Chevron*, in other words, with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th' ol' 'totality of the circumstances' test.").
162. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
163. *Id.* at 842.
164. *Id.* at 843.

court defers to the expertise and experience of the agency vested with the responsibility for a certain matter.[165]

For almost 20 years this was the standard. However, a series of cases over the next two decades questioned the efficacy of *Chevron*.[166] Finally, in 2001 in *United States v. Mead*, the Supreme Court adopted a new threshold test: "Step Zero."[167] *Mead* established a pre-*Chevron* inquiry into whether Congress had delegated to the agency authority to act with the force of law in the specific challenged manner in the first place, and whether the agency had in fact done so.[168] If the answer to both inquiries is affirmative – the examination proceeds to *Chevron* analysis. If not, the *Mead* Court held, *Chevron* no longer applies.[169] Under *Mead*, without a specific congressional delegation – most agencies are limited to their "power to persuade."[170]

For many agencies, failure of *Mead's* "Step Zero" results in relegation to the uphill battle of *Skidmore*. However, the FCC is vested with an additional and unique power: "ancillary authority."[171] In what has been referred to as the FCC's "necessary and proper" clause,[172] Section 154(i) of the Communications Act grants to the Commission the duty and power to "perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions."[173] Ancillary authority, however, is not a blank check. The Supreme Court interprets ancillary authority to function only in conjunction with specific jurisdiction granted to the Commission.[174] In *United States v. Southwestern Cable*, the Supreme Court held that the while the FCC had been given a "comprehensive mandate, with not niggardly but expansive powers," its authority "is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities."[175] In *American Library Association v. United States*, the D.C. Circuit distilled *Southwestern's* principle into a two-part rule, limiting the Commission's jurisdiction over services not directly within its purview.[176] First, the subject of the regulation must be covered by the Commission's general grant of

165. *Id.* at 844.

166. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

167. *See* United States v. Mead, 533 U.S. 218, 226-27 (2001); *see also* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 188-91 (2006).

168. *Mead*, 533 U.S. at 226-27; *see also* Daniel A. Lyons, *Tethering the Administrative State: the Case Against Chevron Deference for FCC Jurisdictional Claims*, 36, J. CORP. L. 823, 831 (2011) ("*Mead* teaches that before deferring to an agency's interpretation of a statute, the Court must first satisfy itself that Congress intended it to do so.").

169. *Mead*, 533 U.S. at 266-27.

170. *Id.*

171. United States v. Sw. Cable Co., 392 U.S. 157, 178 (1968).

172. Motion Picture Ass'n of Am., Inc. v. FCC, 309 F.3d 796, 807 (DC Cir. 2002).

173. 47 U.S.C. § 154(i) (2012).

174. *Sw. Cable*, 392 U.S. at 181.

175. *Id.*

176. Am. Library Ass'n v. FCC, 406 F.3d 689, 692-93 (D.C. Cir. 2005).

jurisdiction under the Act.[177] Second, the subject of the regulation must be ancillary to the Commission's performance of its duties.[178]

American Library arose out of the DTV transition.[179] Like the subject of this note, the motivating concern was "piracy," but of a different sort.[180] Television broadcasters and content producers were concerned that without the natural quality degradation symptomatic of reproducing analog content, there would be no way to prevent unauthorized duplication of broadcasted content.[181] As a remedy, the Commission promulgated the broadcast flag rules, requiring devices capable of receiving DTV broadcast signals include technology enabling them to recognize a code embedded in the broadcast stream to prevent unauthorized redistribution.[182] While the Commission argued that the broadcast flag was essential – ancillary – to carrying out the transition, the Court premised its rejection of the Order on the first prong of the *Southwestern* test: the jurisdictional hook.[183] The Court looked to the Act, noting that the statute did not grant the FCC authority to regulate all devices, but rather, specified: "apparatus . . . incidental to . . . transmission."[184] Based on that observation the Court struck down the broadcast flag order – noting that recognition of the broadcast flag by a receiver is unrelated to signal transmission, and therefore inapplicable.[185]

2. A Regulation Against Aiding and Abetting Unauthorized Broadcasting Would Survive Scrutiny Under Either Standard

An FCC rule holding supporters of pirate radio broadcasters secondarily liable as aiders and abettors of violations of Section 301 would likely survive scrutiny under either the *Chevron* deference standard or under the *American Library* test as a valid exercise of the FCC's ancillary authority. The first question is, under *Mead*, whether Congress delegated authority for the Commission to act with the force of law in such a manner, and whether the Commission has in fact done so.[186] If a reviewing court finds that yes, Congress intended the Commission to act with the force of law to "maintain control . . . of channels of radio transmission," it would also likely find that inclusion of aiders and abettors of Section 301 violations, who are otherwise immune from prosecution, is a reasonable extrapolation from the ambiguous command to "maintain control."[187] As

177. *Id.*
178. *Id.*
179. *Id.* at 691.
180. *Id.*
181. *Id.* at 693-94.
182. *Id.* at 691.
183. *Id.* at 708.
184. *Id.* at 698; 47 U.S.C. § 153(40) (2012).
185. *Am. Library Ass'n*, 406 F.3d at 705.
186. United States v. Mead, 533 U.S. 218, 226-27 (2001).
187. *See* 47 U.S.C § 301 (2012).

confirmation that Congress contemplated aggressive intervention and enforcement against interference by unauthorized broadcasters on otherwise licensed channels of wireless spectrum, the Act explicitly carves an exception for such broadcasters, relieving the Commission of the standard warning requirement before proceeding with enforcement action.[188]

Alternatively, if a court determines that a rule against aiding and abetting Section 301 violations fails *Mead* because Congress had only anticipated actions against primary violators of the Act and therefore could not have explicitly delegated the authority, the regulation would likely survive scrutiny under *American Library* rather than receive condemnation under *Skidmore*. Secondary liability for facilitating unauthorized radio broadcasting is essential to the FCC's responsibility to regulate the wireless spectrum. Unlike *American Library*, here the authority to impose secondary liability on aiders and abettors of pirate radio flows directly from the statement of purpose in the Communications Act: "For the purpose of regulating . . . communication by wire and radio . . . there is created . . . the Federal Communications Commission, which shall . . . execute and enforce the provisions of this [act]."[189] Furthermore, unlike the order struck down by *American Library*, cracking down on pirate radio aiders and abettors undermines the ability of pirates to *transmit* unauthorized radio signals – without need to consider reception of those illicit signals.[190]

C. Aiders and Abettors of Pirate Radio Could Be Prosecuted Under the Criminal Code if Radio Pirates Are Prosecuted for Conversion of Public Property

In *Central Bank*, the Supreme Court warned that there is no universal aiding and abetting liability provision and that application of Section 2 secondary liability from the Criminal Code, to a civil enforcement action, would be an error.[191] Rather than viewing this as a prohibition on criminal prosecution for aiding and abetting Communications Act violations, regulators and prosecutors should interpret *Central Bank* as an instruction: if the only general source of aiding and abetting liability is in the Criminal Code, regulators and prosecutors should bring criminal charges against unauthorized broadcasters in place of, or in addition to, standard enforcement actions under the Communications Act.

Section 641 of the Criminal Code makes embezzlement, theft, or "knowing conversion" of public property a crime.[192] Judicial interpretation of "public property" for application of Section 641 has not relied on traditional property rights, allowing courts to apply a more flexible standard

188. 47 U.S.C. § 503(b)(5) (2012).

189. 47 U.S.C. § 151 (2012).

190. *Cf. Am. Library Ass'n*, 406 F.3d at 693, 698.

191. Central Bank of Denver v. First Interstate Bank, 511 U.S. 164 190 (1994); *see also* 18 U.S.C. § 2 (2006).

192. 18 U.S.C. § 641 (2012).

based on the government's intended control of the alleged stolen property.[193] While scholars, engineers, and politicians once debated the wisdom of applying property rights to "the ether" of wireless spectrum,[194] the Communications Act itself leaves little room for doubt about the government's intent to control all channels of radio transmission.[195]

1. Wireless Spectrum Is Public Property, Conversion of Which Violates the Criminal Code

Section 641 of Title 18 of the U.S. Code establishes, "Whoever . . . knowingly converts to his use or the use of another . . . [a] thing of value of the United States . . . shall be fined under this title or imprisoned."[196] When applying Section 641, courts consider two essential factors: the government's intent to exert control over the converted property,[197] and the defendant's bad faith in converting it.[198] The express language of the Communications Act, "to maintain control . . . over all channels of radio communication," satisfies the first factor.[199] The second factor, bad faith, is established as a matter of course when the FCC notifies violators of unauthorized operation and apparent liability for violation of Section 301. Taken together, it is evident that broadcasting without authorization is conversion of public property.

a. The Government's Intent to Exert Control over Spectrum

The clearest element of conversion of public property is the prerequisite of government intent to retain control of the converted resource. After acknowledging that most previous applications of Section 641 had involved government interest in tangible objects, the Fifth Circuit, in *United States v. Evans*, held that "the critical factor in determining the sufficiency of the federal interest in intangible interests . . . is the basic philosophy of ownership reflected in relevant statues and regulations."[200] The Fifth Circuit distinguished *Evans* from *United States v. Farrell*.[201] In *Farrell* the District Court dismissed a Section 641 indictment for theft of a school television after finding "the basic philosophy of the legislation [providing funds to

193. *See* United States v. Evans, 572 F.2d 455, 471 (5th Cir. 1976).
194. SLOTTEN, *supra* note 4, at 6.
195. 47 U.S.C. § 301 (2012).
196. 18 U.S.C. § 641 (2012).
197. *See Evans*, 572 F.2d at 455.
198. *See* Morrisette v United States, 342 U.S. 246 (1952).
199. 47 U.S.C. § 301 (2012).
200. *Evans*, 572 F.2d at 471 (finding liability for theft of government property where the relevant statutes indicated an underlying Congressional intent that the agency in question retain regulatory control of funds to which federal capital contributions were made).
201. *Id.* at 474.

purchase the television] seems to be to place as little federal control as possible over the actual administration of the programs and projects."[202] The Court held that in Section 641 actions "the government must establish a property interest . . . in order to prevail," and dismissed the indictment.[203] The *Evans* Court modified *Farrell's* analysis, describing a dichotomy: for tangible property, such as *Farrell's* stolen television, the government must have "title, possession, or control over the tangible object involved . . . however for intangible interests, the key factor . . . is the supervision and control contemplated and manifested on the part of the government."[204]

Though drafted half a century earlier, Section 301 of the Communications Act speaks directly to the Fifth Circuit's standard for control, establishing that "[i]t is the purpose of this act . . . to maintain control of the U.S. over all channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority."[205] Not only does the Act reserve control of the spectrum for the FCC, it prohibits reassignment of that control in any form but a temporary limited license.

Early in the radio era, there was substantial debate over how spectrum should be managed. At one extreme, advocates called for a private ownership model – as land in the American West had been distributed in the previous century, encouraging investment in an underutilized resource.[206] At the other extreme were concerns that private property rights would enable consolidation of control, yielding an unfair capacity to shape public opinion.[207] At first, the former dominated, and early radio policy was premised on the idea that spectrum belonged to the public and that everybody had a right to access it.[208] However, as early as 1907 officials recognized open access was unworkable, as illustrated in the *Electric World* bulletin in the introduction of this Note.[209] As the 19th century progressed, and radio entered prominence, it became evident that spectrum was a finite resource, in need of regulation for society to extract is maximum potential.[210]

Over the next three decades, Congress steadily tightened federal control of the spectrum. Constraints began with the 1910 Wireless Ship Act, which set the first access priorities, and the Radio Act of 1912, authorizing the Commerce Department to issue operator licenses and to allocate

202. United States v. Farrell, 418 F. Supp. 308, 310 (M.D. Pa. 1976) (finding that a teacher who had stolen a television purchased with federal funds channeled to the local school district was not liable for theft of public property because the legislation granting the funds purposefully delegated control of the funds away from the federal government).

203. *Id.*

204. *Evans*, 572 F.2d at 471.

205. 47 U.S.C. § 301 (2012).

206. SLOTTEN, *supra* note 4, at 6.

207. *Id*.

208. *Id*.

209. *Current News and Notes*, *supra* note 1.

210. SLOTTEN, *supra* note 4, at 6 ("[A]ll citizens might own the ether, but if everyone tried to use it its value would be destroyed.").

spectrum.[211] They progressed to the Radio Act of 1927, which established the FRC, and for the first time assigned particular frequencies to licensees.[212] Ultimately control was consolidated in the FCC by the Communications Act of 1934.[213] The latter legislation established the lasting notion that spectrum access is a privilege granted based on "public interest, convenience, and necessity."[214]

The Fifth Circuit in *Evans* and Pennsylvania's Middle District in *Farrell* each looked to the relevant statute to determine whether the government had manifested intent to control a particular resource when divining whether or not a resource qualifies as government property.[215] Here, there is little doubt from the history and text of the Communications Act that the intent of the 1934 Congress was to maintain "supervision and control" of the wireless spectrum.

b. The Pirate's Bad Faith Intent To Convert Spectrum

The second clear element of conversion of public property is the defendant's bad faith, or intent to convert the property to his own possession. In *Morissette v. United States*, the Supreme Court considered Section 641, warning that if applied to all conversions, without qualification for intent, the provision would extend more broadly than Congress had intended.[216] The Court held that "knowing conversion requires more than knowledge that defendant was taking the property into his possession. He must have knowledge of the facts, though not necessarily the law, that made the taking a conversion."[217] The court distinguished between stealing (taking illegally without intent to return), embezzlement (taking lawfully with unlawful intent not to return), and conversion, which "may be consummated without any intent to keep and without any wrongful taking," to highlight the importance of Section 641's framers' inclusion of "knowing" as a qualification to "conversion."[218]

This important limitation means that Section 641 can apply to spectrum only if a radio pirate broadcasts with knowledge that the spectrum occupied by that broadcast has been lawfully licensed to another broadcaster and is aware of his violation of the Communications Act in derogation of the government's manifest intent to control the spectrum. In *United States v.*

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211. *Id.* at 6-8.

212. *Id.* at 40.

213. Communications Act of 1934, 47 U.S.C. § 605(a) (2012).

214. SLOTTEN, *supra* note 4, at 40.

215. *See* United States v. Evans, 572 F.2d 455, 471 (5th Cir. 1976); *see also* United States v. Farrell, 418 F. Supp. 308, 310 (M.D. Pa. 1976).

216. Morrisette v United States, 342 U.S. 246, 271-72 (1952).

217. *Id.* at 270-71 (finding that it was a question of fact to be determined by a jury, whether a man who collected scrap metal from government property, had done so with or without knowledge that metal had not been abandoned by the government, regardless of whether or not he was aware of the prohibition against collecting it).

218. *See id.* at 271-72.

McPhilomy, the Tenth Circuit held that "good faith is an affirmative defense that would negate the required mental state" for violation of Section 641.[219] With this "good faith" exception, an unauthorized broadcaster who transmits without knowledge of the interference he is causing, or necessity of the license he is operating without, would likely not be liable for violation of Section 641.

While both *Morissette* and *McPhilomy* qualified "conversion" with the requirement of intent, *Morissette* included an additional caveat that cuts against pirates: while guilt for stealing requires intent to wrongfully keep what a defendant has unlawfully taken, "conversion . . . may be consummated without any intent to keep and without any wrongful taking." [220] This caveat eliminates the potential defense of a pirate broadcaster that the interfered-with-spectrum would be "returned" to its lawful owner, in the same state it was in before the conversion, as soon as the transmitter is powered down. Conversion encompasses unlawful use of property regardless of whether a defendant intended to restore the property to its owner.

McPhilomy contemplated an additional criminal violation: Section 1361, which imposes the same penalty as Section 641 for "[w]hoever willfully injures or commits any depredation against any property of the United States . . . ."[221] By interfering with licensed spectrum, a radio pirate diminishes the value of a particular license, and degrades the reliability of the spectrum regulatory system as a whole. In addition, while Section 1361 raises the scienter standard from "knowingly" to "willfully," it also imposes liability for attempted depredation.[222] Section 1361 could enable prosecutors to bring criminal action against would-be radio pirates, or cellular ninjas, who try and fail to transmit illicit broadcasts.

Section 301 of the Act expressly states the government's intent "to maintain the control of the Unites States over all the channels of radio transmission."[223] Although the Act instructs the FCC to "provide use of such channels" it restricts the Commission from conferring "ownership" – thereby retaining control over the spectrum in all circumstances.[224] When a radio pirate transmits unauthorized broadcasts on a portion of the spectrum licensed to another operator, the pirate not only deprives the licensee of his valuable access, but also converts the portion of spectrum from government control to his own use. If the pirate does so with knowledge of the

219. United States v. McPhilomy, 270 F.3d 1302, 1307 (10th Cir. 2001) (finding that defendants who mined for minerals on federal land despite warnings of non-compliance, for failing to wait a required period of time, and failing to pay an annual fee, could be found guilty for violation because they had, beyond a reasonable doubt, not been engaged in a "good faith pursuit of a mining claim").

220. *Morissette*, 342 U.S. at 271-72 (providing as examples: unauthorized use of property lawfully in one's possession; or commingling money taken into a custodian's custody with the custodian's own).

221. *See McPhilomy*, 270 F.3d at 1307 (considering 18 U.S.C. § 1361 (2012)).

222. 18 U.S.C. § 1361 (2012).

223. 47 U.S.C. § 301 (2012).

224. *Id.*

government's intent to control the spectrum, he has acted in bad faith, satisfying the intent requirement of Section 641 and possibly Section 1361.

2. Application of Criminal Liability to Aiders and Abettors of Pirate Radio

If a primary violation is established under Sections 641 or 1361 by satisfying the elements of "public property" elaborated above, prosecutors may be able to establish secondary liability for aiders and abettors of the criminal conversion or depredation of electromagnetic spectrum. Section 2 of the U.S. Criminal Code provides secondary liability for "[w]hoever commits an offense against the United States or aids [or] abets . . . its commission."[225] To determine aiding and abetting liability, courts rely on the construction elaborated by Judge Hand, and applied by the Second Circuit in *Apuzzo*: the defendant must "in some sort associate himself with the venture, that he participate in it as in something he wishes to bring about, [and] that he seeks by his action to make it succeed."[226]

In modern practice, the DOJ has developed a set of four elements to be satisfied when bringing a charge of aiding and abetting: that the accused (1) had specific intent to facilitate the commission of a crime by another; (2) had requisite intent of the underlying substantive offense; (3) assisted in the underlying substantive offense; and finally (4) that someone committed an underlying offense in the first place.[227] The United States Attorneys Manual indicates unanimity among the circuits on this test for criminal liability of an aider and abettor to be convicted as a principal violator of the underlying offense.[228] Like securities violations, the purpose of prosecuting aiders and abettors of unauthorized broadcasting is more deterrence than compensation, justifying the omission of proximate cause from this standard.[229]

With these factors in mind, the FCC can tailor its enforcement protocol to facilitate criminal prosecution of both primary and secondary violators of Section 301. In addition to issuing warning NOUOs to pirate operators, the Enforcement Bureau should make a point of issuing warnings to any known or likely facilitators – including landlords, advertisers, and

225. 18 U.S.C. § 2 (2012).

226. United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).

227. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL: CRIMINAL RESOURCE MANUAL § 2474 (1998).

228. *Id*. (citing United States v. DePace, 120 F.3d 233 (11th Cir. 1997); United States v. Chavez, 119 F.3d 342 (5th Cir. 1997); United States v. Powell, 113 F.3d 464 (3d Cir. 1997); United States v. Sayetsitty, 107 F.3d 1405 (9th Cir. 1997); United States v. Leos-Quijada, 107 F.3d 786 (10th Cir. 1997); United States v. Stands, 105 F.3d 1565 (8th Cir. 1997); United States v. Pipola, 83 F.3d 556 (2d Cir. 1996); United States v. Chin, 83 F.3d 83 (4th Cir. 1996); United States v. Lucas, 67 F.3d 956, 959 (D.C. Cir. 1995); United States v. Spinney, 65 F.3d 231 (1st Cir. 1995); United States v. Spears, 49 F.3d 1136 (6th Cir. 1995); *see also* United States v. Griffin, 84 F.3d 912, 928 (7th Cir. 1996)).

229. SEC v. Apuzzo, 689 F.3d 204, 212 (2d Cir. 2012).

suppliers – establishing knowledge of the underlying Section 301 violation, and providing notice of possible criminal sanctions. In *McPhilomy*, the court emphasized the fact that defendants had not only violated relevant regulations, but had done so after receiving warnings that their continued actions were impermissible.[230]

A possible objection to this tactic is that the existence of a statutory plan specifically addressing spectrum regulation forecloses extension of criminal law to the same category of offenses. The Ninth Circuit has considered this potential conflict regarding the Lacey Act, a statute that has seen little change since its adoption in 1900.[231] The Lacey Act established federal criminal penalties for violations of state and foreign environmental and conservation laws and regulations – regardless of whether or not the underlying offense is criminal or civil in nature.[232] In *United States v. Cameron*, the Ninth Circuit held that "two statutes can govern the same conduct without running afoul . . . [An act] is not interpreted as repealing, superseding, or modifying' the other law, unless the other law reserves exclusive control over the conduct at issue."[233]

Here, there is no conflict between the Communications Act and the Criminal Code. The Act neither reserves exclusive control nor assigns exclusive enforcement authority to the FCC. Rather, the Act explicitly contemplates Section 301 and the Criminal Code working in tandem[234] and delegates litigation authority to the Attorney General to compel compliance.[235] The Act establishes the government's intent to control the wireless spectrum through the FCC, and where the Act's internal provisions are insufficient to maintain that control, the Criminal Code supplies federal prosecutors additional, though perhaps underapplied, tools to crack down on pirates and the aiders and abettors who support them.

V. CONCLUSION: A WATERY GRAVE FOR PIRATE RADIO

On April 8, 2015, FCC Commissioner Michael O'Rielly issued a statement calling for a renewed emphasis on pirate radio enforcement. He declared, radio pirates "are not cute; they are not filling a niche; they are not innovation test beds; and they are not training grounds for future broadcasters . . . . [P]irate radio causes unacceptable economic harm to legitimate and licensed American broadcasters."[236] Between them, the FCC

230. United States v. McPhilomy, 270 F.3d 1302, 1308 (10th Cir. 2001).

231. United States v. Cameron, 888 F.2d 1279 (9th Cir. 1989).

232. Lacey Act of 1900, 16 U.S.C. §§ 3371-78 (2006).

233. *Cameron*, 888 F. 2d at 1284 (finding that criminal penalties of the Lacey act were not in conflict with underlying state laws, because the Act neither augmented, not diminished the scope of the state laws); *see also* United States v. Sohappy, 770 F.2d 816 (9th Cir. 1985).

234. *See, e.g.*, 47 U.S.C. § 312 (2012).

235. 47 U.S.C. § 401 (2012).

236. Michael O'Rielly, *Consider a New Way to Combat Pirate Radio Stations*, FCC BLOG (Apr. 8, 2015, 10:43 AM), http://www.fcc.gov/blog/consider-new-way-combat-pirate-radio-stations.

and DOJ have at their disposal the tools, or the means to acquire the tools, to cut the legs out from beneath unauthorized pirate radio broadcasters once and for all. Liability for aiders and abettors would fundamentally alter the risk calculation of pirate radio enablers, severing relationships that provide essential services, supplies, and content. The effectiveness of this strategy was proven in the U.K., and Congress has demonstrated its tolerance for such tactics in securities regulation enforcement. Though the urgency of securing the AM-FM radio bands may appear diminished as Internet radio has gained prominence, the next wave of pirates is on the horizon, with America's vital advanced wireless networks in their sights. It is essential that the FCC develop methods to secure the wireless spectrum today, in order to encourage development of the wireless technologies for tomorrow. If Congress is unwilling to act, and if the Commission is unable to regulate, together the Enforcement Bureau and DOJ can use existing criminal law to target aiders and abettors of unauthorized broadcasters, landing a decisive blow against the scourge of pirate radio.

If It Isn't Broken, You're Not Looking Hard Enough: Net Neutrality and Its Impact on Minority Communities

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I. INTRODUCTION

A rose by any other name may smell as sweet, but the same is most certainly not true of Internet Service Providers under the authority of the Federal Communications Commission (FCC). In the FCC's garden of regulations, an entity's classification matters more than the substantive characteristics of said entity. By regulating Internet Service Providers (ISPs) under Title I of the Communications Act of 1934, the FCC initially forfeited its right to strongly regulate these entities, leading to a debate that has become one of the most hot-button issues to the American public: net neutrality.

When cogitating on net neutrality, many fail to consider all aspects of the debate, including the effect it has on minority communities. However, it is the unique struggles of these underrepresented communities that make FCC regulation of ISPs necessary. This Note will tackle the Net Neutrality debate by considering the disproportionately negative impact on minority groups that would result from ISPs' discriminatory behavior. While there may be no perfect solution, light must be shed on the unique challenges that minority groups face when dealing with Open Internet issues. There is a very real threat that Internet fast lanes can have a negative impact on the public in the long run, especially on these underrepresented minority communities.

The FCC is responsible for ensuring that telecommunications, cable, and broadcast companies continuously carry out the policies established by the Communications Act of 1934.[1] With the mission of promoting competition to "secure lower prices and higher quality services for American telecommunications consumers," the Telecommunications Act of 1996 ("1996 Act") gave the FCC both the responsibility and the means to ensure innovation and the continued deployment of new telecommunications technology.[2]

The Internet has rightfully been credited for the accelerated innovation that characterizes this generation, and this innovation must be protected as it continues to grow and contribute to the United States economy. Net neutrality is the general concept that ISPs should enable access to all content and applications equally, regardless of the source, without favoring or blocking particular online services or websites. Simply put, the company that connects you to the Internet should not be able to control what you do on the Internet or how you do it. The net neutrality

1. *See* 47 U.S.C. § 151 (2012).

2. Telecommunications Act of 1996, Pub. L. No. 104-104, pmbl., 110 Stat. 56, 56; *see* 47 U.S.C. § 1302 (2012) (directing the FCC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment").

policy debate must work to foster continued innovation and progress to the public as a whole, which includes our silenced communities and not just the loud majority.

Bringing broadband providers (ISPs) under the authority of the FCC via Title II regulation is a controversial yet necessary move to prevent a disproportionate negative impact on minority communities who have categorically been underrepresented in the media. The courts have confirmed that the FCC does not have authority to enforce strong net neutrality rules on ISPs as Title I entities. Because of this, protecting minority communities can only be adequately done by reclassifying ISPs as Title II entities.

Minority communities in the United States are categorically underrepresented in the media because of a disproportionately low number of opportunities and financial resources. The Internet is currently the primary means for minority communities to have their voices heard. Without an open Internet, their presence in both traditional and new Internet-based media will remain disproportionately underrepresented. Further, minority groups are often negatively stereotyped in the media, which furthers the negative impacts these particular groups face. Net neutrality ensures an open Internet for which minority groups can equally and fairly be heard.

Bringing ISPs under Title II regulations but only subjecting them to certain regulations (forbearance) will promote innovation and equality while also keeping the "open Internet" as open and unregulated as possible. This modified regulatory control over ISPs will also allow the FCC to ensure that minority communities do not suffer a disproportionately negative impact as their primary means of participating in the media will continue to be protected.

While the FCC has taken bold moves to regulate ISPs, the issue of zero-rating, or not charging users for using particular web-based applications, has not been fully addressed. Part II will discuss the path the FCC has taken through net neutrality while Part III of this Note will delve into the impact on minority communities as well as the validity of zero-rating as an option going forward.

II. BACKGROUND AND LEGAL HISTORY

A. The FCC and the Development of Net Neutrality

The Communications Act of 1934 put an end to the Federal Radio Commission and created the FCC to regulate interstate and foreign communication by wire or radio.[3] The Communications Act of 1934 also

3. *See* Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified in scattered sections of 47 U.S.C.).

created title classifications, with Title II subjecting common carriers to stricter regulatory control under the FCC.[4]

The distinction between what was and was not regulated under Title II first came in 1980 with the *Computer II* regime.[5] The Commission drew a line between "basic" services which purely involved the transmission of information and were subject to Title II common carrier regulations and "enhanced" services which involved the processing of said information and were not subject to Title II.[6]

The *Computer II* regime continued for more than twenty years until 1996, when the Communications Act underwent its biggest overhaul since its enactment with the passage of the Telecommunications Act of 1996.[7] Congress designed the 1996 Act to open up the market and foster competition by removing unnecessary barriers to entry into the market.[8] In removing these barriers, the 1996 Act was aimed at increasing competition and sparking innovation in a fast-paced and ever-changing field.[9] Further, the 1996 Act defined telecommunication services as what was formerly "basic" services and defined information service providers as what was once known as "enhanced" services.[10]

With this newfound purpose, however, the FCC was faced with several important decisions that would have a deeper impact on its regulatory scheme than it could have ever imagined. The FCC also chose to codify its longstanding distinction between telecommunications service and information service.[11] In what many consider a game-changing decision, the FCC chose to classify broadband cable service (ISPs)[12] as an information service rather than a telecommunication service.[13] This excused ISPs from the stricter regulatory control of Title II common carriers and instead

4. *See id.* §§ 201-21.

5. *See generally* Amendment of Section 64.702 of the Comm'n's Rules & Regs. (Second Computer Inquiry), *Final Decision*, 77 F.C.C.2d 384 (1980).

6. *See id.* at paras. 5-7, 96-97.

7. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56; *see* Nicholas Economides, *The Telecommunications Act of 1996 and Its Impact*, ECONOMICS OF NETWORKS (Sept. 1998), http://www.stern.nyu.edu/networks/telco96.html.

8. Telecommunications Act § 101, 47 U.S.C. §§ 251-261 (2012).

9. Telecommunications Act pmbl.

10. 47 U.S.C. § 153(24), (50), (51), (53); *see* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 976-77 (2005).

11. Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facils., *Declaratory Ruling*, 17 FCC Rcd 4798, para. 34 (2002); *see also* Appropriate Framework for Broadband Access to the Internet over Wireline Facils., *Report and Order*, 20 FCC Rcd 14853, para. 13 (2005).

12. *Definition of: Broadband*, PC MAG, http://www.pcmag.com/encyclopedia/term/38932/broadband (last visited Jan. 24, 2016) (defining "broadband" as "high-speed transmission . . . [and] commonly refers to Internet access through a variety of high-speed networks, including cable"); *Definition of: ISP*, PC MAG, http://www.pcmag.com/encyclopedia/term/45481/isp (last visited Jan. 24, 2016) (defining "ISP," an acronym for "Internet Service Provider," as "an organization that provides access to the Internet").

13. Appropriate Framework for Broadband Access to the Internet over Wireline Facils., *supra* note 11, at para. 14.

subjected them to Title I regulation.[14] This allowed for media cross-ownership, as Congress intended, as phone, cable, and internet providers converged.[15] In bringing all of these providers together, some feel that power in the field was consolidated into fewer big players, leading to less innovation and undercutting the goals of the 1996 Act.[16] However, it is important to note the opposite stance. With cable companies now providing phone services or companies like Verizon now offering new services that their competitors did not, competition in these fields increased, leading to innovative technologies and solutions in an ever-changing field.[17]

The Supreme Court upheld the FCC's decision not to regulate ISPs under Title II almost ten years later in *National Cable and Telecommunications Ass'n v. Brand X Internet Services*.[18] The Court held that the FCC's intended purpose in its classification was to promote innovation and entry into the broadband market, which was best achieved by treating cable service providers differently because of the current market conditions.[19] Brand X had argued that the FCC should classify broadband cable internet access as a common carrier, regulated under Title II, but the Court applied *Chevron* deference[20] to the Commission's decision.[21] With the Supreme Court providing the final, definitive word on the matter, ISPs were able to evade the tighter restrictions of Title II regulation.

In 2005, the FCC then released an Internet Policy Statement, to "ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers."[22] The Statement adopted the following principles:

> To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to access the lawful Internet content of

14. *Id.* at para. 102.

15. Telecommunications Act of 1996, Pub. L. No. 104-104, §§ 301-302, 110 Stat. 56, 114-18.

16. *Fighting Media Consolidation*, FREE PRESS, http://www.freepress.net/media-consolidation (last visited Jan. 13, 2016).

17. Larry Pressler, *Reflecting on Twenty Years under the Telecommunications Act of 1996*, 68 FED. COMM. L.J. 52, 52-53 (2016).

18. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1000-01 (2005) (holding that the FCC is entitled to change its mind in regards to cable Internet service treatment because the FCC provided a reasonable explanation for its actions).

19. *Id.* at 1001-02.

20. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844-45 (1984).

21. *Brand X*, 545 U.S. at 1003-05 (Breyer, J., concurring) (explaining that agency action is entitled to *Chevron* deference when Congress delegates the authority to fill any "statutory" gaps that may arise to the agency); *see also Chevron*, 467 U.S. at 843-44. This is important to keep in mind as the courts must also uphold any future decisions the FCC makes and grant it the same deference, making it hard for ISPs to win claims against the FCC should they disagree with net neutrality decisions made.

22. Appropriate Framework for Broadband Access to the Internet over Wireline Facils., *Policy Statement*, 20 FCC Rcd 14986, para. 4 (2005).

> their choice, . . . to run applications and use services of their choice, subject to the needs of law enforcement . . . , to connect their choice of legal devices that do not harm the network . . . , [and to promote] competition among network providers, application and service providers, and content providers.[23]

In 2010, the District of Columbia Circuit confined the FCC to its previous decision yet again in *Comcast Corp. v. FCC*.[24] The FCC, claiming its authority from the Communications Act of 1934, attempted to condemn and censure Comcast for interfering with its subscribers' use of peer-to-peer software.[25] However, the District of Columbia Circuit held that the FCC could not extend their control over Comcast, because the FCC previously classified ISPs as information services, limiting the extent of regulations it could apply.[26] The Court explained that, while the FCC has authority to modify its regulations and *Chevron* deference will apply to its new interpretation of the Act, the FCC does not have the authority to go beyond its own classification and regulate Title I information service as if they are Title II common carriers.[27]

In May 2010, Julius Genachowski, then chairman of the FCC, proposed a "third way" to reclassify Internet services as telecommunications services to bring them back under the regulatory control of the FCC.[28] The proposed reclassification would prohibit ISPs from discriminating against certain websites, users or applications while prohibiting the FCC from regulating the content and services that said sites provide.[29] This approach allowed the FCC to play its essential yet limited role in the development of broadband communications.[30]

Opponents of this proposal, including large telecommunication companies like Comcast and Verizon, highlighted the contradictory nature of the FCC's justification.[31] The FCC previously argued a completely opposite view to the Court when it originally chose to classify ISPs as Title I entities.[32] These companies believe allowing the FCC to switch its views

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23. *Id.* at para. 4.

24. Comcast Corp. v. FCC, 600 F.3d 642, 661 (D.C. Cir. 2010).

25. *Id.* Comcast chose to block BitTorrent on its network, which the FCC responded by opening an investigation of Comcast's practices after several groups, including Public Knowledge and Free Press, filed grievances. The FCC then ordered Comcast to stop discriminating against BitTorrent and Comcast appealed.

26. *Id.*

27. *Id.* (explaining that Commission authority to create and modify regulations within its statutory power does not then extend to authority to go beyond said regulations).

28. Edward Wyatt, *F.C.C. Proposes Rules on Internet Access*, N.Y. TIMES (May 6, 2010), http://www.nytimes.com/2010/05/07/technology/07broadband.html. This proposal also placed limits on the FCC's regulatory authority.

29. *Id.*

30. *See generally* Preserving the Open Internet, *Report and Order*, 25 FCC Rcd 17905 (2010) [hereinafter *2010 Order*].

31. Wyatt, *supra* note 28.

32. *Id.*

so easily would only lead to confusion and inhibit innovation in the future.[33] FCC Chairman Genachowski's proposal however, is fully permissible under the Court's ruling in *Brand X* as the Supreme Court ruled that the FCC has authority to modify its regulations as it sees best fit so long as it justifies the modification.[34]

The FCC decided against the proposed regulations but claimed authority under Section 706 of the 1996 Act to issue the *2010 Open Internet Order* (2010 Order), which took effect in November 2011 and tackled the issue of net neutrality[35] head on.[36] In enacting the 2010 Order, the FCC continued its pursuit of an innovative and open forum for its users.

The 2010 Order created two classes of Internet access: fixed-line providers, which were subject to aggressive net neutrality regulations; and wireless networks, which were handled with a more lenient approach as their technical limitations constrained them.[37] Under the 2010 Order, both classes of Internet access are subject to the Transparency Clause, requiring disclosure of network management practices, as well as terms and conditions of services.[38] Both classes of Internet access are also subject to the No Blocking Clause with fixed-line providers subject to more restraints.[39] Lastly, only fixed-line providers were subject to the No Unreasonable Discrimination provision, which applies in the transmission of lawful network traffic.[40]

The District of Columbia Circuit reeled in the FCC's authority to regulate Title I information services in *Verizon v. FCC*, in which Verizon pushed back against the FCC's attempt to again regulate ISPs with its 2010 Order.[41] The Court found the FCC's anti-discrimination and anti-blocking rules to impose per se common carrier obligations to ISPs, which the Court already held were exempt from common carrier treatment.[42] Losing the biggest battle yet in the fight for net neutrality, the FCC took a major hit

33. *Id.*

34. *Id.*; *see also* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1000-01 (2005).

35. *See generally A Timeline of Net Neutrality*, PUB. KNOWLEDGE, http://whatisnetneutrality.org/timeline (last visited Jan. 13, 2016).

36. 47 U.S.C. §1302(a) (2012) (authorizing the FCC to enact measures encouraging the deployment of broadband infrastructure, including the promulgation of rules governing ISPs treatment of Internet traffic); *2010 Order*, *supra* note 30, at para. 117.

37. *2010 Order*, *supra* note 30, at paras. 49, 93-96. For many, access to both fixed-line *and* wireless net services is simply not an option and this growing trend calls for the FCC to shift its focus on the arbitrary distinction to a means that will regulate the open Internet to keep it open.

38. *Id.* at app. A, § 8.3 (to be codified at 47 C.F.R. § 8.3).

39. *Id.* at app. A, § 8.5 (to be codified at 47 C.F.R. § 8.5).

40. *Id.* at app. A, § 8.7 (to be codified at 47 C.F.R. § 8.7).

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

42. *Id.* at 657-59 (vacating the anti-discrimination and anti-blocking rules imposed on ISPs because the FCC treated them like Title II common carriers instead of Title I information services).

when the Court reaffirmed that the 2010 Order applied only to common carriers, which did not include ISPs.[43]

B. After Extensive Debate, the FCC Enshrined Net Neutrality in the Open Internet Order

The FCC was left with minimal means to regulate ISPs under Title I and arguably needed to reconsider its classifications to regain a grip on net neutrality. Otherwise, many feared that large ISPs like Comcast and Verizon would be left to control the not-so-open Internet in the way that they deem fit.[44] While many argue that the FCC could impose some net neutrality rules without regulating under Title II, companies like Verizon have admitted that the FCC's regulations under the 2010 Order were the only thing preventing them from violating net neutrality principles in the past.[45] Meaning, without a leash to pull them back in, ISPs would push the boundaries as far as they could while technically still staying within the limits.

Many also fear that this will lead to the introduction of Internet fast lanes being sold to companies that can afford them, leaving smaller companies and start-ups in the dust of slow Internet speed.[46] By imposing this financial hurdle on smaller start-up companies with less means than large ISPs and large content companies, innovation will suffer.

Further, large content providers like Netflix that buy up these fast lanes from large ISPs will have to eventually pass on the financial burden to their users, meaning that consumers will be forced to pay more to get the same services they are getting now.[47] This may not mean as much for some users, but for those that already struggle to afford means to the Internet, this could have an exponentially detrimental effect.[48]

Under its 2014 *Notice of Proposed Rulemaking*, the FCC sought to find authority under Section 706 of the 1996 Act to regulate ISPs.[49] The FCC also reconsidered Title II reclassification, but expressed hesitation to do so until recently.[50] With opposing sides pulling at different directions, the

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43. *Id.* The Court only upheld the Transparency Clause as it pertained to ISPs under Title I.

44. Barbara van Schewick, *Is the Internet About To Get Slooooooow?*, CNN (Sept. 10, 2014, 11:23 AM ET), http://www.cnn.com/2014/09/10/opinion/van-schewick-Internet-slowdown.

45. *See* Verizon v. FCC, 740 F.3d 623, 646 (D.C. Cir. 2014) (emphasis added) (citing Transcript of Oral Argument at 31, *Verizon*, 740 F.3d 623 (No. 11-1355)) ("[A]t oral argument, Verizon's counsel announced that '*but for [the Open Internet Order] rules* [sic] we would be exploring [paid prioritization] arrangements.'").

46. Van Schewick, *supra* note 44; *see also* Doug Gross, *"Pay to Play" on the Web?: Net Neutrality Explained*, CNN (Jan. 15, 2014, 7:17 PM ET), http://www.cnn.com/2014/01/15/tech/web/net-neutrality-explained.

47. Gross, *supra* note 46.

48. Van Schewick, *supra* note 44.

49. Protecting & Promoting the Open Internet, *Notice of Proposed Rulemaking*, 29 FCC Rcd 5561, para. 142 (2014) [hereinafter *2014 Open Internet NPRM*].

50. *Id.*

FCC focused on the importance of an open Internet for all and made a decision that balances the demands of conglomerate ISPs with a wide spectrum of consumers.[51]

Added difficulty lies in the expansive range of consumers affected by the FCC's decisions.[52] While some may be unaffected regardless of the FCC's recent decision, some populations, like minority communities, have a lot to lose. Without FCC intervention, the open and fair Internet that net neutrality promises could cease to exist and the reality of equal access to the Internet will come to an end.

On November 10, 2014, President Barack Obama took a clear stand on net neutrality, further pressuring the FCC to reclassify ISPs as Title II common carriers to regulate the large ISPs that threaten the continuing existence of an open and fair Internet.[53] Though the media has attempted to portray President Obama and FCC Chairman Tom Wheeler as adversaries in the net neutrality debate, the reality is that Chairman Wheeler's views seem to align more with the President's than not.[54] Despite the extraordinary complex and important nature of net neutrality, it is in the hands of the FCC alone to resolve.[55]

C. In the Matter of Protecting and Promoting the Open Internet

On April 13, 2015, the FCC published its final rules on Net Neutrality, which took effect on June 12, 2015.[56] The FCC's *2015 Open*

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51. *See generally 2014 Open Internet NPRM*, *supra* note 49.

52. Gigi B. Sohn, *FCC Releases Open Internet Reply Comments to the Public*, FCC BLOG (Oct. 22, 2014, 4:07 PM), https://www.fcc.gov/news-events/blog/2014/10/22/fcc-releases-open-internet-reply-comments-public. The Commission eventually received nearly four million comments regarding the *2014 Open Internet NPRM*. Jon Sallet, *The Process of Governance: The FCC & the Open Internet Order*, FCC BLOG (Mar. 2, 2015, 3:22 PM), https://www.fcc.gov/news-events/blog/2015/03/02/process-governance-fcc-open-internet-order.

53. Ezra McHaber, *President Obama Urges FCC to Implement Stronger Net Neutrality Rules*, WHITE HOUSE: BLOG (Nov. 10, 2014, 9:15 AM ET), http://www.whitehouse.gov/blog/2014/11/09/president-obama-urges-fcc-implement-stronger-net-neutrality-rules.

54. Tony Romm, *FCC's Wheeler in Step with Obama on Net Neutrality*, POLITICO (Jan. 7, 2015, 9:41 PM), http://www.politico.com/story/2015/01/tom-wheeler-net-neutrality-114069.html.

55. Administrative Procedure Act § 2, 5 U.S.C. § 551 (2012) (entitling congressionally created administrative agencies of the federal government to promulgate rules in regards to the Agency's expertise); *see also* 5 U.S.C. § 706 (2006). Section 706(1)(A) defines the scope of review to be used when evaluating agency decisions. An agency decision may only be overturned if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" by the reviewing court. An agency's action may not simply be overturned because the reviewing court, or even the President, disagrees with it. Instead, an agency's rule promulgation is given extreme deference. *See generally* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). It is therefore, fair to say that it is solely up to the FCC to resolve the issue of net neutrality as it sees best fit.

56. Protecting and Promoting the Open Internet, 80 Fed. Reg. 19738 (Apr. 13, 2015) (to be codified at 47 C.F.R. pts. 1, 8, 20).

Internet Order prevents blocking, throttling, and paid prioritization by broadband providers to promote enhanced transparency and prevent unreasonable interference with consumers and edge providers.[57]

As Chairman Wheeler pointed out, the Order, although imposing more regulation than the FCC initially intended, the product of over four million comments from the American people.[58] The FCC heard Americans' concerns and responded. The FCC has only implemented nine sections of Title II regulations.[59] The portions of Title II being implemented are targeted at consumer protection, promoting competition, and advancing universal access to the internet.[60] The FCC explains why it cannot easily change the rules that the *2015 Open Internet Order* has put into motion within the 400 pages of the Order itself.[61] It is finally important to note that the FCC undertook a lengthy and complicated rulemaking process before issuing its *2015 Open Internet Order*.[62] The FCC would have to follow the same process in the future if it had any plans of applying more provisions of Title II – this process is a safeguard against any more invasive future FCC action.[63]

Some also fear an eventual expansion in the FCC's power to regulate with the adoption of more Title II provisions and broadband providers are skeptical of the FCC's actions. Many believe that the FCC's Order gives the Commission power to set rates and impose tariffs on broadband service, eventually increasing the cost of service, decreasing innovation and discouraging the creation of new networks.[64]

Though the FCC's new net neutrality regulations are a significant step in the right direction, they are not without objection. The United States Telecom Association, an ISP consortium, recently lost an appeal seeking to enjoin enforcement of the *Open Internet Order* filed mere minutes after it was published in the Federal Register.[65] The group claimed, and the Court rejected, that the new rules violated federal law and that the FCC's actions

57. *Id.*

58. Protecting and Promoting the Open Internet, *Report and Order on Remand*, 30 FCC Rcd 5601, 5914 (2015) [hereinafter *2015 Open Internet Order*] (statement of Chairman Wheeler).

59. Marguerite Reardon, *13 Things You Need To Know about the FCC's Net Neutrality Regulation*, CNET (Mar. 14, 2015, 5:00 AM PDT), http://www.cnet.com/news/13-things-you-need-to-know-about-the-fccs-net-neutrality-regulation/. The FCC is omitting more than 700 Commission rules and regulations. *2015 Open Internet Order*, *supra* note 58, at para. 3.

60. Protecting & Promoting the Open Internet, 80 Fed. Reg. at 19744.

61. Reardon, *supra* note 59. In detailing its rationale for the adoption of Title II regulations, the FCC also effectively created a record which can be used against it to prevent future action by the Agency.

62. *See id.* (describing the intricacies of notice-and-comment rulemaking).

63. *See id.*

64. *Id.*

65. Don Reisinger, *Net Neutrality Laws Get Published – Let the Lawsuits Begin*, CNET (Apr. 13, 2015, 1:52 PM PDT), http://www.cnet.com/news/fccs-net-neutrality-rules-hit-federal-register-lawsuit-underway/. *See also generally* Supplemental Petition for Review, U.S. Telecom Ass'n v. FCC, No. 15-1063, 2016 WL 3251234 (D.C. Cir. June 14, 2016).

were "arbitrary, capricious and an abuse of discretion."[66] Several parties, including Public Knowledge, filed motions for leave to intervene, standing up to support the FCC as it defended its *Open Internet Order* in the District of Columbia Circuit. [67] Despite this action, and several others to come, the FCC stands strongly by its net neutrality rules as it pushes forward towards an open and fair Internet for all,[68] a stance supported by the District of Columbia Circuit.[69] The impact of the *U.S. Telecom* decision signifies the Court's willingness to embrace the FCC's net neutrality regulations and its continued discouragement of all content discrimination on behalf of broadband providers.[70] It is a step in the right direction, but the opposition's existence in itself demonstrates the substantial legal challenges net neutrality continues to battle.

D. Minority Groups Are Categorically Underrepresented in the Media

It comes as no surprise that minority communities are underrepresented in the media, especially in mainstream sitcoms, which feature largely homogenous characters and casts.[71] While diversity in media programming has increased, it is not doing so fast enough. Several factors contribute to this underrepresentation, including a lower proportion of the general population as well as the negative characterization of minority communities in the media.

The Ralph J. Bunche Center for African American Studies at UCLA conducted a study to draw attention to the disparity in minority representation in the media, both on screen and behind the scenes.[72] In 2011, minorities portrayed only 10.5% of the lead roles in 172 reviewed films despite the fact that, in 2010, minorities made up 36.3% of the U.S. population.[73] This means that even taking their proportionate presence in the total population into consideration, minorities were underrepresented a

66. Supplemental Petition for Review at 2, *U.S. Telecom Ass'n*, 2016 WL 3251234 (No. 15-1063).

67. Motion for Leave to Intervene, *U.S. Telecom Ass'n*, 2016 WL 3251234 (No. 15-1063).

68. *See, e.g.*, Dave Calpito, *FCC Defends Net Neutrality in Court as ISPs Continue to Challenge Its Authority*, TECH TIMES (Dec. 7, 2015, 4:35 AM EST), http://www.techtimes.com/articles/113819/20151207/fcc-defends-net-neutrality-in-court-as-isps-continue-to-challenge-its-authority.htm.

69. *See U.S. Telecom Ass'n*, 2016 WL 3251234. *See also* Jonathan H. Adler, *Divided D.C. Circuit Upholds FCC "Net Neutrality" Rule*, WASH. POST (June 14, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/06/14/divided-d-c-circuit-upholds-fcc-net-neutrality-rule/.

70. *See U.S. Telecom Ass'n*, 2016 WL 3251234.

71. *See Media Diversity: Frequently Asked Questions*, LEADERSHIP CONF. ON CIVIL AND HUMAN RIGHTS, http://www.civilrights.org/action_center/media-diversity/faq.html (last visited Feb. 14, 2016).

72. DARNELL HUNT ET AL., RALPH J. BUNCHE CTR. FOR AFRICAN AM. STUDIES AT UCLA, 2014 HOLLYWOOD DIVERSITY REPORT: MAKING SENSE OF THE DISCONNECT 5 (2014).

73. *See id.* at 6.

factor of more than three to one.[74] The movies in which minorities filled the lead roles were primarily ethnic-targeted films, although some were more mainstream.[75]

In a further breakdown of each of the studied films, each individual film also underrepresented minorities in the featured cast. In more than half of the films, minorities constituted less than 10% of the cast.[76] In fact, only an astonishing 2.3% of the films featured a number of minorities proportionate to their U.S. population.[77] And again, most of these films targeted smaller niche minority groups.[78]

This pattern of underrepresentation carries on behind the scenes as well. Minorities directed only about 12% of the studied films, with a majority of these films being marketed to minority groups.[79] In regards to film writers, minorities made up only 7.6% of the total group, at a shocking five-to-one ratio.[80] Again, a majority of these positions were linked to films targeting minority groups.[81]

The numbers for minorities are even worse in regards to television contribution. In 2011, minority actors made up a shockingly low 5.1% of lead roles in broadcast dramas and comedies and 14.7% in cable dramas and comedies.[82] Compared to the total population, this means that minorities were underrepresented by a ratio of seven-to-one in broadcast and two-to-one in cable.[83] This trend of higher representation in cable as compared to broadcast is also true of minorities in reality shows and the number of minority creators.[84] Additionally, minorities directed less than 10% of episodes in more than 70% of both broadcast and cable comedies and dramas.[85] Most recently, the lack of minority representation in the Oscars has been dominating the news as films like *Selma*[86] failed to receive the

74. *See id.*

75. *See id.* (naming titles such as Tyler Perry's *Madea* series and *Jumping the Broom*, which target minority communities, as well as mainstream-oriented films like *Columbiana* and *Fast Five*).

76. *Id.* at 6-7. Additionally, only 11% to 20% of the featured cast featured minorities in more than 22% of the studied films.

77. *Id.*

78. *Id.*

79. *Id.* For example, *Tyler Perry* films as well as *Apollo 18*.

80. *Id.*

81. *Id.*

82. *Id.* at 8.

83. *Id.*

84. *Id.* at 9-10, 12.

85. *Id.* at 15.

86. *Selma* tells the story of voting rights marches that occurred between Selma and Montgomery in the 1960's and is described as a mix of a drama and documentary. Selma, INTERNET MOVIE DATABASE, http://www.imdb.com/title/tt1020072 (last visited Jan. 13, 2016). It received four nominations, including a win for Best Original Song, at the Golden Globes. *See id.* It also received two nominations at the 87th Academy Awards, including a win for Best Original Song, startling critics nationwide due to its box office success and critical acclaim. *See id.*

nominations many believed it deserved.[87] Similarly, minorities are less likely to win an Emmy, especially if they are cast in a cable series with other minority cast members.[88]

The statistics have remained at a static low in the last year as well.[89] In 2012, a USC study found that African Americans only played 10.8% of movie roles, Asians only played 5%, and other minority groups only played 3.6%.[90] Unfortunately, one thing that studies all agree on is that minority communities have categorically been underrepresented in film and television, and continue to be underrepresented, even when their proportion in the total U.S. population is taken into consideration.[91] As history tends to repeat itself, minority communities will face the same underrepresentation without the FCC's presence in the net neutrality issue.

III. ANALYSIS

The question that remains is, why does an open Internet matter? Is it really that beneficial to protect net neutrality? If so, who is benefitting? The FCC's decision to reclassify ISPs as common carriers and bring them under Title II classification to protect net neutrality is especially important to minority communities. Minority communities are categorically underrepresented in the media because of a disproportionately low number of opportunities and financial resources.[92] Without the continuance of an open Internet, their presence in the media will remain disproportionately underrepresented.

A. The FCC Was Correct to Reclassify Broadband Companies as Common Carriers to Protect and Ensure Net Neutrality

Many wonder why the Internet must be changed if it is currently "open" and "fair"? If things are seemingly going fine as they stand, why should the FCC expend valuable time and money to change it? Why not allow the open Internet to continue regulating itself?[93] Simply put, if it is not broken, why fix it? The reality is that the Internet may not be broken, but it is quickly breaking; and we cannot simply wait around for it to completely

87. *See* David Carr, *Why the Oscars' Omission of "Selma" Matters*, N.Y. TIMES (Jan. 18, 2015), http://www.nytimes.com/2015/01/19/business/media/why-the-oscars-omission-of-selma-matters.html (focusing on the importance of recognizing and celebrating such a historical and creative achievement, especially as it pertains to minority communities).

88. HUNT, *supra* note 72, at 19, 21.

89. Rebecca Keegan, *USC Study: Minorities Still Under-Represented in Popular Films*, L.A. TIMES (Oct. 30, 2013), http://articles.latimes.com/2013/oct/30/entertainment/la-et-mn-race-and-movies-20131030.

90. *Id.*

91. *See id.*

92. *See Proposed Combination of Comcast and NBC/Universal: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 2, (2010) (statement by Darnell M. Hunt, Director, Ralph J. Bunche Center for African American Studies).

93. *See 2015 Open Internet Order*, *supra* note 58, at para. 8.

shatter – the Internet will not remain open if left to its own devices.[94] The FCC must step in to fulfill its obligation to ensure that ISPs continue to play the game fairly. The FCC was right to rely on Title II reclassification of ISPs to protect and ensure Net Neutrality because their authority under Section 706 of the Telecommunications Act is not sufficient to do this on its own.[95]

As it stands, content providers (ranging from streaming sites like Netflix and YouTube to sites like Amazon and Google) pay ISPs to deliver their content to users every day.[96] However, ISPs like Comcast and Verizon began to interfere with Internet speeds and had slowed down certain websites.[97] During negotiations with Netflix, Comcast slowed download speeds by more than 20%, with speeds skyrocketing back up by more than 40% after Netflix agreed to Comcast's higher fees.[98] This is certainly not a coincidence and this is exactly how the Internet is beginning to break.

This Note emphasizes the importance of the FCC's actions to reclassify ISPs as Title II common carriers, bringing them under stricter FCC control. However, there is inarguable support for the FCC limiting its regulatory control. Normally, Title II classification would allow the FCC to regulate ISPs in the same way that telephone companies were once regulated.[99] It is important to remember, however, that although the FCC has ample authority, it is not required to use all of it when regulating.[100] To ensure the success of net neutrality reform, the FCC will need to refrain from treating ISPs exactly like phone companies of the 1980s. In order to limit its authority, the FCC must first be sure that it has such authority.

While Section 706 grants the FCC authority to regulate broadband deployment, it does not give them the authority to go beyond other provisions of the 1996 Act.[101] The FCC simply cannot regulate non-

94. Michael Weinberg, *But for These Rules…*, PUBLIC KNOWLEDGE (Sept. 10, 2013), https://www.publicknowledge.org/news-blog/blogs/these-rules. Verizon admitted its interest in entering into agreements with edge providers (namely, websites) in oral arguments. Net neutrality rules are admittedly the only thing keeping ISPs like Verizon "from turning the Internet into cable TV."

95. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

96. Reuters, *FCC Looking into Slow Internet Download Speeds By Reviewing Agreements between Netflix, Internet Service Providers*, N.Y. DAILY NEWS (Jan. 13, 2014, 7:38 PM), http://www.nydailynews.com/news/politics/fcc-slow-Internet-download-speeds-article-1.1829348.

97. Max Ehrenfreund, *This Hilarious Graph of Netflix Speeds Shows the Importance of Net Neutrality*, WASH. POST: WONKBLOG (Apr. 24, 2014, 11:20 AM), http://knowmore.washingtonpost.com/2014/04/25/this-hilarious-graph-of-netflix-speeds-shows-the-importance-of-net-neutrality/.

98. *Id.*

99. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064; *see* Romm, *supra* note 54.

100. *Id.*

101. S. Derek Turner & Matt Wood, *Wonkblog Gets It Wrong: The FCC's Shrinking Authority Isn't Enough to Save Net Neutrality*, FREE PRESS (Jan. 16, 2014), https://www.freepress.net/blog/2014/01/16/wonkblog-gets-it-wrong-fcc's-shrinking-authority-isn't-enough-save-net-neutrality.

common carriers as common carriers.[102] The FCC was correct in classifying ISPs as common carriers, therefore bringing them under Title II classification, in order to fully utilize the authority it derives from Section 706.[103]

B. What Net Neutrality Means for Minority Communities

So what does this all mean? Why does it matter that these populations are underrepresented in the media? What does it have to do with net neutrality? While many of us see the Internet as a luxury, for others it is a necessity. For many, especially those in underrepresented minority communities, an open Internet is the only chance at having their voices heard and their communities represented. For many, traditional media has failed them and has even done them injustice in the way it represents them. For many, it is in their own hands to fix a problem that is prevalent everywhere we look today. For many, it has everything to do with net neutrality.

On September 17, 2014, the Senate Judiciary Committee held a hearing on net neutrality where it heard testimony from a panel of individuals with varying views and stakes in the matter.[104] Independent producer, writer and actress Ruth Livier spoke about the special set of challenges that minority entertainers face in today's media.[105] As an American Latina, Livier shared a common feature with many other minorities in the industry: she was faced with immediate skepticism and overall disinterest, and no one cared about her story.[106] Livier was not the first, nor will she be the last, member of a minority community to experience such adversity because such skepticism only grows stronger as it continues.[107] As the general population accepts such inequality more easily, it becomes the norm and continues to grow in force.[108] As it grows and spreads, it unfortunately becomes harder and harder to change.[109]

Even worse, minority communities are often times represented in negative and stereotypical ways, leading to further normalization of inequality in the media.[110] Dr. Darnell Hunt explains this concept as a cyclical and strengthening chain of events that begins and ends with the

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102. *Id.*

103. *See generally* Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014) (ruling that the FCC could not regulate ISPs as Title II common carriers if the agency had classified them as Title I information services).

104. *Why Net Neutrality Matters: Protecting Consumers and Competition through Meaningful Open Internet Rules: Hearing Before the S. Comm. on the Judiciary*, (Sept. 17, 2014) [hereinafter *Why Net Neutrality Matters*] (statement of Ruth Livier, writer, independent producer, and actress).

105. *Id.*

106. *Id.*

107. HUNT, *supra* note 72, at 5.

108. *Id.*

109. *Id.*

110. *Id.*

"circulation of outrageously insensitive and offensive portrayals of minorities."[111] Regardless of the instant outrage that follows, minorities have continuously been viewed in stereotypical and negative lights when they are represented at all.[112] This kind of behavior teaches society to view minorities as less than others, as nothing more than stereotypes to poke fun at.[113] This system forces minority communities into the shadows, with their stories at the mercy of others to tell.[114]

Because of this cycle of underrepresentation and misrepresentation, people like Livier have turned to the open Internet as a soundboard for their underrepresented voices.[115] Regardless of income disparity or access to means, everyone can use the Internet on a level playing field, including (and arguably most importantly) minority communities.[116] This trend towards online media is rooted in minimal barriers to entry, which in turn minimizes the costs associated with production and distribution of material.[117] For the first time, minorities had an opportunity to make their stories available to the public without "their visions diluted by corporate gatekeepers."[118] This is exactly why net neutrality matters to minority communities: it gives a voice to the silenced.

The open Internet has proven to be the most equal playing field for minority communities in the media. Due to this open platform, minorities have not only been able to further their own careers in the field, but have also created jobs for support staff.[119] In expanding their reach, minority communities have been able to portray their stories in a more accurate and meaningful way, rid of all the negative stereotypes.[120] In addition, an open Internet extends to minority users as well, allowing them to connect with the content they can now access more easily online.[121] Livier explains the importance of building this kind of community: a support system that

111. *Proposed Combination of Comcast and NBC/Universal*, *supra* note 92. Dr. Hunt explains this process with five key stages. It begins with an incredibly offensive portrayal of a minority group followed by public outrage or pressure to react. Then, there is always some release of shocking statistics about minority underemployment and underrepresentation in the media followed quickly by a token initiative to calm the critics. Lastly, all is returned to normal and minority underrepresentation goes back to its shockingly low number.

112. *Id.*

113. HUNT, *supra* note 72, at 5.

114. *Why Net Neutrality Matters*, *supra* note 104.

115. *Id.*

116. *Id.*

117. Reply Comments of National Association of Broadcasters at 56, *Promoting Diversification of Ownership in the Broadcasting Services*, MB 09-33 (Mar. 5, 2012), http://apps.fcc.gov/ecfs/comment/view?id=6017022785. NAB points out that the largest barrier to entry in the media for minorities is the lack of access to capital. Because of this, a large number of minority communities have found solace in the open Internet, which provides a more equitable alternative.

118. *Why Net Neutrality Matters*, *supra* note 104.

119. *Id.* Support staff includes writers, costars, producers, etc.

120. *Id.*

121. *Id.*

continues to grow and strengthen, counteracting the negative cycles taking place through traditional media outlets.[122]

Lastly, many minority groups in support of FCC regulation, such as the Color of Change and the Center for Media Justice, fear that if the FCC does not step in, companies that have to pay more for faster speeds will pass on the higher costs to the consumers, many of whom can hardly afford the Internet as is.[123] As mentioned earlier, many view the Internet as a luxury while others see it as a necessity–a means to do more versus the only means to keep up with everyone around them.[124] If these expenses are passed onto consumers, many will be left behind to suffer from the greediness of ISPs.

All of the statistics, the history of underrepresentation and typecasting of minorities, and the rise of minority presence in online media speak for themselves. When considering the open Internet and its continuance, the FCC must consider the effect that it will have on minority communities. The recent progress credited to an open Internet can only continue for so long without the FCC stepping in to ensure net neutrality remains.

C. The FCC Must Actively Protect the Open Internet

The FCC must take actions to protect the open Internet because, if left unregulated, ISPs would control the Internet as they have continued to control traditional media. As explained earlier, ISPs have already shown what they are truly capable of when left to their own devices.[125] And as they have admitted themselves, ISPs have every incentive to control the Internet and turn a blind eye to net neutrality as we know it.[126] How do we know that this will happen? How do we know that ISPs like Comcast are concerned only with their personal growth and domination of the field? How do we know that we cannot trust ISPs to self-regulate? Because ISPs have fought net neutrality at every stage and have already proven they are solely concerned with their own growth.[127] The FCC would be foolish to stand aside and allow history to repeat itself with regard to the open Internet as we know it.

At the end of 2009, Comcast's holiday gift to the public was an announcement of its intent to acquire a majority share of media

122. *Id.*

123. Gerry Smith, *Why Is the NAACP Siding with Verizon over Net Neutrality?*, HUFFINGTON POST (July 31, 2014, 12:49 PM ET), http://www.huffingtonpost.com/2014/07/31/net-neutrality-naacp-verizon_n_5630074.html.

124. *Id.*

125. Ehrenfreund, *supra* note 97 (illustrating the decrease in Internet download speeds that Netflix experienced while in negotiations with Comcast last year).

126. *See* Verizon v. FCC, 740 F.3d 623, 646 (D.C. Cir. 2014) (emphasis added) (citing Transcript of Oral Argument at 31, *Verizon*, 740 F.3d 623 (No. 11-1355)) ("[A]t oral argument, Verizon's counsel announced that '*but for [the Open Internet Order] rules* [sic] we would be exploring [paid prioritization] arrangements.'").

127. *See id.*

conglomerate NBC Universal.[128] Though the deal originally left Comcast with just enough ownership to qualify as a majority owner (51%), Comcast now owns NBC Universal in full.[129] This deal made Comcast the largest cable provider in the United States, setting them on a dangerous path.[130]

In February 2014, Comcast struck again. Comcast and Time Warner issued a proposal for the largest cable telecommunications company in America to acquire the second largest cable telecommunications company in America.[131] This proposed merger would result in a stock swap valued at more than $45 billion at the time of Comcast's announcement.[132] Because of the magnitude and scope of this merger, Comcast again was required to gain approval from not only the FCC but the United States Department of Justice as well.[133] Many shared the same concern: this will definitely end badly.[134] With two large companies joining forces, consumers were beyond concerned.[135] In fact, both Comcast and Time Warner themselves were so aware of this that they all but threw in the towel in trying to convince the public and instead focused their energy on winning over Capitol Hill.[136]

So how exactly has Comcast been getting away with all of this despite the clear warning signs of negative effects? Admittedly, their initiatives had minority communities in mind as they promised new channels to be put in play.[137] In pursuit of their NBC Universal acquisition, Comcast made deals

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128. Tim Arango, *G.E. Makes It Official: NBC Will Go to Comcast*, N.Y. TIMES (Dec. 3, 2009), http://www.nytimes.com/2009/12/04/business/media/04nbc.html.

129. Amy Chozick & Brian Stelter, *Comcast Buys Rest of NBC in Early Sale*, N.Y. TIMES: MEDIA DECODER (Feb. 12, 2013, 4:54 PM), http://mediadecoder.blogs.nytimes.com/2013/02/12/comcast-buying-g-e-s-stake-in-nbcuniversal-for-16-7-billion/. In further illustrating the motives of ISPs, Comcast acquired the remaining 49% interest in NBC Universal by buying out GE's stocks in a sale that accelerated what was meant to be a gradual process to take place over several more years. Comcast's Chief Executive Brian Roberts described the decision in his own words as a "commitment to NBC Universal and its *highly profitable* cable channels." *Id.* (emphasis added).

130. *Id.*

131. Brian Stelter, *Comcast Buys Time Warner Cable for $45 Billion*, CNN (Feb. 13, 2014, 3:09 PM ET) http://money.cnn.com/2014/02/13/technology/comcast-time-warner-cable-deal/index.html.

132. Alex Sherman, Jeffrey McCracken & Edmund Lee, *Comcast Agrees To Buy Time Warner Cable for $45.2 Billion*, BLOOMBERG TECH. (Feb. 1, 2014, 4:39 PM EST), http://www.bloomberg.com/news/2014-02-12/comcast-said-to-agree-to-pay-159-a-share-for-time-warner-cable.html.

133. Comm'n Seeks Comment on App'ns of Comcast Corp., Time Warner Cable Inc., Charter Comm., Inc. & Spinco to Assign & Transfer Control of FCC Licenses & Other Authorizations, *Public Notice*, 29 FCC Rcd 8272, 8274 (2014) [hereinafter *Comm'n Seeks Comment*].

134. Brad Reed, *New Poll Shows the More Education You Have, The More You Hate the Comcast-TWC Merger*, BGR (Mar. 28, 2014, 2:20 PM), http://bgr.com/2014/03/28/comcast-twc-merger-poll/.

135. *Id.* (noting that both Comcast and Time Warner have "horrendous" customer service ratings, which adds additional concern).

136. *Id.*

137. App'ns of Comcast Corp. & Time Warner Cable Inc. for Consent to Transfer Control of Licenses & Authorizations, *Applications and Public Interest Statement*, MB 14-

with the FCC to expand minority-focused programming on their networks and they have in fact done so. In the last few years, Comcast launched four independent networks with minority ownership and management.[138] Owners of these new networks include producer Sean Combs, who launched REVOLT at the end of 2013, and former basketball player Magic Johnson, who launched Aspire as a family-oriented network.[139] These minority-based channels include Combs' REVOLT and El Rey, which was also launched at the end of 2013.[140] Additionally, Comcast has expanded its distribution of diverse minority content throughout its audiences by changing the channel packages under which such channels are included.[141]

However, the reality of these situations only further emphasizes the importance of net neutrality to minority groups. Though ISPs like Comcast are seemingly paving the way for minority groups to finally have a voice, the reality is not as clear. This voice that Comcast has promised minority groups is not as new at they let on. Controversy stems from the fact that these new minority networks are simply recycling and reshuffling their managers and programs from existing programs and networks.[142] For example, the lineup of Johnson's network Aspire included a number of reruns instead of original broadcasting.[143] The lineup includes shows like *The Cosby Show* (which aired its last new episode more than a decade ago in 1992),[144] *Flip*, and *Julia* (both of which aired their last episodes in the early 1970s).[145] In addition, the managers were taken from the old Gospel Music Channel that previously aired.[146]

Again, why does this all matter? What does it mean for minority communities? Though it may be a considerable effort, Comcast has illustrated the importance of minority communities truly taking charge of their representation in the media. The real issue is the purpose behind the

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57, at 114 (2014), http://apps.fcc.gov/ecfs/comment/view?id=6017611309 [hereinafter *App'ns of Comcast & Time Warner*].

138. *Id.* "Minority" means African American or Hispanic American in this context.

139. Mandalit Del Barco, *Comcast Deal Puts New Minority-Run Channels In Play*, NPR (Nov. 12, 2013, 3:08 AM ET), http://www.npr.org/2013/11/12/244558834/comcast-deal-puts-new-minority-run-channels-in-play. Both of these networks resulted from the merger deal Comcast made with the FCC.

140. Sarah Rodman, *Minority-Owned Cable Networks Hope To Blaze a Trail*, BOSTON GLOBE (Jan. 25, 2014), http://www.bostonglobe.com/arts/television/2014/01/25/new-minority-owned-networks-hope-blaze-trail/X4EMY3zvOR314XOqZFrg0K/story.html. Director Robert Rodriguez, of the *Sin City* and *Spy Kids* franchises, created the El Rey Network with help from the network Univision. REVOLT currently airs in approximately 20 million homes while the El Rey Network reaches an astonishing 40 million homes. *Id.*

141. App'ns of Comcast & Time Warner, *supra* note 137, at 114.

142. Del Barco, *supra* note 139.

143. *Id.*

144. *The Cosby Show*, INTERNET MOVIE DATABASE, http://www.imdb.com/title/tt0086687/ (last visited Jan. 13, 2016).

145. *Flip*, INTERNET MOVIE DATABASE, http://www.imdb.com/title/tt0065294/, (last visited Jan. 13, 2016); *Julia*, INTERNET MOVIE DATABASE, http://www.imdb.com/title/tt0062575/ (last visited Jan. 13, 2016); Del Barco, *supra* note 139.

146. *Id.*

creation of these stations: they are a compromise with the FCC to allow Comcast to keep control acquisition after acquisition. The issue only deepens when focusing on the control Comcast still exhibits over these minority stations. Unequal funding and opportunity still dominates the market as a key concern and the ultimate inhibitor for minority communities. Though progressing, the facts tell the FCC a very clear story—minority communities must continue to rely heavily on an open Internet, protected by net neutrality, if they stand a chance to be heard.

D. Why Minority Groups Seem to Be Split on the Issue

Some argue that minority groups themselves are in support of the FCC staying out of the net neutrality debate and leaving the Internet open to regulate itself as it has always done in the past.[147] Some minority communities have issued public comments in response to the FCC's proposal stating their support for the same conglomerate companies that other organizations claim minority communities need protection from. However, as is the case with most issues, there is much more than meets the eye. Though some minority communities seem to side with ISPs on the issue of net neutrality, there are underlying factors, such as ISPs making financial contributions to minority groups and influencing certain viewpoints, which must be taken into consideration.

Groups like the National Association for the Advancement of Colored People (NAACP) and National Urban League have sided with ISPs in the net neutrality debate and advocated for an FCC-free Internet.[148] But the underlying story is key. For starters, several of these groups receive a substantial amount of funding from large companies, which also explains their support of the Comcast merger with NBC Universal.[149] In fact, between 2009 and 2011, the Minority Media and Telecommunications Council (MMTC) received more than $700,000 in sponsorships and donations from ISPs like Verizon and Time Warner.[150] MMTC is the same organization that has historically opposed the consolidation of industry players but has recently changed its tune.[151] This sudden change in views makes more sense when Verizon's direct contribution of $40,000 to MMTC

147. *See* Josh Peterson, *Minority Conflict over Net Neutrality Goes to Root of Tech Divide*, WATCHDOG.ORG (Oct. 21, 2014), http://watchdog.org/177555/minority-net-neutrality/.

148. Smith, *supra* note 123.

149. *Id.*

150. Jason McLure, *Civil Rights Group's FCC Positions Reflect Industry Funding, Critics Say*, PUB. INTEGRITY (June 6, 2013, 6:00 AM), http://www.publicintegrity.org/2013/06/06/12769/civil-rights-groups-fcc-positions-reflect-industry-funding-critics-say.

151. *Id.* Though MMTC has publicly announced its support for the relaxation of consolidation rules, it failed to disclose the amount of sponsorships it has received from the same companies arguing before the FCC. In 2011, MMTC received more than $1.5 million from these entities, yet did not feel the need to disclose this information.

is taken into account.[152] Additionally, the NAACP, another strong supporter of ISPs, has received more than $1 million in donations from AT&T in 2009.[153] The National Hispanic Media Coalition received more than $15,000 from Verizon in the preceding years.[154] This friendly relationship cooled down rather quickly after the organization's president, Alex Nogales, began seeking stronger net neutrality rules in 2010.[155] Nogales said it best: "[W]hen we took an [opposing] position on net neutrality, that was the end of the relationship."[156] Concerns have been raised as this trend of financial support runs rampant throughout the minority organizations that claim to support ISPs in the net neutrality debate.[157]

Even worse, many minority groups have taken a "eat or be eaten" mentality in the net neutrality war. Some of these minority groups that oppose Title II reclassification are not only receiving funding from ISPs, but they are also working with them.[158] The Hispanic Technology and Telecommunications Partnership (HTTP) worked to host an event on Capitol Hill last year in opposition of Title II reclassification.[159] Upon further investigation, Martin Chavez, the HTTP worker that hosted this event, is also on the staff of the Ibarra Strategy Group, one of Verizon's lobbying firms.[160] These minority groups were quite literally working for their adversaries. Though it is common and perfectly acceptable for groups to work with companies they have similar views with, it is important to ask which came first: the chicken or the egg, the funding or the "similar views."

A recent lawsuit has called this matter into the public eye for scrutiny and questioning. The National Association of African-American Owned Media (NAAAOM) filed a complaint on February 20, 2015 with a California court alleging racial discrimination of Comcast and Time Warner.[161] The NAAAOM claims that the two companies have actively refused to contract with media companies that are entirely owned by African Americans.[162] Though some have questioned how the NAAAOM will bring factual proof of these allegations, it certainly calls into question the

152. *Id.* At the height of the Net Neutrality debate, MMTC listed $160,000 in sponsorships from Verizon on their tax returns.

153. Smith, *supra* note 123.

154. *Id.*

155. *Id.*

156. *Id.*

157. Lee Fang, *Leading Civil Rights Group Just Sold Out on Net Neutrality*, NATION (July 25, 2014, 10:11 AM), http://www.thenation.com/blog/180781/leading-civil-rights-group-just-sold-out-net-neutrality/. The Organization of Chinese Americans considers Comcast as a major sponsor for its events and a large donor to the organization. Additionally, the League of United Latin American Citizens has received more than $5 million from Comcast in exchange for their support against FCC regulation of net neutrality.

158. *Id.*

159. *Id.*

160. *Id.*

161. Complaint at 1, Nat'l Ass'n of African-Am. Owned Media v. Comcast, No. 2:15 CV-01239-TJH-MAN (C.D. Cal. Feb. 20, 2015).

162. *Id.* at 6.

"diversity initiatives" these companies make.[163] This lack of true progress only solidifies the notion that minority communities must rely more heavily on the open Internet to get their stories out into the media. This can only be done if the FCC steps in to ensure net neutrality and the continuance of the open Internet.

It is easy to make sense of the split in minority communities when the underlying information is brought to light. Minority groups that are quick to support ISPs are the same minority groups that are not facing the financial challenges of their peers. For this reason, the argument that minority groups support minimal FCC interference cannot be taken entirely at face value.

E. Is Zero-Rating Still a Valid Option?

Zero-rating is the concept that ISPs do not count the data used from certain applications against users' data caps.[164] In a way, it is a different means to the same end: instead of paying more to have faster lanes, ISPs charge less for users to access certain sites.[165] Unlike fast lanes, many view zero-rating as a solution to the problem that many face: users cannot access websites because they cannot afford them.[166] Unfortunately in the long run, it involves the same underlying concept: big companies are paying ISPs to have their content "favored" over others.[167] Therein lies the problem.

Content providers pay AT&T to deliver certain content to end users that does not count against the end users' data caps, causing end users to favor those sites over others.[168] This concept, like fast lanes, will leave smaller businesses and start-ups in the dust as they likely will not be able to keep up with this kind of competition.[169] Minority communities that have not been able to break into such a competitive market will continue to fail as they attempt to compete with companies like Netflix, YouTube, and Hulu who have the means to pay their way to the top and keep all other competition out.[170]

Gigaom's Antonios Drossos explains it quite simply: zero-rating is "blunt anti-competitive price discrimination designed to favor [telecommunications companies'] own or their partners' [applications]

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163. Eriq Gardner, *Comcast, Al Sharpton Hit with $20 Billion Racial Discrimination Lawsuit*, HOLLYWOOD REP. (Feb. 23, 2015, 7:29 AM PT), http://www.hollywoodreporter.com/thr-esq/comcast-al-sharpton-hit-20-777015.

164. Jon Healey, *Netflix, "Zero Rating" and the Net-Neutrality Drama*, L.A. TIMES (Feb. 3, 2015, 1:10 PM), http://www.latimes.com/opinion/opinion-la/la-ol-net-neutrality-netflix-zero-rating-20150203-story.html.

165. *Id.*

166. *Id.*

167. *Id.*

168. Antonios Drossos, *Forget Fast Lanes. The Real Threat for Net-Neutrality Is Zero-Rated Content*, GIGAOM (Apr. 26, 2014, 10:30 AM PDT), https://gigaom.com/2014/04/26/forget-fast-lanes-the-real-threat-for-net-neutrality-is-zero-rated-mobile-traffic/.

169. *See id.*

170. *Id.*

while placing competing [applications] at a disadvantage. A zero-rated [application] is an offer consumers cannot refuse."[171] It is also an offer smaller, minority-owned companies will not be able to compete with.

While the idea of zero-rating data may seem to benefit end users, it cannot stand because it undermines the underlying principle of net neutrality. The FCC has ruled to handle this issue on a case-by-case basis for now because of the complexity of the issue.[172] It does not appear that this concept can remain in the long run however because it destroys the concept of net neutrality on a much larger level despite the benefits it provides end users. Minority communities in particular will bear the brunt of the negative consequences as ISPs continue to overpower or soften their voices.

Though the debate will continue for years to come, the FCC must take a stand. It must step in and regulate the Internet to ensure it remains open. While the FCC must ensure that innovation and development continues in the field, it also has a responsibility to the people it governs. This includes minority communities that are categorically underrepresented in the media. In weighing its options and making decisions, the FCC must consider the disproportionately negative impact that the loss of Net Neutrality would have on said minority communities.

IV. CONCLUSION

The FCC must take a stand and reclassify ISPs as Title II common carriers under the 1996 Act to bring them back under the domain of the FCC's regulatory control, as its authority under Section 706 is not sufficient. In doing this, the FCC must also ensure that its forbearance provisions are effectively executed so that ISPs are not as heavily regulated as the phone companies originally brought under Title II control. The FCC has successfully taken these steps with its *2015 Open Internet Order* and has begun the move towards an open and fair Internet for all.

In doing this, the FCC can prevent ISPs from implementing fast lanes for companies that are able and willing to pay more for faster broadband speeds, leaving those without the means to afford faster broadband speeds to fall behind the competition. This prohibition of Internet fast lanes will allow the Internet to remain truly open, preserving an even playing field for minority communities. This even playing field allows minority communities an opportunity to share their work and their stories, through their own eyes, without the negative stereotypes that often times plague the media.

Further, the prohibition of Internet fast lanes will prevent large companies from passing on their additional costs to their users, many of whom struggle to afford Internet access in the first place. ISPs, and the

171. *Id.*

172. Phil Goldstein, *FCC Approves Net Neutrality Rules for Wireless, Putting Future Zero-Rating Plans on Notice*, FIERCE WIRELESS (Feb. 26, 2015), http://www.fiercewireless.com/story/fcc-approves-net-neutrality-rules-wireless-putting-future-zero-rating-plans/2015-02-26.

financial support they offer to many minority groups, actually influence the seemingly split views of minority groups on the net neutrality issue. In reality, minority groups that do not buy into the pressures of these conglomerate companies face the same risk of being cast aside while catching up with ISPs' profit-seeking objectives.

History has shown us that ISPs cannot be left to their own devices and trusted to regulate their own actions. If left unregulated, these companies will likely transform the "open" Internet in the same way that they transformed and consolidated the cable field. The FCC must step in and reclassify ISPs as Title II common carriers to regulate their behavior and prevent the continued underrepresentation of minority communities.

What's in Your Mobile Wallet? An Analysis of Trends in Mobile Payments and Regulation

Carolyn Lowry *

TABLE OF CONTENTS

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I. INTRODUCTION

In September 2014, Apple announced the launch of Apple Pay, a mobile payments solution integrated into the new generation of iPhones, joining Google Wallet as a mobile payments option.[1] A few months later, Microsoft began applying for state money transfer licenses, a move that all but confirms Microsoft's soon-to-occur entry into the mobile payments space.[2] These announcements are significant because mobile payments, while popular in other countries, have been generally slow to catch on in the United States.[3] The emergence of technologies and services like Square, Uber, and Apple Pay allows consumers to leave their checkbooks, cash, and even wallets at home, a shift that could significantly transform commerce and business.[4] In fact, the idea for Venmo, a mobile payment application (app), came about in 2009 when one of the cofounders forgot his wallet and wondered why he was not able to simply transfer money to his friend through his cell phone instead of dealing with cash or paper checks.[5] The shift from paper to plastic to digital for everyday activities and transactions may seem far off to some, but increased convenience, security protections, and endorsement and adoption by government entities and major retailers may make the shift to e-wallets and mobile payments a near-term reality.

Mobile payments emerged as the result of the colliding worlds of technology and banking. As these industries collaborate and merge together, financial regulations must be examined to ensure existing regulations are able to provide the appropriate protections to consumers and, if not, to determine how such regulations should be modified to meet our increasingly mobile-centric world. Historically, banking has been a very heavily regulated industry, with state-level agencies and several federal government

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1. Press Release, Apple, Apple Announces Apple Pay (Sept. 9, 2014), http://www.apple.com/pr/library/2014/09/09Apple-Announces-Apple-Pay.html.

2. *See, e.g.*, Matt Krantz, *Apple Pay Faces Another Problem*, USA TODAY (Apr. 6, 2015, 1:37 PM), http://americasmarkets.usatoday.com/2015/04/06/apple-pay-has-another-problem/.

3. Laurence Witherington & Henry Williams, *Apple Pay Moves World Closer to Mobile Payment Acceptance*, WALL ST. J. (Oct. 31, 2014, 7:39 AM ET), http://online.wsj.com/articles/apple-pay-moves-world-closer-to-mobile-payment-acceptance-1414755547.

4. *See, e.g.*, Aaron Klein, *Pocket Policy: Do New Technologies Need New Rules?*, BIPARTISAN POL'Y CTR. (Dec. 17, 2014), http://bipartisanpolicy.org/blog/pocket-policy-do-new-payments-technologies-need-new-rules/. The Iowa Department of Transportation also considered the potential for wallet-less living and recently announced the development of a smartphone app that would contain a digitally-encoded drivers license that would replace the commonly-used plastic card. *See* Joyce Russell, *A Plan To Put Your Driver's License On Your Phone*, NPR: ALL TECH CONSIDERED (Jan. 7, 2015, 5:46 PM), http://www.npr.org/blogs/alltechconsidered/2015/01/07/375658605/a-plan-to-create-put-your-drivers-license-on-your-phone.

5. Felix Gillette, *Cash is for Losers!*, BLOOMBERG (Nov. 20, 2014, 6:32 AM EST), http://www.bloomberg.com/bw/articles/2014-11-20/mobile-payment-startup-venmo-is-killing-cash.

agencies overseeing the financial services space, including the Federal Reserve, Federal Deposit Insurance Corporation (FDIC), Office of the Comptroller of the Currency (OCC), Securities and Exchange Commission (SEC), and the Commodity Futures Trading Commission (CFTC). Additionally, the financial crisis and resulting Dodd-Frank Act led to the establishment of the Consumer Financial Protection Bureau (CFPB), an entire agency devoted to consumer financial protection. There are also state-level banking agencies and regulators in addition to state attorneys general. Compared to the banking and financial services industry, the mobile industry experiences a fairly hands-off approach with respect to regulation, despite its predecessors in the wireline industry being heavily monitored.

As technology becomes more ingrained in our lifestyles, products are emerging that straddle the financial services and wireless industries. For example, mobile wallets such as Apple Pay and Google Wallet are both apps, which are functionally a feature of a phone, not a new financial service or provider. Regardless of this distinction, because of the association of mobile payments with financial services, the legacy baggage of regulation exists.

As use of technology grows and the adoption of mobile payments becomes more prevalent, regulators will likely increase their level of attention and scrutiny upon these products. These new mobile payment technologies have raised the question of whether existing regulations are sufficient and provide an appropriate level of protection to consumers. The legal and regulatory framework affecting mobile payments should be comprehensive and effective while at the same time allowing innovation and development of new products. While existing regulations relating to payments were drafted before the emergence of mobile payments, these existing regulations provide robust legal protections for consumers. The introduction of new technology does not render existing regulations inapplicable, and point-of-sale mobile payments should legally be treated the same as the traditional, underlying transactions. Creating an additional layer of regulations could cramp innovation and lead to consumer confusion.

Part II of this Note provides an overview of the development of mobile payments, the types of mobile payments, and existing regulations that apply to electronic and mobile payments. Part III critically analyzes the extent to which existing legal and regulatory frameworks apply to mobile payments and examines the transformative effect that mobile payments may have on commerce. Part IV concludes that existing regulations are sufficient to protect consumers while allowing for innovation.

II. BACKGROUND

A. Mobile Has the Potential to Significantly Change Commerce and Business.

Mobile phones have revolutionized the way that people interact, communicate, shop, and conduct business. It is estimated that 2.6 billion people worldwide use smartphone mobile devices that are Internet-enabled, with this number predicted to more than double to 6.1 billion by 2020.[6] In the United States, use of mobile phones is similarly widespread, as shown by 87 percent of the U.S. adult population owning a mobile phone and 71 percent of these mobile phones being smartphones.[7] The availability of Internet on-the-go is changing the way that people shop and conduct financial business, and the mobile payments industry is expected to grow and become mainstream.[8] Recent studies have reflected this predicted growth; 17 percent of mobile phone users made a mobile payment in 2013, increasing to 22 percent in 2014.[9] This growth is expected to be "explosive" over the next few years, with a Business Insider Intelligence report predicting growth of the U.S. mobile payment volume at a five-year compound annual growth rate of 172 percent, increasing from less than $100 billion in 2014 to more than $800 billion in 2019.[10]

It is interesting to note, however, that the prevalence of mobile phone use for commerce and banking varies significantly by country and for a variety of reasons.[11] While some countries are still tied to the brick-and-mortar bank, others have adopted newer mobile-based technologies such as mobile payments through text-based data transfers.[12] Many of these technologies have been widely adopted, as illustrated by the fact that in nine

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6. Ingrid Lungen, *6.1B Smartphone Users Globally by 2020, Overtaking Basic Fixed Phone Subscriptions*, TECHCRUNCH (June 2, 2015), http://techcrunch.com/2015/06/02/6-1b-smartphone-users-globally-by-2020-overtaking-basic-fixed-phone-subscriptions/.

7. BD. OF GOVERNORS OF THE FED. RESERVE SYS., CONSUMER AND MOBILE FINANCIAL SERVICES 2015, at 1 (2015), http://www.federalreserve.gov/econresdata/consumers-and-mobile-financial-services-report-201503.pdf.

8. *See* Jason Ankey, *Financial Execs Survey: Mobile Payments Going Mainstream by 2015*, FIERCEMOBILECONTENT.COM (July 13, 2011), http://www.fiercemobileit.com/story/financial-execs-survey-mobile-payments-going-mainstream-2015/2011-07-13 (finding that 83 percent of financial services, technology, telecommunications, and retail executives expect mobile payments will achieve widespread mainstream consumer adoption by 2015).

9. BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 7, at 1.

10. John Heggestuen, *The Apple Pay Effect Is Real — In-Store Mobile Payments Volume Will Top $800 billion in 2019*, S.F. CHRON. (Mar. 20, 2015, 6:02 AM), http://www.sfgate.com/technology/businessinsider/article/Mobile-Payments-Are-Poised-To-Explode-This-Year-4526391.php (forecasting that by 2019, 15 percent of all payment volume will occur through mobile devices).

11. *See id.*

12. Leo Mirani, *How to Manage All Your Financial Affairs from a $20 Mobile Phone*, QUARTZ (June 19, 2014), http://qz.com/218988/how-to-manage-all-your-financial-affairs-from-a-20-mobile-phone/.

African countries, the number of mobile money accounts exceeds the number of traditional bank accounts, providing a payment solution for many who may otherwise be unbanked or underbanked.[13] This widespread adoption of mobile payments in Africa has not gone unnoticed; both government and business have realized this trend and found ways to make use of mobile payments.[14]

Nordic countries have similarly experienced a shift towards cashless societies.[15] Denmark has taken great strides toward adopting mobile payments, with 1.8 million of the country's 5.6 million residents using an app provided by Danske Bank called "MobilePay."[16] The Danish government has even gone as far as proposing regulations that would make retail businesses no longer required to accept cash payments, with the goal of economic growth through reduced costs and increased productivity.[17]

While mobile payments have been successful in some global markets, they have been slower to catch on in the United States.[18] One major reason for this is that the United States has a robust banking system that promotes traditional financial products like credit cards and debit cards. While it cannot be overlooked that approximately one out of every four Americans is "unbanked"[19] or "underbanked,"[20] more than three out of four African adults

13. *Id.* The nine countries are Cameroon, the Democratic Republic of the Congo, Gabon, Kenya, Madagascar, Tanzania, Uganda, Zambia, and Zimbabwe.

14. *See, e.g.*, *Tanzania Collects Billions in Mobile Money Tax*, IT NEWS AFRICA (Sept. 9, 2013), http://www.itnewsafrica.com/2013/09/tanzania-collects-billions-in-mobile-money-tax/ (stating that the Tanzania Revenue Authority reported success with accepting mobile payments for tax bills and annual motor vehicle licensing fees); *see also* Jake Kendall et al., *Sub-Saharan Africa: A Major Potential Revenue Opportunity for Digital Payments*, MCKINSEY & CO. INSIGHTS & PUBL'NS (Feb. 2014), http://www.mckinsey.com/insights/financial_services/sub_saharan_africa_a_major_potential_revenue_opportunity_for_digital_payments (finding Sub-Saharan Africa an attractive market for mobile financial services growth and investment).

15. *Nordic Countries Point Way to Cashless Future as U.S. Struggles with Chip-and-Pin*, GUARDIAN (Jan. 9, 2015, 11:25 AM EST), http://www.theguardian.com/money/2015/jan/09/nordic-countries-cashless-societies-us-chip-pin; *see also* Liz Alderman, *Going Cashless in Sweden*, N.Y. TIMES (Dec. 26, 2015), http://www.nytimes.com/2015/12/27/business/international/in-sweden-a-cash-free-future-nears.html (remarking that in Sweden, cash accounts for only 20% of consumer transactions, compared to 75% in the rest of the world).

16. *Id.*

17. Doug Bolton, *Denmark Moves Closer to a Cashless Society*, INDEPENDENT (May 7, 2015), http://www.independent.co.uk/news/world/europe/denmark-moves-closer-to-a-cashless-society-10231995.html.

18. *See* Mirani, *supra* note 12; *see also* FED. DEPOSIT INS. CORP., 2013 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS: EXECUTIVE SUMMARY 3 (Oct. 2014) [hereinafter *FDIC Survey*], https://www.fdic.gov/householdsurvey/2013execsumm.pdf.

19. The FDIC defines "unbanked" as households that do not have an account at an insured financial institution. *FDIC Survey*, *supra* note 18, at 3.

20. The FDIC defines "underbanked" as households that households that have an account, but have also obtained financial services and products from nonbank, alternative financial services providers in the prior 12 months. *Id.*

lack a bank account or financial product with a formal banking entity.[21] As a result, mobile payments have been an attractive option for many people in Africa who do not have access to traditional banking products, whereas a widely used banking and payment system has contributed to the slower adoption of mobile payments in the United States.[22] Even with a widely used and robust payment system, however, approximately 88 million Americans are unbanked or underbanked and lack access to bank accounts and credit scores,[23] which means that they lack access to the mainstream financial system that is so important to paying bills, building credit, buying a home, and sending a child to college. These unbanked and underbanked consumers often turn to alternative financial services providers, like payday lenders or check-cashing locations, in order to cash checks and make ends meet.[24] Payday lenders are often unregulated and charge higher fees,[25] a practice that has drawn the attention of the CFPB.[26]

Growth in the mobile payments industry may provide opportunities to shift unbanked and underbanked consumers toward more affordable and more regulated banking and financial products and services. Consider, for example, the efficiencies, increased convenience, and potential innovation that could occur with mobile payments by aligning the 1.3 billion active credit and debit cards with the nearly 7.3 billion active mobile phone accounts, two billion of which are smartphones.[27]

B. Mobile Devices Can Be Used to Make Various Types of Payments.

In the United States, there are five methods for processing payment transactions: cash, checks, credit and debit card rails, automated clearing

21. *See* Aaron Oliver, *Unbanked in Africa See Inclusion through Mobile Financial Services*, MASTERCARD (Mar. 19, 2014), https://newsroom.mastercard.com/2014/03/19/unbanked-in-africa-see-inclusion-through-mobile-financial-services/.

22. *See* Mirani, *supra* note 12.

23. Gosia Glinska, *Fighting Financial Exclusion: How to Serve 88 Million Americans Who Have No Bank*, FORBES (June 5, 2014, 11:48 AM), http://www.forbes.com/sites/darden/2014/06/05/fighting-financial-exclusion-how-to-serve-88-million-americans-who-have-no-bank/.

24. *Id.*

25. *See* Niraj Chokshi, *Payday Loans Suck Up Billions in Fees in States Where They're Unregulated*, WASH. POST (Sept. 11, 2013), http://www.washingtonpost.com/blogs/govbeat/wp/2013/09/11/payday-loans-still-suck-up-billions-in-fees-in-states-where-theyre-unregulated/.

26. *See* Press Release, Consumer Fin. Prot. Bureau, CFPB Considers Proposal to End Payday Debt Traps (Mar. 26, 2015), http://www.consumerfinance.gov/newsroom/cfpb-considers-proposal-to-end-payday-debt-traps/.

27. *The Mobile Pay Revolution*, MORGAN STANLEY BLUE PAPERS (Jan. 23, 2015), http://www.morganstanley.com/ideas/mobile-pay-taps-global-growth/.

house (ACH) rails, and wire transfers.[28] Payments can take place in person or electronically, and the emergence of new technologies and devices has shifted how consumers conduct their banking and purchasing. The connectivity and power of a mobile phone has potential to develop products and applications that provide better services at a lower cost.[29]

The term "mobile payments" can refer to a variety of transactions, and most consumers use a credit or debit card for the underlying payment transaction. Mobile payments can be made through the web browser of a mobile device, through text message, via a mobile application, or through a point-of-sale or Near Field Communication transaction.

1. Mobile Payments Can Be Made Through Websites or Mobile Apps, Facilitating Remote Transactions

Many may think that mobile payments in their most basic form are payments made through web browsers, such as purchases through retailers' traditional websites. For example, a consumer who is on-the-go but needs to purchase something online, such as a train ticket or a birthday gift for mom, can use a mobile device to access websites like amtrak.com or macys.com. These mobile transactions occur through the company's existing website and are treated the same as transactions made through the browser on a desktop or laptop computer.

Realizing that mobile phones provide new opportunities for consumer engagement, many companies involved in e-commerce have developed mobile-friendly websites and stand-alone apps. Online commerce channels have grown four times faster at a global level than brick-and-mortar stores,[30] and these online payments have the potential to make purchases and transactions more convenient and user-friendly for customers. For example, the Amtrak app offers both purchase options and other features that are intended to increase convenience, such as the Amtrak rewards program, eTickets, and calendars.[31] Use of retail websites, however, remains much more prevalent than use of apps, which is a behavior that can be attributed to discovery and web searches.[32] Many people use search engines like

28. Erin F. Fonté, *Mobile Payments in the United States: How Disintermediation May Affect Delivery of Payment Functions, Financial Inclusion and Anti-Money Laundering Issues*, 8 WASH. J.L. TECH & ARTS 419, 422-23 (2013).

29. *The Future of Money: Hearing Before the H. Subcomm. on Fin. Inst. & Consumer Credit of the H. Comm. on Fin. Servs.*, 112th Cong. (2012) (statement of Marla Blow, Assistant Dir., Card and Payment Markets, Consumer Financial Protection Bureau), http://financialservices.house.gov/UploadedFiles/112-142.pdf.

30. *The Mobile Pay Revolution*, *supra* note 27.

31. *See Amtrak app*, APPLE ITUNES PREVIEW, https://itunes.apple.com/us/app/amtrak/id405074003 (last accessed Mar. 14, 2015).

32. *See Mobile Web Outpaces Apps for Retail Transactions*, EMARKETER (Mar. 4, 2015), http://www.emarketer.com/Article/Mobile-Web-Outpaces-Apps-Retail-Transactions/1012138.

Google to locate an online retailer or product, and the search results tend to be more likely to lead the customer to a company's website rather than an app.[33]

Banks have also developed apps that strive to allow consumers to conduct banking both conveniently and securely.[34] Mobile banking is generally linked to traditional banking products like checking accounts, savings accounts, and credit cards.[35] Adoption of mobile banking has been fairly successful, with over fifty percent of smartphone owners using their smartphone devices to access mobile banking, whether it be to check account balances, transfer money between accounts, deposit checks, or other banking activities.[36] Consumers may also use their mobile banking applications to pay bills and, in the United States, the most basic and common form of mobile payment was the payment of a bill through an online system.[37] All major U.S. banks offer bill pay services through mobile payments.[38]

Mobile payments can also be conducted through websites and applications specifically designed to transfer money, as opposed to traditional brick-and-mortar banks that use online banking to supplement their existing business. Examples of these web-based payment providers are PayPal and Venmo, which allow consumers to transfer money to customers or "friends."[39] These providers generally need to acquire a money transmitter license from state regulators in order to do business.[40]

33. *Id.*

34. BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 7, at 1.

35. *See Consumers and Mobile Financial Services March 2012: Current Use of Mobile Banking and Payments*, BD. OF GOVERNORS OF THE FED. RESERVE SYS., https://www.federalreserve.gov/econresdata/mobile-devices/2012-current-use-mobile-banking-payments.htm (last visited June 17, 2016) (defining mobile banking as "using a mobile phone to access your bank account, credit card account, or other financial account. Mobile banking can be done either by accessing your bank's web page through the web browser on your mobile phone, via text messaging, or by using an application downloaded to your mobile phone").

36. BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 7, at 1.

37. *Id.*

38. DIV. OF DEPOSITOR & CONSUMER PROT., FED. DEPOSIT INS. CORP., ASSESSING THE ECONOMIC INCLUSION POTENTIAL OF MOBILE FINANCIAL SERVICES 25 (2014) (citing JAVELIN STRATEGY & RESEARCH, 2013 MOBILE BANKING FINANCIAL INSTITUTION SCORECARD (2013)), https://www.fdic.gov/consumers/community/mobile/Mobile-Financial-Services.pdf.

39. Sharon Profis, *Five Ways to Get People to Pay You Back (Compared)*, CNET (Feb. 10, 2015, 3:00 AM PDT), http://www.cnet.com/how-to/square-vs-venmo-vs-google-wallet-vs-paypal/.

40. For an overview of state money transmitter registration requirements, *see* THOMAS BROWN, 50-STATE SURVEY: MONEY TRANSMITTER LICENSING REQUIREMENTS, http://abnk.assembly.ca.gov/sites/abnk.assembly.ca.gov/files/50%20State%20Survey%20-%20MTL%20Licensing%20Requirements(72986803_4).pdf (last visited June 17, 2016).

2. Mobile Payments Can Be Made Through Text Message Transactions

Another type of mobile payment is conducted through the use of short messaging service (SMS), a form of mobile phone texting.[41] Consumers with text messaging-enabled phones can send payments to merchants or other persons by sending text messages with details on payee and payment amounts.[42] Text message payments and remittances are particularly popular in countries with large populations of unbanked individuals or where the use of cash may be prevalent yet risky.[43] However, in the United States, SMS payments for specific causes, such as political contributions or contributions to certain Red Cross' initiatives have been somewhat successful, whereas use of SMS payments for everyday transactions has been slow to catch on.[44] Consumer protection issues also exist with SMS payments that are billed directly to mobile phone bills. This billing practice has led to "cramming," the fraudulent practice of adding unauthorized third-party charges to a customer's phone bill.[45] As a result of this cramming fraud, and associated enforcement actions taken by the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC), major wireless carriers in the United States have generally ended the practice of allowing third-party premium SMS charges.[46]

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41. *See SMS*, NEW OXFORD AM. DICTIONARY (3d ed. 2010).

42. Meena Aharam Rajan, *The Future of Wallets: A Look at the Privacy Implications of Mobile Payments*, 20 COMMLAW CONSPECTUS 445, 447 (2012).

43. *See* Fonté, *supra* note 28, at 445-46.

44. While the United States has a well-established payments system compared to other countries, this may have in fact hampered development of mobile payments technologies. *See* Fonté, *supra* note 28, at 446. *But see, e.g.*, Steve Lackmeyer, *Oklahoma Tornadoes: Red Cross Agrees to Dedicate Text Donations to State Storm Relief Efforts*, NEWSOK (May 23, 2013), http://newsok.com/oklahoma-tornadoes-red-cross-agrees-to-dedicate-text-donations-to-state-storm-relief-efforts/article/3833632 (estimating that the Red Cross raised $3.8 million for Oklahoma tornado disaster victims through text message contributions)*;* Janie Lorber, *Obama's Campaign Quick to Capitalize on Text-to-Donate Option*, ROLL CALL (Oct. 24, 2012, 10:33 AM), http://www.rollcall.com/news/Obama-Campaign-Quick-to-Capitalize-on-Text-to-Donate-Option-218432-1.html (estimating that the Obama campaign raised $836,550 through text message donations).

45. *See* FED. COMM. COMM'N, FCC CONSUMER GUIDE: CRAMMING – UNAUTHORIZED CHARGES ON YOUR PHONE BILL (last reviewed June 10, 2016), http://transition.fcc.gov/cgb/consumerfacts/cramming.pdf.

46. *See* Press Release, Fed. Comm. Comm'n, AT&T Mobility to Pay $105 Million to Settle Wireless Cramming and Truth-in-Billing Investigation (Oct. 8, 2014), http://www.fcc.gov/document/att-pay-105-million-resolve-wireless-cramming-investigation-0; *see also* Lydia Beyoud, *T-Mobile, FTC May Be Close to Settlement on Cramming Charges*, BLOOMBERG BNA (Oct. 22, 2014), http://www.bna.com/tmobile-ftc-may-n17179906182/ (highlighting that in November 2013, T-Mobile, AT&T, Sprint, and Verizon said they planned to stop all billing for premium text services except charitable giving and political giving).

3. Mobile Payments Can Be Made Through Point-of-Sale Transactions

The likely area of growth in the mobile payments space, and primary focus of this paper, is point-of-sale (POS) transactions using smartphones, a type of proximity payment.[47] While a smaller group of consumers use their smartphones to make point-of-sale payments, it appears likely that this will be the growing segment of the mobile payments space in the United States.[48] Of this group, thirty-nine percent made the point-of-sale payment by scanning a barcode or Quick Response code[49] (QR code) available on the screen of the phone.[50] The standalone Starbucks app and the LevelUp app, both use QR codes to effectuate point-of-sale payments.[51] In each app, customers hold the mobile device in front of a countertop scanner and scan a user-specific on-screen barcode to remit payment.[52] Apps can also provide a tipping feature[53] and the Starbucks app is closely integrated with the My Starbucks Rewards loyalty program—attracting customers who appreciate the convenience of the app and the opportunity to earn rewards like free coffee.[54]

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47. Cadie Thompson, *Near Field Communication the Next Mobile Boost?*, USA TODAY (Jan. 8, 2012, 2:24 AM), http://usatoday30.usatoday.com/tech/news/story/2012-01-08/cnbc-near-field-communication-mobile/52443756/1.

48. *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 7, at 1.

49. A Quick Response Code (QR Code) is a type of two-dimensional matrix barcode developed by the Japanese automobile industry in the 1990s. QR Codes can hold 100 times the amount of information compared to a traditional one-dimensional barcode and have consequently expanded beyond the auto industry into more mainstream logistics and advertising. *See* Andrew Tarantola, *How QR Codes Work and Why They Suck So Hard*, GIZMODO (Dec. 18, 2012, 2:20 PM), http://gizmodo.com/5969312/how-qr-codes-work-and-why-they-suck-so-hard.

50. *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 7.

51. *See* STARBUCKS, STARBUCKS MOBILE APPS AND PAYMENTS FACT SHEET (Mar. 2014), https://news.starbucks.com/uploads/documents/Fact_Sheet_-_Starbucks_Mobile_Apps_and_Mobile_Payment_-_MAR2014.pdf; *see also* Alyson Shontell, *Payment Startup LevelUp Thinks It Has Found a Way to Charge Merchants a 0% Credit Card Processing Fee*, BUS. INSIDER (Apr. 16, 2014, 10:03 AM), http://www.businessinsider.com/levelups-cheap-credit-card-processing-fee-heading-towards-0-2014-4.

52. Lauren Johnson, *Starbucks Looks to Share Its App Payment System with Other Retailers*, ADWEEK (July 25, 2014, 9:54 AM), http://www.adweek.com/news/technology/starbucks-looks-share-its-app-payment-system-other-retailers-159100.

53. *See, e.g.*, *Starbucks app*, APPLE ITUNES PREVIEW, https://itunes.apple.com/us/app/starbucks/id331177714?mt=8 (last accessed Mar. 2, 2016); *LevelUp app*, APPLE ITUNES PREVIEW, https://itunes.apple.com/us/app/levelup-.-pay-with-your-phone/id424121785?mt=8 (last accessed Mar. 2, 2016).

54. *See* Dave Fortney, *Mobile Payments: Ready for Primetime*, 2 BANKING PERSPECTIVE, no. 3, 2014, https://www.theclearinghouse.org/publications/2014/banking-perspective-q32014/mobile-payments-ready-for-primetime.

Mobile payments also benefit small businesses and entrepreneurs.[55] For instance, payee-side mobile payment applications loaded on a business's smartphone or tablet allowing electronic payments with a small device like Square, as opposed to a more traditional credit or debit card processing machine.[56] Square services are available worldwide and allow small businesses to use specialized software on a phone or tablet to accept card payments.[57] Alternatively, the payer-side LevelUp app, which allows customers to pay any participating merchant via a credit or debit-linked QR code,[58] charges lower transaction fees than other credit card processors, purportedly making it more affordable for merchants than Square or MasterCard.[59] LevelUp allows businesses that cannot afford their own branded app to seize upon the efficiencies mobile payments generate.

An increase in point-of-service mobile payments is also expected to occur with Near Field Communication (NFC),[60] the "tap-and-go" technology used by mobile wallets such as Google Wallet, SoftWallet (formerly known as Isis[61]), and Apple Pay.[62] Mobile devices with NFC capabilities include a controller chip that is used for wireless communications between the POS terminal and the mobile device.[63] A consumer can make a purchase by positioning his or her phone near the NFC-enabled POS receiver.[64] A more detailed description of the technology

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55. *See* Press Release, Fed. Comm. Comm'n, *supra* note 46, *see also* Beyoud, *supra* note 46.

56. *See The Mobile Pay Revolution*, *supra* note 27.

57. Richard Trenholm, *Square Register App Now Available to Small Businesses Around the World*, CNET (Nov. 20, 2014, 9:50 AM PST), http://www.cnet.com/news/square-register-app-now-available-to-small-businesses-around-the-world/.

58. *See* Shontell, *supra* note 51.

59. *See id.* (noting that LevelUp is both a mobile payment and advertising mechanism, which allows it to be one of the cheapest credit card payment processing option available to merchants).

60. *See* Fortney, *supra* note 54; *see also* Preeta M. Banerjee & Craig Wigginton, *Smart Device, Smart Pay*, DELOITTE UNIV. PRESS (June 23, 2015), http://dupress.com/articles/mpayments-mobile-pos-system-in-retail/ (predicting that 60 percent of smartphones will have Near Field Communication (NFC) capabilities by 2018).

61. *See* Jacob Kastrenakes, *ISIS Mobile Wallet Changes Name to Softcard to Avoid Association with Militant Group*, THE VERGE (Sep. 3, 2014, 8:40 AM), http://www.theverge.com/2014/9/3/6101035/isis-rebrands-as-softcard-to-avoid-association-with-militant-group.

62. *See* Witherington & Williams, *supra* note 3; *see also* Sarah Nassauer, *Retailers to Begin Public Tests of MCX Mobile Payment App But Face Hurdles*, *Wall St. J* (Aug. 11, 2015, 6:30 PM ET), http://www.wsj.com/articles/mcx-to-begin-public-tests-of-mobile-payment-app-but-faces-hurdles-1439332228 (noting that Merchant Customer Exchange (MCE), a consortium of retailers, launched a mobile wallet app in late 2015 known as CurrentC as a competitor to ApplePay); Mike Isaac, *Apple Pay Rival MCX Open to Other Technology*, N.Y. TIMES (Oct. 29, 2014), http://www.nytimes.com/2014/10/30/technology/rival-says-it-may-adopt-apple-pays-system.html.

63. *See* Sam Gustin, *Near Communications Big (Money) Moment*, WIRED (May 25, 2011, 3:59 PM), http://www.wired.com/picenter/2011/05/wired-nfc.faq/.

64. *See* Fonté, *supra* note 28, at 428.

is as follows: "Near Field Communication technology is a short-range tool that operates on wireless frequencies . . . . It works by connecting a user's mobile device, equipped with an NFC antenna . . . to a receiver, usually a few feet away.[65]

NFC technologies and devices have caught on more quickly than expected, with NFC-compatible terminals available at more than two million stores.[66] Analysts predict that 148 million consumers worldwide will make a contactless payment in 2016.[67] This growth is largely spurred by the adoption of Apple Pay, signing up 12 million users monthly since its launch in October 2014, and Android Pay, which has signed up 5 million users a month since September 2015.[68]

C. Payments Are Subject to a Variety of Existing Regulations

As new technologies develop in the payment space, regulators must ensure that appropriate protections are in place to safeguard consumers from fraud and unauthorized transactions.[69] Furthermore, companies should be encouraged to develop technologies that include sufficient privacy and security protections to reduce the chances of data breaches and associated fallout.[70] Particularly given the recent data breaches at retailers such as Target[71] and Anthem,[72] which affected tens of millions of consumers, it is essential that consumers can feel comfortable using their financial products, especially when new technologies are involved.[73]

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65. Gustin, *supra* note 63.

66. Hilary Brueck, *Apple Pay is Going Somewhere New This Year*, FORTUNE (Mar. 24, 2016, 9:18 AM EDT), http://fortune.com/2016/03/24/apple-pay-gets-easier-to-use-this-year/.

67. Andrew Meola, *Apple Pay and Samsung Pay Continue to Dominate the Mobile Wallet Market*, BUS. INSIDER (Mar. 4, 2016, 10:38 AM), http://www.businessinsider.com/apple-pay-samsung-pay-lead-mobile-wallet-growth-2016-3.

68. Olga Kharif, *Samsung Gunning for Apple in Race to Dominate Mobile Payments*, BLOOMBERG TECH. (Mar. 1, 2016, 5:00 AM EST), http://www.bloomberg.com/news/articles/2016-03-01/samsung-gunning-for-apple-in-race-to-dominate-mobile-payments.

69. *See* Press Release, Consumer Fin. Prot. Bureau, CFPB Launches Inquiry into Mobile Financial Services (June 11, 2014), http://www.consumerfinance.gov/about-us/newsroom/cfpb-launches-inquiry-into-mobile-financial-services/.

70. *See* Press Release, Fed. Trade Comm'n, Staff Report on Mobile Shopping Apps (Aug. 1, 2014), https://www.ftc.gov/news-events/press-releases/2014/08/staff-report-mobile-shopping-apps-found-disclosures-consumers-are.

71. *See* Rachel Abrams, *Target Puts Data Breach Costs at $148 Million, and Forecasts Profit Drop*, N.Y. TIMES (Aug. 5, 2014), http://www.nytimes.com/2014/08/06/business/target-puts-data-breach-costs-at-148-million.html (explaining that December 2013 hack of Target's computer system compromised personal data and credit card information of twelve million customers, imposing significant costs on Target and hurting its stock price).

72. *See* Dan Munro, *Health Data Breach At Anthem Is A Blockbuster That Could Affect 80 Million*, FORBES: PHARMA & HEALTHCARE (Feb. 5, 2015, 9:36 AM), http://www.forbes.com/sites/danmunro/2015/02/05/health-data-breach-at-anthem-is-a-blockbuster-could-affect-80-million/ (explaining that Anthem experienced a data breach affecting the records of approximately 80 million customers).

73. *See* Press Release, Consumer Fin. Prot. Bureau, *supra* note 69.

Regulations currently exist that provide protections to purchases made by credit card and debit card, as well as stored-value cards such as prepaid or gift cards. Even though these forms of payment are generally used in the same manner, such as through a swipe at a grocery store or by entering the card information on a website, it is important to note that the regulations differ for each form of payment and, as a result, may have different consequences for consumers.

1. The Fair Credit Billing Act and Truth in Lending Act Protect Consumers' Credit Card Purchases

Fraudulent credit card transactions are protected under the Truth in Lending Act of 1968 (TILA)[74] and subsequent Fair Credit Billing Act of 1974 (FCBA).[75] Additionally, Regulation Z of the TILA provides protections to consumers using credit products, including credit cards.[76] Under Regulation Z, consumers are provided a means of fair and timely resolution of credit billing disputes.[77] Additionally, under the Fair Credit Billing Act (FCBA), a consumer's liability is limited to $50 for unauthorized or fraudulent charges.[78]

It is important to note that there are differences between protections for credit and debit cards. If there is a fraudulent charge involving a credit card, a customer's availability of credit is affected. This is different from a fraudulent charge on a debit card, which affects the availability of actual funds in a bank account. It is also important to consider that, with a credit card, a customer can withhold payment until the fraudulent charge is investigated.[79] Furthermore, many credit card issuers go beyond the statutory requirements of the FCBA and offer zero liability for customers who experience fraud.[80]

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74. Truth in Lending Act, 15 U.S.C. §§ 1601-1667f (2012). TILA was originally adopted to prohibit unsolicited credit cards but has since been expanded to address a variety of consumer credit products. *See, e.g.*, CONSUMER FIN. PROT. BUREAU, CFPB CONSUMER LAWS AND REGULATIONS: TRUTH IN LENDING 1 (2013), http://files.consumerfinance.gov/f/201306_cfpb_laws-and-regulations_tila-combined-june-2013.pdf.

75. 15 U.S.C. § 1666 (2012).

76. 15 U.S.C. § 1601 (2012).

77. *See id.*

78. 15 U.S.C. § 1666; *see also Disputing Credit Card Charges*, FED. TRADE COMMISSION: CONSUMER INFO. (Aug. 2012), http://www.consumer.ftc.gov/articles/0219-disputing-credit-card-charges.

79. *Disputing Credit Card Charges*, *supra* note 78.

80. Allison Martin & Beverly Harzog, *Should Consumers Mostly Use Credit or Debit Cards?*, WALL ST. J. (Mar. 1, 2015, 11:37 PM), http://www.wsj.com/articles/should-consumers-mostly-use-credit-or-debit-cards-1425271054.

2. The Electronic Funds Transfer Act Protects Consumers Who Make Purchases by Debit Card

Fraudulent debit card transactions are protected under the Electronic Funds Transfer Act (EFTA), which is implemented by the Federal Reserve Board through Regulation E.[81] The EFTA outlines rights, responsibilities, and liabilities for consumers using electronic fund transfer (EFT) services.[82] A consumer's liability is dependent on the time period in which he or she reports a fraudulent charge to the card issuer.[83] If someone makes unauthorized transactions with a consumer's debit card number, the consumer has limited liability for those transactions if he or she reports them within 60 days of the statement being sent.[84] The EFTA also outlines the responsibilities and requirements of financial institutions offering EFT services.[85]

While there is limited liability for customers who use debit cards, it is important to note that there may still be drawbacks. For example, a customer who relies predominantly on a debit card and experiences a fraudulent purchase may experience cash flow issues.[86] The funds from the checking account that are used for the fraudulent transaction may be tied up while the bank or card issuer investigates and reimburses the unauthorized transaction.[87]

3. Purchases Made by Stored-Value Cards Are Provided Different Statutory Protections

Consumers can use stored-value cards like branded loyalty cards or "general purpose reloadable cards" (often called prepaid debit cards) to make mobile payments.[88] While historically less popular than debit or credit

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81. 15 U.S.C. § 1693b, o-2 (2012); *see also* 12 C.F.R. § 205 (2015); *Disputing Credit Card Charges*, *supra* note 78. Regulation E covers any "transaction initiated through an electronic terminal, telephone, computer, or magnetic tape that instructs a financial institution either to credit or debit a consumer's account." Examples of EFT systems include "automated teller machine transfers, telephone bill-payment services, point-of-sale (POS) terminal transfers in stores, and preauthorized transfers from or to a consumer's account (such as direct deposit and social security payments)." BD. OF GOVERNORS OF THE FED. RESERVE SYS., REGULATIONS: COMPLIANCE GUIDE TO SMALL ENTITIES, http://www.federalreserve.gov/bankinforeg/regecg.htm (last visited on May 3, 2016).

82. 15 U.S.C. § 1693o-2.

83. *See id.*

84. 15 U.S.C. § 1693g.

85. 15 U.S.C. § 1693b.

86. *See* Martin & Harzog, *supra* note 80.

87. *See id.*

88. *See* John Adams, *Starbucks Mobile POS Success Shows Barcode's Potential*, AM. BANKER (Apr. 2011), http://www.americanbanker.com/bulletins/-1036436-1.html; *see also How Prepaid Cards Can Ignite Mobile Payments*, PYMNTS.COM (Dec. 16, 2013),

cards, use of prepaid cards has surged recently, with $37 billion loaded onto cards in 2010 and predictions of $80 billion or more by the end of 2014.[89] While this option may seem appealing and convenient for customers who want to control or limit the amount of their purchases or who want to reduce the risk of fraud by not using their primary credit card number, from a regulatory standpoint, this option is actually the least protected. Prepaid debit cards are not provided the same statutory protections as credit or debit cards, and only the FTC Act provides protections for unauthorized charges under existing federal law.[90] While the FDIC regulates accounts associated with credit and debit cards, the FDIC does not limit the liability for unauthorized use of most prepaid cards.[91] If an FDIC-member company issues a prepaid card, however, FDIC deposit insurance may kick in if the member company fails.[92]

The CFPB recently published proposed rules relating to general purpose reloadable cards in the fall of 2014, and these rules may have a substantial impact for consumers as well as companies looking to provide mobile payment options through these prepaid cards. The proposed rules would require companies issuing prepaid cards to provide increased consumer protections, including limitations on a consumer's losses when a card is lost or stolen.[93] Pending finalization of the CFPB's rules and with current regulatory protections for prepaid cards being fairly limited, some companies may fill in the statutory gaps through contractual provisions.[94] The FTC stresses that, while these protections are commendable, the protections are voluntary and can be withdrawn or modified at any time.[95]

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http://www.pymnts.com/uncategorized/2013/how-prepaid-cards-can-ignite-mobile-payments/.

89. Carter Dougherty, *Fraud Protections for Prepaid Cards Proposed by Consumer Bureau*, BLOOMBERG (Nov. 13, 2014, 12:01 AM EST), http://www.bloomberg.com/news/articles/2014-11-13/fraud-protections-for-prepaid-cards-proposed-by-consumer-bureau.

90. *See* FED. TRADE COMM'N, REPORT: PAPER, PLASTIC . . . OR MOBILE? AN FTC WORKSHOP ON MOBILE PAYMENTS 6 (Mar. 2013), https://www.ftc.gov/sites/default/files/documents/reports/paper-plastic-or-mobile-ftc-workshop-mobile-payments/p0124908_mobile_payments_workshop_report_02-28-13.pdf.

91. *See* FED. DEPOSIT INS. CORP., TEN THINGS YOU SHOULD KNOW ABOUT DEBIT, CREDIT, OR PREPAID CARDS (Mar. 1, 2012), https://www.fdic.gov/consumers/consumer/information/ncpw/cardstopten.html.

92. *Id.*

93. *See* Press Release, Consumer Fin. Prot. Bureau, CFPB Proposes Strong Federal Protections for Prepaid Products (Nov. 13, 2014), http://www.consumerfinance.gov/newsroom/cfpb-proposes-strong-federal-protections-for-prepaid-products/.

94. *See* FED. TRADE COMM'N, *supra* note 90, at 7. (finding that some mobile payment providers that allowed funding from prepaid cards, voluntarily limited customer liability for fraudulent charges up to $50, similar to debit card protections).

95. *See id.*

4. Money Transfer Rules Vary by State and May Apply to Companies That Provide Certain Mobile Payment Transaction Services

Currently, all 50 states have money transmitter laws requiring licensure. The definition of "money transmission," however, varies by state. As a result, it can be challenging for money transmitter companies to develop and implement appropriate regulatory regimes that appropriate and sufficiently meet the requirements of the different jurisdiction.

One example of this is Square, a credit card and debit card payment system, which failed to register as a money transmitter and faced legal and enforcement actions in Florida and Illinois.[96] Regulations can differ depending on whether the transmitter accepts just credit and debit cards or whether the company accepts gift cards, as this activity involves "holding" rather than just "transferring" funds.[97] Companies offering mobile payment products and services should be aware of a state's definition of money transmitters and should register accordingly. Companies such as PayPal, Amazon, Facebook, and Google have taken a comprehensive approach to registration in response to pressure from a multistate alliance of regulators and have registered in all states with money transmitter laws.[98] Such an endeavor, however, can be incredibly time-consuming and can cost $500,000 or more for the required licenses.[99] These costs can be prohibitive and crippling, and in some states, such as California, the burden can be so high as to drive away business and stifle innovation.[100] These sorts of

96. *See, e.g.*, Ingrid Lunden, *Square Fined $507k in Florida for Operating a Mobile Payment Service Without a Money Transmitter License*, TECHCRUNCH (Aug. 16, 2013), http://techcrunch.com/2013/08/16/square-fined-507k-in-florida-for-operating-a-mobile-payment-service-without-a-money-transmitter-license/; Leena Rao, *Square Slapped With Cease And Desist By Illinois State Department Of Financial Regulation*, TECHCRUNCH (Mar. 1, 2013), http://techcrunch.com/2013/03/01/square-slapped-with-cease-and-desist-by-illinois-state-department-of-financial-regulation/. *See also* Sean Sposito, *Facebook Fast-Tracks Its Payments Business*, AM. BANKER (Feb. 21, 2012), http://www.americanbanker.com/issues/177_35/facebook-credits-money-transmitter-license-bank-regulation-1046825-1.html (noting that Facebook proactively sought money transfer licenses to avoid similar legal issues); *Money Transfer Licenses*, FACEBOOK, https://www.facebook.com/payments_terms/licenses (last visited June 18, 2016).

97. Tim Fernholz, *The Patchwork of Regulations Entangling Square, and Every American Internet Startup That Takes Money*, QUARTZ (Mar. 13, 2013), http://qz.com/62265/why-square-and-seven-other-finance-start-ups-got-run-out-of-illinois/.

98. *Id.*

99. *Id.*

100. *See* Owen Thomas, *This Innovation-Killing California Law Could Get a Host of Startups in Money Trouble*, BUS. INSIDER (July 11, 2012, 6:21 PM), http://www.businessinsider.com/california-money-transmitter-act-startups-2012-7 (arguing that California's money transfer law led FaceCash to withdraw from doing business in the state). FaceCash, now defunct, was an innovative payments start-up that created a mobile app that would enable participating merchants to view a photo of the consumer before approving a point-of-sale purchase. Fumiko Hayashi, *Mobile Payments: What's in It for Consumers?*

regulations, while purportedly put into place to protect consumers, are particularly burdensome for start-ups, thus inhibiting the development of innovative solutions and products.

5. Data Collected in Connection with Mobile Payments May Be Subject to Privacy and Data Security Regulations

Depending on the type of data transferred or stored and the user of the device, mobile payment providers may be subject to various privacy and data security regulations. As a result, companies should ensure that their products and services meet the requirements of these regulations in addition to the regulations that apply to financial transactions.

One of the significant risks for credit and debit cards is a data breach and the subsequent unauthorized use of personal and card data. Currently, there is no federal law that regulates data breaches, although some federal laws protect data in specific sectors like health and financial information.[101] Myriad state laws supplement these sector-specific federal laws, adding yet again to the patchwork of regulation. State law, as one might expect, is not uniform, and some states lack even basic privacy protections like data breach notification rules.[102] By September 2014, forty-seven states, the District of Columbia, the United States Virgin Islands, Guam, and Puerto Rico, have enacted data breach notification laws that require government and private entities to notify individuals of loss of personally identifiable information.[103] While the state regulations generally do not provide a private cause of action for individuals whose private information is breached,[104] the

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ECON. REV. 1st Quarter 2012, at 35, 50, https://www.kansascityfed.org/publicat/econrev/pdf/12q1Hayashi.pdf.

The California money transmitter regulations, however, have since been amended. *See* Sean Sposito, *California Reforms Money Transmitter Law*, AM. BANKER (Oct. 13, 2013), http://www.americanbanker.com/issues/178_195/california-reforms-money-transmitter-law-1062691-1.html.

101. *See, e.g.*, Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. 104–191, 110 Stat. 1936 (setting national standards for protection of electronic health care information); Gramm-Leach-Bliley Financial Modernization Act, Pub. L. No. 106–102, 113 Stat. 1338 (1999) (setting national standards for protection of consumer information held by financial institutions); Children's Online Privacy Protection Act (COPPA), 15 U.S.C. §§ 6501-6505 (2012) (giving FTC authority to regulate the collection and use of personal information from and about children under thirteen years old on the Internet).

102. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, STATE SECURITY BREACH NOTIFICATION LAWS, (Sept. 4, 2014), http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx. As of the report's publication, only Alabama, New Mexico, and South Dakota do not have any data breach laws in place. *Id.*

103. *See id.*

104. Lance Bonner, *Cyber Risk: How the 2011 Sony Data Breach and the Need for Cyber Risk Insurance Policies Should Direct the Federal Response to Rising Data Breaches*, 40 WASH. U. J.L. & POL'Y 257, 267 (2012).

compliance costs imposed on companies and governments can still be tremendously high.[105]

In conjunction with his 2015 State of the Union address, President Barack Obama introduced a package of cybersecurity and data security proposals, including the Personal Data Notification and Protection Act, which would establish a national standard for companies to notify employees and customers about security breaches, as well as a Consumer Privacy Bill of Rights.[106] Congress may choose to consider the President's proposals or other data protection and privacy bills during the 114th Congress, and such action could increase consumers' confidence with respect to their data transferred through electronic and mobile payments.[107]

D. The CFPB and FTC Have the Responsibility to Enforce Consumer Protection Laws

The FTC has broad jurisdiction in the commercial marketplace, and Section 5(a) of the Federal Trade Commission Act allows the FTC to take action against companies that engage in "unfair or deceptive acts or practices [UDAP] in or affecting commerce." [108] The FTC also has jurisdiction in certain circumstances over telecommunication providers, mobile phone operators, and nondepository providers of financial products or services.[109]

The CFPB has jurisdiction that is even broader than that of the FTC, although its application is limited to financial products and services. The Dodd-Frank Act builds off of the general consumer protection authority of the FTC Act and directs the CFPB to issue regulations and take action against companies engaging in "unfair, deceptive, and abusive acts or practices [UDAAP]" [110] This expands on the traditional consumer protection authority at the FTC, with the additional "A" standing for abusive, a term that at this time is fairly vague but is likely to be defined through the CFPB's rulemaking activities. Additionally, under the Dodd-Frank Act, the

105. *Id.* at 262.

106. Press Release, White House Office of the Press Sec'y, Fact Sheet: Safeguarding American Consumers & Families (Jan. 12, 2015), http://www.whitehouse.gov/the-press-office/2015/01/12/fact-sheet-safeguarding-american-consumers-families.

107. *See* AM. BANKERS ASS'N, THE CHANGING FACE OF THE PAYMENTS SYSTEM: A POLICYMAKER'S GUIDE TO IMPORTANT ISSUES 4 (2013), http://www.aba.com/Tools/Function/Payments/documents/2013EmergingPayments.pdf.

108. Federal Trade Commission Act §45(a), 15 U.S.C. §45(a)(2) (2012) (granting the FTC authority to prosecute unfair and deceptive trade practices, often referenced as UDAP, which was extended to banks under the Federal Deposit Insurance Act § 8, 12 U.S.C. § 1818 (2012), but is enforced by other agencies like the FDIC) *See* FED. DEPOSIT INS. CORP., FDIC COMPLIANCE EXAMINATION MANUAL – NOVEMBER 2015, at VII-1.1 (2015), https://www.fdic.gov/regulations/compliance/manual/ComplianceExaminationManual.pdf

109. *See* FED. TRADE COMM'N, *supra* note 90, at 3; *see also* 15 U.S.C. § 45(a)(2); 12 U.S.C. § 5581(b)(5)(c).

110. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act §§ 1002, 1031, 1036(a), 12 U.S.C. §§ 5481, 5531 & 5536(a) (2012) (defining the provisions often referred to as UDAAP).

CFPB is granted jurisdiction over two entities: "covered persons" and "service providers."[111] The Dodd-Frank Act allows state attorneys general to bring civil actions against companies for violations of UDAAP.[112]

As will be further discussed below, companies involved with mobile payments may be covered by the CFPB's broad authority. The banks providing traditional financial products such as checking accounts, debit cards, and credit cards are clearly under the jurisdiction of the CFPB. What is important to note, however, is that the CFPB's UDAAP authority is not limited to financial services and could cover financial products, regardless of the provider or method of payment.[113]

III. IN ORDER FOR MOBILE PAYMENTS TO BE WIDELY ADOPTED, CONSUMERS NEED AN OVERWHELMING REASON TO CHANGE THEIR BEHAVIOR

The release of the iPhone in 2007, just a few short years ago, revolutionized the way that many consumers do business, communicate with friends and family, and get information. The growth of smartphones over the past few years has surpassed the growth of any other technology, including televisions and computers.[114] Mobile payments have also grown over the years, with 12 million users and 15 percent of United States revenue coming from mobile payments.[115] In order for mobile payments to become mainstream, however, consumers will need an overwhelming reason to change their behavior and will need to be assured that their mobile payment activity is secure, which may be a challenge in light of the recent card data breaches.[116]

One positive and potentially highly influential step in the direction of mainstream mobile payments was the announcement during a February 2015 White House Cybersecurity Summit that the federal government

111. 15 U.S.C. § 5481(6), (26) (2012) (defining the terms "covered person" and "service provider").

112. Dodd-Frank Wall Street Reform and Consumer Protection Act § 1042, 12 U.S.C. § 5552 (2012).

113. *See* Danielle Douglas-Gabriel, *Are Wal-Mart and Apple Poised to be Regulated by the CFPB?*, WASH. POST (Sept. 25, 2014), http://www.washingtonpost.com/news/business/wp/2014/09/25/are-wal-mart-and-apple-poised-to-be-regulated-by-the-cfpb/; *see also* Catherine Dunn, *Will Apple Pay Earn Oversight by the Consumer Financial Protection Bureau?*, INT'L BUS.TIMES (Sept. 12, 2014, 5:07 PM), http://www.ibtimes.com/will-apple-pay-earn-oversight-consumer-financial-protection-bureau-1687574.

114. *See* Fortney, *supra* note 54 (citing MARY MEEKER, KCPB INTERNET TRENDS 2014 95 (2014), http://www.kpcb.com/internet-trends).

115. *Id.*

116. *See* Richard Moulds, *Why Mobile Payment Adoption Has Been Slow – And Why That's About to Change,* WIRED (Jan. 2015), http://www.wired.com/2015/01/mobile-payments-adoption/.

would begin taking Apple Pay as payment in September 2015.[117] According to this announcement, Apple Pay will be accepted for admission fee payments at National Parks and will be linked to Social Security and veterans benefits.[118] The U.S. government is also expected to integrate Apple Pay into its GSA SmartCard programs for use with federal payment cards.[119] This announcement was viewed by many as a "vote of confidence" for the security of Apple Pay.[120] Developments like these in the payments space can be likened to an endorsement of the technology and are likely to have a positive effect on the growth and adoption of Apple Pay and similar mobile payment products.

The convenience factor of mobile payments should certainly not be overlooked or discounted. Mobile phones are compact and portable, and the integration of financial services into the device could eliminate the need to carry around a bulky wallet with multiple cards in addition to cash and coins.[121] Convenience with respect to time is also worth noting; some studies have estimated that transactions using contactless payment methods such as NFC can be 15 to 30 seconds faster than swiping a credit or debit card and signing or entering a PIN.[122] A study by Sweetgreen, a salad chain, found that using the LevelUp app to pay for purchases takes just seven seconds.[123]

A. Companies Involved with Mobile Payments Must Alleviate Consumers' Privacy and Fraud Concerns

In order for mobile payments to be widely adopted, consumers will need to be confident in the privacy and data security protections of mobile payment providers. While providers of mobile payments have touted security of this new technology, customers may remain skeptical until the technologies are tried and true. A Federal Reserve study found that concerns about the security of the technology were the primary reason given for not using mobile payments.[124] The adoption of Apple Pay by the federal government could be the stamp of approval needed to motivate and tip potential customers into integrating Apple Pay into their daily activities.

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117. Press Release, White House Office of the Press Sec'y, Fact Sheet: White House Summit on Cybersecurity and Consumer Protection (Feb. 13, 2015), https://www.whitehouse.gov/the-press-office/2015/02/13/fact-sheet-white-house-summit-cybersecurity-and-consumer-protection; *see also* Michal Lev-Ram, *Tim Cook: Apple Pay Launching for Government Transactions*, FORTUNE (Feb. 13, 2015, 2:48 PM EDT), http://fortune.com/2015/02/13/tim-cook-apple-pay-government/.

118. Lev-Ram, *supra* note 117.

119. Andrea Peterson, *Apple Pay Gets a Big Vote of Confidence from the U.S. Government*, WASH. POST (Feb. 13, 2015), http://www.washingtonpost.com/blogs/the-switch/wp/2015/02/13/apple-pay-gets-a-big-vote-of-confidence-from-the-u-s-government/.

120. *Id.*

121. Hayashi, *supra* note 100, at 43.

122. *Id.* at 44.

123. Shontell, *supra* note 51.

124. BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 7.

Consider, for example, that over 56 million Americans receive social security benefits.[125] Integrating Apple Pay into the daily use of even a fraction of these beneficiaries could drastically increase the number of users of Apple Pay.[126] As described in more detail below, mobile payment providers have taken key steps to ensure privacy, data security, and protection from fraud.

B. Businesses Should Strive to Ensure Mobile Payments Are Convenient for Customers

In order to facilitate widespread adoption of mobile apps by consumers, businesses will need to ensure that mobile payments are convenient for consumers. Businesses may need to utilize market research to determine how to maximize convenience. Starbucks, for example, enhanced its app with an option for customers to tip baristas through the app.[127] The development was thoughtful; customers may not find it convenient to pay for their drink through their phones, but at the same time, needing to dig into their wallet to find change to tip is anything but convenient.

Businesses may also want to consider integration with other apps and features to make sure that mobile payments are convenient as possible. Google, for example, has the potential to greatly influence a consumer through integration of payments space with other touch points like Google Maps, Gmail, etc.[128] The Motley Fool, a multimedia company providing financial advice, explains that the highly integrated environment for hypothetical Starbucks VIP customers provides the ultimate user experience:

> Straight from the app, you can order your black car service to pick you up and take you to your local Starbucks, where your drink is already waiting for you when you arrive since you've ordered and paid ahead of time through the app. It will also have your favorite daily newspaper loaded on your phone ready

125. SOC. SEC. ADMIN., SOCIAL SECURITY MONTHLY STATISTICAL SNAPSHOT: NOVEMBER 2015, at 1 (2015), https://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/2015-11.pdf.

126. *Cf.* Kif Leswing, *Why It Matters that the Federal Government Will Accept Apple Pay*, GIGAOM (Feb. 13, 2015, 1:31 PM PDT), https://gigaom.com/2015/02/13/why-it-matters-that-the-federal-government-will-accept-apple-pay/.

127. Press Release, Starbucks, Digital Tipping and 'Shake to Pay' are New with Starbucks Enhanced App for iPhone (Mar. 11, 2014), http://news.starbucks.com/news/starbucks-accelerates-mobile-payment-leadership-with-release-of-enhanced-io. Starbucks states that the new app makes "the digital experience even easier and more rewarding for our customers and partners" and notes that, "As more and more customers are using their phone to pay, they have also asked for a convenient and meaningful way to show their appreciation to store partners." *Id.*

128. Mike Dautner, *Buy from the Map: Google Maps Advances into Mobile Payments*, PAYMENT WEEK (Nov. 16, 2015), http://paymentweek.com/2015-11-16-buy-from-the-map-google-maps-advances-into-mobile-payments-8860/.

> to read along with your coffee, and then have your private driver return you home, all without ever leaving the app.[129]

Companies can develop and implement different types of integrated experiences based on customer needs and demands.

C. Businesses May Need to Revamp or Incorporate New Incentives to Encourage Customers to Adopt Mobile Payments

Merchants and mobile payment providers should explore coupons and discounts for using mobile payments to incentivize the use of the mobile payment products. For example, the Starbucks app is considered highly successful, as shown by 10 million customers using the app for 5 million transactions each week.[130] Starbucks provides incentives for use of the app by offering app rewards such as free birthday drinks.[131] Businesses using the LevelUp app similarly reward loyal customers by providing free meals after multiple visits.[132]

Card issuers and businesses may also want to consider whether and how to incentivize customers to use mobile applications for payment. If mobile payments are, in fact, more secure than payments involving the traditional swipe of a credit or debit card, cost savings involved with issuing and processing cards could result.

IV. EXISTING LAWS AND REGULATIONS APPLY TO THE UNDERLYING TRANSACTIONS OF MOBILE PAYMENTS AND PROVIDE SUFFICIENT PROTECTIONS TO CONSUMERS

As described above, there is an existing framework of regulations that applies to payment transactions. This framework is robust and provides consumer protections against fraud across a variety of different financial products. These regulations are tied to the payment instrument (i.e., credit or debit card) and therefore provide the same protections, whether the instrument is used for an in-store, online, or mobile transaction. These existing regulations, coupled with the increased security measures put in place for mobile payment applications, should help lead to widespread adoption of mobile payments by consumers.

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129. Seth McNew, *What Makes Starbucks' Mobile App Great?*, MOTLEY FOOL (Oct. 7, 2014, 6:22 PM), http://www.fool.com/investing/general/2014/10/07/what-makes-starbucks-mobile-app-great.aspx.

130. John Heggestuen, *Starbucks Generated Over $1 Billion From Mobile Transactions Last Year*, BUS. INSIDER (Jan. 31, 2014, 2:30 PM), http://www.businessinsider.com/mobile-payments-at-starbucks-explode-in-2013-passing-the-1-billion-mark-2-2014-1.

131. *Id.*

132. *See* LEVELUP, https://www.thelevelup.com/; *see also, e.g.*, *Sweetgreen app*, APPLE ITUNES PREVIEW, https://itunes.apple.com/us/app/sweetgreen/id594329490 (explaining that "[f]or every $99 you spend using the app, you'll get $9 toward your next purchase.").

A. Existing Regulations Provide Robust Protections to Mobile Payments and Should Not Be More Extensively Regulated.

Federal regulators have consistently stated that existing financial services regulations apply to mobile banking and mobile payments.[133] Consumer protections for mobile payments are dependent on the payment instrument (i.e., credit or debit card) and not based on whether the instrument is used in person or on a mobile device.[134] As a result, consumers are granted the same protections for fraud and unauthorized transactions as those existing for a physical credit or debit card transaction. Generally speaking, if a cardholder experiences an unauthorized transaction or has a dispute with a merchant, the cardholder can dispute the charge with the credit card issuer, and this ability to dispute applies to card payments made via a mobile device. Furthermore, merchants that accept Visa and MasterCard must agree to the operating terms and conditions.[135]

So far, regulators have taken a wait-and-see approach, which is appropriate here. Payments made through a digital wallet should be treated the same as payments made with a physical credit or debit card. The statutory and regulatory systems currently in place to provide consumers with protections for electronic payments are robust and ensure that consumers have limited liability for fraudulent transactions while also ensuring that consumers are provided with detailed disclosures. A consistent regulatory approach to transactions by card, regardless of whether by swipe, website, or mobile transaction, is beneficial to consumers, merchants, and processors alike; a separate regulatory scheme would cause confusion—particularly if the processing and billing are treated the same.

Digital wallets, like Apple Pay and Google Wallet, are different from money transmitters, like PayPal, that are subject to state-level money transfer rules. Digital wallets hold funds and should not be considered third-party intermediaries that transfer the funds. Digital wallets simply facilitate payments and are mechanisms for using existing processes for credit, debit, or prepaid card transactions. As such, the transactions carry no more risk of loss or fraud than physical credit or debit card purchases. Additionally, consumers who use mobile wallets are likely to receive the purchased items immediately upon completion of the point-of-sale transactions.

Digital wallets are generally linked to credit or debit cards and do not charge back to a customers' wireless bill. Unless the product structure is changed to allow for direct charges to phone bills, digital wallets will generally not fall under FCC jurisdiction. The wireless carrier providing

133. *The Future of Money*, *supra* note 29.

134. Hayashi, *supra* note 100, at 50.

135. VISA, VISA INTERNATIONAL OPERATION REGULATIONS (2013), https://usa.visa.com/dam/VCOM/download/merchants/visa-international-operating-regulations-main.pdf.

service to the mobile phone, however, will continue to be subject to FCC regulations such as the Truth-in-Billing rule.[136]

1. Mobile Wallets like Apple Pay and Google Wallet Should Be Treated like Traditional Payments

Payment mechanisms such as Apple Pay and Google Wallet facilitate electronic transactions that involve credit and debit cards. The card selected by the user for use in a mobile transaction is and should be afforded the same protections as a physical credit or debit card because the underlying transaction is via the card. Simply because the transaction is conducted over a new form of technology does not mean that the existing regulations do not or should not apply.

In support of this argument, the FDIC provided the following guidance:

> To date, no federal laws or regulations specifically govern mobile payments. However, to the extent a mobile payment uses an existing payment method, such as ACH or EFT, the laws and regulations that apply to that method also apply to the mobile payment. For example, a mobile payment funded by the user's credit card will be covered by the laws and regulations governing traditional credit card payments.[137]

While banks and financial institutions cannot always protect consumers from fraudulent activity by third parties, multiple regulations are in place to ensure that victimized consumers are not liable for fraud.[138]

The Electronic Funds Transfer Act (EFTA) "establishes consumer rights to a number of disclosures and error resolution procedures for unauthorized or otherwise erroneous transactions. The disclosures include upfront disclosures regarding, among other things, the terms and conditions of the EFT service and how error resolution procedures will work."[139] The

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136. *See* SUZANNE MARTINDALE, MOBILE PAYMENTS AND ECONOMIC INCLUSION: ISSUES FOR CONSUMERS 11 (Dec. 1, 2011), https://www.fdic.gov/about/comein/MartindaleDec11.pdf. In an FDIC Presentation, the Consumers Union stated that the "FCC does not appear to have jurisdiction over mobile payments," as its "truth-in-billing" regulations apply only to "telephone services." *See id.* The FDIC echoes this in its mobile guidance, stating that Truth-in-Billing applies to wireless carriers. *Mobile Payments: An Evolving Landscape*, 9 SUPERVISORY INSIGHTS, Winter 2012, at 3, https://www.fdic.gov/regulations/examinations/supervisory/insights/siwin12/SIwinter12.pdf. Given that most U.S. carriers no longer allow third-party charges and most current mobile payment systems use an underlying financial product as opposed to a phone bill charge, it seems unlikely that Truth-in-Billing will be applicable to mobile payments. *See id.*

137. *Mobile Payments: An Evolving Landscape*, *supra* note 136, at 8.

138. *See id.*

139. *Id.*

FDIC states that this regulation applies to mobile payments when the underlying transaction is made from a consumer's account through an electronic funds transfer (EFT), an example of which would be a purchase using a debit card.[140] As a result, mobile payment transactions using debit cards are protected under the EFTA.[141]

The Truth in Lending Act (TILA) requires creditors "to provide disclosures to consumers describing costs; including interest rate, billing rights, and dispute procedures."[142] The FDIC states that this regulation applies to mobile payments "when the underlying source of payment is a credit card" (or other credit account covered by TILA and Regulation Z).[143] Mobile payment transactions using credit cards will have their transactions protected under the TILA.

It is important to note, however, that the FDIC has stated that mobile payment systems that do not use the existing payment infrastructure, such as the traditional banking system or credit or debit cards, may not be subject to the laws and regulations for the existing infrastructure.[144] This does not mean, however, that the system would not be subject to regulation, as regulators like the FTC, FCC, and other state and federal banking regulators have jurisdiction over a variety of consumer protection matters. A practice that may not fall under FDIC purview, for example, could be payments made by text message and billed to the wireless phone bill, a practice that has been subject to high scrutiny and serious enforcement actions.[145]

Due to the complexity and sheer number of regulations surrounding payments, consumers may lack a clear understanding of their rights and responsibilities, as well as an understanding of which regulator is responsible for enforcing regulations to mobile payments. Both EFTA/Regulation E and TILA/Regulation Z rules require financial institutions to provide detailed disclosures to consumers in connection with opening accounts, and to periodically provide disclosures and updates thereafter.[146] The proposed CFPB rules relating to prepaid cards would bring prepaid cards under the EFTA and TILA, which would effectively result in requiring similar disclosures for prepaid cards.[147] While banks and financial institutions frequently use model disclosures, such as those provided by the CFPB or other banking regulators, these disclosures may still be

140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *See Id.*
145. *See, e.g*, Press Release, Fed. Trade Comm'n, T-Mobile to Pay At Least $90 Million, Including Full Consumer Refunds To Settle FTC Mobile Cramming Case (Dec. 19, 2014), https://www.ftc.gov/news-events/press-releases/2014/12/t-mobile-pay-least-90-million-including-full-consumer-refunds.
146. Truth in Lending Act, 15 U.S.C. §§ 1601-1667f (2012); *see generally* Regulation E, 12 C.F.R. § 205 (2016); Regulation Z, 12 C.F.R. § 226 (2016).
147. Prepaid Accounts under the Electronic Fund Transfer Act (Regulation E) and the Truth In Lending Act (Regulation Z), 79 Fed. Reg. 77101 (proposed Dec. 23, 2014) (to be codified at 2 C.F.R. pts. 1005, 1026).

complicated for consumers to understand.[148] Furthermore, a paper insert received in an envelope with a plastic credit card may not be easily accessible. As a result, financial companies involved with a mobile payment product should make sure that disclosures are easy to read and available online for consumers to access at any time.[149]

2. Technology Companies Do Not Necessarily Fall Under the CFPB's Supervision as a Result of Their Involvement in Mobile Payments

The Dodd-Frank Act grants jurisdiction to the CFPB over "covered persons" and "service providers," subject to a limited number of exceptions.[150] The Dodd-Frank Act gives the CFPB authority to regulate unfair, deceptive, or abusive acts or practices (UDAAP) by these entities in the course of transactions or offerings of consumer financial products or services.[151] While the scope of this authority is still yet to be clearly defined, the CFPB has asserted that it encompasses mobile payments,[152] recently stating that:

> The Bureau's role is not to choose market winners and losers, but to protect consumers and to make sure that companies offering consumer financial products or services play by the same rules. By and large, those rules are technologically neutral. Rules that apply to plastic card payments generally also apply to payments with a phone. For example, disclosures must be clear, consumers must be protected from unauthorized transactions, and conduct towards consumers must not be unfair, deceptive, or abusive.[153]

148. Eric Goldberg, *Prepaid Cards: Help Design a New Disclosure*, CONSUMER FIN. PROT. BUREAU: POL'Y & COMPLIANCE (Mar. 18, 2014), http://www.consumerfinance.gov/blog/prepaid-cards-help-design-a-new-disclosure/.

149. Note that the FTC issued a study on mobile shopping apps in 2014 that found that app disclosures were lacking and did not provide consumers with important information relating to payment disputes and consumer data. *See* Press Release, Fed. Trade Comm'n, Staff Report on Mobile Shopping Apps Found Disclosures to Consumers Are Lacking (Aug. 1, 2014), https://www.ftc.gov/news-events/press-releases/2014/08/staff-report-mobile-shopping-apps-found-disclosures-consumers-are. While mobile shopping apps are different from mobile payments, *see supra* Section II.B, it would not be out of the question for regulators to examine mobile payment disclosures as well, particularly given the challenges involved with limited screen space.

150. 12 U.S.C. § 5481 (2012).

151. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act §§ 1031, 1036(a), 12 U.S.C. §§ 5531, 5536 (2012).

152. *See* Douglas-Gabriel, *supra* note 113; *see also* Dunn, *supra* note 113.

153. Dunn, *supra* note 113 (quoting the remarks of Moira Vahey, CFPB spokesperson).

While it is accurate to say that the technologically neutral rules applying to physical card payments also apply to mobile payments,[154] tech companies involved with mobile payments should not be responsible for unfair, deceptive, or abusive conduct resulting from card issuers' or financial institutions' unilateral decisions. For example, if a bank's conduct relating to the advertising of a credit or debit card was found to run afoul of CFPB's UDAAP authority, that does not necessarily mean that the technology provider like Apple Pay or Google Wallet should also be found liable of UDAAP as a result of facilitating a transaction associated with the violating card.

The FDIC reiterates this stance on the application of these consumer protection laws and provides guidance, stating that the CFPB's UDAAP authority and the FTC's UDAP authority "applies to all mobile payments regardless of underlying payment source."[155]

Taking the contrary position, Georgetown University Law Center Professor Adam Levitin argues that "[c]ard issuers are covered persons, and Apple is providing a material service in connection with a consumer financial product: a credit card."[156] Consequently, Levitin argues that Apple has become a "regulated financial institution."[157] Levitin argues that Apple's involvement (as well as Google's) hinges on their "participat[ion] in designing, operating, or maintaining [a] consumer financial product or service."[158] In a blog post on the topic, Levitin distinguishes Apple's involvement and says that, while the device (i.e., hardware) does not trigger CFPB supervision, Apple's development of the Apple Pay feature means that Apple Pay is operating and maintaining a payment system.[159]

This interpretation of the CFPB definition is problematic. If Apple (or Google as the provider of Google Wallet) is considered a financial provider, it may gain responsibility of providing fraud protection, limited liability and other services traditionally provided by banks, payment processors, and other financial institutions. This interpretation of Apple as a service provider would mean that there would be overlapping jurisdictions and multiple layers of regulated institutions. This is a regulatory burden that does not benefit the consumer because the Apple Pay product uses existing payment infrastructure that is already sufficiently regulated. The bank or financial institution issuing the underlying payment method—which is likely a credit, debit, or prepaid card—is and should be subject to applicable regulations and CFPB supervision.[160]

The potential for the interpretation of Apple or similar companies as a "service" provider has not gone unnoticed by the CFPB. In a September

154. *See id.*

155. *Mobile Payments: An Evolving Landscape*, *supra* note 136.

156. Dunn, *supra* note 113.

157. Adam Levitin, *Apple Pay and the CFPB*, CREDIT SLIPS (Sept. 10, 2014, 10:56 PM), http://www.creditslips.org/creditslips/2014/09/apple-pay-and-the-cfpb.html.

158. *Id.*

159. Dunn, *supra* note 113.

160. See 12 U.S.C. §§ 5531, 5536, 5481 (2012).

2014 speech, CFPB Director Richard Cordray stated that the CFPB had sent Requests for Information on issues relating to mobile banking and financial management services to address potential consumer protection issues.[161] Director Cordray then made general remarks about mobile payments, stating that:

> Using mobile devices for all sorts of banking services can make some transactions cheaper or faster or both. But we need to make sure that the legal and regulatory framework can keep up effectively, so that all consumers can be well served and remain protected, whether they are opening their wallet or scanning the screen on their smartphone.[162]

The CFPB issued a report on mobile financial services in November 2015 based on the results of its Request for Information,[163] but it remains uncertain what other actions the agency might take in this space.

B. Even Without Existing Regulations to Ensure Consumer Protection, Products like Apple Pay and Google Wallet Are Designed for Security

In addition to being subject to existing statutory and regulatory protections for traditional payments transactions, many of the emerging payment technology mechanisms and products have been developed to ensure that transactions are safe and secure. These increased security measures are an essential step in ensuring that consumers are comfortable adopting a new technology, especially due to the frequency of data breaches and the subsequent burdens involved with remedying the consequences of these data breaches. At the heart of a mobile payment is the smartphone itself and its unique profile of features, such as Wi-Fi, GPS data, and the type and number of apps.[164] This unique profile can help the device identify whether the user is authentic and can erect barriers if the purchase seems suspect or fraudulent.[165] Additionally, many mobile payments take advantage of encryption technology to ensure secure payments.[166]

Apple, for example, has implemented several security protections for its Apple Pay product. First and foremost, in order to use the device, a user

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161. Darrell Delamaide, *Delamaide: Apple Pay May Test Regulators*, USA TODAY (Sept. 16, 2014, 8:44 PM EDT), http://www.usatoday.com/story/money/business/2014/09/16/delamaide/15743653/.

162. *Id.*

163. CONSUMER FIN. PROT. BUREAU, MOBILE FINANCIAL SERVICES (2015), http://files.consumerfinance.gov/f/201511_cfpb_mobile-financial-services.pdf.

164. *See* Moulds, *supra* note 116.

165. *Id.*

166. *See, e.g.*, PCI SEC. STANDARDS. COUNCIL, ACCEPTING MOBILE PAYMENTS WITH A SMARTPHONE OR TABLET (2014), https://www.pcisecuritystandards.org/documents/accepting_mobile_payments_with_a_smartphone_or_tablet.pdf.

must enter a passcode and choose to set up a fingerprint verification (Touch ID).[167] Then, in order to use the Apple Pay feature, the user must link a credit or debit card to his or her Apple account.[168] The credit or debit cards that are used for payment are subject to the aforementioned regulations and are also subject to additional security measures put in place by Apple.[169] When entering credit card details, a user can use the device's camera or type in the numbers.[170] In either case, the information is encrypted.[171] According to Apple:

> If you use the camera to enter the card information, the information is never saved to the device or stored to the photo library. Apple decrypts the data, determines your card's payment network, and re-encrypts the data with a key that only your payment network can unlock. Then it sends the encrypted data, along with other information about your iTunes account activity and device (such as the name of your device, its current location, or if you have a long history of transactions within iTunes) to your bank. Using this information, your bank will determine whether to approve adding your card to Apple Pay.[172]

After the credit or debit card is approved, the payment network or the consumer's bank creates a unique Device Account Number.[173] This Number is also encrypted, and Apple is unable to decrypt this number. Instead, Apple will add it to the Secure Element within the consumer's device.[174] Apple describes Secure Element as:

> An industry-standard, certified chip designed to store your payment information safely. The Device Account Number in the Secure Element is unique to your device and to each card added. It's isolated from iOS, never stored on Apple Pay servers, and never backed up to iCloud. Because this number is unique and different from usual credit or debit card numbers, your bank can prevent its use on a magnetic stripe card, over the phone, or on websites.[175]

Google highlights similar protections for its Google Wallet product, including one-hundred percent fraud protection, ability to disable the

167. *Apple Pay Security and Privacy Overview*, APPLE (last modified May 6, 2016), http://support.apple.com/en-us/HT203027.
168. *See id.*
169. *See id.*
170. *See id.*
171. *See id.*
172. *Id.*
173. *See id.*
174. *See id.*
175. *See id.*

account if the mobile device is lost or stolen, a custom four-digit PIN, transaction notifications, and data encryption.[176] Whether these security precautions for mobile devices will be effective, however, remains to be seen. Experts take both sides on whether the system is as secure as the developer claims it to be, but it is possible that the tokenization technology will make mobile payments more secure than the traditional card swipe that leaves card data less secure and more at risk in the event of a breach. While some argue that mobile payments may not be foolproof with respect to security from hackers, others argue that Apple Pay takes the essential step of eliminating the use of the old credit card number storage format, which raised significant risks when major companies and retailers were breached in recent months.[177] Robert Neivert, chief operating officer of Private.me, a company that created an anonymous search engine and is working to improve online privacy, says that, while "nothing is absolutely secure," Apple's elimination of the old card format is "an improvement from the existing [options.] . . . It takes away one of the most prominent ways in which security breaches happen, which is intercepting that credit card number."[178]

There have been reports of fraudulent transactions occurring on Apple Pay, specifically a series of transactions occurring at Apple retail stores using stolen credit card numbers.[179] While this may be concerning to some and call into question the security of the Apple Pay system, these incidents are not a result of an Apple Pay breach, but instead are legacy problems resulting from previous data breaches at retailers such as Home Depot and Target.[180] Fraudsters were able to make unauthorized purchases without having a physical card present by instead using stolen card numbers in the Apple Pay system.[181] Banks and card issuers alerted to this problem have, as a result, made changes to tighten their verification procedures for inserting card data for use with Apple Pay.[182] While this is an example of a potential flaw to the mobile payments system, the quick reaction of companies to address the weakness is a testament to the commitment to the security and success of mobile payments. Additionally, it is likely that these types of fraudulent transactions will decrease as tokenization becomes more popular, resulting in fewer usable credit or debit card numbers in circulation following a breach.

176. *See Google Wallet*, GOOGLE, https://www.google.com/wallet/ (last accessed Mar. 2, 2016).

177. *See, e.g.*, Louis Bedigian, *Is Apple Pay Secure?*, YAHOO! FIN. (Oct. 24, 2014, 10:08 AM), http://finance.yahoo.com/news/apple-pay-safe-140843948.html.

178. *Id.*

179. Robin Sidel & Daisuke Wakabayashi, *Apple Pay Stung by Low-Tech Fraudsters*, WALL ST. J. (Mar. 5, 2015, 7:50 PM ET), http://www.wsj.com/articles/apple-pay-stung-bylow-techfraudsters-1425603036.

180. *Id.*

181. *Id.*

182. *Id.*

V. CONCLUSION

Convincing consumers to switch from cash or a traditional credit card swipe to a new mobile payment technology may take time, as consumers have concerns about the security and privacy of mobile payments. In reality, however, mobile payments use advanced technologies like tokenization to ensure safety of payment data. Additionally, transactions through mobile payments are protected through underlying regulations that provide consumer protections for credit, debit, and prepaid card transactions. New mobile payment mechanisms are designed to work within the existing payment infrastructure and are consequently protected by existing regulations. While it is prudent to monitor the mobile payments space to ensure that consumers are adequately protected by current laws, additional regulations for mobile payments are likely unnecessary and overly burdensome and could stifle innovation and product development.