

# 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)<sup>1</sup> 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*,<sup>2</sup> 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

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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*,<sup>3</sup> 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,<sup>4</sup> 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;<sup>5</sup> (2) the agency's

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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;<sup>6</sup> and (3) the Fifth Amendment's Due Process Clause.<sup>7</sup> Generally speaking, while the APA provides the general procedural requirements for administrative decision making,<sup>8</sup> the individual agency enabling act dictates the scope and specific methodologies an agency may use in its policymaking.<sup>9</sup> 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.<sup>10</sup>

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.”<sup>11</sup> The process by which an agency makes a rule is known as a “rulemaking,”<sup>12</sup> whereas an order is the product of an

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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.”<sup>13</sup> However, both rulemaking and adjudication are further divided between informal and formal methodologies<sup>14</sup>—creating, in practice, roughly four distinct forms of agency decision making.<sup>15</sup>

### *a. Formal Rulemaking*

Formal rulemaking procedures are governed by Sections 556 and 557 of the APA.<sup>16</sup> Generally, this method requires the agency to hold a legislative hearing after notice of the proceeding is published in the Federal Register.<sup>17</sup> Parties affected by the rulemaking proceeding must be provided with the opportunity to present witness testimony and cross-examine opposing witnesses at the hearing.<sup>18</sup> 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.<sup>19</sup> 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.”<sup>20</sup> 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.<sup>21</sup> Also known as “notice-and-comment rulemaking,” informal rulemaking generally follows

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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.<sup>22</sup> 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.<sup>23</sup>

### c. Formal Adjudication

Formal adjudication provides for some of the most stringent policymaking procedures used by federal agencies.<sup>24</sup> Formal adjudication proceedings are governed by Sections 554, 556, and 557 of the APA.<sup>25</sup> These proceedings tend to focus on a limited number of interested persons and/or entities, and thus are akin to a judicial trial.<sup>26</sup> 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.”<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup>

### 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.”<sup>30</sup> Although the APA’s framers arguably

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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,<sup>31</sup> the Supreme Court has interpreted Section 555 of the APA to provide “minimal requirements” for such proceedings.<sup>32</sup> 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.<sup>33</sup>

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.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup>

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.<sup>37</sup> 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.<sup>38</sup> Yet, in practice, the APA's broad, often vague procedural requirements allow agencies to individually craft their own methodologies.<sup>39</sup>

The FCC is empowered to use either rulemaking or adjudication in its decision-making processes.<sup>40</sup> Traditionally, the FCC utilized rulemaking rather than adjudication to implement new policies<sup>41</sup> 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.<sup>42</sup>
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.<sup>43</sup>
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.<sup>44</sup>
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.<sup>45</sup>

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.<sup>46</sup> Therefore, the FCC at times will begin its rulemaking proceedings

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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.<sup>47</sup> And, the agency sometimes will take no further action in a proceeding beyond issuing an NPRM.<sup>48</sup>

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.<sup>49</sup>

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.<sup>50</sup> 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."<sup>51</sup> Thus, in practice, FCC adjudications are conducted informally, and focus on actions by specific actors, rule violations, and licensing disputes.<sup>52</sup>

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,<sup>53</sup> 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.<sup>54</sup> 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<sup>55</sup>—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.<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup> 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."<sup>59</sup> Furthermore, the carrier may seek the full Commission's review only after the WCB issues a decision.<sup>60</sup> Finally, once the full Commission has reviewed the USAC decision, the carrier may appeal the decision to a federal appellate court.<sup>61</sup>

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.<sup>62</sup> 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.<sup>63</sup> 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."<sup>64</sup> 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."<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup> Moreover, USAC ordered

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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.<sup>68</sup>

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.<sup>69</sup> Although the FCC ultimately reversed USAC's decision requiring InterCall to remit USF contributions based on past revenues,<sup>70</sup> it nevertheless found that audio bridging service revenues were subject to USF contribution obligations.<sup>71</sup>

The main issue in the *InterCall Order* was whether audio bridging services qualified as either telecommunications or telecommunications services—and not information services;<sup>72</sup> with the former classifications subjecting the services to direct USF contribution obligations on retail revenue, and the latter exempting InterCall from said USF contributions.<sup>73</sup> InterCall's audio bridging service facilitates conference calls.<sup>74</sup> 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."<sup>75</sup> The FCC held that the entirety of InterCall's audio

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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.<sup>76</sup> The FCC reasoned that since “‘the heart of ‘telecommunications’ is transmission,’”<sup>77</sup> 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).”<sup>78</sup>

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.<sup>79</sup> 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.<sup>80</sup> Thus, audio bridging results in “‘no more than the creation of the transmission channel chosen by the customer.’”<sup>81</sup> 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.<sup>82</sup>

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.<sup>83</sup> 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.”<sup>84</sup> 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.<sup>85</sup>

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.<sup>86</sup> 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.”<sup>87</sup> 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.<sup>88</sup> 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*.<sup>89</sup> Accordingly, the FCC ordered InterCall to make only prospective USF contributions.<sup>90</sup>

The FCC mandated only prospective USF contributions by InterCall, thus sparing the company from potentially massive retroactive financial exposure.<sup>91</sup> As Michael Corleone in *The Godfather* might have uttered, the FCC “made an offer [the company] couldn’t refuse.”<sup>92</sup> 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.<sup>93</sup> 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.”<sup>94</sup>

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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.<sup>95</sup> The FCC directed USAC to enforce the USF contributors' registration, contribution, and annual and quarterly filing obligations on all audio bridging providers going forward.<sup>96</sup>

Although InterCall believed that its audio conferencing service offering was an information service,<sup>97</sup> 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.<sup>98</sup> 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.<sup>99</sup> 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 TELECOMMUNICATIONS 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](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.<sup>100</sup> 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.”<sup>101</sup> The FCC subsequently affirmed the application of the contamination theory to the classification of regulated communication services in 1987 in *Computer III*,<sup>102</sup> and again in its 1998 *Stevens Report*.<sup>103</sup>

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."<sup>104</sup> The FCC explained in the *Stevens Report* that the test did "not depend on the type of facilities used,"<sup>105</sup> 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."<sup>106</sup> 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.<sup>107</sup>

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*.<sup>108</sup> 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."<sup>109</sup> 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."<sup>110</sup>

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*.<sup>111</sup> 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.”<sup>112</sup> 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.<sup>113</sup> Even when the Supreme Court in *National Telecommunications Association v. Brand X Internet Services*<sup>114</sup> upheld the FCC’s 2002 *Cable Modem Order*, which introduced the “integrated services test” to the contamination theory,<sup>115</sup> 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*,<sup>116</sup> wherein the FCC found that prepaid calling card offerings were telecommunications services in accordance with the integrated services test.<sup>117</sup> 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*,<sup>118</sup> 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]";<sup>119</sup> 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.<sup>120</sup> 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] . . . facilitate[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.<sup>121</sup> 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.<sup>122</sup> 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.<sup>123</sup>

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.<sup>124</sup> 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.<sup>125</sup>

## 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.<sup>126</sup> Specifically, the Court upheld the FCC's introduction of the integrated services test to the contamination theory jurisprudence.<sup>127</sup> According to the Court, the key question in classifying offerings with both telecommunications and information service capabilities is whether the telecommunications

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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.”<sup>128</sup> In other words, merely packing two services together does not create a single integrated service.<sup>129</sup> 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.”<sup>130</sup>

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.<sup>131</sup> 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.”<sup>132</sup> 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.<sup>133</sup>

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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.<sup>134</sup>

### 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*.<sup>135</sup> 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.<sup>136</sup> 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.<sup>137</sup>

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.<sup>138</sup>

No longer was the mere presence of enhanced services in a single service offering sufficient to render the entire offering an information service.<sup>139</sup> Yet

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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.<sup>140</sup> 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."<sup>141</sup> 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.<sup>142</sup>

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.<sup>143</sup>

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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*, COMPLIANCE GROUP (Oct. 27, 2009), <http://www.compliancegroup.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).<sup>144</sup> 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).<sup>145</sup> 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.<sup>146</sup>

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.<sup>147</sup> 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*.<sup>148</sup> 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.<sup>149</sup> 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.

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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 its 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.<sup>150</sup> 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).<sup>151</sup> Therefore, the FCC argued *Pulver.com's* holding was inapplicable to its ruling in the *InterCall Order*.<sup>152</sup>

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*.<sup>153</sup> 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.<sup>154</sup>

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.<sup>155</sup> 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."<sup>156</sup> 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*,<sup>157</sup> 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*.<sup>158</sup>

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*.<sup>159</sup> 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.<sup>160</sup>

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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.<sup>161</sup> 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.<sup>162</sup> This uncertainty led the Conference Group, *inter alia*, to appeal both Orders to the District of Columbia Circuit.<sup>163</sup>

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*.<sup>164</sup>

## 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*.<sup>165</sup> 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*.<sup>166</sup> 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.<sup>167</sup> 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.<sup>168</sup> 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.<sup>169</sup> 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.<sup>170</sup> 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.<sup>171</sup> 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.<sup>172</sup>

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.<sup>173</sup>

### 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

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171. Specifically, MeetingOne argued that its proposed computer-to-computer audio conferencing service demonstrated that the "PSTN 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 PSTN 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.<sup>174</sup> 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*."<sup>175</sup> 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.<sup>176</sup> 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.<sup>177</sup>

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,<sup>178</sup> 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.<sup>179</sup> 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

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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.”<sup>180</sup> Furthermore, consent decrees are typically immune from judicial scrutiny as parties are required to waive any rights to appeal in exchange for a settlement.<sup>181</sup> Thus, as with informal adjudications, consent decrees are riddled with “procedural loopholes” allowing the FCC to pursue policymaking outside of public scrutiny.<sup>182</sup> 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.<sup>183</sup>

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,

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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."<sup>184</sup> 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."<sup>185</sup> Thus, according to WebEx, its online collaboration service was an information service.<sup>186</sup>

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."<sup>187</sup> Accordingly, USAC concluded that WebEx should have claimed a portion of its revenue as USF-assessable because it was generated from telecommunications.<sup>188</sup> 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.<sup>189</sup> 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.<sup>190</sup>

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.<sup>191</sup> 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

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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 Hodkowsky, 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.”<sup>192</sup> 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.<sup>193</sup> 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.<sup>194</sup> 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.”<sup>195</sup> 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,’”<sup>196</sup> or services “allow[ing] basic voice communications with a few extra bells and whistles.”<sup>197</sup> 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.”<sup>198</sup>

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.”<sup>199</sup> Thus, according to WebEx, the FCC could appropriately make such a fundamental policy shift only through notice-and-comment rulemaking.<sup>200</sup> Doing otherwise would

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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.<sup>201</sup>

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."<sup>202</sup> 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.<sup>203</sup> 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*.<sup>204</sup>

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

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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.”<sup>205</sup> 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.”<sup>206</sup> 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.<sup>207</sup> 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.<sup>208</sup> 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.<sup>209</sup> 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.”<sup>210</sup> 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.<sup>211</sup>

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/wwwpdf/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.”<sup>212</sup> 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.<sup>213</sup> 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.<sup>214</sup> “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.”<sup>215</sup> 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](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,<sup>216</sup> and much thought has continued to go into this issue since the passage of the APA.<sup>217</sup> 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<sup>218</sup> 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.<sup>219</sup> Other criticisms focus on the simplistic approach of the bipolar model,<sup>220</sup> and suggest that the approach does not fully reflect the diverse set of policy and regulatory issues confronted by administrative agencies.<sup>221</sup>

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.<sup>222</sup> Rulemaking and adjudication provide separate procedural protections to stakeholders and offer different decision-making tools to administrators.<sup>223</sup> Therefore, from the standpoint of both administrative agencies and industry stakeholders, the procedural form of an agency’s decision making carries significant weight.<sup>224</sup> 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

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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.<sup>225</sup> 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.<sup>226</sup> They tend to involve past events<sup>227</sup> and lend themselves more easily to proof by testimony or other direct evidence about a party's actions.<sup>228</sup> For example, in the context of a judicial proceeding, adjudicative facts are traditionally left to the jury or the finder of fact.<sup>229</sup>

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.<sup>230</sup> 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.<sup>231</sup> 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

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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.<sup>232</sup>

On the other hand, legislative facts are “general and do not concern merely the immediate parties” to an action or dispute.<sup>233</sup> Rather, they assist a decision maker in the process of creating law, or determining policy for an entire industry or industry sector.<sup>234</sup> 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.<sup>235</sup> 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.”<sup>236</sup> 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.”<sup>237</sup>

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.<sup>238</sup> 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.

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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,<sup>239</sup> and is not an information service as InterCall claims.<sup>240</sup> 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.<sup>241</sup>

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)."<sup>242</sup> 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.<sup>243</sup> 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."<sup>244</sup> 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.<sup>245</sup> Rather, the FCC takes an end-to-end approach in the

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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.<sup>246</sup> 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.”<sup>247</sup> Across the audio bridging industry, providers viewed themselves as information service providers.<sup>248</sup> 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.<sup>249</sup> 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.”<sup>250</sup> 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.<sup>251</sup> The FCC also deprived itself of a comprehensive record upon which to base its decision.<sup>252</sup> 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.<sup>253</sup> 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.<sup>254</sup> 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.<sup>255</sup>

## 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.<sup>256</sup> In fact, the APA requires an agency to give public notice of a rulemaking and invite the public to comment on the proceedings,<sup>257</sup> meaning that rulemaking proceedings almost always enjoy more attention than individual adjudications.<sup>258</sup> The “hard look” doctrine also forces an agency to genuinely consider the material in the administrative record.<sup>259</sup> Otherwise, a court may overturn the agency’s decision as arbitrary and capricious.<sup>260</sup> Rulemaking gives the public, interest groups, industry groups, and government officials the most information about policy decisions

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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,<sup>261</sup> therefore providing such groups with the opportunity to influence—or at least participate in—the decision-making process.<sup>262</sup>

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.<sup>263</sup> Moreover, third parties to an adjudication generally cannot appeal the decision.<sup>264</sup> 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.<sup>265</sup> 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.<sup>266</sup> 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.<sup>267</sup>

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.<sup>268</sup> Moreover, encouraging participation in the rulemaking process promotes other goals that legitimize agency actions, such as political accountability and deliberative democracy.<sup>269</sup>

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.<sup>270</sup> As will be discussed more completely below, “an agency’s imminent application of its established interpretation of a statute” is sufficient to support standing,<sup>271</sup> and

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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.<sup>272</sup> 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.<sup>273</sup> “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.<sup>274</sup> 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”<sup>275</sup> 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.<sup>276</sup> 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.<sup>277</sup> 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.<sup>278</sup> 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.<sup>279</sup>

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.<sup>280</sup>

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.<sup>281</sup> 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

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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*.<sup>282</sup> 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."<sup>283</sup> 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.

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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).<sup>284</sup> 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.<sup>285</sup> Additionally, adjudications typically apply retroactively,<sup>286</sup> 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.<sup>287</sup>

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.<sup>288</sup> 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.<sup>289</sup> As a result, rulemaking is generally considered the fairer, more effective policymaking tool.<sup>290</sup>

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

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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.”<sup>291</sup> 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.<sup>292</sup>

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.<sup>293</sup> 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<sup>294</sup> permit federal courts to review final agency actions—including both affirmative actions, and an agency's failure to act.<sup>295</sup> However, Section 701 excludes judicial review of decisions

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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.<sup>296</sup> 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.<sup>297</sup>

## 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.”<sup>298</sup> However, a plaintiff relying upon Section 702 for standing must still demonstrate constitutional and prudential standing.<sup>299</sup>

To establish constitutional standing under Article III,<sup>300</sup> a plaintiff has the burden of showing: (1) injury in fact; (2) causation; and (3) redressability.<sup>301</sup> First, injury in fact requires an injury to be concrete, particularized, and actual or imminent.<sup>302</sup> Next, a plaintiff must demonstrate causation by showing that: (a) the plaintiff’s injury is “fairly traceable” to the challenged action;<sup>303</sup> and (b) the challenged action has a “determinative or coercive effect” in causing the injury.<sup>304</sup> 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;<sup>305</sup> where “the party seeking judicial review be himself among the injured,”<sup>306</sup> and have a “distinct and palpable injury.”<sup>307</sup> 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.’”<sup>308</sup>

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.<sup>309</sup> Prudential standing encompasses three elements: (1) the prohibition against litigating generalized grievances;<sup>310</sup> (2) the prohibition against litigating the rights of a third party;<sup>311</sup> and (3) the requirement that the plaintiff’s interest falls within the zone of interests that the statute was designed to protect.<sup>312</sup> A plaintiff can generally demonstrate prudential standing when its statutory and personal interests intertwine.<sup>313</sup> 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.<sup>314</sup>

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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.<sup>315</sup> 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."<sup>316</sup> 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"<sup>317</sup>—at the expense of an individual plaintiff seeking redress for agency misconduct.<sup>318</sup>

Issues of constitutional and prudential standing commonly arise in administrative law cases, especially where the distinction between agency rulemaking and adjudication is at issue.<sup>319</sup> Generally, courts are more willing to grant standing to a third-party plaintiff when the agency proceeds by rulemaking rather than by adjudication.<sup>320</sup> 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.<sup>321</sup> 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.<sup>322</sup>

In contrast, courts are less willing to grant standing to a third-party plaintiff appealing an agency adjudication.<sup>323</sup> 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

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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.<sup>324</sup> 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.”<sup>325</sup> However, a third-party plaintiff has standing to review an adjudication “when the prospect of impending harm was effectively certain.”<sup>326</sup> 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.<sup>327</sup> Exactly how a plaintiff must make this showing remains subject to debate—most notably within the District of Columbia Circuit.<sup>328</sup>

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”;<sup>329</sup> (2) being “extraordinarily inconsistent”;<sup>330</sup> and (3) abused by judges as a tool to “vindicate their view of the merits” of a given case.<sup>331</sup> Furthermore, some scholars argue that standing is unnecessary to ensure an actual dispute exists between opposing parties.<sup>332</sup> 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.<sup>333</sup> In fact, personal injury “usually does

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.”<sup>334</sup> Thus, the notion that standing doctrine ensures the adverseness essential to effective judicial review is likely illusory.<sup>335</sup>

In cases involving administrative law, the plaintiff’s injury in fact is rarely essential to resolving the merits of a case.<sup>336</sup> 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.<sup>337</sup> 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.<sup>338</sup> The one exception to this general notion is that injury-in-fact requirements “frequently do make merits adjudication concrete”<sup>339</sup> where a plaintiff’s injury is an essential factor in the agency’s decision-making process.<sup>340</sup> 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.<sup>341</sup> 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.<sup>342</sup> This has allowed agencies "to insulate the *substance* of their decision making based on standing" through "basically[] a *procedural* device."<sup>343</sup> Yet, some scholars have noted that, in cases such as *FEC v. Akins*,<sup>344</sup> *Bennett v. Spear*,<sup>345</sup> and *Friends of the Earth v. Laidlaw Environmental Systems, Inc.*,<sup>346</sup> the Supreme Court demonstrated a willingness to permit challenges to *non-final* agency actions where the plaintiff's standing would otherwise be lacking.<sup>347</sup>

Federal courts have implemented a strict interpretation of standing while seemingly disregarding the harm that it causes,<sup>348</sup> "unnecessarily shut[ting] the courthouse doors when the judiciary is needed to keep the Executive Branch in check."<sup>349</sup> 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.<sup>350</sup>

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 Env'tl. 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."<sup>351</sup> 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.<sup>352</sup> 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.<sup>353</sup> The effect of this mechanism is limited as the FCC has no obligation to respond to a petition for reconsideration of a rulemaking.<sup>354</sup> It must, however, respond to adjudicative proceedings under Sections 204(a) and 208(b) of the Communications Act (i.e., formal adjudications).<sup>355</sup> 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.<sup>356</sup> 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.”<sup>357</sup> 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.<sup>358</sup>

*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.<sup>359</sup> On appeal, the court may determine “the validity of, and enjoin[], set[] aside, or suspend[], in whole or in part” an FCC decision.<sup>360</sup> 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.”<sup>361</sup> 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.<sup>362</sup> 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.<sup>363</sup>

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

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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).<sup>365</sup> 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.<sup>366</sup> 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.<sup>367</sup>

### 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.<sup>368</sup> 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*.<sup>369</sup> 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

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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 COMM'LAW CONSP'CTUS 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).<sup>370</sup> This resulted in “a decision that rests on material errors of both fact and law”<sup>371</sup> 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.<sup>372</sup> 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.<sup>373</sup> 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.<sup>374</sup> 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*.<sup>375</sup>

#### 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.”<sup>376</sup> The FCC’s decision to extend

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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.<sup>377</sup> Agency decisions qualify as legislative rules whenever they make substantive changes in prior regulations “hav[ing] a substantive adverse impact” on the challenging party,<sup>378</sup> or “create new law, rights, or duties.”<sup>379</sup> 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.<sup>380</sup> 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.”<sup>381</sup>

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.<sup>382</sup> 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).<sup>383</sup> 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,'"<sup>384</sup> and did not "simply state[] what the administrative agency thinks the statute means" by merely "*remind[ing] affected parties of existing duties*"<sup>385</sup> 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.<sup>386</sup> 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.<sup>387</sup>

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.<sup>388</sup> 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.<sup>389</sup>

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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."<sup>390</sup> Instead, the Public Notice merely suggested that the InterCall proceeding was an "informal adjudication involving one carrier's service offering,"<sup>391</sup> and "failed to give any indication of the scope and import of the informal adjudication of a singular company's services."<sup>392</sup> 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."<sup>393</sup> Thus, for the Conference Group, the *InterCall Order* had to be overturned as it was adopted without proper notice-and-comment procedures.<sup>394</sup>

## 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.<sup>395</sup>

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.<sup>396</sup> Instead, the conference bridge service did *not* facilitate ordinary telephone calls, but "rather provide[d] a computer processing function."<sup>397</sup> And, the record did not provide "a single shred of evidence" supporting the FCC's conclusion.<sup>398</sup> Therefore, the FCC "ignored" InterCall's statement that the audio bridging service providers did not route calls.<sup>399</sup> Accordingly, for the Conference Group, the *InterCall Order* was

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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.<sup>400</sup>

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.<sup>401</sup> 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.<sup>402</sup> 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.<sup>403</sup> 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<sup>404</sup>—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.<sup>405</sup> 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*,<sup>406</sup> the *InterCall Order* focused on whether customers were *obligated to use both the basic and enhanced components* of the offering.<sup>407</sup> 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.<sup>408</sup>

### iii. Standing

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

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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."<sup>410</sup> 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.'"<sup>411</sup> 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.<sup>412</sup>

*b. The FCC's Argument*

The FCC's final brief argued that the *InterCall Order* violated neither Section 553 nor 706 of the APA.<sup>413</sup> 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;<sup>414</sup> and (2) the Order did not adopt a substantive rule requiring proper observance of any notice-and-comment provisions.<sup>415</sup> Nevertheless, the FCC maintained that it had provided adequate notice-and-comment opportunities prior to issuing the *InterCall Order*.<sup>416</sup>

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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,”<sup>417</sup> with a subject matter that the District of Columbia Circuit had previously recognized as being appropriately resolved by the FCC through such a proceeding.<sup>418</sup> 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.<sup>419</sup> This was because the “basic tenets of administrative law require the FCC to apply its rules consistently in adjudicatory proceedings.”<sup>420</sup> Hence, the *InterCall Order* had *automatic* precedential effect for the entire audio bridging industry—even though it was not a rulemaking proceeding.<sup>421</sup>

Furthermore, the FCC claimed that the Conference Group’s depiction of the *InterCall Order* as a rulemaking was flawed for two reasons.<sup>422</sup> 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.<sup>423</sup> 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.<sup>424</sup>

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,”<sup>425</sup> 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.’”<sup>426</sup> 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.<sup>427</sup> 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.<sup>428</sup>

### 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.<sup>429</sup> The FCC argued that the *InterCall Order* did not qualify as a substantive rule<sup>430</sup> because the decision merely clarified the existing obligations of InterCall, and similarly-situated audio bridge service providers "based upon existing rules and requirements."<sup>431</sup> Thus, the decision did not amend an existing FCC rule or order, but merely clarified the existing obligations of an audio bridge service provider.<sup>432</sup> However, the FCC made no mention of the apparent disparity between the *Pulver.com*, *Prepaid Calling Card*, and *InterCall Orders* in its argument.<sup>433</sup>

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.<sup>434</sup> 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.'"<sup>435</sup> 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."<sup>436</sup> 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."<sup>437</sup> 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.<sup>438</sup>

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.<sup>439</sup> 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"<sup>440</sup> 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."<sup>441</sup>

#### 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.<sup>442</sup> 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.'"<sup>443</sup> 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.”<sup>444</sup> 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.”<sup>445</sup> 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.<sup>446</sup>

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.”<sup>447</sup> Instead, the Public Notice provided sufficient notice-and-comment procedures as “[a] number of persons[] recognize[d] 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.<sup>448</sup> Moreover, the Conference Group “fail[ed] to identify any relevant facts or legal arguments that were excluded from the administrative record.”<sup>449</sup>

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,”<sup>450</sup> 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;<sup>451</sup> and (2) to *explicitly* announce that a decision in the proceeding could have an industry-wide impact.<sup>452</sup> 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,<sup>453</sup> and (2) an adequate explanation of how the *Pulver.com* and *Prepaid Calling Card Orders* were distinguishable from the *InterCall Order*.<sup>454</sup> 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.<sup>455</sup> 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.<sup>456</sup> 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,"<sup>457</sup> but that "the purpose . . . of the bridge is simply to facilitate the routing of ordinary calls."<sup>458</sup> 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"<sup>459</sup>—notwithstanding the fact that this is exactly the function of a router.<sup>460</sup>

The FCC argued that the Conference Group mistakenly concluded that the *InterCall Order* found audio bridging services to be telecommunications services.<sup>461</sup> "[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’<sup>462</sup> 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*.”<sup>463</sup>

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.<sup>464</sup> 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.<sup>465</sup> 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*.<sup>466</sup> 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,<sup>467</sup> 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.<sup>468</sup> 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."<sup>469</sup> 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.<sup>470</sup> 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."<sup>471</sup> Never before had the FCC argued that the features offered in conjunction with InterCall's services were not enhanced services.<sup>472</sup>

## 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*.<sup>473</sup> 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 that an adjudication creates a precedent that could harm a non-

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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.<sup>474</sup>

As a threshold matter, the District of Columbia Circuit addressed the Conference Group's standing to challenge the Order.<sup>475</sup> 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."<sup>476</sup>

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."<sup>477</sup> 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.<sup>478</sup> 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."<sup>479</sup> 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."<sup>480</sup>

Yet, the District of Columbia Circuit found that the Conference Group lacked standing if the *InterCall Order* was an adjudication.<sup>481</sup> "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.'"<sup>482</sup> 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 . . . ."<sup>483</sup> 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.*”<sup>484</sup> 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.”<sup>485</sup> 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.”<sup>486</sup>

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.<sup>487</sup> 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.<sup>488</sup> 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.*

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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*.<sup>489</sup> 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."<sup>490</sup> 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."<sup>491</sup>

Furthermore, the District of Columbia Circuit did not extend the broad understanding given to an "imminent application of disputed agency policy"<sup>492</sup> 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"<sup>493</sup> 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 its 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.”<sup>494</sup> 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,<sup>495</sup> but in *Conference Group*, the court deemed it essential for a third party to demonstrate that an FCC enforcement action was effectively certain.<sup>496</sup> 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.”<sup>497</sup> 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].”<sup>498</sup> 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.<sup>499</sup> 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.<sup>500</sup>

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.<sup>501</sup> The court, noting that the FCC had “very broad discretion to decide whether to proceed by adjudication or rulemaking,”<sup>502</sup> 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.”<sup>503</sup> 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.”<sup>504</sup> Therefore, the District of Columbia Circuit correctly stated that the FCC had broad discretion to select its policymaking methodology,<sup>505</sup> 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.<sup>506</sup>

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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*.<sup>507</sup> 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.”<sup>508</sup> Thus, since the FCC followed similar procedures in the *InterCall Order*, it was also an adjudication as “simply the latest application of this approach.”<sup>509</sup>

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.”<sup>510</sup> The court found that “[w]ithout the phrase, the precedential effect of the order would be the same”<sup>511</sup> 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.”<sup>512</sup> 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.<sup>513</sup> Therefore, “[t]he fact that an order rendered in an adjudication ‘may affect agency policy and have general prospective application’”<sup>514</sup> did not render the decision a “rulemaking subject to APA section 553 notice and comment.”<sup>515</sup>

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*.<sup>516</sup> 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.’”<sup>517</sup>

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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 v. 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.<sup>518</sup> 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.<sup>519</sup> 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.<sup>520</sup> In addition to judges embracing

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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.”<sup>521</sup> 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*<sup>522</sup> that the zone of interests test was merely a “gloss” upon the APA’s standing provisions.<sup>523</sup> 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.<sup>524</sup> 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.<sup>525</sup> 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.<sup>526</sup> 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

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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.<sup>527</sup> 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.<sup>528</sup> 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.<sup>529</sup> This, coupled with the fact that courts like the District of

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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.<sup>530</sup> 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.<sup>531</sup> 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 CHERMERINSKY, 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.<sup>532</sup> 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

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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.<sup>533</sup>

## 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.

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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.

