USTelecom and its Aftermath

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I. BACKGROUND

For almost fifteen years, the thorny issue of net neutrality has loomed over the telecom debate. But what started with the simple notion that the FCC should stop broadband service providers ("BSPs") from engaging in strategic anticompetitive conduct ultimately morphed into the Obama Administration's rejection of nearly twenty years of bi-partisan consensus that the Internet should be subject to "light touch" regulation under Title I of the Communications Act in favor of applying a legacy common carrier regulation designed for the old Ma Bell telephone monopoly under Title II of the Communications Act.[1] While much of the debate to date has revolved around the threshold legal question of whether broadband Internet access should be appropriately classified as an "information" service under Title I or a common carrier "telecommunications" service under Title II, the purpose of this Article is to focus on perhaps the more substantive (yet notably neglected) legal problem: the FCC's actual *implementation* of Title II in the *2015 Open Internet Order*, specifically the ratemaking and tariffing provisions of Sections 201,[2] 202[3] and 203,[4] along with its forbearance authority in Section 10.[5]

As explained in detail below, a proper application of these statutory provisions should have prevented the FCC from doing what it wanted to do in its *2015 Open Internet Order*—in particular, the FCC wanted (1) to force BSPs to provide edge providers with terminating access without compensation (i.e., a regulated price of zero) in direct contradiction of Section 201; (2) to impose a blanket ban on reasonable discrimination in direct contradiction of Section 202; but yet (3) to give the patina of a "light touch" approach, to impose directly a regulated price of "zero" but use its forbearance authority contained in Section 10 to forbear from the formal tariffing requirements of Section 203—even while finding that BSPs were "terminating monopolists" and additional competitive entry was unlikely to ensure rates remained "just and reasonable." The FCC's solution to its legal pickle? To ignore the "vast majority of rules adopted under Title II"[6] by selectively picking and choosing whatever provisions of Title II it found convenient to achieve a results-driven outcome, so that it could, in the FCC's own words, "tailor[] [Title II] . . . for the 21st century."[7] In effect, since the statute prohibited the rules the FCC wished to impose, the FCC simply

1. Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601 (2015) [hereinafter *2015 Open Internet Order*].
2. 47 U.S.C. § 201.
3. 47 U.S.C. § 202.
4. 47 U.S.C. § 203.
5. 47 U.S.C. § 160.
6. *2015 Open Internet Order*, 30 FCC Rcd at 5616, para. 51.
7. *Id.* at 5603-04, para. 5.

rewrote the statute. Respect at the FCC for precedent and its governing statute, it seemed, was officially dead.[8]

As to be expected, the FCC's *2015 Open Internet Order* was appealed. For reasons known only to them, however, the appellants made the strategic decision to focus their legal challenge on the statutory reclassification question and deliberately not to challenge how the FCC actually implemented Title II via its rules. This strategy proved to be a costly miscalculation.

Citing the Supreme Court's seminal case in *NCTA v. Brand X,*[9] the D.C. Circuit found in *United States Telecom v. FCC* that the FCC had wide—nearly unbounded—latitude to interpret the Communications Act and not only upheld the FCC's decision to reclassify but—because no one squarely challenged the FCC's tortured implementation of Title II—also upheld the FCC's ability to "tailor" how it chose to implement Title II.[10] In so doing, the D.C. Circuit—rather by accident or by design—has taken the concept of administrative deference under the *Chevron Doctrine* to the extreme.[11] As demonstrated below, *USTelecom* may have greatly expanded the FCC's authority to set the rates, terms, and conditions of private actors well beyond its statutory mandate. Accordingly, the statutory construct of "Title II" now has no meaning; it is some bizarre legal hybrid that the FCC made up and the D.C. Circuit has, albeit indirectly, sanctioned.

This Article is organized as follows: In Section II, I present several examples of how the FCC in its *2015 Open Internet Order* ignored both the plain language of Title II and extensive case law to achieve select political objectives, followed by a discussion of the D.C. Circuit's review of such legal manipulations. To provide an example of the troubling precedent set by *USTelecom*, I demonstrate in Section III how former FCC Chairman Tom Wheeler attempted (but, due to the clock running out by the Presidential election in 2016, ultimately did not succeed) to use the same theory of the case found in *USTelecom* to regulate the prices of Business Data Services. Conclusions and policy recommendations are at the end.

II. *2015 OPEN INTERNET ORDER* AND THE D.C. CIRCUIT'S RESPONSE

When the FCC was contemplating its current *2015 Open Internet Rules*, it had a choice of two legal theories under which it could have proceeded. Under the first theory, the FCC could have followed the legal roadmap set

8. *C.f.*, T. Randolph Beard et al., *Eroding the Rule of Law: Regulation as Cooperative Bargaining at the FCC*, PHX. CTR. POL'Y PAPER NO. 49 (Oct. 2015), http://www.phoenix-center.org/pcpp/PCPP49Final.pdf [https://perma.cc/Q9ZH-SH4W] (published as *Regulating, Joint Bargaining, and the Demise of Precedent,* 39 MANAGERIAL AND DECISION ECONS. 638 (2018)).

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

10. United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016), *pet. for rehearing en banc denied*, 855 F.3d 381 (2017), *cert. denied,* No. 17-504 (Nov. 5, 2018) (2018 WL 5779073).

11. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

forth by the D.C. Circuit in *Verizon v. FCC*[12] and enacted its rules using the authority provided by Section 706 of the Telecommunications Act of 1996.[13] The advantage of this approach is that because this was a relatively "greenfield" area of the law, the FCC would have had a great deal of latitude to determine its own path under a "commercially reasonable" standard.[14] The other option (which the Wheeler FCC ultimately chose) was a reclassification of broadband Internet access as a Title II common carrier telecommunications service. Of course, the downside of a Title II approach is that when you choose to apply a law designed for the old Ma Bell monopoly in 1934 to the Internet, you presumably also get the nearly eighty years of established case law that goes along with it.

By its own admission, the FCC in its *2015 Open Internet Order* imposed a "no blocking" rule that was specifically designed to "prohibit[] broadband providers from charging edge providers a fee . . . "[15] As the D.C. Circuit expressly recognized in *Verizon v. FCC*, this rule was intended to "bar providers from charging edge providers for using their service, thus forcing them to sell this service to all who ask at a price of $0."[16] With intent, the FCC's rule establishes "a regulated price of zero."[17] Thus, despite the FCC's protestations to the contrary,[18] because net neutrality is unambiguously price regulation (albeit "zero-price" regulation), the reclassification dictated by the FCC's *2015 Open Internet Order* must satisfy the relevant rate-making provisions of Title II of the Communications Act.[19] These provisions include:

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

13. Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (1996) (codified at 47 U.S.C. § 1302); *see also* Lawrence J. Spiwak, *What Are the Bounds of the FCC's Authority over Broadband Service Providers?—A Review of the Recent Case Law*, 18 J. OF INTERNET L. 1, 20 (2015).

14. Spiwak, *supra* note 13; *see also* Protecting and Promoting the Open Internet, *Notice of Proposed Rulemaking*, 29 FCC Rcd 5561, 5564-65, para. 10 (2014) [hereinafter *2014 Open Internet NPRM*].

15. *See 2015 Open Internet Order,* 30 FCC Rcd at para. 113.

16. *Verizon*, 740 F.3d at 657.

17. *Id.* at 668 (Silberman, J., concurring in part and dissenting in part).

18. *See*, *e.g.*, *2015 Open Internet Order,* 30 FCC Rcd 5601 at para. 37 (our "light-touch approach for the use of Title II" means "no rate regulation"); *Id.* at para. 382 ("there will be no rate regulation"); *see also* Tom Wheeler, *This is How We Will Ensure Net Neutrality,* WIRED (Feb. 4, 2015), https://www.wired.com/2015/02/fcc-chairman-wheeler-net-neutrality [https://perma.cc/EYL2-3WUE] ("there will be no rate regulation"). To its credit, the FCC in its *Restoring Internet Freedom Order* finally admitted to this obvious fact, observing that the *2015 Open Internet Order* "imposed price regulation with its ban on paid prioritization arrangements, which mandated that ISPs charge edge providers a zero price." Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order*, FCC 17-166, para. 101 (2017) [hereinafter *Restoring Internet Freedom Order*].

19. *See generally*, George S. Ford & Lawrence J. Spiwak, *Tariffing Internet Termination: Pricing Implications of Classifying Broadband as a Title II Telecommunications Service,* 67 FED. COMM. L.J. 1 (2015).

- Section 201, which mandates that rates must be "just and reasonable;"[20]

- Section 202, which prohibits "unreasonable" discrimination;[21] and

- Section 203, which provides the enforcement mechanism for Sections 201 and 202—i.e., tariffs.[22]

If, however, the FCC wants to refrain from imposing direct price regulation and surrender the pricing function to the market, then Section 10 allows the FCC to forbear from the tariffing requirements of Section 203 under a delineated set of circumstances.[23]

What is important to understand is that the ratemaking and forbearance provisions of Title II are not solely designed to govern the conduct of the regulated firm (the FCC's rules serve that function), but to govern the conduct of the *regulator*. Indeed, whenever the government intervenes in the market—particularly when it seeks to set the price, terms, and conditions of service of private actors—a myriad of important due process concerns come to the fore that must be respected to avoid a "takings" under the Fifth Amendment of the U.S. Constitution.[24] For this reason, courts have provided detailed guidance on how the FCC is supposed to interpret these various statutory provisions. As explained in detail below, the FCC's problem in its *2015 Open Internet Order* was that both the plain terms of the statute and this extensive precedent prohibited them from doing what they wanted to do.[25] The FCC's solution? Ignore the plain language of the statute and the case law in order to make up new theories of both rate regulation and forbearance under Title II *de novo*. Let's look at a few examples.

A. "Just and Reasonable" Rates

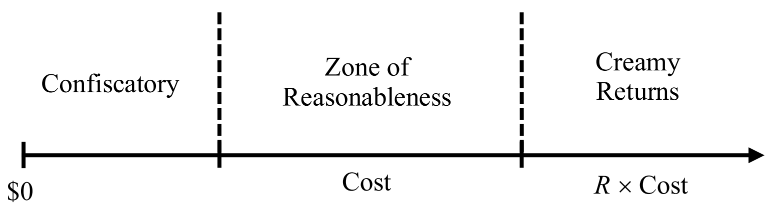
1. The FCC's Approach

Under Section 201 of the Communications Act, all rates must be "just and reasonable."[26] However, as the D.C. Circuit remarked over thirty years ago, the phrase "just and reasonable" is not "*a mere vessel into which meaning*

20. 47 U.S.C. § 201.
21. 47 U.S.C. § 202.
22. 47 U.S.C. § 203.
23. 47 U.S.C. § 160. Indeed, in cases where the FCC has opted to pursue this route in the past, it has relied upon the complaint process contained in Section 208 (47 U.S.C. § 208 (2012)) as a regulatory backstop. *See* Policy and Rules Concerning the Interstate, Interexchange Marketplace, *Second Report and Order*, 11 FCC Rcd 20730 (1996).
24. The Fifth Amendment to the U.S. Constitution provides, in the relevant part, that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.
25. Ford & Spiwak, *supra* note 19.
26. 47 U.S.C. § 201(b).

must be poured."[27] The problem, of course, is that ratemaking is not "an exact science."[28] For this reason, courts simply require that in order to satisfy the "just and reasonable" standard the FCC must set a regulated rate that falls within the *zone of reasonableness*. As illustrated in Figure 1, this zone of reasonableness lies between rates that are *confiscatory* at the low end (that is, below cost and a "takings" under the Fifth Amendment) and rates that are *excessive* at the high end (that is, "creamy returns," the limit of which is defined by the markup *R*).[29] As the Supreme Court held in its seminal *Permian Area Rate Cases* ruling, the zone of reasonableness is such that the rate "may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interest, both existing and foreseeable."[30] So, in attempting to set a "just and reasonable" rate, the FCC must set a rate that exceeds cost, but not by too much.[31]

Figure 1. Zone of Reasonableness in Rate Setting



As noted above, in its *2015 Open Internet Order*, the FCC imposed a "no blocking" rule that was specifically designed to "prohibit broadband providers from charging edge providers a fee."[32] This rule is intended to "bar broadband providers from charging edge providers for using their service,

27. *See, e.g.*, Farmers Union Cent. Exch. v. FERC, 734 F.2d 1486, 1504 (D.C. Cir. 1984), *cert denied sub nom.*, 469 U.S. 1034 (1984) (emphasis added) (citation omitted) (internal quotation marks omitted). It is important to recognize that the "just and reasonable" standard is not exclusive to the Communications Act. This standard can also be found, for example, in the Federal Power Act and in the Natural Gas Act, all of which were enacted during the same time period.

28. *See, e.g.*, Fed. Power Comm'n. v. Conway Corp., 426 U.S. 271, 278 (1976); WorldCom v. FCC, 238 F.3d 449, 457 (D.C. Cir. 2001); Sw. Bell Tel. Co. v. FCC, 168 F.3d 1344, 1352 (D.C. Cir. 1999); Time Warner Entm't Co. v. FCC, 56 F.3d 151, 163 (D.C. Cir. 1995); United States v. FCC, 707 F.2d 610, 618 (D.C. Cir. 1983); *see also* Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered By Competitive Local Exchange Carriers; Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221, 14276, 14297-98, paras. 96, 144 (1999).

29. *See, e.g.*, *Farmers Union,* 734 F.2d at 1502-03 (citations omitted).

30. Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968).

31. I would like to thank Phoenix Center Chief Economist Dr. George S. Ford for his graphic rendering of the "zone of reasonableness."

32. *See 2015 Open Internet Order,* 30 FCC Rcd at 5647, 5648-49, paras. 107, 113.

thus forcing them to sell this service to all who ask at a price of $0."[33] Thus, the FCC's rule establishes "a regulated price of zero."[34] Accordingly, if edge providers are "customers" of BSPs as the D.C. Circuit found in *Verizon*, then the FCC's *2015 Open Internet Order* has the unambiguous effect of requiring BSPs to provide carriage to edge providers without any compensation.[35]

By directly setting a "zero-price," the FCC's actions violated many basic principles of ratemaking. For example, under the plain terms of the Communications Act, if edge providers are in fact customers of a BSP (as the D.C. Circuit found in *Verizon*) and Title II applies to this service as the *Order* plainly states, then a BSP must be allowed to charge a positive "fee" for this termination service because a common carrier is "for hire."[36] Indeed, the statute defines a service regulated under Title II as an "offering [] *for a fee* directly to the public."[37] Equally as important, this positive fee must also satisfy the "just and reasonable" ratemaking standard contained in Section 201. However, the FCC may not set a rate arbitrarily. Instead, the FCC must provide its whys and wherefores on how it derived the rate.[38] The FCC provided no such analysis in its *2015 Open Internet Order*.[39]

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33. *See* Verizon v. FCC, 740 F.3d 623, 657 (D.C. Cir. 2014) (citing Cellco P'ship v. FCC, 700 F.3d 534, 548 (2012)).

34. *Verizon*, 740 F.3d at 668 (Silberman J., concurring in part and dissenting in part).

35. *Id.* at 654 (Commission seeks to "compel[] an entity to continue furnishing service at no cost.").

36. 47 U.S.C. §§ 153(11), (53) (2012).

37. *Id.* at § 153(53) (emphasis added).

38. *See, e.g.*, Century Commc'ns Corp. v. FCC, 835 F.2d 292, 300–02 (D.C. Cir. 1987) (rejecting FCC's judgment where supported by "scant" evidence), *cert. denied,* 486 U.S. 1032 (1988); Cincinnati Bell Tel. Co. v. FCC, 69 F.3d 752, 760, (6th Cir. 1995) (overturning Commission's judgment when FCC "provide[d] to this Court nothing, no statistical data or even a general economic theory, to support its argument").

39. The exchange of voice traffic among carriers, a service also subject to Sections 201 and 202, is arguably priced at zero under the FCC's bill-and-keep regulations for terminating voice traffic. Thus, so the argument goes, the FCC may also impose a zero rate for the service offered to edge providers. This argument holds no water. Bill-and-keep is based on the FCC's authority over reciprocal compensation under Sections 251(b)(5) (47 U.S.C. § 251(b)(5)) and 252(d)(2) (47 U.S.C. § 252(d)(2)) of the Act. That is, the bill-and-keep regime only applies to parties seeking to impose rates by tariff or in the context of a Section 252 agreement between carriers. Parties are otherwise free to contract for different rates.

More importantly, carrier-to-carrier relationships, governed by Sections 251 and 252 of the Communications Act, are not "customer" relationships, and edge providers are not, today, carriers; they are customers. *See* Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform -- Mobility Fund, *Order*, 26 FCC Rcd 17,663 (2011). The FCC has not purported to classify edge providers as common carriers. As observed by the 10th Circuit Court of Appeals in FCC 11-161*,* 753 F.3d 1015 (10th Cir. 2014), when ruling on the FCC's *Connect America Fund Order,* carrier-to-carrier relationships involve the "recovery of costs through the offsetting of reciprocal obligations." 753 F.3d at 1128. Bill-and-keep is not per se "zero-price" regulation since there is consideration in the form of "reciprocal obligations," and the "recovery of costs" is a direct consideration. Besides, the FCC has expressly forborne from Sections 251 and 252 in the *2015 Open Internet Order* and thus must rely on its authority under Sections 201 and 202 when applying "Title II [] to the second side of the market." *See 2015 Open Internet Order*, 30 FCC Rcd at 5849-52, paras. 513-14.

Formulating termination rates is likely to be a complex and arduous task, but drudgery is no excuse for the FCC's avoidance of the requirements of its own choice to apply Title II. Unquestionably, the cost of a service is not zero—there are no free lunches. In fact, it could be argued that most of the costs of the broadband network are attributable to edge providers, since the bulk of traffic is downstream rather than upstream (a ratio of about 6:1).[40] Under a fully-distributed cost formula, it is feasible that much of the costs would be assigned to the edge providers.[41] As such, it may be that the revenues from edge providers could eventually make up a lion's share of BSP revenue from the sale of broadband service. In such a world, the consumer would benefit greatly. Economic theory predicts that as the edge provider's price rises, the end-user's price falls.[42] A more balanced rate structure across the two sides of the market may be beneficial to both network deployment and service adoption.

Unfortunately, the FCC failed to even consider such inquiry in its *2015 Open Internet Order*. In fact, it did nothing.[43] What cost standard was used to establish this zero price? Historical cost? Forward-looking cost? Marginal cost? Average cost? Total Element Long Run Incremental Cost? We cannot know, because the FCC arbitrarily set a price of zero without a shred of analysis.[44] Instead, the FCC bluntly told BSPs that they are prohibited from

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The bill-and-keep regime also includes two backstops unavailable to BSPs. First, the 10th Circuit recognized in *FCC 11-161* that to the extent costs are not recovered from such compensation, "[s]tates are free to set end-user rates, and the Order does not prevent states from raising end-user rates to allow a fair recovery of termination costs." *FCC 11-161*, 753 F.3d at 1130. Under the express terms of the *2015 Open Internet Order,* however, retail broadband prices were not regulated so there is no mechanism by which to ensure that costs are recovered. Second, if intercarrier compensation is insufficient to cover costs, the courts have noted that "the FCC reforms include funds for carriers that would otherwise lose revenues." *Id.*; *see also* Ace Tel. Ass'n v. Koppendrayer, 432 F.3d 876, 880 (8th Cir. 2005). The *2015 Open Internet Order* neither created nor even considered a subsidy scheme designed to broadly support BSPs impacted by the uniform zero-price rule. Cost recovery is not merely hypothetical. The FCC has observed elsewhere that the "financial incentives for private deployment of competitive networks are sometimes insufficient." City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160a-340 et seq., *Memorandum and Order*, 30 FCC Rcd 2408, para. 3 (2015); *rev'd,* Tennessee v. FCC, 832 F.3d 597 (6th Cir. 2016). Moreover, the economic theory of two-sided markets affirms that a regulated price cut on one side of a two-sided market will not be fully offset by price increases on other side of that market. *See* E. Glen Weyl, *The Price Theory of Two-sided Markets* 17-18 (2006).

At a minimum, if the carrier-to-carrier bill-and-keep type regime is created for edge provider termination service to BSPs, then edge providers must become telecommunications carriers, a formal classification that likewise will subject edge providers to Title II regulation. The *2015 Open Internet Order* does not classify edge providers as common carriers.

40. Sandvine, *Global Internet Phenomena Report*, 1H 2014, 1, 5 (2014).

41. *C.f.* STEPHEN J. BROWN & DAVID S. SIBLEY, THE THEORY OF PUBLIC UTILITY PRICING 44-49 (1986).

42. *See* Weyl, *supra* note 39; Jay Pil Choi & Byung-Cheol Kim, *Net Neutrality and Investment Incentives*, 41 RAND J. OF ECONS. 446-465, 453-57 (2010).

43. Despite having this wealth of case law brought to its attention, the FCC summarily proceeded to ignore it. *See 2015 Open Internet Order,* 30 FCC Rcd at 5843, n.1519.

44. Indeed, even in the case of TELRIC—a methodology many argued produced a confiscatory rate—the FCC demonstrated its why's and wherefores to the satisfaction of the courts. *See generally* AT&T v. Iowa Utilities Bd., 525 U.S. 366 (1999); Verizon Commc'ns Inc. v FCC, 535 U.S. 467 (2002) (finding FCC had provided sufficient detail in establishing TELRIC rate for unbundled network elements).

charging edge providers a fee for terminating access (despite the fact that edge providers impose a cost on the network). Absent some cost analysis indicating otherwise, therefore, the FCC—by definition—arbitrarily established a "confiscatory" (i.e., below cost) rate for the service BSPs offer to edge providers under Section 201.[45]

2. The D.C. Circuit's Response

As noted in the preceding section, when the FCC first attempted to impose a "no blocking" and "no paid prioritization" rule in 2010, the D.C. Circuit in *Verizon* repeatedly pointed out that the FCC was imposing zero-price regulation on BSPs under Title I.[46] (In fact, this *de facto* price regulation was the crux of the court's reversal of the FCC's *2010 Open Internet Rules* in *Verizon,* finding that the FCC was improperly attempting to regulate Title I information services as common carriers under Title II.[47]) Yet, when essentially the same rules came before the court again in *USTelecom*, the litigants failed to raise this argument on appeal. As a court will only respond to arguments made before it, the D.C. Circuit accepted this zero-price regulation at face value in the context of Title II. In fact, they made no mention of it at all in their opinion.

This lack of attention to the FCC's attempt to force BSPs to carry edge providers' traffic without any compensation was a serious omission by both the litigants and, by extension, the court. Indeed, throughout the *2015 Open Internet Order,* the FCC made great hay out of using the "just and reasonable" standard in Section 201 to justify its rules, yet the court never once stopped to consider whether the actual rate imposed by the FCC's rules—i.e., zero—passed muster under that standard. By giving the FCC a free pass to set a regulated rate without conducting an underlying cost analysis, the court has established a dangerous precedent. Under an expansive reading of *USTelecom*, the FCC now has wide latitude to set the rates, terms, and conditions of private firms with little regard for their guaranteed due process protections under the Fifth Amendment. Such a result is particularly curious given that the court has not hesitated to reprimand the FCC in the past for its

45. Ford & Spiwak, *supra* note 19.

46. *See* discussion *supra* in Section II.A.1.

47. *See*, *e.g.*, Verizon v. FCC*,* 740 F.3d 623, 655 (D.C. Cir. 2014) ("We have little hesitation in concluding that the anti-discrimination obligation imposed on fixed broad-band providers has 'relegated [those providers], *pro tanto,* to common carrier status.' In requiring broadband providers to serve all edge providers without 'unreasonable discrimination,' this rule by its very terms compels those providers to hold them-selves out 'to serve the public indiscriminately.'" (citation omitted)).

failure to engage in the requisite due diligence when reviewing rate cases.[48] Even though ratemaking is a complex problem, complexity is no excuse for the court to give the FCC a pass in this instance.[49]

B. *Undue Discrimination*

1. The FCC's Approach

Under the express terms of Section 202(a), carriers are allowed to engage in *reasonable* discrimination.[50] In fact, the FCC conceded this very point before the D.C. Circuit in *Orloff v. FCC*.[51] But how to define "unreasonable" discrimination? According to well-established case law, any charge that a carrier has unreasonably discriminated must satisfy a three-step inquiry (in sequence): (1) whether the services offered are "like"; (2) if they are "like," whether there is a price difference among the offered services; and (3) if there is a price difference, whether it is reasonable.[52] If the services are not "like," or not "functionally equivalent" in the legal parlance, then discrimination is not an issue and the investigation ends. There is no valid discrimination claim for *different* prices or price-cost ratios for *different* goods.[53]

Notably, a determination of whether services are "like" is based upon neither cost differences nor competitive necessity. Cost differentials are excluded from the likeness determination and introduced only to determine "whether the discrimination is unreasonable or unjust."[54] Likeness is based

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48. As a classic case, take the example of payphone rates. While the FCC was charged with a simple task—setting a single rate—it took three separate attempts before the court finally found that the FCC acted correctly. *See* Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, *Report and Order*, 11 FCC Rcd 20541 (1996) [hereinafter *First Order*]; Ill. Pub. Telecomms. Ass'n v. FCC, 117 F.3d 555 (D.C. Cir. 1997) [hereinafter *Payphones I*]; Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, *Second Report and Order*, 13 FCC Rcd 1778 (1997); MCI Telecomms. Corp. v. FCC, 143 F.3d 606 (D.C. Cir. 1998) [hereinafter *Payphones II*]; Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, *Third Report and Order and Order on Reconsideration of the Second Report and Order*, 14 FCC Rcd 2545 (1999); Am. Pub. Commc'ns Council v. FCC, 215 F.3d 51 (D.C. Cir. 2000) [hereinafter *Payphones III*].

49. One potential explanation may lie with the author of the majority's opinion—Judge David Tatel—who has shown a reluctance in the past to focus on the FCC's violation of basic ratemaking principles. *See, e.g.*, Lawrence J. Spiwak, *From International Competitive Carrier to the WTO: A Survey of the FCC's International Telecommunications Policy Initiatives 1985-1997*, 51 FED. COMM. L. J. 111 (1998); *Addendum*, 51 FED. COMM. L.J. 519 (1999).

50. *See* 47 U.S.C. § 202(a) (2018).

51. Orloff v. FCC, 352 F.3d 415, 420 (D.C. Cir. 2003), *cert denied,* 542 U.S. 937 (2004) ("the [FCC] emphasizes that § 202 prohibits only *unjust* and *unreasonable* discrimination in charges and service") (emphasis in original).

52. *See, e.g.*, MCI Telecomms. Corp. v. FCC, 917 F.2d 30, 39 (D.C. Cir. 1990) and citations therein.

53. *Id.; see also* George S. Ford & Lawrence J. Spiwak, *Non-Discrimination or Just Non-Sense: A Law and Economics Review of the FCC's New Net Neutrality Principle*, PHX. CTR. PERSPECTIVE NO. 10-03 (Mar. 24, 2010), http://www.phoenix-center.org/perspectives/Perspective10-03Final.pdf [https://perma.cc/A8YH-56LT].

54. *Id.*

solely on functional equivalence.[55] If the services are determined to be "like" or "functionally equivalent," then "the carrier offering them has the burden of justifying the price disparity as reasonable," such as a difference in cost.[56] If a price difference is not justified, then the price difference is deemed unlawful. A price difference cannot be arbitrarily presumed unlawful, yet that is exactly what the FCC proceeded to do in its *2015 Open Internet Order*.

One usual measure to determine reasonableness is an inquiry as to whether the different rates are offered to "similarly situated" customers.[57] That is, are the customers roughly the same size and exchange similar levels of traffic, or, for example, is one customer a wholesale customer while the other only buys at retail? In the standard course of regulating telecommunications rates, such distinctions permit different rates. A prioritized termination service is not the functional equivalent of the typical termination service, so there is no claim of unreasonable discrimination under Section 202 across the two services. Nor does Netflix.com place the same demands on the network as does craigslist.org. To the extent the Open Internet is about slow and fast lanes and Title II is about "just and reasonable" and "not unreasonably discriminatory" rates, Title II offers no barrier to different services with different rates. In fact, it seems more likely that Title II facilitates rather than impedes the creation of prioritized termination.[58]

Clearly, a "no paid prioritization" rule violates both the letter and the spirit of Section 202. As was its expansive interpretation of Section 201, however, the FCC's response was to ignore the law. In this particular case, the FCC side-stepped the law by promulgating its "no paid prioritization" rule—not under Section 202(a), the provision in the Communications Act that is eponymously charged with regulating all issues of discrimination—but under the "public interest" catchall of Section 201(b) and Section 706.[59]

2. The D.C. Circuit's Response

Similar to its blessing of the FCC's tortured approach to the "just and reasonable" standard of Section 201, the court was just as accommodating to the FCC's disregard of the plain language of Section 202. Rather than the blind neglect the court adopted regarding the FCC's use of Section 201, however, this time the court decided to engage in a bit of legal gymnastics.

As noted in the previous section, rather than confront the plain language of Section 202(a) that expressly permits *reasonable* discrimination, the FCC adopted its "no paid prioritization" rule under the "public interest" catchall of

55. *Id.*
56. *Id.*
57. *See*, *e.g.*, Competition in the Interstate Interexchange Marketplace, *Notice of Proposed Rulemaking*, 5 FCC Rcd 2627, 2642-43, paras. 131-139 (1990) (citing Associated Gas Distribs. v. FERC, 824 F. 2d 981, 1007-1013 (D.C. Cir. 1987); *but c.f.* Orloff v. FCC, 352 F.3d 415, 420 (2003) (allowing a mobile CMRS carrier to charge different promotional rates to similarly situated retail customers under *competitive* market conditions in the absence of tariffs)).
58. *See* Ford & Spiwak, *supra* note 19, at 13.
59. *See 2015 Open Internet Order,* 30 FCC Rcd at 5728, para. 292.

Section 201(b) and Section 706—an explicit recognition that the FCC was skirting the plain language of the statute.[60] In so doing, this use of Section 706 apparently provided a sufficient legal hook for the court. Citing its ruling in *Verizon,* the court held that not only does the FCC have independent rulemaking authority under Section 706 but that such authority "extends to rules 'governing broadband providers' treatment of internet traffic'—including the anti-paid-prioritization rule—in reliance of the virtuous cycle theory."[61] In other words, under the court's logic, once Section 706 is invoked, Section 202's express allowance of reasonable discrimination becomes irrelevant.

The majority's willingness to give the FCC a pass on basic ratemaking principles did not escape the dissent's watchful eye, however. As Judge Stephen Williams noted,

> . . . I can find no indication—and the [FCC] presents none—that any of the agencies regulating natural monopolies, such as the Interstate Commerce Commission, Federal Energy Regulatory Commission, or Federal Communications Commission—has ever attempted to use its mandate to assure that rates are "just and reasonable" to invalidate a rate distinction that was not unreasonably discriminatory. To uproot over a century of interpretation—and with so little explanation—is truly extraordinary.[62]

Yet, because Judge Williams was in the minority, the majority's blessing of the FCC's abject failure to adhere to basic principles of ratemaking remains the law of the land.

Worse, *USTelecom* represents a significant expansion of the D.C. Circuit's interpretation of Section 706. While the court had previously

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60. Section 706 is comprised of two relevant sections. Under Section 706(a),

> The [FCC] and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment. 47 U.S.C. § 1302(a).

Section 706(b), in turn, requires the FCC to conduct a regular inquiry "concerning the availability of advanced telecommunications capability . . . " 47 U.S.C. § 1302(b). It further provides that should the FCC find that if "advanced telecommunications capability is [not] being deployed to all Americans in a reasonable and timely fashion[,]" then it "shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." *Id.* The statute defines "advanced telecommunications capability" to include "broadband telecommunications capability." 47 U.S.C. § 1302(d)(1).

61. United States Telecom Ass'n v. FCC, 825 F.3d 674, 734 (D.C. Cir. 2016) (citing Verizon v. FCC, 740 F.3d 623, 639-40, 644-49 (D.C. Cir. 2014)).

62. *USTelecom*, 825 F.3d at 759-760 (Williams, J., concurring in part and dissenting in part) (citations omitted).

recognized Section 706 as an independent source of authority in *Verizon*, prior to *USTelecom* the D.C. Circuit was quite adamant that the FCC's use of its Section 706 authority was not unfettered. As the court made plain in *Verizon,* "any regulatory action authorized by Section 706(a) [must] fall within the [FCC]'s subject matter jurisdiction over such communications—*a limitation whose importance this court has recognized in delineating the reach of the [FCC]'s ancillary jurisdiction.*"[63] Reading this case in conjunction with the court's earlier holding in *Comcast v. FCC*, this language means that any use of Section 706 must be tied directly to a specific delegation of authority in "Title II, III, or VI . . . "[64] In other words, prior to *USTelecom,* precedent dictated that one should read Section 706 as some sort of "enhanced" ancillary authority to the Communications Act—subject to appropriate constraints—which would provide sufficient legal jurisdiction for the FCC to oversee the activities of BSPs providing Title I "information" services.[65] Under the pre-*USTelecom* reading of Section 706, therefore, precedent would seem to dictate that if the FCC wants to control the rates, terms, and conditions of BSPs under Section 706, then the FCC needs to look exclusively at ratemaking portions of the Communications Act—namely, Sections 201 and 202.

Significantly, this reading of Section 706 was nothing new to the court. In fact, the D.C. Circuit's 2009 ruling in *Ad Hoc Telecommunications Users Committee v. FCC*—a case the FCC cited with approval several times in its *2015 Open Internet Order*—is directly on point.[66] In *Ad Hoc,* the court was asked to rule on the FCC's decision to use its Section 10 authority to forbear from dominant carrier price regulation for special access services. To support its decision to forbear, the FCC also argued that its actions would further Section 706's goals of promoting broadband deployment. After review, the court held that the "general and generous phrasing of Section 706 means that the FCC possesses significant, albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband—a statutory reality that assumes great importance when parties implore courts to overrule FCC decisions on this topic."[67]

However, the court in *Ad Hoc* made it crystal clear that the FCC's forbearance authority did not lie in Section 706 itself, but exclusively in Section 10. As the court stated bluntly, "*As contemplated by [Section] 706 . . . [f]orbearance decisions are governed by the Communications Act's [Section] 10*."[68] Under this reasonable reading of the statute, therefore, even if the FCC un-reclassifies and returns broadband Internet access service to a Title I "information service" (as it did in the *Restoring Internet Freedom Order*), then the FCC—should it so chose—can implement adequate

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63. *Verizon*, 740 F.3d at 639-40 (emphasis added). It is interesting to note that when the FCC cited to this exact passage from *Verizon* in its *Order,* the FCC specifically omitted the italicized language above. *See 2015 Open Internet Order*, 30 FCC Rcd at 5561, para. 138.

64. Comcast v. FCC, 600 F.3d 642, 654 (D.C. Cir. 2010).

65. *See* Spiwak, *supra* note 13.

66. Ad Hoc Telecom. Users Comm. v. FCC, 572 F. 3d 903, 907 (D.C. Cir. 2009).

67. *Id.* at 906-07.

68. *Id.* at 907 (emphasis added).

safeguards to protect an "Open Internet" under Section 706 so long as such actions are constrained by the relevant provisions of the Communications Act via the doctrine of ancillary jurisdiction.[69]

The problem with the D.C. Circuit's ruling in *USTelecom* is that this decision marks a significant expansion of the FCC's Section 706 authority not only from the court's 2009 ruling in *Ad Hoc,* but from its rulings in *Comcast* and *Verizon* as well. Indeed, the majority's ruling in *USTelecom* does not just elevate Section 706 to same level of 201 and 202; *USTelecom* essentially holds that Section 706 now *supersedes* Sections 201 and 202. The problem with such an expansive reading is that at least under Section 201 and 202, the FCC must comply with basic ratemaking principles to ensure, for example, that the FCC does not establish a confiscatory rate. Under *USTelecom,* however, the D.C. Circuit has told the FCC that if it wants to regulate directly BSP rates, terms, and conditions under Section 706, then it need not first determine that rates are "just and reasonable."[70] Instead, the FCC is now free to pick a rate out of thin air so long as it can claim that this rate will lead to increased broadband deployment.[71]

C. Forbearance of Tariffing Requirements

1. The FCC's Approach

Finally, we come to the FCC's forbearance decision. In its *2015 Open Internet Order*, the FCC used its authority under Section 10 to forbear from the tariffing requirements of Section 203 when it reclassified broadband Internet access as a Title II common carrier telecommunications service.[72] Prior to the *2015 Open Internet Order*, the FCC had never granted forbearance of tariffing requirements in the total absence of competition—either competition was present or at least imminent.[73] The reason is because under the plain language of Section 10 of the Communications Act, the FCC may only forbear when the enforcement of such regulation or provision is not

69. In the *Restoring Internet Freedom Order*, the FCC opted to pursue a very different course, however. FCC 17-166.

70. The preceding discussion raise an interesting academic question: what if FCC had adopted a "commercially reasonable" standard similar to one D.C. Circuit approved in *Cellco* as originally contemplated in the FCC's *2014 Open Internet NPRM*. *See 2014 Open Internet NPRM,* 29 FCC Rcd at 5564-65, para. 10. The FCC most likely would not have run into the problem of whether it violated the "just and reasonable" standard because the FCC would not be directly setting a rate. Instead, companies would have privately negotiated rate and then the FCC would have evaluated that rate under a defined set of parameters. *See* Spiwak, *supra* note 13.

71. In the *Restoring Internet Freedom Order,* the FCC held that going forward it would view Section 706 as hortatory rather than an independent source of authority. *See Restoring Internet Freedom Order,* FCC 17-166, at paras. 268-283. However, what one Commission can do, the next can undo, so the fact that the current Commission does not view Section 706 as independent authority does not mean that a future Commission will take the same view. *See, e.g.*, Verizon v. FCC*,* 740 F.3d 623, 636 (D.C. Cir. 2014) ("[T]he Commission need not remain forever bound by . . . [a] restrictive reading of section 706(a).").

72. *2015 Open Internet Order*, 30 FCC Rcd at 5841-42, para. 497.

73. For a detailed discussion of the FCC's forbearance authority, *see* George S. Ford & Lawrence J. Spiwak, *Section 10 Forbearance: Asking the Right Questions to Get the Right Answers*, 23 COMMLAW CONSPECTUS 126 (2014).

necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory.[74]

Stated another way, the FCC needs to ensure that the market will ensure that rates continue to fall under the "just and reasonable" standard before it can eliminate tariffs.[75] The problem for the FCC, however, was that its entire Open Internet paradigm up to 2015 rested on the proposition that each individual BSP is a "terminating monopoly" (subsequently changed to the more innocuous term "gatekeeper" in the *2015 Open Internet Order*), which, by the FCC's own terms, means that every BSP has the ability to raise price and restrict output.[76]

Yet in the *2015 Open Internet Order*, the FCC rejected the obvious logic of the statute, holding that it was free to surrender ratemaking to the market even in the presence of a "gatekeeper" because "nothing in the language of Section 10 precludes the [FCC] from proceeding in that basis where warranted."[77] The problem is that the FCC's legal logic for its new forbearance standard is circular. Let's walk though it step-by-step:

(1) Because all BSPs are "gatekeepers"/"terminating monopolists," the relevant market is each individual company; thus, each BSP is "dominant" over itself and, by definition, the potential for additional entry is zero.

(2) Under Title II, "dominant" firms (i.e., those firms with market power) have traditionally been subject to rate regulation under Section 201 and 202.[78]

(3) Rate regulation is enforced by the tariffing provisions of Section 203.

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74. 47 U.S.C. § 160(a)(1).

75. *See* Orloff v. FCC, 352 F.3d 415, 420 (D.C. Cir. 2003) (In the case of Section 203 forbearance, "[r]ates are determined by the market, not the [FCC], as are the level of profits.").

76. In its *2015 Open Internet Order,* in response to comments from the dissent in *Verizon* that "because terminating monopolies are not largely discussed outside of Commission jurisprudence, and '[t]he gatekeeper effect is a tool that facilitates the exercise of market power over sellers; it is not market power itself,'" the FCC elected to substitute the phrase "gatekeeper" for "terminating monopoly." For all intents and purposes, the FCC essentially uses these terms to mean the same thing. *See 2015 Open Internet Order*, 30 FCC Rcd at 5630, n.130 ("However, our reliance on these terms for our determinations today focuses on how this unique "gatekeeper" position of broadband providers in combination with other realities about broadband availability and access affects broadband providers' incentives and abilities to harm the open nature of the Internet. As explained further below, the FCC's discussion of these terms is especially important in combination with switching costs and limited retail broadband competition for fixed broadband. With respect to mobile, the presence of some additional retail competition is not enough to alter our conclusion here.").

77. *2015 Open Internet Order*, 30 FCC Rcd at 5807-08, para. 439 (citation omitted).

78. *See*, *e.g.*, Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier, *Order*, 11 FCC Rcd 3271 (1995).

(4) Under the plain terms of Section 10, the FCC may only forbear from the tariffing requirements of Section 203 when "enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are 'just and reasonable' and are not unjustly or unreasonably discriminatory."[79] In other words, if competitive forces can keep prices in check, then forbearance from the tariffing requirements of Section 203 is warranted. However, if a firm is "dominant" (i.e., it has the ability to raise price and restrict output), then forbearance is inappropriate.

(5) Yet, under plain terms of the *2015 Order*, the lack of competition due to the presence of a "gatekeeper" is immaterial to the FCC's Section 10 analysis. Under the FCC's logic, it can forbear from the tariffing requirements of Section 203 in this case because enforcement of the "no paid prioritization" and "no blocking" rules are sufficient to ensure that rates will remain "just and reasonable" as required by Section 10.[80]

The logical flaw in the FCC's argument is readily apparent: *The FCC is not surrendering ratemaking to the market because it does not trust the market to ensure that prices will remain "just and reasonable."* Indeed, on the one hand, the FCC claims that it is forbearing from the formal implementation of price regulation under Section 203, but on the other hand the FCC is nonetheless imposing a regulated price of zero without the due process protections of a tariff under Section 706. This it cannot do: Again, either the FCC may regulate prices via tariffs (subject to the due process contours of established law), or it may forbear from the tariff requirements and rely upon the market to ensure that rates remain "just and reasonable." The FCC cannot directly set a regulated price in a de-tariffed market, but that is precisely what it did in the *2015 Open Internet Order*.[81]

These legal shenanigans did not go un-noticed. As then-Commissioner Ajit Pai warned in his lengthy dissent to the *2015 Order*,

> What I cannot find—and what our precedent does not countenance—is any instance where the FCC eliminated economic regulations without first performing any market analysis or finding competition sufficient to constrain anticompetitive pricing and behavior. *** [T]he FCC has not and, under the statute, cannot forbear from *any* economic regulation on a whim or a lark. Instead, it must identify *something else* that will constrain pricing, and that something else has always been—and can only be—competition.

79. 47 U.S.C. § 160.
80. *2015 Open Internet Order*, 30 FCC Rcd at 5809-14, paras. 441-52.
81. *C.f.*, Orloff v. FCC, 352 F.3d 415, 420 (D.C. Cir. 2003).

> But in forbearing from economic regulations in today's *Order*, the [FCC] doesn't just fail to find sufficient competition. It goes so far as to find that competition is lacking in the market for broadband Internet access service: Competition "appears to be limited in key respects," with consumers facing "high switching costs . . . when seeking a new service," and "broadband providers hav[ing] significant bargaining power in negotiations with edge providers and end users." *** If that's truly how the FCC sees the market, it should go ahead and use the m-word—monopoly—and rely on the economic regulations of the Communications Act that Congress designed to prevent a monopolist (back in 1934, it was Ma Bell) from exercising market power to the detriment of consumers. I do not see how the [FCC] could possibly forbear from economic regulations while at the same time finding that competition is so limited or nonexistent. Yet the *Order* does just that.[82]

For these reasons, Commissioner Pai pointed out that the FCC essentially invented "out of whole cloth a new method of conducting a forbearance analysis that bears little resemblance to either the terms of the Act or the [FCC]'s precedents."[83] Instead, as Commissioner Pai explained, the "forbearance section of the *Order* most clearly reveals that the [FCC]'s decision today is driven neither by the law nor the facts but rather by the need to reach certain predetermined policy outcomes."[84] Commissioner Pai had a valid point: when it comes to the FCC's new forbearance standard, it is readily apparent that the FCC did not forbear from tariffing requirements to relieve constraints on the regulated. Quite to the contrary, the FCC acted to relieve constraints on itself as the regulator.

2. The D.C. Circuit's Response

Once again, the court upheld the FCC's tortured application of the plain terms of the Communications Act. As noted above, however, this result was not due to superior legal acumen by the FCC, but again the consequence of litigation tactics.

First, counsel for the appellants never directly challenged the FCC's new forbearance standard. Instead, Petitioners were more upset about the various provisions in the Communications Act from which the FCC did not

82. *See 2015 Open Internet Order,* 30 FCC Rcd at 5979 (Comm'r Pai, dissenting) (citations omitted) (emphasis in original).
83. *Id*. at 5976.
84. *Id.* at 5975

forbear.[85] Certainly, a regulated firm cannot be expected to challenge a relaxed standard for setting aside regulation (ignoring, unfortunately in this case, the fact that the relaxed standard was being used *to expand* regulation).

Second, the court found that for the one intervenor that did directly challenge the FCC's forbearance standard—Full Service Network—its counsel failed to make the requisite statutory arguments outlined above. As the court noted,

> Notably . . . Full Service Network has never claimed that the [FCC] misapplied any of the section 10(a) factors, failed to analyze competitive effect as required by section 10(b), or acted contrary to its forbearance precedent. Indeed, when pressed at oral argument, Full Service Network disclaimed any intent to make these arguments.[86]

Facing no meaningful opposition to the FCC's perversion of the plain language of Section 10, the court therefore upheld the FCC's new forbearance standard.

This perversion of Section 10 by both the FCC and the majority in *USTelecom* proved to be a bridge too far for Judge Janice Brown. In her scathing dissent to the court's denial of a petition for rehearing *en banc*, Judge Brown argued that both the FCC and the majority in *USTelecom* "disregard[ed] the nature of forbearance."[87] As Judge Brown observed,

> Forbearance permits the FCC *to reduce* common carriage regulation over telecommunications, *not expand* common carriage regulation by reclassifying an information service and shaping common carriage regulations around it. The FCC has consistently understood this, invoking forbearance toward one of "Congress's primary aims in the 1996 Act:" "deregulate telecommunications markets to the extent possible."
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> ***
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> There is a sad irony here. Both this Court and the Supreme Court admonished the FCC for asserting forbearance authority without congressional authorization when the [FCC]'s aim was *deregulatory*. Now, when the [FCC]'s aim is to *increase regulation*, this Court is willing to bless the [FCC] using

85. *See*, *e.g.*, Joint Brief for Petitioners USTelecom, NCTA, CTIA, ACA, WISPA, AT&T, and Centurylink, *USTelecom v. FCC* at 20 ("Although the Order forbears under 47 U.S.C. § 160 from some Title II provisions, massive new regulation of broadband Internet access service remains."); Joint Reply Brief for Petitioners USTelecom, NCTA, CTIA, ACA, WISPA, AT&T, and Centurylink in *USTelecom v. FCC* at p.22 (the FCC "never addresses the immense costs imposed by the many Title II provisions from which the Order did not forbear).

86. *See* United States Telecom Ass'n v. FCC, 825 F.3d 674, 732 (D.C. Cir. 2016).

87. *USTelecom*, 855 F.3d at 408 (*pet. for rehearing en banc denied*, Brown J., dissenting) (emphasis in original) (citations omitted).

> forbearance without any satisfaction of the statutory requirements, and at odds with the nature of forbearance itself.[88]

In Judge's Brown's view, if "the FCC is to possess statutory forbearance authority, it should conform to forbearance's statutory conditions and the overall statutory scheme. Neither is the case here."[89] Given such a perversion of the plain terms of Section 10, therefore, Judge Brown concluded that the "FCC's abuse of forbearance amounts to rewriting the 1996 Act in the bowels of the administrative state, when it should petition Congress for these purportedly-necessary changes."[90]

Judge Brown's dissent certainly vindicates FCC Commissioner Michael O'Reilly's concerns about the [FCC]'s *2015 Open Internet Order*. As Commissioner O'Reilly presciently noted in his dissent to the *2015 Open Internet Order*,

> [T]he most surprising—and troubling—aspect of the item is that it promises forbearance from most of Title II but does not actually forbear from the substance of those provisions. Instead, the item intends to provide the same protections using a few of the "core" Title II provisions that are retained: chiefly, sections 201, 202, and 706. I call this maneuver *fauxbearance*.[91]

And that is precisely the point: either the FCC can directly impose price regulation (and follow the rules thereto) under Title II, or it can deregulate and surrender to the market. Due process mandates that it cannot do both (except—apparently according to the D.C. Circuit—it can do so now).[92]

III. *USTELECOM* AND ITS AFTERMATH: THE FCC ATTEMPTS TO REGULATE BUSINESS DATA SERVICES

The notion that an administrative agency should be able to set the rates, terms and conditions without the due process protections of a tariff held great appeal to former FCC Chairman Tom Wheeler. For example, in 2016, the FCC launched a *Further Notice of Proposed Rulemaking* ("*FNPRM*") to develop a new policy framework for "Business Data Services" or "BDS" (formally known as "Special Access" services).[93] Without belaboring the details, the FCC essentially sought to divide the BDS world into two segments

88. *Id.* at 409 (emphasis in original) (citations omitted).
89. *Id.*
90. *Id.*
91. *2015 Open Internet Order,* 30 FCC Rcd at 5996 (Comm'r O'Reilly, dissenting).
92. *C.f.*, Orloff v. FCC, 352 F.3d 415 (D.C. Cir. 2003).
93. Business Data Services in an Internet Protocol Environment, Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans, Special Access for Price Cap Local Exchange Carriers, AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Service, *Tariff Investigation Order And Further Notice Of Proposed Rulemaking*, 31 FCC Rcd 4723 (2016) [hereinafter *BDS Further Notice*].

based upon a simple head-count: markets that are "competitive" and markets that are "not." According to the *FNPRM*, if a market is competitive, then the FCC would remove price regulation; but if the FCC finds that a market is not competitive, then the FCC would impose price cap regulation on "dominant" carriers. Significantly, however, the FCC did not seek to enforce this rate regulation via the process outlined in the Communications Act—i.e., a tariff. Instead, the FCC proposed to forbear from the tariffing requirements of Section 203 and instead exclusively rely upon the general catch-all provisions of Sections 201 and 202 of the Communications Act.[94]

If this legal theory sounds familiar, it should. It was the same flawed theory of ratemaking and forbearance that the FCC used in its *2015 Open Internet Order*, which was ultimately upheld by the D.C. Circuit in *USTelecom*. By the FCC's own admission, the detariffed BDS markets were *not competitive*—i.e., firms have market power and, therefore, have both the incentive and ability to raise price and restrict output. Thus, by definition, the FCC cannot surrender enforcement of the "just and reasonable" standard to the market, yet that is exactly what it purported to do in the BDS context. But, just as in the *2015 Open Internet Order*, despite this alleged forbearance, the FCC was fully prepared to impose a regulated rate on "detariffed" providers without any cost justification (other than the fact that the FCC believed them to be "too damn high").[95]

Given the case law outlined above, the problems with the FCC's proposed approach in the *BDS Further Notice* become apparent: if the government wants to set a regulated price (i.e., a rate), then tariffing provides an important constraint on the FCC's behavior. For example, tariffing forces the FCC to engage in a serious analysis to see if a rate is "just and reasonable"—a task the FCC never attempted to do.[96] Indeed, in the absence of a full-fledged review of a tariff in a rate case, how is a carrier protected from the FCC setting a confiscatory (i.e., below-cost) rate in violation of the "just and reasonable" standard contained in Section 201? Short answer: it's not. Similarly, under Section 202, firms are allowed to engage in *reasonable* discrimination so long as they provide the same product at the same price to a "similarly situated" customer.[97] In the absence of a formal tariff where price terms and conditions are public to all, litigation of alleged "unreasonable" price discrimination will run rampant. As with its *2015 Open Internet Rules*, the FCC was not attempting to use its forbearance authority to relieve constraints on the regulated; quite to the contrary, the FCC was seeking to relieve the constraints on itself as the regulator.

With the 2016 election, political pressure forced then-FCC Chairman Tom Wheeler to pull his final *BDS Order* on the eve of the FCC vote (something Mr. Wheeler was not particularly happy about).[98] Mr. Wheeler's

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94. *Id.* at para. 263.

95. *See* George S. Ford, *How (and How Not) to Measure Market Power Over Business Data Services*, PHX. CTR. POLICY PAPER NO. 50 (Sept. 2016), http://www.phoenix-center.org/pcpp/PCPP50Final.pdf [https://perma.cc/S7L4-E9FM].

96. *Id.*

97. *See* discussion *supra* Section II.B.

98. Lawrence J. Spiwak, *A Political Temper Tantrum at the FCC*, THE HILL (Dec. 1, 2016, 7:28 AM), http://thehill.com/blogs/pundits-blog/technology/308187-a-political-temper-tantrum-at-the-fcc [https://perma.cc/77SA-7QUT].

successor—current FCC Chairman Ajit Pai—subsequently formally withdrew Mr. Wheeler's approach and replaced it with an approach more in line with the established Title II jurisprudence outlined above: namely, where there is sufficient competition, the FCC would forbear from regulation, and in markets still served by only one firm, it would impose price regulation via mandatory tariffs under Section 203.[99] As the Pai-led FCC correctly observed, "we conclude it is not practical to detariff carriers that are now subject to—and will remain subject to—price cap regulation, *where the tariff is the tool the [FCC] has used—and will continue to use—to enforce that regulation*."[100] Still, with *USTelecom* still on the books, despite the restraint shown by the Pai-led Commission, the risk that a future FCC with activist regulatory proclivities could again set a rate without the due process protections that tariffs afford remains a very legitimate possibility.

IV. CONCLUSION

USTelecom has established a troubling precedent. As noted above, the statutory construct of "Title II" now has no meaning; it is some bizarre legal hybrid that the FCC made up and the D.C. Circuit has sanctioned. The big question, therefore, is whether the precedential effect of *USTelecom* will be limited or significant. My guess is the latter.

For example, in January 2018, the Federal Communications Commission under Republican Chairman Ajit Pai reversed the Obama Administration's controversial *2015 Open Internet Rules*,[101] ironically relying, in no small part, on the deference accorded to the FCC by the D.C. Circuit in *USTelecom* to interpret the ambiguous language of the Communications Act. As such deference is a double-edged sword, however, it is not a stretch to presume that once the Democrats regain power they will try to reinstate all or part of the *2015 Open Internet Order*.[102] (Of course, we

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99. Business Data Services in an Internet Protocol Environment; Technology Transitions; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, *Report & Order*, 32 FCC Rcd 3459 (2017); *aff'd,* Charter Advanced Serv. v. Lange, 903 F.3d 715 (8th Cir. 2018); *see also* George S. Ford, *Economics Makes a Welcome Return in the Forthcoming BDS Order,* @LAWANDECONOMICS BLOG (Apr. 18, 2017), http://www.phoenix-center.org/blog/archives/2223 [https://perma.cc/8HPW-GCRA].

100. AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, *Report & Order*, 32 FCC Rcd 3459, para. 165 (2017) (emphasis added).

101. Restoring Internet Freedom, *Declaratory Ruling, Report And Order, And Order*, 33 FCC Rcd 311 (1) (2018). Interestingly, the *Restoring Internet Freedom Order* did not discuss the Title II implementation problems of the *2015 Open Internet Order*.

102. Lawrence J. Spiwak, *Congress Needs to Stop the Net Neutrality Definitional Merry-Go-Round,* BLOOMBERG BNA (Nov. 6, 2017), https://www.bna.com/congress-needs-stop-n73014471706 [https://perma.cc/W4Q5-3LSC]. What is not clear, however, is assuming that the *2015 Open Internet Order* went into place and the FCC brought a specific enforcement action against a BSP that was ultimately appealed, whether a reviewing court would balk at the FCC's obvious torturing of the statute in a fact-specific adjudicative (as opposed to a generic rulemaking) context.

can always hope that Congress will end this merry-go-round with legislation. Yet if past is prologue, given the political rancor surrounding the Open Internet debate, having Congress do its job remains wishful thinking).

Moreover, in addition to a sound legal basis, the court's ruling provides excellent political cover for such efforts: Indeed, because the implementation of Title II was not specifically challenged in *USTelecom*, when one hears claims by net neutrality proponents that the rules contained in the FCC's *2015 Open Internet Order* were upheld by the courts, in a technical sense, these claims are true.[103]

Which brings us to the point of the pencil: properly viewed, the current iteration of the net neutrality debate is not really about an "Open Internet," "free speech," or even who has the biggest Reese's Peanut Butter mug; it's about *power*.[104] That is, should an administrative agency be permitted on its own initiative to expand its power beyond its statutory mandate at the expense of private actors' Fifth Amendment due process protections? Indeed, if an administrative agency, by its own admission, is free to interpret selectively its own enabling statute to fit the times, then what is the role of Congress? At stake, in other words, is whether an administrative agency should be permitted to re-write the law—especially when it does so simply to fit a political agenda.[105] So while this Article has focused on the actions of Federal Communications Commission, it is important to recognize that the D.C. Circuit's holding applies equally to other agencies with the power to regulate the price, terms, and conditions of private firms. As such, under the logic of *USTelecom*, what is to stop other agencies such as the Federal Energy Regulatory Commission or the Surface Transportation Board from doing the exact same thing? Absolutely nothing.

If anything, *USTelecom* proves the old adage that "bad facts make bad law." As noted above, the appellants made a deliberate, strategic decision to focus their legal challenge on the statutory interpretation question and not to challenge how the FCC actually implemented Title II via its rules. Still, while the FCC certainly has great latitude to interpret the Communications Act, it

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103. *See*, *e.g.*, *Debunking Chairman Pai's Claims about Net Neutrality,* Prepared by the Office of FCC Commissioner Clyburn (Nov. 30, 2017), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1130/DOC-348016A1.pdf [https://perma.cc/AS2P-EQ5W] ("The D.C. Circuit twice upheld the *2015 Order* and rejected all of the statutory interpretation arguments Chairman Pai raised in his dissent (which he raises again in the draft *Destroying Internet Freedom Order*.").

104. John Eggerton, *John Oliver Takes on FCC's Pai, Net Neutrality*, BROADCASTING & CABLE (May 8, 2017), http://www.broadcastingcable.com/news/washington/john-oliver-takes-fccs-pai-net-neutrality/165586 [https://perma.cc/U4HE-YRBT].

105. The Obama White House's interference in the FCC's deliberations regarding the *2015 Open Internet Order* is well-documented. *See*, *e.g.*, United States Telecom Ass'n v. FCC, 855 F.3d 381, 394 (D.C. Cir. 2017) (Brown, J. dissenting from *denial of petition for reh'g en banc*) ("When the FCC followed the *Verizon* 'roadmap' to implement 'net neutrality' principles without heavy-handed regulation of Internet access, the Obama administration intervened. Through covert and overt measures, FCC was pressured into rejecting this decades-long, light-touch consensus in favor of regulating the Internet like a public utility.") (citations omitted); *see also* Gautham Nagesh & Brody Mullins, *Net Neutrality: How White House Thwarted FCC Chief,* WALL ST. J. (Feb. 4, 2015), https://www.wsj.com/articles/how-white-house-thwarted-fcc-chief-on-internet-rules-1423097522 [https://perma.cc/5YEZ-9X7P]; Lawrence J. Spiwak, *The "Clicktivist" In Chief,* THE HILL (Nov. 12, 2014), http://thehill.com/blogs/pundits-blog/technology/223744-the-clicktivist-in-chief [https://perma.cc/LAB8-QU6C].

must nonetheless operate "within the bounds of reasonable interpretation,"[106] and it is not at liberty to pick and choose select provisions of the statute to govern for the sake of expediency. Or does it? Under a broad reading of the D.C. Circuit's decision in *USTelecom*, the FCC apparently now has *carte blanche* to tailor its enabling statute to fit a results-driven outcome and trample on key due process concerns so long as it can sprinkle some pixie dust about promoting broadband deployment. For those who care deeply about due process and the rule of law, therefore, the precedent set by the D.C. Circuit in *USTelecom* is deeply troubling, and we will likely have to deal with its aftermath for years to come.

And if that unbridled expansion of regulatory power doesn't scare you, then it damn well should.

106. *See*, *e.g.*, Utility Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2431 (2014) (citing City of Arlington v. FCC, 569 U.S. 290, 296 (2013)) (internal quotation marks omitted).