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USTELECOM AND ITS AFTERMATH

Abstract: In 2015, the Federal Communications Commission made the controversial decision to reclassify broadband Internet access as a common carrier "telecommunications" service under Title II of the Communications Act. While much of the debate has focused on the legality of reclassification, little attention has been paid to actual implementation. As detailed in this BULLETIN, a proper implementation of Title II precluded the Commission's approach, forcing the Agency to ignore the "vast majority of rules adopted under Title II" and "tailor[] [Title II] for the 21st Century." Surprisingly, the D.C. Circuit found in *United States Telecom Association v. FCC* that the agency had wide latitude to interpret the Communications Act and not only upheld the agency's decision to reclassify but also its gross distortion of Title II. In so doing, the D.C. Circuit has extended *Chevron* deference beyond any reasonable limit, greatly expanding the Commission's authority well beyond its statutory mandate. This BULLETIN first presents several examples of how the *2015 Open Internet Order* ignores both the plain language of Title II and the extensive case law to achieve select political objectives, followed by a discussion of the D.C. Circuit's acceptance of such legal perversions. Next, this BULLETIN discusses how the FCC attempted 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.

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I. Background

For over a decade, the thorny issue of net neutrality has loomed over the telecom debate. What started with the simple notion that the Federal Communications Commission should stop broadband service providers ("BSPs") from engaging in strategic anticompetitive conduct eventually morphed into the Obama Administration subjecting the Internet to legacy common carrier regulation under Title II of the Communications Act designed for the old Ma Bell telephone monopoly of the last century.[1] While much of the debate to date has revolved around the threshold legal question of whether the Commission has the authority to reclassify in the first instance, the purpose of this BULLETIN is to focus on perhaps the more substantive (yet notably neglected) legal problem: the Commission's actual implementation of Title II, in particular the ratemaking provisions of Sections 201 and 202 and its forbearance authority in Section 10.

As explained in detail below, a proper application of these provisions should have prevented the Commission from doing what it wanted to do in its *2015 Open Internet Order* – in particular, the Commission 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 to Section 202; but yet (3) to give the patina of a "light touch" approach, to forbear from the tariffing requirements of Section 203 despite directly imposing price regulation. The Commission's solution to its legal pickle? To ignore the "vast majority of rules adopted under Title II"[2] 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 Commission's own words, "tailor[] [Title II] … for the 21st Century."[3] In effect, since the statute prohibited the rules the Commission wished to impose, the Agency simply rewrote the statute. Respect for precedent at the Commission, it seemed, was officially dead.[4]

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*.[5] That is, should an administrative agency be

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1 *Protecting and Promoting the Open Internet*, REPORT AND ORDER ON REMAND, DECLARATORY RULING, AND ORDER, FCC 15-24, 30 FCC Rcd 5601, 80 Fed. Reg. 19738 (rel. Mar. 12, 2015) (hereinafter "*2015 Open Internet Order*").

2 *Id.* at ¶ 51.

3 *Id.* at ¶ 5.

4 *C.f.*, T.R. Beard, G.S. Ford, L.J. Spiwak, and M. Stern, *Eroding the Rule of Law: Regulation as Cooperative Bargaining at the FCC*, PHOENIX CENTER POLICY PAPER NO. 49 (October 2015) (available at: http://www.phoenix-center.org/pcpp/PCPP49Final.pdf).

5 J. Eggerton, *John Oliver Takes on FCC's Pai, Net Neutrality*, BROADCASTING & CABLE (May 8, 2017) (available at: http://www.broadcastingcable.com/news/washington/john-oliver-takes-fccs-pai-net-neutrality/165586).

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.[6]

According to the D.C. Circuit in *United States Telecom v. FCC,* the answer appears to be "yes."[7] Citing the Supreme Court's seminal case in *Brand X*,[8] the D.C. Circuit found in *USTelecom* that the FCC had wide—nearly unbounded—latitude to interpret the Communications Act and not only upheld the agency's decision to reclassify, but also upheld the agency's ability to "tailor" how it chose to implement Title II. In so doing, the D.C. Circuit—rather by design or by omission—has taken *Chevron* deference to the extreme.[9] As demonstrated below, *USTelecom* has greatly expanded the Commission'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 sanctioned. For those who care deeply about due process and the rule of law, the precedent set by the D.C. Circuit in *USTelecom* is deeply troubling and is a case that we will likely have to deal with its aftermath for years to come.

This paper is organized as follows: In the next section, I present several examples how the Commission 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. In Section III, I demonstrate 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.

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[6] The Obama White House's interference in the FCC's deliberations regarding the *2015 Open Internet Order* is well-documented. *See, e.g.,* G. Nagesh & B. Mullins, *Net Neutrality: How White House Thwarted FCC Chief,* WALL STREET JOURNAL (February 4, 2015) (available at: https://www.wsj.com/articles/how-white-house-thwarted-fcc-chief-on-internet-rules-1423097522); L.J. Spiwak, *The "Clicktivist" In Chief,* THE HILL (November 12, 2014)(available at: http://thehill.com/blogs/pundits-blog/technology/223744-the-clicktivist-in-chief).

[7] *United States Telecom Association v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *pet. for rehearing en banc denied*, 855 F.3d 381 (2017) (hereinafter "*USTelecom*").

[8] *National Cable & Telecommunications Ass'n v. Brand X Internet Servs.,* 545 U.S. 967 (2005).

[9] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

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 proceed. Under the first theory, the Commission could have followed the guide path set forth by the D.C. Circuit in *Verizon* and enacted its rules using the authority provided by Section 706 of the Telecommunications Act of 1996.[10] The advantage of this approach is that because this was a relatively "greenfield" area of the law, the Commission would have had a great deal of latitude to determine its own path under a "commercially reasonable" standard.[11] The other option (which the Commission ultimately chose) was a reclassification of broadband Internet access as a Title II common carrier telecommunications service. The downside of a Title II approach is that when you choose to apply a law designed for the old Ma Bell monopoly to the Internet, however, is that you presumably also get the nearly eighty years of established case law that goes along with it.[12]

By its own admission, the Commission in its *2015 Open Internet Order* imposed a "no paid prioritization" rule that was specifically designed to "prohibit broadband providers from charging edge providers a fee…"[13] 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."[14] With intent, the Commission's rule establishes "a regulated price of zero."[15] Thus, despite the Commission's protestations to the contrary,[16] because net neutrality is unambiguously price regulation (albeit "zero-price" regulation), the reclassification dictated by the FCC's Commission's *2015 Open*

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10 L.J. Spiwak, *What Are the Bounds of the FCC's Authority over Broadband Service Providers? – A Review of the Recent Case Law*, 18 JOURNAL OF INTERNET LAW 1 (2015).

11 *Id.; see also Protecting and Promoting the Open Internet*, FCC 14-61, NOTICE OF PROPOSED RULEMAKING, 29 FCC Rcd 5561 (2014) at ¶ 10 (hereinafter "*2014 Open Internet NPRM*").

12 *Id.*

13 *See 2015 Open Internet Order, supra* n. 1 at ¶ 113.

14 *See Verizon v. FCC,* 740 F.3d 623, 657 (D.C. Cir. 2014).

15 *Id.*, 740 F.3d at 668 (D.C. Cir. 2014) (Silberman J. Dissenting).

16 *See, e.g., 2015 Open Internet Order, supra* n. 1 at ¶ 37 (our "light-touch approach for the use of Title II" means "no rate regulation"); *id.* at ¶ 382 ("… there will be no rate regulation…"); *see also* T. Wheeler, *This is How We Will Ensure Net Neutrality,* WIRED (February 4, 2015) ("… there will be no rate regulation…") (available at: https://www.wired.com/2015/02/fcc-chairman-wheeler-net-neutrality);

Internet Order must satisfy the relevant rate-making provisions of Title II of the Communications Act.[17] These provisions include:

- Section 201, which mandates that rates must be "just and reasonable";[18]
- Section 202, which prohibits "unreasonable" discrimination;[19] and
- Section 203, which provides the enforcement mechanism for Sections 201 and 202—i.e., tariffs.[20]

If, however, the Commission wants to refrain from imposing direct price regulation and surrender this 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.[21]

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 Commission's rules serve that function), but to govern the conduct of the *regulator*. Indeed, whenever the government intervenes into the market—particularly when it seeks to set the price, terms and conditions of service of private actors—a myriad of Constitutional due process concerns come to the fore that must be respected to avoid an undue takings under the Fifth Amendment. For this reason, courts have provided detailed guidance on how the Commission is supposed to interpret these various statutory provisions. As explained in detail below, the Commission'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.[22] The Commission's solution? Ignore the plain language of the statute and the case law in order to make up both a new theory of rate regulation and forbearance under Title II *de novo*. Let's look at a few examples.

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[17] *See generally*, G.S. Ford and L.J. Spiwak, *Tariffing Internet Termination: Pricing Implications of Classifying Broadband as a Title II Telecommunications Service,* 67 FEDERAL COMMUNICATIONS LAW JOURNAL 1 (2015) (available at: http://www.fclj.org/wp-content/uploads/2015/02/Tariffing-Internet-Termination.pdf).

[18] 47 U.S.C. § 201.

[19] 47 U.S.C. § 202.

[20] 47 U.S.C. § 203.

[21] 47 U.S.C. § 160. Indeed, in case where the Commission 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) as a regulatory backstop. *See In re Policy and Rules Concerning the Interstate, Interexchange Marketplace,* FCC 96-424, SECOND REPORT AND ORDER, 11 FCC Rcd 20730 (rel. October 31, 1996) (hereinafter "*IXC Detarrifing Order*").

[22] Ford and Spiwak, *Tariffing Internet Termination, supra* n. 17.

A. *"Just and Reasonable Rates"*

1. *The Commission's Approach*

Under Section 201 of the Communications Act, all rates must be "just and reasonable." However, as the D.C. Circuit remarked over thirty years ago, the phrase "just and reasonable" is not "*a mere vessel into which meaning must be poured*."[23] The problem, of course, is that ratemaking is "far from an exact science."[24] For this reason, courts simply require that in order to satisfy the just and reasonable standard, the Commission 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).[25] As the Supreme Court held in its seminal *Permian Area Rate Cases*, 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."[26] So, in attempting to set a just and reasonable rate, the Commission must set a rate that exceeds cost, but not by too much.[27]

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[23] *See, e.g., Farmers Union Central Exchange v. FERC,* 734 F.2d 1486, 1504 (D.C. Cir.), *cert denied sub nom.*, 469 U.S. 1034 (1984) (emphasis supplied). 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.

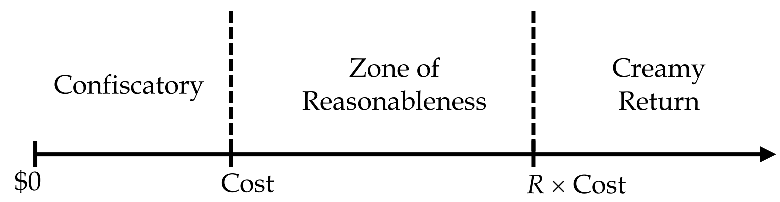
[24] *See, e.g., Fed. Power Comm'n. v. Conway Corp.,* 426 U.S. 271, 278 (1976); *WorldCom v. FCC,* 238 F.3d 449, 457 (D.C. Cir. 2001); *Sw. Bell Telephone Co. v. FCC,* 168 F.3d 1344, 1352 (D.C. Cir. 1999); *Time Warner Entm't Co. v. FCC,* 56 F.3d 151, 163 (D.C. Cir. 1995); *United States v. FCC,* 707 F.2d 610, 618 (D.C. Cir. 1983); *see also In the Matter of 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,* FCC 99-206, FIFTH REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING, 14 FCC Rcd 14221 (rel. August 27, 1999) at ¶¶ 96, 144.

[25] *See, e.g., Farmers Union, supra* n. 23, 734 F.2d at 1502.

[26] *In re Permian Basin Area Rate Cases,* 390 U.S. 747, 792 (1968).

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

Figure 1. Zone of Reasonableness in Rate Setting



As noted above, in its *2015 Open Internet Order*, the Commission imposed a "no paid prioritization" rule that was specifically designed to "prohibit broadband providers from charging edge providers a fee…."[28] This rule is 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."[29] Thus, the Commission's rule establishes "a regulated price of zero."[30] Accordingly, if edge providers are "customers" of BSPs as the D.C. Circuit found in *Verizon*, then the Commission's *2015 Open Internet Order* has the unambiguous effect of requiring BSPs to provide carriage to edge providers without any compensation.[31]

By directly setting a "zero-price," the Commission'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."[32] Indeed, the statute defines a service regulated under Title II as an "offering [] *for a fee* directly to the public."[33] Equally as important, this positive fee must also satisfy the "just and reasonable" ratemaking standard contained in Section 201. However, the Commission may not set a rate arbitrarily. Instead, the Commission

28 *See 2015 Open Internet Order*, *supra* n. 1 at ¶ 113.

29 *See Verizon v. FCC*, *supra* n. 14, 740 F.3d at 657.

30 *Id.*, Silberman J. Dissenting, 740 F.3d at 668.

31 *Id.*, 740 F.3d at 654 (Commission seeks to "compel[] an entity to continue furnishing service at no cost.")

32 47 U.S.C. § 153(11); *see also* 47 U.S.C. §151(53).

33 *Id.* (Emphasis supplied).

must provide its whys and wherefores on how it derived the rate.[34] The Commission provided no such analysis in its *2015 Open Internet Order*.

Formulating termination rates is likely to be a complex and arduous task, but drudgery is no excuse for the Commission'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).[35] Under a fully-distributed cost formula, it is feasible that much of the costs would be assigned to the edge providers.[36] As such, it may be that the revenues from edge providers 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 providers' price rises, the end-users' price falls.[37] A more balanced rate structure across the two sides of the market may be beneficial to both network deployment and service adoption.

Unfortunately, the Commission failed to even consider such inquiry in its *2015 Open Internet Order*. In fact, it did nothing.[38] 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 Commission arbitrarily set a price of zero without a shred of analysis.[39] Instead, the Agency bluntly told BSPs that they are prohibited from 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

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[34] *See, e.g. Century Communications Corp. v. Federal Communications Comm'n*, 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, 108 S.Ct. 2014, 2015, 100 L.Ed.2d 602 (1988); *Cincinnati Bell Telephone Company 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.").

[35] *Global Internet Phenomena Report*, 1H 2014, SANDVINE (2014) at p. 5.

[36] S. Brown and D. Sibley, THE THEORY OF PUBLIC UTILITY PRICING (1986) at pp. 44-9.

[37] *See* G.E. Weyl, *The Price Theory of Two-sided Markets* (2006) at p. 17-8; J.P. Choi & B-C. Kim, *Net Neutrality and Investment Incentives*, 41 RAND J. OF ECONOMICS 446-465 (2010) at pp. 453-7.

[38] Despite having this wealth of case law brought to its attention, the Commission summarily proceeded to ignore it. *See 2015 Open Internet Order, supra* n. 1 at fn. 1519.

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

Commission—by definition—arbitrarily established a "confiscatory" (i.e., below cost) rate for the service BSPs offer to edge providers under Section 201.[40]

2. *The D.C. Circuit's Response*

When the Commission 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 Commission was imposing zero-price regulation on BSPs under Title I. (In fact, it was the crux of the court's reversal of the FCC's *2010 Open Internet Rules,* finding that the Commission was improperly attempting to regulate Title I "information" services" as "common carriers" under Title II.[41]) Yet, when essentially the same rules came before the court again in *USTelecom,* 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.

This lack of attention to the Commission's attempt to force BSPs to carry edge providers' traffic without any compensation was a serious omission by 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 Commission 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 Commission now has wide latitude to set the rates, terms and conditions of broadband service providers with little regard to 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 Commission in the past for its failure to engage in the requisite due diligence when

40 Ford and Spiwak, *Tariffing Internet Termination, supra* n. 17.

41 *See, e.g., Verizon, supra* n. 14, 740 F.3d at 655-56 ("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.'")

reviewing rate cases.[42] Even though ratemaking is a complex problem, complexity is no excuse for the court to give the Commission a pass in this instance.[43]

B. *Undue Discrimination*

1. *The Commission's Approach*

Under the express terms of Section 202(a), carriers are allowed to engage in *reasonable* discrimination.[44] In fact, the Commission conceded this very point before the D.C. Circuit in *Orloff v. FCC*.[45] 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.[46] 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.

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." Likeness

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[42] As a classic case, take the example of payphone rates. While the Commission was charged with a simple task—setting a single rate—it took three separate attempts before the court finally found that the Commission acted correctly. *See In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* FCC 96-386, REPORT AND ORDER, 11 FCC Rcd 20541 (rel. September 20, 1996) ("First Order"); *Illinois Pub. Telecomms. Ass'n v. FCC,* 117 F.3d 555 (D.C. Cir. 1997) ("*Payphones I*"); *In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* FCC 97-371, SECOND REPORT AND ORDER, 13 FCC Rcd 1778 (rel. October 9, 1997); *MCI Telecomms. Corp. v. FCC,* 143 F.3d 606 (D.C. Cir. 1998) ("*Payphones II*"); *In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* FCC 99-7, THIRD REPORT AND ORDER AND ORDER ON RECONSIDERATION OF THE SECORD REPORT AND ORDER, 14 FCC Rcd 2545 (rel. February 4, 1999); *American Public Communications Council v. FCC,* 215 F.3d 51 (D.C. Cir. 2000) ("*Payphones III*").

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

[44] 47 U.S.C. § 202(a).

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

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

is based solely on functional equivalence.[47] If the services are determined to be "like" or "functionally equivalent," then the carrier offering them has the burden of justifying any price disparity as reasonable, such as a difference in cost.[48] 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 Commission 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.[49] 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 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.[50]

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 Commission's response was to ignore the law. In this particular case, the Commission side-stepped the law by promulgating its "no paid prioritization" rule—not under Section 202(a), the statute which is eponymously charged with regulating all issues of discrimination—but under the "public interest" catchall of Section 201(b) and Section 706.[51]

2. *The D.C. Circuit's Response*

Similar to its blessing of the Commission's tortured approach to the "just and reasonable" standard of Section 201, the court was just as accommodating to the Commission's disregard of the plain language of Section 202. Rather than the blind neglect the court engaged in towards the

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47 *Id.*

48 *Id.*

49 *See, e.g., In the Matter of Competition in the Interstate Interexchange Marketplace,* FCC 90-90, 5 FCC Rcd. 2627, NOTICE OF PROPOSED RULEMAKING (rel. April 13, 1990) at ¶¶ 131-139 (*citing Associated Gas Distributors v. FERC,* 824 F. 2d 981, 1007-1013 (D.C. Cir. 1987); *but c.f. Orloff, supra* n. 45 (allowing a mobile CMRS carrier to charge different promotional rates to similarly situated retail customers under *competitive* market conditions in the absence of tariffs).

50 *See* Ford and Spiwak, *Tariffing Internet Termination, supra* n. 17.

51 *See 2015 Open Internet Order, supra* n. 1 at ¶ 292.

Commission'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, tather than confront the plain language of Section 202(a) that expressly permits reasonable discrimination, the Commission adopted its "no paid prioritization" rule under the "public interest" catchall of Section 201(b) and Section 706—an explicit recognition that the Agency was skirting the plain language of the statute.[52] 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 Commission 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."[53] In other words, 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 Williams noted,

> … I can find no indication—and the Commission 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

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

> The Commission 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 Commission to conduct a regular inquiry "concerning the availability of advanced telecommunications capability." 47 U.S.C. §1302(b). It further provides that should the Commission 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).

53 *USTelecom, supra* n. 7, 825 F.3d at 734.

> unreasonably discriminatory. To uproot over a century of interpretation—and with so little explanation—is truly extraordinary.[54]

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

Putting aside both the FCC's and the court's tortured interpretation of the "virtuous cycle" theory for the moment[55] as well as its deliberate dismissal of both the plain terms of the statute and established case law, it is important to recognize that *USTelecom* represents a significant expansion of the D.C. Circuit's interpretation of Section 706. First, while the court had previously recognized Section 706 as an independent source of authority, prior to *USTelecom* the D.C. Circuit was quite adamant that the Commission'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 Commission's subject matter jurisdiction over such communications—*a limitation whose importance this court has recognized in delineating the reach of the Commission's ancillary jurisdiction.*"[56] 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, Title III, or Title VI…"[57] 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 Commission to oversee the activities of BSPs providing Title I "information" services.[58] Under the pre-*USTelecom* reading of Section 706, therefore, precedent would seem to dictate that if the Commission wants to control the rates, terms and conditions of BSPs under Section 706, then the agency 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 Commission cited with approval several times in its *2015 Open Internet Order*—is directly on

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54 *USTelecom, supra* n. 7, 825 F.3d at 759-760.

55 For a thorough dismantling of the FCC's mis-application of the "virtuous cycle" theory, *see* G.S. Ford, *Bait-and-Switch – Or Why the FCC's "Virtuous Circle" Theory is Nonsense,* BLOOMBERG BNA (May 18, 2015) (available at: http://www.phoenix-center.org/oped/BloombergBNAVirtuousCircle18May2015.pdf).

56 *Verizon, supra* n. 14, 740 F.3d 623 at 639-40 (emphasis supplied). It is interesting to note that when the Commission cited this exact passage from *Verizon* in its *Order,* the agency specifically omitted the italicized language above. *See 2015 Open Internet Order, supra* n. 1 at ¶ 138.

57 *Comcast v. FCC,* 600 F.3d 642, 654 (D.C. Cir. 2010) (emphasis supplied).

58 *See* Spiwak, *Bounds of the FCC's Authority, supra* n. 10.

point.[59] 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 Commission 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 § 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.[60]

However, the court made it crystal clear that the Commission's forbearance authority did not lie in Section 706 itself, but exclusively in Section 10. As the court stated bluntly, "*As contemplated by § 706 . . . [f]orbearance decisions are governed by the Communications Act's § 10….*"[61] Under this reasonable reading of the statute, therefore, even if the Commission un-reclassifies and returns broadband Internet access service to a Title I "information service," then the Commission—should it so chose—can implement adequate safeguards to protect an "Open Internet" because the Commission's use of Section 706 is constrained by the relevant provisions of the Communications Act via the doctrine of ancillary jurisdiction.

The problem with the D.C. Circuit's ruling in *USTelecom* is that this decision marks a significant expansion of the Commission'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 Commission must comply with basic ratemaking principles to ensure, for example, that the Commission does not establish a confiscatory rate. Under *USTelecom,* however, the D.C. Circuit has told the Commission that if it wants to regulate directly BSPs rates, terms and conditions under Section 706, then it need not first determine that rates are "just and reasonable." Instead, the agency 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.[62]

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[59] *Ad Hoc Telecommunications Users Committee v. FCC*, 572 F. 3d 903, 907 (D.C. Cir. 2009).

[60] *Id.* at 906-07.

[61] *Id.* at 907.

[62] 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 Commission's *2014 Open Internet NPRM*. *See 2014 Open Internet NPRM, supra* n. 11 at ¶ 10. Most likely the Commission would not have run into the problem of whether it violated the just and reasonable standard because Commission would not be

C. *Forbearance of Tariffing Requirements*

1. *The Commission's Approach*

Finally, we come to the FCC's forbearance decision. In its *2015 Open Internet Order*, the Commission 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.[63] 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.[64] 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 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.[65]

Stated another way, the Commission needs to ensure that the market will ensure that rates continue to fall under the just and reasonable standard before it can eliminate tariffs.[66] The problem for the Commission, however, is 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 Commission's own terms, has the ability to raise price and restrict output.[67]

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directly setting a rate. Instead, companies would have privately negotiated rate and then the Commission would have evaluated that rate under a defined set of parameters. *See Spiwak, Bounds of the FCC's Authority, supra* n. 10.

63 *2015 Open Internet Order, supra* n. 1.

64 For a detailed discussion of the FCC's forbearance authority, *see* G.S. Ford and L.J. Spiwak, *Section 10 Forbearance: Asking The Right Questions To Get The Right Answers*, 23 COMMLAW CONSPECTUS 126 (2014).

65 47 U.S.C. §160(a)(1).

66 *See Orloff, supra* n. 45, 352 F.3d at 420 (In the case of Section 203 forbearance, "[r]ates are determined by the market, not the Commission, as are the level of profits.").

67 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 Commission elected to substitute the phrase "gatekeeper" for "terminating monopoly." For all intents and purposes, the Commission essentially uses these terms to mean the same thing. *See 2015 Open Internet Order, supra* n. 1 at 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 Commission's discussion of these

In the *2015 Open Internet Order*, the Commission 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 Commission from proceeding in that basis where warranted."[68] The problem is that the Commission's legal logic for its new forbearance standard is circular. Let's walk though it step-by-step:

(1) All BSPs are "gatekeepers"—i.e., they are dominant over themselves and competition is irrelevant.

(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.[69]

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

(4) Under the plain terms of Section 10, the Commission may only forbear from the 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."[70]

(5) But because BSPs are subject to the "no paid prioritization" rule and "no blocking rule," the presence of competition was not warranted as a prerequisite for forbearance in this particular case. Instead, the Commission can forbear from the tariffing requirements of Section 203 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.[71]

The logical flaw in the Commission's argument is readily apparent: *The Commission is not surrendering ratemaking to the market because it does not trust the market to ensure that rates will remain just and reasonable.* Instead, the Commission claimed it was forbearing from price regulation but nonetheless imposed a regulated price without the due process protections of a tariff. This it

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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.")

[68] *2015 Open Internet Order, supra* n. 1 at ¶ 439.

[69] *See, e.g., In re Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier,* FCC 95–427, ORDER, 11 FCC Rcd 3271 (rel. 23 Oct. 1995).

[70] 47 U.S.C. § 160.

[71] *2015 Open Internet Order, supra* n. 1 at ¶¶ 441-452.

cannot do: Again, either the Commission 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 Agency cannot directly set a regulated price in a de-tarriffed market, but that is precisely what it did in the *2015 Open Internet Order*.[72]

These legal shenanigans did not go un-noticed. As then-Commissioner Pai warned in his lengthy dissent,

> 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.
>
> But in forbearing from economic regulations in today's *Order*, the Commission 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 Commission 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.[73]

For these reasons, Commissioner Pai pointed out that the Commission 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 Commission's precedents."[74] Instead, as Commissioner Pai explained, the "forbearance section of the Order most clearly reveals that the Commission's

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72 *C.f., Orloff, supra* n. 45.

73 *See* Dissent of Commissioner Pai to *2015 Open Internet Order, supra* n. 1, slip op. at p. 378.

74 *Id.*

decision today is driven neither by the law nor the facts but rather by the need to reach certain predetermined policy outcomes."[75] Commissioner Pai had a valid point: when it comes to the Agency's new forbearance standard, it is readily apparent that the Commission did not forbear from tariffing requirements to relieve constraints on the regulated. Quite to the contrary, the Commission acted to relieve constraints on itself as the regulator.

2. *The D.C. Circuit's Response*

Once again, the court upheld the Commission's tortured application of the plain terms of the Communications Act. To be clear, however, this result was not due to superior legal acumen by the Commission, but the consequence of litigation tactics. First, counsel for the appellants actively supported the FCC's new forbearance standard. 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 who did challenge the FCC's forbearance standard—Full Service Network—their counsel failed to make the requisite statutory arguments outlined above. As the court noted,

> Notably … Full Service Network has never claimed that the Commission 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."[76]

Facing no meaningful opposition to the Commission'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 Commission and the majority in *USTelecom* proved to be a bridge to far for Judge Brown. In her scathing dissent to the court's denial of a rehearing *en banc*, Judge Brown argued that both the FCC and the majority in *USTelecom* "disregard[ed] the nature of forbearance." 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

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75 *Id.*

76 *See USTelecom, supra* n. 7, 825 F.3d at 732

> primary aims in the 1996 Act:" "deregulate telecommunications markets to the extent possible." ***
>
> 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 Commission's aim was *deregulatory*. Now, when the Commission's aim is to *increase regulation,* this Court is willing to bless the Commission using forbearance without any satisfaction of the statutory requirements, and at odds with the nature of forbearance itself.[77]

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."[78] 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."[79]

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

> … the 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*.[80]

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

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77 *USTelecom, petition for rehearing en banc denied*, Judge Brown dissenting, *supra* n. 7, 855 F.3d at 409 (emphasis in original and citations omitted).

78 *Id.*

79 *Id.*

80 Dissent of Commissioner Michael O'Reilly, *2015 Open Internet Order, supra* n. 1, slip op. at p. 396.

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III. *USTelecom* and its Aftermath: The FCC Attempts to Regulate Business Data Services

Facing no opposition from the D.C. Circuit to their reinvention of Title II jurisprudence in the *2015 Open Internet Order*, the Commission under FCC Chairman Tom Wheeler wasted no time to push the edge of the legal envelope. For example, in 2016, the Agency 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).[81] Without belaboring the details, the Commission essentially sought to divide the BDS world into two segments 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 will remove price regulation; but if the FCC finds that a market is not competitive, then the Agency intends to impose price cap regulation on "dominant" carriers. Significantly, however, the Commission did not seek to enforce this rate regulation via the process outlined in the Commutations Act—i.e., a tariff. Instead, the Commission proposed to forbear from the tariffing requirements of Section 203 and instead exclusively rely upon the general catch-all rate provisions of Sections 201 and 202 of the Communications Act.[82]

If this legal theory sounds familiar, it should. It was the same theory of ratemaking and forbearance that the Commission used in its *2015 Open Internet Order*. And, just as in the BDS case, the Commission actions bore no bearing to established Title II jurisprudence. By the FCC's own admission, the detariffed BDS market was *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 Commission 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 Commission believed them to be "too damn high").[83]

Given the case law outlined above, the problems with the Commission's proposed approach in the *BDS Further Notice* become apparent: if the government wants to set a regulated price (i.e.,

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81 *In the Matter of 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,* FCC 16-54, TARIFF INVESTIGATION ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING, __ FCC Rcd __ (rel. May 2, 2016) (available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0602/FCC-16-54A1.pdf) (hereinafter "*BDS Further Notice*").

82 *Id.* at ¶ 263.

83 *See* G.S. Ford, *How (and How Not) to Measure Market Power Over Business Data Services*, PHOENIX CENTER POLICY PAPER NO. 50 (September 2016) (available at: http://www.phoenix-center.org/pcpp/PCPP50Final.pdf).

a rate), then tariffing provides an important constraint on the FCC's behavior. For example, tariffing forces the Commission to engage in a serious analysis to see if a rate is "just and reasonable"—a task the Commission never attempted to do.[84] Indeed, in the absence of a full-fledged review of a tariff in a rate case, how is a carrier protected from the Commission 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. 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 Commission was not attempting to use its forbearance authority to relieve constraints on the regulated; quite to the contrary, the Commission was seeking to relieve the constraints on itself as the regulator.

With last year's election, political pressure forced then-FCC Chairman Tom Wheeler to pull his proposed *BDS Further Notice* on the eve of the Commission vote (something Mr. Wheeler was not particularly happy about).[85] Mr. Wheeler's 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 Commission would forbear from regulation, and in markets still served by only one firm, it would impose price regulation via mandatory tariffs under Section 203.[86] As the Commission 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 Commission has used—and will continue to use—to enforce that regulation*."[87] Still, with *USTelecom* still on the books, despite the restraint shown by the Pai-led Commission the risk that a subsequent Commission with activist regulatory proclivities could again set a rate without the due process protections that tariffs afford remains a very legitimate possibility.

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84 *Id.*

85 L.J. Spiwak, *A Political Temper Tantrum at the FCC*, THE HILL (December 1, 2016) (available at: http://thehill.com/blogs/pundits-blog/technology/308187-a-political-temper-tantrum-at-the-fcc).

86 *In the Matter of 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,* FCC 17-43, REPORT & ORDER, __ FCC Rcd __ (rel. April 28, 2017).

87 *Id.* at ¶ 165 (emphasis supplied).

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 is what happens next? As of this writing, the D.C. Circuit has denied petitions for rehearing *en banc* review,[88] and whether the Supreme Court will grant *certiorari* is a crapshoot—particularly as the Republican-led FCC has announced plans to reverse its *2015 Open Internet Order*.[89] While removing the Internet out from under the thumb of such a bizarre legal construct certainly is a step in the right direction, *USTelecom*—for the foreseeable future—remains the law of the land and can provide powerful ammunition for a future Commission who does not share Chairman Pai's respect for due process.

If anything, *USTelecom* proves the old adage that "bad facts make bad law." While the Commission certainly has great latitude to interpret the Communications Act, the Agency must nonetheless operate "within the bounds of reasonable interpretation"[90] 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? With 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.

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

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88 *USTelecom, petition for rehearing en banc denied, supra* n. 7.

89 *C.f.*, Editorial: *Defining Deference Down: A Chance for the Supreme Court to Revisit its Chevron Doctrine,* WALL STREET JOURNAL (May 11. 2017) (available at: https://www.wsj.com/articles/defining-deference-down-1494544427); *In re Restoring Internet Freedom,* FCC 17-60, NOTICE OF PROPOSED RULEMAKING, __ FCC Rcd __, (rel. May 23, 2017) (available at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-60A1.pdf).

90 *See, e.g., Utility Air Regulatory Group v. Environmental Protection Agency*, __ U.S. __; 134 S.Ct. 2427, 2431 (2014); *City Of Arlington, Texas v. Federal Communications Commission*, __ U.S. __, 133 S.Ct. 1863, 1864 (2013)).

Tariffing Internet Termination: Pricing Implications of Classifying Broadband as a Title II Telecommunications Service

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I. INTRODUCTION

Since the early days of the Internet, the Federal Communications Commission (the "Commission") has taken a largely "hands off" regulatory approach to broadband Internet services—a light touch widely-held to be a key contributor to the rapid innovation, diffusion and adoption of Internet services in the United States.[1] Facilitating this deregulatory approach was the agency's classification of broadband Internet access as an "information service" under Title I of the Communications Act.[2] Despite the success of this approach, and in response to the agency's struggles to construct legally sustainable "Open Internet" rules,[3] the Commission is coming under intense political pressure to reverse course and classify broadband Internet connectivity as a common carrier telecommunications service under Title II.[4] Doing so, it is argued, is the only way to provide the agency with

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1. *See, e.g.*, J. Oxman, *The FCC and the Unregulation of the Internet* (FCC, OSP Working Paper No. 31, 1999), *available at* http://www.fcc.gov/working-papers/fcc-and-unregulation-internet; K. High, *Digital Pioneers Remember Past, Forecast Future of the Internet*, POLITIC365 (December 6, 2013, 3:09 PM), http://politic365.com/2013/12/06/digital-pioneers-remember-past-forecast-future-of-the-internet.

2. *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (cable modem); Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Report and Order*, FCC 05-150, 20 FCC Rcd. 14853, 14862 (2005), *aff'd* Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007) (wireline broadband); Appropriate Reg. Treatment for Broadband Access to the Internet over Wireless Networks, *Declaratory Ruling*, FCC 07-30, 22 FCC Rcd. 5901 (2007) (wireless broadband); United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Serv. as an Information Serv., *Memorandum Opinion and Order*, FCC 06-165, 21 FCC Rcd. 13281, 13281 (2006) (broadband over powerline).

3. Protecting and Promoting the Open Internet, *Notice of Proposed Rulemaking*, FCC 14-61, 29 FCC Rcd. 5561 (2014) [hereinafter *2014 Open Internet NPRM*], *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-61A1.pdf.

4. *See, e.g.*, Lawrence J. Spiwak, *The "Clicktivist" In Chief,* THE HILL (November 12, 2014) (http://thehill.com/blogs/pundits-blog/technology/223744-the-clicktivist-in-chief); Brendan Sasso, *In Net-Neutrality Push, Democrats Aim to Make the Internet a Utility,* NAT'L J. (July 14, 2014), http://www.nationaljournal.com/tech/in-net-neutrality-push-democrats-aim-to-make-the-internet-a-utility-20140714?ref=the_edge; Kate Tummarello, *Senate Dems: Regulate Internet Like Telephones*, THE HILL (July 15, 2014, 11:30 AM), http://thehill.com/policy/technology/212270-senate-dems-want-to-regulate-the-internet-like-phones. The full text of the letter is available on Senator Markey's

sufficient legal authority to prevent Broadband Service Providers ("BSPs") from engaging in anticompetitive conduct.[5]

This reclassification debate begs the question: How does classifying broadband as a common carrier telecommunications service help protect the "Open Internet"? According to proponents of reclassification, the answer lies in the direct application of Sections 201 and 202 of the Communications Act.[6] As stated by the advocacy group Public Knowledge, "Sections 201 and 202 provide strong statutory grounding for creating strong rules to protect an open internet."[7] Section 201 requires rates to be "just and reasonable"[8] while Section 202 prohibits "unreasonable discrimination."[9] These two sections, it is argued, can be used to prevent Broadband Service Providers from establishing slow and fast lanes for the delivery of edge-provider traffic to consumers, since such differential treatment of edge providers could be labeled by the Commission as

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webpage at: http://www.markey.senate.gov/news/press-releases/to-protect-net-neutrality-markey-leads-senate-dems-in-call-to-reclassify-broadband-as-a-utility.

5. This argument is inaccurate. *See* 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. INTERNET L. 1 (Jan. 2015).

6. *See, e.g.*, Comments of Pub. Knowledge & Common Cause at 12, Open Internet Remand, FCC GN Docket 14-28 (rel. March 21, 2014) [hereinafter *Public Knowledge Comments*], *available at* http://apps.fcc.gov/ecfs/document/view?id=7521094713; Comments of Mozilla at 6, 13, Protecting and Promoting the Open Internet, FCC GN Docket 14-28 (rel. July 15, 2014) [hereinafter *Mozilla Comments*], *available at* http://apps.fcc.gov/ecfs/document/view?id=7521479935; Comments of AARP at 41-42, Protecting and Promoting the Open Internet, FCC GN Docket 14-28 (rel. July 15, 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=7521705861.

7. Public Knowledge Comments, *supra* note 6, at 12.

8. Section 201 of the Communications Act, 47 U.S.C. § 201(b), provides in relevant part that "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful . . . ."

9. Section 202 of the Communications Act, 47 U.S.C. § 202(a), states:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage

"unreasonable discrimination."[10] Network Neutrality advocate and law professor Marvin Ammori, pointing to Section 201 and 202, claims "under Title II, the FCC can eliminate certain classes of fees and discrimination, including banning paid prioritization (a.k.a. fast lanes) on the Internet altogether."[11]

Thus far, the advocates for reclassification have put forth mostly superficial arguments, suited more for political markets than for policymakers (and consumers) trying to grasp the full implications of such a significant regulatory change.[12] Almost no attention has been directed at the fine details of how reclassification would be implemented. To wit, what service is to be reclassified and regulated? Who are the buyers and sellers impacted by reclassification? What enforcement mechanisms are available? In this ARTICLE, we address these specific issues. Our legal and economic review forces us to conclude that reclassification is likely to cause a radical change in the economic fabric of the Internet ecosystem.

Relying on the plain terms of the Commission's governing statute, current case law, and the Commission's own precedent, we show that reclassification turns edge providers into "customers" of Broadband Service Providers. This new "carrier-to-customer" relationship (as opposed to a "carrier-to-carrier" relationship) would then require all BSPs (i.e., telephone, cable, and wireless broadband providers) to create, and then tariff, a *termination service* for Internet content under Section 203 of the Communications Act. Critically, this termination service would be separate

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10. Public Knowledge Comments, *supra* note 6, at 12. ("Violating any nondiscrimination rule will necessarily involve violating Sections 201 and 202 by engaging in practices that unjustly or unreasonably give preference to or disadvantage a particular class of persons: namely, the users of particular lawful applications, services, or content.")

11. Marvin Ammori, *Title II and Paid Prioritization*, AMMORI.ORG (May 12, 2014), http://ammori.org/2014/05/12/title-ii-and-paid-prioritization. Despite such cursory claims, Sections 201 and 202 do not prohibit the establishment of slow and fast lanes; decades of rate regulation plainly show that establishing slow and fast lanes is entirely consistent with Sections 201 and 202 of the Act, if not, as some argue, mandated by them. Differential quality and pricing under Title II is commonplace, so it will be very difficult for the Commission to prohibit paid prioritization under Title II regulation, despite the *ad hoc* arguments to the contrary.

12. Indeed, press reports indicate that some 60 percent of initial comments to the Commission's *2014 Open Internet NPRM* came in the form of letters pre-written by advocacy campaigns. According to the Washington Post, this "suggests a heavy role for 'clicktivists,' or members of the public who weighed in by doing nothing more than clicking a button in an e-mail or on a Web site." *See* Brian Fung, *Sunlight: 99 Percent of Net Neutrality Comments Wanted Stronger FCC Rules*, WASH. POST, Sept. 2, 2014, http://www.washingtonpost.com/blogs/the-switch/wp/2014/09/02/sunlight-99-percent-of-net-neutrality-comments-wanted-stronger-fcc-rules; *see also Clictivist in Chief*, *supra* note 4.

and apart from any carrier-to-carrier agreements to deliver traffic.[13] Because a tariffed rate cannot be set arbitrarily, and since a service cannot be generally tariffed at a price of zero, reclassification would require all edge providers (not their carriers)—as customers of the BSP—to make direct payments to the BSPs for termination services. That is, *all content providers*, whether Netflix or a church website (or its host company), would be on the hook to pay every broadband service provider a positive termination fee.[14] Most importantly, the agency would likely be prohibited from using its authority under Section 10 of the Communications Act to forbear from such tariffing requirements because the Commission has labeled all BSPs as "terminating monopolists." In the presence of a terminating monopoly in the relevant market (i.e., each BSP is "dominant" for terminating access to their customers), competition—a key prerequisite for invoking section 10—cannot be used as a basis for forbearance for "terminating services." Accordingly, the agency has boxed itself in for mandatory tariffing under Title II. In light of the above, we can find no

13. The discrimination feared by net neutrality advocates regards specific forms of content, not specific carriers. Carriers deliver all types of content. Thus, the issue is not about degrading or enhancing the delivery of the entirely of a carrier's traffic, but the picking-and-choosing of some of the content of a carrier's (or multiple carriers') total traffic. As discussed *infra*, the carrier-to-carrier relationships are very different than those contemplated in the network neutrality debate.

14. Today, much carrier-to-carrier termination, also subject to Section 201 and 202, is arguably priced at "zero" under the Commission's Bill-and-Keep regulatory approach. Carrier-to-carrier relationships, governed by Section 252 of the Communications Act, are not "customer" relationships, and edge providers are not, today, considered carriers (the companies carrying their traffic are carriers). *See* Connect America Fund, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 11-161, 26 FCC Rcd. 17663 (2011) [hereinafter *USF/ICC Transformation Order*]. The difference between carriers and customers is substantial. As observed by the Tenth Circuit Court of Appeals in In re FCC 11-161, 753 F.3d 1015 (10th Cir. 2014), when ruling on the FCC's *USF/ICC Transformation Order*, carrier-to-carrier relationships involve the "recovery of costs through the offsetting of reciprocal obligations," and that to the extent costs are not recovered, "[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" and "the FCC reforms include funds for carriers that would otherwise lose revenues." *Id.* at 1128-30; *see also* Ace Tel. Ass'n v. Koppendrayer, 432 F.3d 876, 880 (8th Cir. 2005) (stating that a reciprocal compensation rate of zero did not violate the "reasonably approximation of the additional costs" requirement). 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 point at which they are likewise subject to Title II regulation. The implications of classifying edge providers as Title II common carriers is beyond the scope of this ARTICLE, but certainly an interesting issue worthy of investigation.

clear, legally supported path to a "Title II Lite" that avoids a tariffed termination service.[15]

To explore this complex issue in detail, this ARTICLE is organized as follows: In Section II we delineate the relevant market and show how reclassification turns edge providers into customers of BSPs, thereby creating a formal, regulated termination market. In Section III, we demonstrate that BSPs must set tariffs for this termination service, and the established rates would most likely have a positive price. In Section IV, we show that the Commission's own precedent likely prohibits forbearance of the tariffing requirements of Section 203 of the Communications Act. Conclusions and policy recommendations are provided in the final section.

II. RECLASSIFICATION AND THE CREATION OF A TERMINATION MARKET

If the FCC is to impose regulations to protect the "Open Internet," then it is essential to define exactly what transaction will be regulated, along with identifying the buyers and sellers involved in this transaction. That is, the relevant market must be established. Using the Commission's *2010 Open Internet Order*,[16] the D.C. Circuit's remand of the agency's Network Neutrality efforts in *Verizon v. FCC*,[17] and the agency's *2014 Open Internet NPRM*,[18] it is possible to sharply delineate the relevant transaction.

We first turn to the Commission's *2014 Open Internet NPRM* for a clear depiction of the relevant market. There, the agency defines the "Open Internet" as a broadband ecosystem that "allows innovators and consumers at the edges of the network to create and determine the success or failure of content, applications, services and devices, without requiring permission from the broadband provider to reach end users."[19] In this statement, "permission" is the key word. According to both the Commission and the D.C. Circuit in *Verizon*, the BSP's ability to grant or deny "permission" to

15. It should be noted that former Commission Chairman Julius Genachowski attempted to float such an idea for a "Title II Lite" but ultimately rejected it. *See* George S. Ford, Lawrence J. Spiwak, & Michael L. Stern, *The Broadband Credibility Gap*, 19 COMMLAW CONSPECTUS 75 (2010), *available at* http://www.phoenix-center.org/papers/CommlawConspectusBroadbandCredibilityGap.pdf [hereinafter *Broadband Credibility Gap*].

16. Preserving the Open Internet, *Report and Order*, FCC 10-201, 25 FCC Rcd. 17905 (2010) [hereinafter *2010 Open Internet Order*], *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf.

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

18. *2014 Open Internet NPRM*, *supra* note 3.

19. *Id.* at para. 1 (internal quotation marks omitted).

particular edge providers arises from the belief that BSPs are "terminating monopolies" (or "gatekeepers") and thus may exert control over the flow of Internet traffic over the last mile connection.[20] A BSP's interference with the flow of content from the edge to the customer is argued to disrupt the "virtuous circle of innovation" in the broadband ecosystem.[21]

The *2014 Open Internet NPRM* lays out three concerns arising from the "terminating monopolist's" control over traffic flow over the last mile: (a) broadband providers may have economic incentives to block or disadvantage a particular *edge provider* or class of *edge providers*; (b) broadband providers may have incentives to increase revenues by charging *edge providers* for access or prioritized access to broadband providers' end users; and (c) broadband providers, if charging positive prices for prioritized service, would have an incentive to degrade or decline the quality of service they provide to non-prioritized traffic.[22] The Commission and proponents of reclassification point to offerings such as Verizon's "expressed interest in pursuing commercial agreements with edge providers" and AT&T's "new sponsored data service, in which an edge provider enters an agreement with AT&T to sponsor and pay for data charges resulting from eligible uses of the sponsor's content by an AT&T mobile subscriber" as examples.[23] From these statements, it is clear that *the relevant transaction which the FCC would have to regulate under Title II is the one between BSPs and edge providers.*[24] As observed by the

20. *2010 Open Internet Order, supra* note 16, at para. 24; *Verizon,* 740 F.3d at 646; *2014 Open Internet NPRM, supra* note 3, at para. 42. Indeed, the D.C. Circuit went out of its way to find that this "terminating monopoly" was reinforced by the fact that not only do consumers have "limited" competitive options because "only one or two wireline or fixed wireless firms" provide service in most markets, but also that consumers face high switching costs for such services, including "early termination fees; the inconvenience of ordering, installation, and set-up, and associated deposits or fees; possible difficulty returning the earlier broadband provider's equipment and the cost of replacing incompatible customer-owned equipment; the risk of temporarily losing service; the risk of problems learning how to use the new service; and the possible loss of a provider-specific email address or website." *Verizon* 740 F.3d at 646-47.

21. *Verizon,* 740 F.3d at 649; *2010 Open Internet Order, supra* note 16, at para. 14.

22. *2014 Open Internet NPRM, supra* note 3, at para. 6.

23. *Id.* at para. 37.

24. Mozilla, in its filing before the Commission, makes the same argument, calling for the creation of "a new type of service" that is "the offering of delivery of traffic, upstream and downstream, to a remote edge provider . . . . [This] remote delivery service connects each of the Internet's edge providers to all of the local network's subscribers." Mozilla Comments, *supra* note 6, at 9-10. Mozilla uses the analogy of an apartment building doorman:

Commission, the relevant transaction for "Open Internet" regulations is the "second side of the market—between broadband providers and edge providers or other third parties."[25] The service provided in this "second side of the market" is *termination*, a fact made clear by the use of the term "terminating monopolies." Thus, according to the Commission's logic, to protect the "Open Internet," any rules must target the transactions between edge providers on the demand side and BSPs on the supply side of the market in which a termination service is traded.

Historically, edge providers have not been considered "customers" of the BSPs.[26] Upon reclassification, however, edge providers would formally and legally become *customers* of BSPs.[27] In *Verizon v. FCC*, the creation of this new termination market is made plain:

> It is true, generally speaking, that the "customers" of broadband providers are end users. But that hardly means that broadband providers could not also be carriers with respect to edge providers . . . . [b]ecause broadband providers furnish a

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> It works a little bit like a doorman in a high-end condominium or apartment building. The doorman offers a service to the building's residents, in holding their mail (whether it has arrived or is waiting to be sent out). But the doorman is also, at the same time, effectively offering a service to Amazon, Best Buy, Netflix (for its DVD shipments), and any other company that the resident purchased a good from. In this metaphor, the doorman (who functions as the gatekeeper for millions of individual residents) is considering asking some shippers to pay more to make sure the subscriber gets their goods right away, while packages from non-preferred shippers might be left in the mailroom for a day or two. Mozilla is asking for the relationship between the doorman and the shipper to be codified, separate from the relationship between the doorman and the resident, even though the act of holding onto the packages is the same for both relationships. *Id.* at 10.

25. *2014 Open Internet NPRM*, *supra* note 3, at para. 37.

26. Of course, a termination service is provided, but to date transactions directly between BSPs and edge providers have not been commonplace, but not entirely absent either. *See, e.g.*, Eliot Van Buskirk, *ESPN to ISPs: Pay for Your Customers to Play Video*, WIRED (Feb. 5, 2009, 5:18 PM), http://www.wired.com/2009/02/espn-stands-fir; S. Nassauer, *ESPN Charges Net Providers for Right to Offer Broadband Web Site*, WALL ST. J. (Aug. 1, 2006), http://online.wsj.com/article/SB115439535367922979.html.

27. Under 47 U.S.C. § 201(a), every common carrier engaged in interstate or foreign communication by wire or radio has a "duty . . . to furnish such communication service upon reasonable request therefor." It may be that some edge providers could be classified as carriers, either on their own motion or as a result of Commission action. As carriers, the exchange of traffic would be governed by rules related to carrier-to-carrier traffic exchange.

> service to edge providers, thus undoubtedly functioning as edge providers' "carriers" . . . regardless of whether edge providers are broadband providers' principal customers. This is true whatever the nature of the preexisting commercial relationship between broadband providers and edge providers . . . . No one disputes that a broadband provider's transmission of edge-provider traffic to its end-user subscribers represents a valuable service: an edge provider like Amazon wants and needs a broadband provider like Comcast to permit its subscribers to use Amazon.com.[28]

By reclassifying broadband as a telecommunications service, this termination service becomes a common carrier telecommunications service, thereby formalizing this "customer" relationship between edge providers (e.g., Amazon) and BSPs. Recalling that the D.C. Circuit in *Verizon* remanded the agency's *2010 Open Internet Order* because the agency effectively turned BSPs into common carriers, consider the court's statement:

> [G]iven the Open Internet Order's anti-blocking and anti-discrimination requirements, if Amazon were now to make a request for service, Comcast must comply. That is, Comcast must now "furnish . . . communication service upon reasonable request therefor."[29]

This "furnish[ed] communications service" is termination. Thus, with reclassification, the Commission creates a *termination* market—*an entirely new service involving edge providers and BSPs*.[30] This termination market

28. Verizon v. FCC, 740 F.3d 623, 653 (D.C. Cir. 2014).

29. *Id.* at 653-54 (emphasis in original).

30. Significantly, in the Commission's *2014 Open Internet NPRM,* the agency highlights its own concerns about the possibility that edge providers will formally become "customers" of BSPs. *See 2014 Open Internet NPRM*, *supra* note 3, at para. 151.

> Separate from the reclassification of "broadband Internet access service," we seek comment on how the Commission should consider broadband providers' service to edge providers and whether that service (or some portion of it) is subject to Title II regulation. As mentioned above, in *Verizon*, the D.C. Circuit stated that "broadband providers furnish a service to edge providers, thus undoubtedly functioning as edge providers' 'carriers.'" We understand such service to include the flow of Internet traffic on the broadband providers' own network, and not how it gets to the broadband providers' networks . . . . We seek comment on whether and, if so how, the Commission should separately identify and classify a

is separate and apart from the carrier-to-carrier delivery of Internet traffic. We turn now to how creating this new "termination market" might be regulated to protect the "Open Internet."

III. A NEW TERMINATION MARKET

As we have detailed above, the Commission and the courts conclude that Network Neutrality addresses the terminating market in which edge providers are the buyers and BSPs are the sellers. It follows that *it is this terminating market, formalized by reclassification, which must be regulated to protect the Open Internet*. Legal precedent suggests that in order for the Commission to effectively regulate this terminating market under the auspices of Sections 201 and 202, BSPs would be required to file (positive-price) tariffs under Section 203 for this new termination service. Such a regulated transaction does not occur today, but the D.C. Circuit in *Verizon* recognized that this absence places no limitation on the consequences of reclassification. Under this plausible scenario, therefore, edge providers would be required to pay a tariffed rate to BSPs for the termination of their traffic to end users. After all, a "telecommunications service," which is what broadband becomes upon reclassification, is defined as "the offering of telecommunications *for a fee*."[31]

While a thorough discussion of the tariffing process is beyond the scope of this ARTICLE, a brief background may prove fruitful in what we expect to be a healthy debate over the potential rate regulation of the "termination market." First, we have Section 201, which requires, *inter alia*, that a common carrier's rates must be "just and reasonable."[32] We also have Section 202, which prohibits a carrier from engaging in "unreasonable

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broadband service that is furnished by broadband providers' to edge providers in order to protect and promote Internet openness. *Id.*

31. 47 U.S.C. § 153(53) (2012). Mozilla claims that the "fee" need not be monetary compensation, but there is no precedent for that in end-user markets (though the Commission views the exchange of traffic in carrier-to-carrier relationships as a form of compensation, thus justifying a bill-and-keep regime). Interconnection is not treated as a telecommunications service. Mozilla also contends that the termination fee may be set to zero in light of a positive price for broadband access paid by the end user. Mozilla Comments, *supra* note 6, at 11-12. However, termination and end-user services are entirely different markets and, we suspect, will be classified differently for regulatory purposes (*i.e.*, termination is a telecommunications service, end-user broadband is an information service). If end-user services are not regulated, ensuring they are fully compensatory, then using positive end-user prices as a basis for a zero termination charge is legally suspect, and some might argue such a scheme is a subsidy from consumers to edge providers.

32. 47 U.S.C. § 201(b) (2012).

discrimination" or providing for "undue" preferences.[33] Section 201 and 202 are, in turn, enforced by Section 203, which requires a common carrier to file a tariff with the Commission.[34] If, after an opportunity for a hearing, the Commission finds that the filed rate is not "just and reasonable" or is "unreasonably discriminatory," then the Commission can adjust the rate under Section 205.[35] Moreover, as a backstop, there is Section 208, which allows interested parties to file a complaint with the Commission.[36]

Rate setting is not as simple as it seems.[37] Regarding the first prong of the test ("just and reasonable"), it is well established that a rate must fall into what is referred to as the "zone of reasonableness"—*i.e.*, it cannot be "confiscatory" (*i.e.*, "below cost") on the bottom end and "excessive" on the high end. As a result, while rates cannot allow a monopoly return, a rate generally must have a "positive" price (*i.e.*, it cannot be set at "zero"). Given the multiple methodologies used to set rates, (*e.g.*, price cap, rate of return, LRIC, TELRIC, etc.) and the formidable complexity of measuring cost and demand, both courts and the Commission have consistently recognized that ratemaking is "far from an exact science."[38]

Given the lack of historical termination fees for Internet traffic, how termination rates will be formulated is a complex matter. Evaluating a filed rate, especially if it is rejected, will require some sort of cost study for termination services. Unquestionably, the cost is not zero—there are no

33. 47 U.S.C. § 202(a) (2012). Section 202 of the Communications Act states:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage. *Id.*

34. 47 U.S.C. § 203 (2012).

35. 47 U.S.C. § 205 (2012).

36. 47 U.S.C. § 208 (2012).

37. Indeed, the phrase "just and reasonable" is not "a mere vessel into which meaning must be poured." *See* Farmers Union Cent. Exch. v. FERC, 734 F.2d 1486, 1504 (D.C. Cir.), *cert denied sub nom.*, Williams Pipe Line Co. v. Farmers Union Cent. Exch., 469 U.S. 1034 (1984).

38. *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 Telephone Co. v. FCC, 168 F.3d 1344, 1352 (D.C. Cir. 1999); United States v. FCC, 707 F.2d 610, 618 (D.C. Cir. 1983); *see also* Access Charge Reform, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, FCC 99-206, 14 FCC Rcd. 14221, at paras. 96, 144 (1999) (the Commission justified its deregulatory triggers by noting that "regulation is not an exact science"); George S. Ford & Lawrence J. Spiwak, *The Need for Better Analysis of High Capacity Services*, 28 JOHN MARSHALL J. COMPUTER & INFORMATION L. 343 (2011).

free lunches. In fact, it could be argued that most of the costs of the broadband network are related to termination, since the bulk of traffic is downstream rather than upstream (a ratio of about 6:1).[39] Under a fully-distributed cost formula, after reclassification, it is feasible that much of the BSPs revenue could be collected on the termination side of the two-sided market.[40] As such, the tariffed termination fee to be paid by edge providers will not only be positive, but, in the end, it may turn out that the revenues from termination make up the lion's share of BSP revenue from the sale of broadband service.[41]

Regarding the second prong of the standard (that any rate must also not be "unreasonably" discriminatory), note that the operative word here is "unreasonable"—*i.e.*, *reasonable* discrimination in service offerings is perfectly acceptable. Thus, 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.[42] 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.

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." Likeness is based solely on functional equivalence.[43] If the services are determined to be "like" or "functionally equivalent," then the carrier offering them has the

39. SANDVINE, GLOBAL INTERNET PHENOMENA REPORT 1H 2014 at 5 (2014, *available at* https://www.sandvine.com/downloads/general/global-internet-phenomena/2014/1h-2014-global-internet-phenomena-report.pdf.

40. STEPHEN J. BROWN & DAVID S. SIBLEY, THE THEORY OF PUBLIC UTILITY PRICING 44-49 (1986). Rate setting also has a strong dose of politics. *See, e.g.*, T. Randolph. Beard & George S. Ford, *Splitting the Baby: An Empirical Test of Rules of Thumb in Regulatory Price Setting*, 58 KYKLOS 331-51 (2005); T. Randolph. Beard & Henry Thompson, *Efficient Versus "Popular" Tariffs for Regulated Monopolies*, 69 J. BUS. 75-87 (1996).

41. Depending on how one views the issue, this would be a positive result, because under the theory of two-sided markets, such a change in financing of last-mile networks could lead to sizeable reductions in end-user rates and thus expand adoption. Similarly, tariffing terminating access would now force edge providers to pay into universal service, thus raising the possibility that universal service contributions charged to end consumers would also be reduced.

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

43. *Id.*

burden of justifying any price disparity as reasonable, such as a difference in cost.[44] If a price difference is not justified, then the price difference is deemed unlawful. One usual measure to determine reasonableness is an inquiry as to whether the different rates are offered to "similarly situated" customers.[45] That is, are the customers roughly the same size and do they 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.[46] Critically, 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. To the extent network neutrality is about slow and fast lanes, reclassification offers no power to prohibit their creation. In fact, it seems more likely that reclassification facilitates the creation of prioritized termination.

In sum, under standard, utilities-style rate-setting rules, the tariffed rates for this "new" termination service "created" by reclassification must be positive to avoid a confiscatory rate, could be quite large under common rate setting methodologies, and may very well differ across edge provider types. These charges will apply to edge providers and not their carriers, and can reasonably be expected to apply to all edge providers—from Netflix, to Amazon, to a political candidate's website. Plainly, reclassification is a radical change on the Internet ecosystem, and, surprisingly, the agency's authority to impede fast and slow lanes under Title II is exceedingly weak.

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44. *Id.*

45. *See, e.g.*, Competition in the Interstate Interexchange Marketplace, *Notice of Proposed Rulemaking*, FCC 90-90, 5 FCC Rcd. 2627, at paras. 131-39 (1990) (citing Associated Gas Distribs. v. FERC, 824 F. 2d 981, 1007-1013 (D.C. Cir. 1987); *but cf.* Orloff v. FCC, 352 F.3d 415, 418 (D.C. Cir. 2003), *cert. denied*, 542 U.S. 937 (2004) (allowing a mobile CMRS carrier to charge different promotional rates to similarly situated retail customers under competitive market conditions).

46. For a deeper exploration of this topic, *see, e.g.*, 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. Policy Perspectives No. 10-03 (2010)), *available at* http://www.phoenix-center.org/perspectives/Perspective10-03Final.pdf.

IV. FORBEARANCE AND THE TERMINATING MONOPOLY PROBLEM

By any standard, Title II is burdensome and many parts of it are unnecessary for modern communications markets.[47] As a result, some of the more conscientious parties arguing for reclassification concede that the Commission should use its authority contained in Section 10 of the Communications Act to forbear from portions of Title II.[48] As we explain here, however, given both the D.C. Circuit's holding in *Verizon* and the Commission's prior holdings, forbearance from the tariffing requirements of Section 203 will prove difficult for the agency. As such, there appears to be significant legal challenges to the formation of a "Title II Lite" that excludes creating and tariffing a termination service.[49]

It is now recognized that Network Neutrality is rate regulation (albeit "zero" price regulation), and the reclassification proponents' reliance on Sections 201 and 202 make that fact clear enough.[50] Rate regulation of consumer rates under Section 201 and 202 is effectuated through the filing of tariffs under Section 203.[51] Oddly, we are unaware of any proposal that

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47. *See* Fed.-State Joint Bd. on Universal Servs., *Report to Congress*, FCC 98-67, 13 FCC Rcd. 11830, at para. 82 (1998), *available at* http://www.fcc.gov/Bureaus/ Common_Carrier/Reports/fcc98067.pdf [hereinafter *Federal-State Joint Board*] ("classifying Internet access services as telecommunications services could have significant consequences for the global development of the Internet. We recognize the unique qualities of the Internet, and do not presume that legacy regulatory frameworks are appropriately applied to it").

48. *See, e.g.*, Public Knowledge Comments, *supra* note 6, at 12 ("When combined with the Commission's Section 10 forbearance ability, Title II provides the clear statutory authority to implement rules critical to protecting an open internet while avoiding importing unnecessary legacy regulations of the past.").

49. For a detailed analysis of the FCC's forbearance authority, *see* George S. Ford and Lawrence J. Spiwak, *Section 10 Forbearance: Asking The Right Questions To Get The Right Answers*, 23 COMMLAW CONSPECTUS 126 (2014) *available at* http://scholarship.law.edu/commlaw/vol23/iss1/5.

50. Indeed, one of the reasons the D.C. Circuit struck down the Commission's last set of Open Internet rules is because the Commission forced BSPs to charge a "zero" price to all comers for broadband Internet access. *See* Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014). For a full discussion, *see* Spiwak, *What Are the Bounds of the FCC's Authority, supra* note 5.

51. Section 203 requires that:

> Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and

specifically recognizes that Section 203 is an essential element of any "Title II Lite," though at least one party alludes to the risk of forbearing from tariff filings.[52] Presumably, reclassification advocates take for granted that the Commission would forbear from Section 203.[53] Yet, there has been no serious analysis on the question of whether forbearance is a legitimate option for the enforcement of an "Open Internet," particularly in regard to tariff filings.[54] The Commission's prior holdings and the D.C. Circuit's ruling in *Verizon* would seem to preclude forbearance from Section 203 for the new termination service.

Under Section 10 of the Communications Act, the Commission may forbear from sections of the Act if, after doing so, the rates, terms and conditions for telecommunications services remain just, reasonable, and nondiscriminatory. Forbearance must also be in the public interest.[55] In all significant cases of forbearance from Section 203, the Commission has

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> points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. 47 U.S.C. § 203.

52. Comments of Pub. Knowledge, Benton Found., & Access Sonoma Broadband at 85, Protecting and Promoting the Open Internet, FCC GN Docket 14-28 (rel. July 15, 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=7521480282. Many other Title II provisions, including the Section 203 requirements of carriers to report rates, provide consumers with the transparency necessary to protect their interests, whether through legal action or their exercise of buying power. Even in the presence of a competitive market, this transparency is necessary for consumers to take advantage of that competitive market. Without the necessary information to distinguish between providers, consumers are no better off with several providers to choose from. *Id.*

53. There has been some discussion of forbearance, but never a serious outline of a legally-sound algorithm to achieve it. For a cursory, slapstick (yet often cited) discussion of forbearance, *see* Harold Feld, *Title II Forbearance Is Actually So Easy It Makes Me Want to Puke*, WETMACHINE (July 14, 2014), http://www.wetmachine.com/tales-of-the-sausage-factory/title-ii-forbearance-is-actually-so-easy-it-makes-me-want-to-puke.

54. Unfortunately, the Commission is equally guilty in this regard. To wit, in both the Commission's *2010 Open Internet Notice of Inquiry* and again in its *2014 Open Internet NPRM*, the Commission "contemplated that, if it were to classify the Internet connectivity component of broadband Internet access service, it would forbear from applying all but a handful of core statutory provisions—sections 201, 202, 208, and 254—to the service." *2014 Open Internet NPRM*, *supra* note 3, at para. 154; *see also* Framework for Broadband Internet Serv., *Notice of Inquiry*, FCC 10-114, 25 FCC Rcd. 7866, at para. 68 (2010). However, the Commission provides zero specific guidance on how it would use Section 10 to forbear from the tariffing requirements of Section 203. *See id*.

55. 47 U.S.C. § 160 (2012).

concluded that it is the presence of competition in the relevant market that permits forbearance; that is, competition, rather than regulation, is trusted to keep rates just, reasonable, and nondiscriminatory.[56] When the Commission has found competition to be lacking, it has denied forbearance requests.[57] As stated in its *1996 Long Distance Detariffing Order*, in which the Commission forbore from applying Section 203 tariffing requirements to long distance service, the Commission "believe[d] that market forces will generally ensure that the rates, practices, and classifications of non-dominant interexchange carriers for interstate, domestic, interexchange services are just and reasonable and not unjustly or unreasonably discriminatory."[58] It appears that in all forbearance cases regarding Section 203 (if not *all* forbearances cases involving rates), an appeal to competition is made to justify forbearance from tariffing or other statutory mandates.[59]

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56. *See Section 10 Forbearance*, *supra* note 49 and citations therein. After forbearance, the Commission relies upon the complaint process contained in Section 208, 47 U.S.C. § 208, as a regulatory backstop to enforce Section 201 and 202. *See* Orloff v. FCC, 352 F.3d 415, 418 (D.C. Cir. 2003), *cert. denied*, 542 U.S. 937 (2004).

57. *See, e.g.*, Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, *Memorandum Opinion and Order*, FCC 10-113, 25 FCC Rcd. 8622 (2010) [hereinafter *Phoenix Forbearance Order*], *aff'd*, Qwest v. FCC, 689 F.3d 1214 (10th Cir. 2012).

58. Policy and Rules Concerning the Interstate, Interexchange Marketplace, *Second Report and Order*, FCC 96-424, 11 FCC Rcd. 20730, at para. 21 (1996), *aff'd*, MCI v. FCC, 209 F.3d 760 (D.C. Cir. 2000).

59. A similar result can be found in the Commission's experience in forbearing from Section 203 in the wireless context using its authority under Section 332 of the Communications Act, which contains language very similar to that contained in Section 10. As the Commission observed,

> Concerns about the ramifications of tariff forbearance are unwarranted. Despite the fact that the cellular service marketplace has not been found to be fully competitive, there is no record evidence that indicates a need for full-scale regulation of cellular or any other CMRS offerings. [M]ost CMRS services are competitive. Competition, along with the impending advent of additional competitors, leads to reasonable rates. Therefore, enforcement of Section 203 is not necessary to ensure that the charges, practices, classifications, or regulations for or in connection with CMRS are just and reasonable and are not unjustly or unreasonably discriminatory.

Implementation of Sections 3(N) and 332 of the Commc'ns Act, *Second Report and Order*, FCC 94-31, 9 FCC Rcd. 1411, at para. 174 (1994). The D.C. Circuit in *Orloff* reached a similar conclusion:

> When the common carrier designation fit, the regulatory consequences depended upon the requirements set forth in Title II.

Certainly, an argument can be made that competition in the broadband marketplace could be used to forbear from regulating transactions between BSPs and end users.[60] Those rates aren't regulated today, and we suspect that the Commission is inclined to forbear from retail rate regulation even after reclassification (though forbearance of retail rates may be difficult under the dicta of the *Phoenix Forbearance Order*, the D.C. Circuit's affirmation thereof, and the Commission's recent decision to raise the definition of broadband service to 25 Mbps).[61] As made plain above, however, advocates are making it clear that Net Neutrality is not

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> Much of ''the Communications Act's subchapter applicable to Common Carriers [had been] premised upon the tariff-filing requirement of § 203.'' The Commission reviewed and approved rates and determined what level of profits the regulated carrier would earn. The carrier had to file its rates and make them publicly available; and it could not charge different rates without making a new filing and then waiting for a specified period of time (120 days under § 203(b)(1)). All of that has changed for CMRS …. Rates are determined by the market, not the Commission, as are the level of profits. With § 203 no longer applicable, there is no statutory provision even requiring that the carrier publicly disclose any of its rates, although competition will force it to do so.

See Orloff v. FCC, *supra* note 56, 352 F.3d at 418 (internal citations omitted).

60. Commission Chairman Tom Wheeler, however, apparently believes otherwise. *See* Tom Wheeler, Chairman, FCC, The Facts and Future of Broadband Competition at 1776 Headquarters, Washington, D.C. (Sept. 4, 2014) ("My goal is not to criticize, but to recognize that meaningful competition for high-speed wired broadband is lacking and Americans need more competitive choices for faster and better Internet connections, both to take advantage of today's new services, and to incentivize the development of tomorrow's innovations."), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0904/DOC-329161A1.pdf.

61. *See In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, FCC 15-10, __ FCC Rcd. __, 2015 BROADBAND PROGRESS REPORT AND NOTICE OF INQUIRY ON IMMEDIATE ACTION TO ACCELERATE DEPLOYMENT (rel. February 4, 2015), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0206/FCC-15-10A1.pdf. In imaginable scenarios, the regulation of the end-user rates may be necessary to regulate aggressively the termination market. *See generally Phoenix Forbearance Order*, *supra* note 57; Ford and Spiwak, *Section 10 Forbearance*, *supra* note 49; *see also* Haley S. Edwards, *The New FCC Definition of Broadband Could Change Everything for Comcast*, TIME.COM (January 30, 2015) *available at* http://time.com/3689378/fccs-broadband-comcast-twcs-merger-case ("if the merger is allowed to go through, then a whopping 63% of U.S. households would have only one choice for a broadband Internet provider").

about these retail transactions, but rather the transactions between edge providers and BSPs in the *termination market*. And, in light of the *2010 Open Internet Order*, the *2014 Open Internet NPRM*, and the D.C. Circuit's decision in *Verizon*, the Commission has already determined that the presence of competition is not a viable foundation for forbearance in the termination market. For example, in the *2010 Open Internet Order*, the Commission states:

> [T]hreats to Internet-enabled innovation, growth, and competition do not depend upon broadband providers having market power with respect to end users . . . [b]ecause broadband providers have the ability to act as gatekeepers even in the absence of market power with respect to end users.[62]

The agency is very clear here—*competition does not eliminate the incentive to violate the principles of the Open Internet*. In fact, market power is so irrelevant to the issue that the agency concluded it "need not conduct a market power analysis."[63] If competition does not favorably impact incentives, then competition cannot be used as a basis for forbearance.

Moreover, as noted above, both the Commission and the D.C. Circuit in *Verizon* view BSPs as "terminating monopolists," or monopolists in the *terminating market*.[64] This alleged "terminating monopoly" problem is explicitly addressed in the *2010 Open Internet Order*,[65] by the D.C. Circuit in *Verizon*,[66] and in the *2014 Open Internet NPRM*, where the Commission states that customer switching costs "creat[e] 'terminating monopolies' for content providers needing high-speed broadband service to reach end users."[67] In the presence of a terminating monopoly, competition cannot be used as a basis for forbearance for "terminating services," the exact services the "Open Internet" rules are supposed to be all about. Accordingly, given the Commission's finding that all BSPs are "terminating monopolists" (*i.e.*, each BSP is "dominant" for terminating access to their customers), forbearance from Section 203 does not appear to be a viable legal option.[68]

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62. *2010 Open Internet Order*, *supra* note 16, at para. 32, n. 87.

63. *Id.*

64. The Commission failed to explain why a "terminating monopolist" has chosen, thus far, to charge a zero termination fee. Verizon v. FCC, 740 F.3d 623, 646 (D.C. Cir. 2014); *2010 Open Internet Order*, *supra* note 16, at para. 24.

65. *2010 Open Internet Order*, *supra* note 16, at n. 66.

66. *Id.* at para. 38.

67. *2014 Open Internet NPRM*, *supra* note 3, at para. 42.

68. This is not to say that the Commission cannot change its policy regarding the need to find a degree of competition before it grants forbeaance under Section

V. CONCLUSION

While the Federal Communications Commission has taken a light-touch regulatory approach to broadband Internet access, the agency is coming under intense political pressure to reverse course and reclassify broadband Internet connectivity as a common carrier telecommunications service under Title II in order to protect the "Open Internet." Doing so would permit the Commission to regulate BSPs under Sections 201 and 202 of the Communications Act, which, it is argued, can be used to prevent Broadband Service Providers from establishing slow and fast lanes for the delivery of edge-provider traffic to consumers. Under current case law, the plain terms of the Communications Act, and the Commission's own precedent, it is clear that "reclassification" is more than a political platitude; reclassification invokes significant and complex legal and economic issues which, in turn, require significant and complex implementation, which, in turn, will have "significant consequences for the global development of the Internet."[69]

Specifically, upon reclassification, BSPs would be required to file tariffs under Section 203 of the Communications Act to charge all edge providers (*e.g.*, Netflix, Amazon) a positive price for terminating Internet access. These charges will be distinct from carrier-to-carrier relationships; edge providers are customers of the BSP, not telecommunications carriers. Moreover, because the Commission has found BSPs to be "terminating monopolists" with respect to their customers, forbearance under Section 10 of Section 203's tariffing requirements runs contrary to Commission precedent and, therefore, is not a viable legal option. Accordingly, we do not see how reclassification can avoid applying legacy regulatory frameworks to the Internet, and, in doing so, radically change the economic fabric of the Internet ecosystem. Whether such changes are "good" or "bad" we leave to others to judge.

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10. *See FCC v. Fox Television*, 556 U.S. 502 (2009). However, if the FCC elects to go that route and find that forbearance is acceptable in the face of a monopoly (i.e., *one firm*) in the relevant market, then the agency will have to reconcile that holding with its decisions both (a) to suspend special access regulation where it found that *two firms* were insufficient to warrant degregulation, *In the Matter of 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*, FCC 12-92, 27 FCC Rcd 10557, REPORT AND ORDER (rel. August 22, 2012) *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-12-92A1.pdf; and (b) its refusal to grant forbearance of residual undundling obligations, again finding that *two firms* in each relevant market was insufficient to invoke Section 10. *See Phoenix Forbearance Order*, *supra* note 57.

69. *Federal-State Joint Board*, *supra* note 47, at para. 82.

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What Are the Bounds of the FCC's Authority over Broadband Service Providers?—A Review of the Recent Case Law

By Lawrence J. Spiwak

The Federal Communications Commission (FCC) has a long and distinguished history of applying a light regulatory touch to nascent technologies that can, and often do, disrupt the status quo (*see*, *e.g.*, the FCC's successful *Competitive Carrier* paradigm for long distance service).[1] Consistent with this precedent, as the Internet began to emerge as an alternative platform to traditional telecommunications services, the agency again had the foresight to apply a light regulatory touch.

What is interesting to note is the FCC's choice of legal theories under which it decided to pursue its deregulatory strategy for broadband. The Telecommunications Act of 1996 offered the FCC two broad paths.[2]

First, the FCC could have tried to regulate broadband Internet access using a "light touch" form of Title II common carrier-style regulation by using

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What Are the Bounds
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its authority under Section 10 of the 1996 Act to forbear from select portions of the Communications Act.[3] While this approach was contemplated over the years, both Democrat and Republican administrations soundly rejected this path. As the Clinton-era FCC observed in 1998, "classifying Internet access services as telecommunications services could have significant consequences for the global development of the Internet. We recognize the unique qualities of the Internet, and do not presume that legacy regulatory frameworks are appropriately applied to it."[4] Indeed, there are several fundamental legal and policy problems with such a "Title II Lite" approach: For example, as the FCC noted, this approach would foist a host of legacy regulations designed for a monopoly telephone world (including state regulation) immediately upon the Internet—a policy which on its face makes little sense, not to mention its inconsistency with FCC precedent of applying *de minimis* regulation on nascent technologies.[5]

Second, the agency's use of its Section 10 forbearance authority has a sordid past, and the agency's latest theory of forbearance—set forth in its *Phoenix Forbearance Order*—effectively neuters Section 10 as a plausible deregulatory tool.[6] Indeed, because the Commission has described each BSP as a "terminating monopoly" over access to their respective customers, Commission precedent makes it difficult for the agency to forbear from mandatory tariffing requirements and other common carrier obligations should it choose to reclassify broadband internet access as a Title II common carrier service.[7] Thus, for such a "light touch" common carrier approach to work effectively, the FCC must maintain a sufficient level of credibility for "regulatory self-restraint" with both the industry and financial markets to preserve investment incentives—a credibility which is tenuous at best.[8]

Instead, the FCC classified broadband Internet access as an "information service"[9] under Title I and decided to impose regulation (as necessary) under its long-standing "ancillary authority."[10] Not only did such an approach avoid applying legacy regulations to the Internet, but had the added benefit of effectively preempting state public utility commissions from regulating broadband.[11] The FCC eventually classified everything from cable broadband,[12] wireline broadband,[13] wireless broadband[14] and even broadband over powerline[15] as a Title I information service. The FCC's deregulatory approach is credited with the rapid pace of deployment, adoption, and innovation in the broadband ecosystem.[16]

CONCERNS ABOUT THE CURRENT LEGAL REGIME

Notwithstanding the benefits of the agency's deregulatory approach for broadband, some parties are concerned that the current legal regime fails to provide the FCC with sufficient authority over broadband Internet services to protect consumers[17] and, as such, the FCC should solidify its authority by reclassifying broadband Internet service as a Title II common carrier telecommunications service.[18] Given the FCC's current efforts to move forward with the IP Transition[19] and with its new attempt to draft legally-sustainable *Open Internet Rules*,[20] questions regarding the strength of the agency's authority under alternative legal approaches, as well as a search for the boundaries of the agency's authority, have returned to the forefront of the debate.[21]

In an effort to provide some illumination to this important question, this article reviews three recent cases from the DC Circuit—*Comcast v. FCC*,[22] *Cellco Partnership v. FCC*[23] and *Verizon v. FCC*[24]—to evaluate the current state of the law. After review, these cases indicate that the FCC has ample authority over Broadband Service Providers (BSPs) going forward under the current legal regime and, as such, reclassification of broadband Internet access as a Title II common carrier telecommunications service is unwarranted. In particular, this analysis reveals the following:

1. Where applicable, these cases hold that BSPs are still subject to direct jurisdiction under certain sections of Title II (telephone service), Title III (wireless service) and Title VI (cable service) of the Communications Act; hence, the FCC's decision to classify broadband Internet access as a Title I information service does not *a fortiori* mean that the FCC has abdicated its oversight of BSPs altogether. To the contrary, to the extent BSPs continue to engage in activities that fall

within the agency's direct subject matter jurisdiction, the FCC's ability to carry out its traditional core mandate (*e.g.*, spectrum allocation, consumer protection, public safety, universal service, etc.) remains very much intact.[25]

2. These cases hold that the FCC's ancillary jurisdiction over BSPs remains alive and well, provided that the FCC ties the use of that jurisdiction to a specific delegation of authority under Title II, Title III, or Title VI. In this sense, nothing has changed. So, while ancillary authority remains a potent and legally-sound tool in the FCC's regulatory arsenal to remedy policy-relevant harms, especially on a case-by-case basis, the agency must provide its whys-and-wherefores to the court.
3. With the DC Circuit's ruling in *Verizon*, the FCC now has an *additional hook for ancillary authority* under Section 706 to regulate BSPs, subject to two important limitations: (1) just as the FCC's use of its traditional ancillary authority, in order to invoke Section 706 the FCC must tie its actions back to a specific delegation of authority in Title II, Title III, or Title VI; and (2) the FCC also must demonstrate that any use of Section 706 is designed to promote infrastructure investment and deployment on a reasonable and timely basis. As shown below, these limitations can be meaningful. For example, because the FCC must tie its invocation of Section 706 to a specific delegation of authority, this requirement probably prevents the FCC from extending regulation to stand-alone edge providers who are not otherwise engaged in jurisdictional activities as some fear. Similarly, because the FCC must tie its use of Section 706 to a specific delegation of authority in the Communications Act, Section 706 probably does not expand the FCC's authority to preempt state laws restricting municipal broadband deployment.
4. These cases make clear that although the FCC retains jurisdiction over BSPs, the nature of the type of regulation it may impose has changed. That is to say, because the FCC classified broadband Internet access as a Title I information service, the FCC is prohibited by statute from imposing traditional Title II common carrier obligations on BSPs.[26] Specifically, the agency may not regulate broadband Internet access using the traditional "unjust and unreasonable" or "undue discrimination" standards of Title II.[27] However, these cases also hold that the FCC may regulate the conduct of BSPs under a "commercially reasonable" standard, which, the courts reasoned, permits individualized transactions and is thus sufficiently different from common carrier regulation to be lawful. Thus, in a way, the FCC's regulatory authority over BSPs actually may be *broader* than what it previously had under the traditional Title II common carrier regime. That being stated, as the D.C. Circuit noted in *Verizon*, evaluation of any new "commercially reasonable" standard will be contingent on "*how* the common carrier reasonableness standard applies in … context, not *whether* the standard is actually the same as the common carrier standard."[28]

THE CASE LAW

This section evaluates the current state of the law regarding the FCC's authority over BSPs, by reviewing three recent cases from the DC Circuit: (1) *Comcast v. FCC*, (2) *Cellco Partnership v. FCC*, and (3) *Verizon v. FCC*. The intention is to provide a review of the current law and to avoid any commentary about how or when the FCC should exercise this authority.

COMCAST V. FCC

In *Comcast*, the DC Circuit was confronted with the FCC's first formal attempt to address the network management practices of BSPs,[29] an effort for which the FCC conceded it lacked any express jurisdiction to do.[30] As such, the central legal issue in *Comcast* revolved around the question of whether the FCC could exercise its ancillary jurisdiction to regulate such practices.[31] At bottom, while the court answered this question in the affirmative, it found that in this particular case the agency had failed to provide an adequate justification to warrant the exercise of its ancillary jurisdiction.

In its analysis of the law, the court looked at two types of statutes on which the FCC relied: (1) statements of Congressional policy; and (2) statutory provisions that purport to provide a grant of direct responsibility. Let's look at how the court viewed each category under the particular facts of this case below.

Statements of Congressional Policy

As many pieces of legislation, the Communications Act is replete with Congressional statements of policy expressing this desire or another.[32] In this particular case, however, the court focused on the FCC's use of policy statements contained in Section 230(b)[33] and Section 1 of the Communications Act.[34] According to the DC Circuit, however, "policy statements alone cannot provide the basis for the Commission's exercise of ancillary authority" because such "authority derives from the 'axiomatic' principle that 'administrative agencies may [act] only pursuant to authority delegated to them by Congress.'" As the court observed,

> Policy statements are just that—statements of policy. They are not delegations of authority. To be sure, statements of congressional policy can help delineate the contours of statutory authority. *** *[So, while] policy statements may illuminate [the FCC's] authority, it is Title II, Title III, or Title VI to which the authority must be ancillary*.[35] (Emphasis supplied.)

In fact, reasoned the court, not only was the FCC's use of policy statements inconsistent with Supreme Court precedent, "but, if accepted it would virtually free the FCC from its Congressional tether."[36] Ancillary authority, the court reiterated, must be tied to a specific delegation of authority in Title II, Title III, or Title VI.

Specific Delegations of Authority

As noted in the preceding discussion, the court announced that it was amenable to arguments that the FCC could exercise ancillary jurisdiction over BSPs, so long as the FCC articulates a clear nexus to a specific grant of authority found somewhere in Titles II, III, or VI of the Communications Act. In this particular case, because of both substantive and procedural infirmities, the court ruled that the FCC did not meet this requirement. The following describes three examples of such infirmities:

1. The FCC opened its argument by citing Section 706 as potential authority. However, because at the time of this decision the FCC still held that Section 706 did not provide it with an independent grant of authority, the court rejected this argument.[37]
2. The FCC also relied on Section 256, which directs the FCC to "establish procedures for … oversight of coordinated network planning … for the effective and efficient interconnection of public telecommunications networks."[38] However, because the court noted that Section 256 goes on to state that "[n]othing in this section shall be construed as expanding … any authority that the FCC" otherwise has under law"—which, in the court's view, was "precisely what the FCC attempted to do" in this case—the court similarly rejected the FCC's argument.[39]
3. The court rejected the agency's attempt to use Section 257, which directs the FCC to issue a report every three years identifying barriers to entry for entrepreneurs and small businesses in the provision and ownership of telecommunications and information services.[40] While the court found that it could "readily accept that certain assertions of Commission authority [to] be 'reasonably ancillary' to the Commission's statutory responsibility to issue a report to Congress"—for example, the court recognized that it would be permissible for the agency to impose disclosure requirements on BSPs in order to gather data needed for such a report—it also found that "the FCC's attempt to dictate the operation of an otherwise unregulated service based on nothing more than its obligation to issue a report defies any plausible notion of 'ancillariness.'"[41]

Case Summary

So, what does *Comcast* tell us? At minimum, to paraphrase Mark Twain, the reports of the demise of the FCC's ancillary authority are "greatly exaggerated." To the contrary, a plausible reading of *Comcast* (a reading that is reinforced by the dicta contained in the two cases described below) indicates that the FCC's ancillary authority is alive and well, subject to two clear limiting conditions: First, the FCC may not assert its ancillary authority by simply relying on statements of Congressional policy; and second, the FCC must tie the exercise of its ancillary jurisdiction to a specific delegation of authority contained in Title II, Title III, or Title VI[42] (a holding that is a well-established criterion of ancillary jurisdiction).[43] What

Comcast did not do, however, is address the question of what are the exact boundaries of that ancillary authority vis-à-vis the imposition of common carrier obligations on Title I services. We turn to that question next.

CELLCO PARTNERSHIP V. FCC

In *Cellco*, the DC Circuit was tasked with evaluating the legality of the FCC's *Data Roaming Order*, under which the agency mandated mobile providers to offer data roaming agreements to other such providers on "commercially reasonable" terms.[44] While the FCC's authority for its earlier efforts to impose roaming for voice services was relatively clear under Title II,[45] the *Data Roaming Order* pushed the legal envelope because not only had the FCC specifically classified mobile broadband as an "information service" under Title I, but under the plain terms of Section 332(c)(2) of the Communications Act, "a person engaged in the provision of a service that is a private mobile service *shall not,* insofar as such person is engaged, *be treated as a common carrier for any purpose under this Act*."[46] Accordingly, the court in *Cellco* was forced to resolve two legal questions: (1) did the FCC have the legal authority to issue the *Data Roaming Order* in the first instance?; and, if so, (2) did the agency unlawfully treat mobile providers as "common carriers" in this particular case? How the court resolved each question is discussed below.

Jurisdiction

In support of its action, the FCC identified three sources of regulatory authority for its *Data Roaming Order*: (1) Title III of the Communications Act, which broadly governs the FCC's authority over radio spectrum; (2) Section 706 of the Telecommunications Act of 1996; and (3) the FCC's ancillary authority under Title I. According to the court, however, in this particular case "we begin—and end—with Title III."[47]

In particular, the court focused on the agency's use of Section 303(b), which authorizes the agency to "'[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class'"[48]; and Section 303(r), which empowers the FCC, subject to the demands of the public interest, to "'[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter.'"[49] While the appellants argued that the FCC's use of these sections represented "an unprecedented and unbounded theory of regulatory power over wireless Internet service under its general 'public interest' authority", the court disagreed.

First, the court noted that while Title III does not "confer an unlimited power," it does endow the FCC with "expansive powers" and a "comprehensive mandate to 'encourage the larger and more effective use of radio in the public interest.'"[50] So, while the court held that the FCC may not rely on Title III's public-interest provisions without mooring its action to a distinct grant of authority in that Title (a finding consistent with the holding in *Comcast*), in this particular case the court found that the agency's reliance on Section 303(b) was a sufficient delegation of direct authority.

According to the court, Section 303(b) directs the FCC, consistent with the public interest, to "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class." In the court's view, that is "exactly what the [*Data Roaming Order*] does—it lays down a rule about 'the nature of the service to be rendered' by entities licensed to provide mobile-data service." The appellants countered by arguing that the *Data Roaming Order* exceeded the bounds of Section 303(b) because instead of merely prescribing the nature of a service, the *Order* mandated the provision of service. Again, the court disagreed. In the court's view, wireless carriers are perfectly free to "choose not to provide mobile-internet service." As such, reasoned the court, the *Data Roaming Order* "merely defines the form mobile-internet service must take for those who seek a license to offer it."[51]

Next, the court took on the appellant's argument that the *Data Roaming Order* impermissibly resulted in a "fundamental change"—rather than a mere modification—of its existing licenses under Section 316 of the Communications Act.[52] While the court agreed that the FCC's Section 316 power to "modif[y] existing licenses does not enable it to fundamentally change those licenses," in the court's view, the *Data Roaming Order* "cannot be said to have wrought such a 'fundamental change.'" According to the court, because the *Data Roaming Order* "requires nothing more than the offering of 'commercially reasonable' roaming agreements, it hardly effects such a radical change." Indeed, reasoned the court, "imposing a limited obligation to offer data-roaming agreements to other mobile-data providers 'can reasonably be considered [a] modification [ ] of existing licenses.'"[53]

Common Carriage

Having ruled that Title III authorized the FCC to promulgate the *Data Roaming Order,* the court next turned to the other central legal question of the case—did the *Data Roaming Order* contravene the Communications Act's prohibition against treating providers of mobile data service as common carriers?[54]

The Communications Act defines "common carrier" as "any person engaged as a common carrier for hire"[55]—a definition which the court found to be "unsatisfyingly circular."[56] Complicating matters, reasoned the court, was the fact that "over the years…the Commission has relaxed the duties of common carriers in certain respects, and the line between common carriers and private carriers, *i.e.*, entities that are not common carriers, has blurred."[57] Accordingly, the difficult task before the court was "to pin down the essence of common carriage in the midst of changing technology and the evolving regulatory landscape."[58]

As a first step, the court reviewed the relevant case law and discerned the following three "basic principles" to guide its analysis to determine whether a BSP is acting as a "common carrier." They are as follows:

> Principle No. 1—If a carrier is forced to offer service indiscriminately and on general terms, then that carrier is being relegated to common carrier status.
>
> Principle No. 2—The FCC has significant latitude to determine the bounds of common carriage in particular cases.
>
> Principle No. 3—There is an important distinction between the question of whether a given regulatory regime is *consistent* with common carrier status and the question of whether that regime *necessarily confers* common carrier status. (Emphasis in original.)[59]

While Principles Nos. 1 and 2 are rather straightforward and reflect years of administrative law precedent, it is Principle No. 3 which is the interesting holding of law. According to the court,

> …even if a regulatory regime is not so distinct from common carriage as to render it inconsistent with common carrier status, that hardly means it is so fundamentally common carriage as to render it inconsistent with private carrier status. In other words, common carriage is not all or nothing—there is a gray area in which although a given regulation might be applied to common carriers, the obligations imposed are not common carriage *per se*. It is in this realm—the space between *per se* common carriage and *per se* private carriage—that the FCC's determination that a regulation does or does not confer common carrier status warrants deference. Such is the case with the data roaming rule.[60]

Having derived these principles—and, in particular, having identified a permissible "gray area"—the court then used these principles to evaluate whether the *Data Roaming Order* improperly imposed common carriage requirements. After review, the court found that it did not.

In particular, the court focused on the fact that the *Data Roaming Order* provided substantial room for individualized bargaining and discrimination in terms by expressly permitting providers to adapt roaming agreements to "individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms." Given the FCC's phraseology, reasoned the court, the *Data Roaming Order* does "not amount to a duty to hold out facilities *indifferently* for public use." (Emphasis in original.) Moreover, reasoned the court, while the *Data Roaming Order* requires carriers to offer terms that are "commercially reasonable," the *Data Roaming Order* imposes no presumption of "reasonableness" (in contrast to the traditional "just and reasonable" standard under Title II); instead, the FCC will evaluate commercial reasonableness via 16 different subjective factors plus a catch-all "other special or extenuating circumstances" factor. According to the court, because the *Order* provides "considerable flexibility for providers to respond to the competitive forces at play in the mobile-data market" via commercial negotiation, the *Data Roaming Order* does not contravene the statutory exclusion of mobile providers who provide data service from common carrier status.[61]

Case Summary

After review, there are several interesting aspects of *Cellco* which merit further discussion. First, notwithstanding its holding in *Comcast* affirming the validity of the FCC's ancillary authority, it is interesting to note that the court in *Cellco* went out of its way to find a direct delegation of authority in this case, *i.e.*, although mobile broadband is classified as a Title I service, the court permitted the FCC to regulate the service under Title III. In so doing, *Cellco* tells us that the FCC's decision to reclassify broadband Internet access as a Title I service does not *a fortiori* mean that the FCC abdicated its general jurisdiction altogether.[62] To the contrary, to the extent that Broadband Service Providers engage in some sort of activity governed by Title II, Title III, or Title VI, *Cellco* is a plain reminder that the FCC's plenary jurisdiction over BSPs remains very much in force. As such, *Cellco* can be read for the proposition that the FCC's ability to carry out its traditional core mandate (*e.g.*, spectrum allocation, consumer protection, public safety, universal service, etc.) remains very much intact.[63]

The court also identified a permissible "gray area" where the FCC, subject to some limitations, may impose regulations that resemble—but are not *per se*—common carriage obligations on BSPs. So, while the FCC may not use the traditional "just and reasonable"[64] or "undue discrimination"[65] standards contained in Title II to regulate BSPs, *Cellco* holds that the agency may use a "commercially reasonable" standard to do so. The holding sends a clear signal that while the FCC cannot impose formal Title II price regulation on Title I BSPs, the agency retains the authority to impose *de facto* rate regulation, albeit under a "softer" standard that permits some individualization of terms and conditions across transactions.

VERIZON V. FCC

In the last case of the trilogy, the DC Circuit in *Verizon* was again tasked with determining whether the FCC could impose "net neutrality" regulations on BSPs.[66] This case makes two significant holdings of law. First, *Verizon* was the first case in which a court affirmatively held that Section 706 provided the FCC with an independent source of regulatory authority over BSPs (albeit subject to several limitations).[67] Second, notwithstanding this newfound independent authority, the court reaffirmed the principle that because the agency made the affirmative decision to classify broadband Internet access as an "information service" under Title I, it is bound by its prior policy choices—that is, having classified broadband Internet access as an "information service" under Title I, the Communications Act expressly prohibits the imposition of traditional common carriage regulation upon such services.[68] Each holding is discussed more fully below.

Section 706 as an Independent Grant of Authority

Section 706 is made up 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.[69]

Section 706(b), in turn, requires the FCC to conduct a regular inquiry "concerning the availability of advanced telecommunications capability."[70] 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."[71] The statute defines "advanced telecommunications capability" to include "broadband telecommunications capability."[72]

Turning first to Section 706(a), the court held that this provision did in fact provide the FCC with an affirmative grant of authority. In the court's view, Congress intended Section 706(a) to act as a backstop to the deregulation intended by the Telecommunications Act of 1996. As the court observed, "Section 706(a)'s legislative history suggests that Congress may have, somewhat presciently, viewed that provision as an affirmative grant of authority to the FCC whose existence would become necessary if other contemplated grants of statutory authority were for some reason unavailable."[73]

That said, the court was careful to point out that the FCC's authority under Section 706(a) was not unfettered. In fact, the court found that there are at least two limiting principles inherent to Section 706(a). The first limiting principle, according to the court, is that Section 706(a) "must be read in conjunction with other provisions of the Communications Act including, most importantly, those limiting the Commission's subject matter jurisdiction to 'interstate and foreign communication by wire and radio.' Thus, reasoned the court, "any regulatory action authorized by Section 706(a) [must] fall within the Commission's subject matter jurisdiction over such communications—*a limitation whose importance this court has recognized in delineating the reach of the Commission's ancillary jurisdiction*."[74] In other words, Section 706 is not a direct delegation of authority rather, Section 706 should be viewed as an alternative source of ancillary jurisdiction.

The second limiting principle, according to the court, is that "any regulations must be designed to achieve a particular purpose: to 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.' Section 706(a) thus gives the FCC authority to promulgate only those regulations that it establishes will fulfill this specific statutory goal . . . ."[75]

Thus dispensing with Section 706(a), the court next turned to Section 706(b). Whether Section 706(b) presented the FCC with an affirmative source of authority was a particularly intriguing question for the court because for the agency's first five *Section 706 Reports*, the FCC always had found that broadband was being deployed on a "reasonable and timely basis."[76] Yet, subsequent to *Comcast* and prior to *Verizon,* the FCC in its *Sixth Section 706 Report* suddenly decided otherwise. While the court conceded that the "timing of the FCC's timing is certainly suspicious,"[77] the court upheld the FCC's use of Section 706(b) for essentially the same reason it provided for the FCC's use of Section 706(a), namely,

> that Congress contemplated that the Commission would regulate this industry, as the agency had in the past, and the scope of any authority granted to it by section 706(b)—limited, as it is, both by the boundaries of the Commission's subject matter jurisdiction and the requirement that any regulation be tailored to the specific statutory goal of accelerating broadband deployment—is not so broad that we might hesitate to think that Congress could have intended such a delegation.[78]

Having determined that both Section 706(a) and Section 706(b) provide an affirmative source of authority (subject to the limitations highlighted above), the court next turned to whether the FCC properly invoked this authority. According to the court, the FCC's "virtuous cycle of investment" model was sufficient justification of a market failure for the use of Section 706.

Under the FCC's "virtuous cycle of investment" model, regulations are required to "protect and promote edge-provider development for more and better broadband technologies, which in turn stimulates competition among broadband providers to further invest in broadband."[79] Stating the agency's model another way, "broadband providers' potential disruption of edge-provider traffic to be itself the sort of 'barrier' that has 'the potential to stifle overall investment in Internet infrastructure'" and, therefore, could "limit competition in telecommunications markets."[80] In buying this argument, however, the court issued dicta which will be a point of contention in the broadband debate for some time.

For example, the court found that BSPs "represent a threat to Internet openness and could act in ways that ultimately would inhibit the speed and extent of future broadband deployment."[81] To support such a conclusion, the court found that BSPs are "motivated to discriminate against and among edge providers" who provide similar services such as VoIP or video. Moreover, the court found that BSPs have "powerful incentives to accept fees from edge providers, either in return for excluding their competitors or for granting them prioritized access to end users." Should such conduct occur, reasoned the court, "the resultant harms to innovation and demand will largely constitute 'negative externalities': any given broadband provider will 'receive the benefits of . . . fees but [is] unlikely to fully account for the detrimental impact on edge providers' ability and incentive to innovate and invest.'" Notwithstanding the ample literature showing that such a universal conclusion is not true,[82] the court adamantly held that these potential outcomes are "based firmly in common sense and economic reality."[83]

But the court did not stop there, the court also found that BSPs "have the technical and economic ability to impose such restrictions." To support this conclusion, the court provided several rationales. First, the court found that because "all end users generally access the Internet through a single broadband provider, that provider functions as a 'terminating monopolist,' with power to act as a 'gatekeeper' with respect to edge providers that might seek to reach its end-user subscribers."[84] Second, the court found that this "terminating monopoly" was reinforced by the facts that not only do consumers have "limited" competitive options because "only one or two wireline or fixed wireless firms" provide service in most markets,[85] but that consumers face high switching costs for such services such as "early termination fees; the inconvenience of ordering, installation, and set-up, and associated deposits or fees; possible difficulty returning the earlier broadband provider's equipment and the cost of replacing incompatible customer-owned equipment; the risk of temporarily losing service; the risk of problems learning how to use the new service; and the possible loss of a provider-specific email address or website."[86] Finally, the court found that consumers may not be sufficiently sensitive to BSP conduct for competition, if it exists, to protect them from bad conduct. In the court's view:

> Broadband providers' ability to impose restrictions on edge providers does not depend on their benefiting from the sort of market concentration that would enable them to impose substantial price increases on end users—which is all the Commission said in declining to make a market power finding. Rather, broadband providers' ability to impose restrictions on edge providers simply depends on end users not being fully responsive to the imposition of such restrictions.[87]

Yet, oddly, in the *Open Internet Order*, the FCC never made an affirmative finding of market power to justify the imposition of regulation in fact, the FCC made it expressly clear that competition plays *no role* in its application of net neutrality regulation.[88] In so doing, the court went beyond the *Open Internet Order* on competition, further trivializing the role of market power in the analysis of net neutrality regulation.

Issues of Common Carriage

Having found that Section 706 provides an affirmative grant of authority to the FCC (subject to the limitations outlined above), the court next turned to the question of whether the specific rules proposed in the *Open Internet Order*—the anti-discrimination, the "no blocking" and the transparency requirements—constituted an impermissible imposition of common carriage requirements on Title I services.[89] Using the principles detailed in *Cellco,* the court found that the non-discrimination and anti-blocking provisions certainly did.

What is interesting is that the court appeared to focus on the fact that for both the anti-blocking and non-discrimination rules, such prohibitions essentially amounted to the imposition of uniform price regulation to all comers (regardless of customer class), albeit "zero price" regulation.[90] Again, remembering from *Cellco* that a major element of common carriage is the requirement to carry all traffic indiscriminately (as opposed to private carriage, where the practice is to make individualized decisions about whether, and on what terms, to deal), the court found that "the Commission may not claim that the *Open Internet Order* imposes no common carrier obligation simply *because it compels an entity to continue furnishing service at no cost*."[91]

For example, in determining the validity of the non-discrimination requirement the court observed that:

> the *Open Internet Order* makes no attempt to ensure that its reasonableness standard remains flexible. Instead, with respect to broadband providers' potential negotiations with edge providers, the *Order* ominously declares: "it is unlikely that pay for priority would satisfy the 'no unreasonable discrimination' standard." *If the Commission will likely bar broadband 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, we see no room at all for "individualized bargaining*."[92]

The court's focus on uniform "zero price" regulation applied equally to the FCC's attempt to impose an anti-blocking rule, finding that:

> The anti-blocking rules establish a minimum level of service that broadband providers must furnish to all edge providers: edge providers' "content, applications [and] services" must be "effectively [ ]usable." The *Order* also expressly prohibits broadband providers from charging edge providers any fees for this minimum level of service. *In requiring that all edge providers receive this minimum level of access for free, these rules would appear on their face to impose per se common carrier obligations with respect to that minimum level of service.*[93]

So, while *Verizon* makes clear that the FCC cannot mandate that BSPs universally charge a uniform price to all comers (in this case a "zero" price), the court was ambiguous as to the exact contours of a standard that would pass legal muster. Although the court did hint that a *Cellco*-type "commercially reasonable" test might work going forward, the court suggested that the evaluation of any new rule will be contingent on "*how* the common carrier reasonableness standard applies in … context, not *whether* the standard is actually the same as the common carrier standard."[94]

Finally, the court (as appellate courts often do) provided the FCC with a plausible, alternative path for an anti-blocking rule going forward. Specifically, the court hypothesized if the relevant "carriage" BSPs provide "might be access to end-users more generally"—as opposed to a "minimum required service"—then the "anti-blocking rule would permit broadband providers to distinguish somewhat among edge providers" and not result in common carriage. To illustrate this point, the court provided the following hypothetical:

> For example, Verizon might, consistent with the anti-blocking rule—and again, absent the anti-discrimination rule—charge an edge provider like Netflix for high-speed, priority access while limiting all other edge providers to a more standard service. In theory, moreover, not only could Verizon negotiate separate agreements with each individual edge provider regarding the level of service provided, but it could also charge similarly-situated edge providers completely different prices for the same service. Thus, if the relevant service that broadband providers furnish is access to their subscribers generally, as opposed to access to their subscribers at the specific minimum speed necessary to satisfy the anti-blocking rules, then these rules, while perhaps establishing a lower limit on the forms that broadband providers' arrangements with edge providers could take, might nonetheless leave sufficient "room for individualized bargaining and discrimination in terms" so as not to run afoul of the statutory prohibitions on common carrier treatment.[95]

While we do not know at the time of this writing how the FCC will ultimately proceed with its new *Open Internet Rules*, it is important to note that the Commission acknowledged the viability of this legal approach in its *2014 Open Internet NPRM*.[96]

Disclosure Rules Upheld

Finally, we come to the court's treatment of the FCC's transparency/disclosure rules. The court upheld these rules in a single perfunctory sentence: The appellant did "not contend that these rules, on their own, constitute *per se* common carrier obligations, nor do we see any way in which they would."[97] So that, as they say, is that.

Case Summary

While some maintain that Section 706 was never intended to provide the agency with an independent source of regulatory authority, with the DC Circuit's ruling in *Verizon* that question is now moot.[98] As the invocation of Section 706 therefore breaks new legal ground, *Verizon* perhaps raises more questions than provides answers.

Are 706(a) and 706(b) Independent of Each Other? An interesting question raised by *Verizon* is whether Section 706(a) and Section 706(b) may be read independently of each other or whether Section 706(b) is the affirmative trigger for the use of delineated powers contained in 706(a)? Again, Section 706(a) provides that the FCC "shall encourage … deployment on a reasonable and timely basis" either by regulatory forbearance or by imposing additional regulation. Read alone, therefore, a reasonable interpretation would be that Section 706(a) provides the FCC with a continuing independent duty to encourage broadband deployment using the various regulatory powers delineated in that provision. Yet, there also is Section 706(b), which requires the FCC to conduct a regular inquiry and a clear mandate that if the agency finds after such inquiry that broadband is not being deployed "on a reasonable and timely basis," then it "shall take immediate action."

Clearly, at the time the FCC promulgated its original *Open Internet Order*, the agency believed that Section 706(b) was required to trigger the use of its authority in Section 706(a) given the fact that the FCC decided—(in the court's words) "suspicious[ly]"—post-*Comcast* and pre-*Verizon* to find in its *Sixth 706 Report* that broadband was no longer being deployed on a reasonable and timely basis. This view of Section 706 is reasonable given that it is a "fundamental canon of statutory construction that the words in a statute must be read in their context and with a view to their place in the overall statutory scheme."[99] However, if the FCC's original reading of Section 706 was accurate, then the Achilles heel of the legal theory is exposed, *i.e.*, what one FCC finds to be "reasonable and timely" in one *Section 706 Report*, the next FCC can find differently later.

Yet, for whatever reason, the court never looked at how the agency defined the terms "reasonable and timely" for either Section 706(a) or Section 706(b). (Had it done so, given the FCC's naked gerrymandering of its own cost data, we probably would have been looking at a different result.[100]) Instead, the court reasoned that because BSPs—as "terminating monopolists"—*always* have both the incentive and ability to discriminate and, therefore, absent regulation BSPs will *always* will adversely affect the virtuous cycle of investment. With such logic, we can infer that the court takes the view that Section 706(a) is independent from Section 706(b), because the court seemed to say that the defined trigger of Section 706(b) is irrelevant to the FCC's on-going (and independent) effort to promote broadband deployment under Section 706(a) under foreseeable market conditions. If this is the correct reading of *Verizon*, however, then the implications are significant.

To start, a "virtuous cycle," by definition, has no beginning or end. Thus, by endorsing the FCC's "virtuous cycle of innovation" hypothesis and ignoring the "reasonability" (*i.e.*, cost of deployment) requirement part of the statute, the court allows the agency to move the goal posts at whim to ensure its jurisdiction under Section 706 continues indefinitely.[101] To illustrate this point, consider the following hypothetical: Assume *arguendo* the agency has achieved its "Broadband Nirvana," i.e., that every home in every hamlet in America has broadband.[102] Under this scenario, broadband is now "deployed." Yet, if the *speed* of this broadband is deemed insufficient, then under *Verizon* the FCC may continue to impose regulation until the new speed threshold is satisfied, even though the costs of deploying such an upgrade may not be under any legitimate scenario "reasonable."[103] Furthermore, even if a "Broadband Nirvana" is achieved, then the agency may reason that its realization is a direct consequence of regulation, thereby providing justification for the perpetual regulation of the Internet.[104] Given the potential expansion of its powers by viewing Section 706(a) as independent of Section 706(b), it should come as no surprise that the FCC has now embraced this latter view.[105]

Are There Limits on the FCC's Section 706 Authority? Perhaps the clearest message from *Verizon* is that because the FCC made the deliberate policy choice to classify broadband Internet access as a Title I information service, it is prohibited from applying traditional Title II common carriage telephone regulation on Broadband Service Providers. Yet, with the invocation of Section 706, the FCC now has the authority to promulgate "measures that promote competition in the local telecommunications market" via a variety of tools, including "other regulating methods that remove barriers to infrastructure investment." The question at hand, therefore, is whether there are limits to that authority? According to *Verizon*, the answer is yes.

In particular, *Verizon* makes clear that Section 706 does not provide the FCC with a direct delegation of authority. To the contrary and as noted above, *Verizon* holds that Section 706 is really another form of the FCC's ancillary authority—that is, as with any use of its traditional ancillary authority (see discussion of *Comcast*), *Verizon* requires the FCC to tie its use of Section 706 to a specific delegation of authority in Title II, Title III, or Title VI. On top of that, the FCC also must find that its actions are designed to promote additional broadband investment (a requirement, as demonstrated herein, is a bit squishier).

These limitations can be meaningful. For example, *Verizon's* requirement that the FCC tie its use of Section 706 to a specific delegation of authority probably prevents the FCC from extending its regulation to stand-alone edge providers who are not otherwise engaged in jurisdictional activities as some fear (although an aggressive FCC could certainly try).[106] Similarly, *Verizon's* requirement that the FCC tie its use of Section 706 to a specific delegation of authority probably does not enhance the FCC's ability to preempt state laws restricting municipal broadband deployment.[107]

CONCLUSION

This article seeks to answer a straightforward legal question: What are the bounds of the FCC's authority over BSPs? Based on the three cases reviewed here, it is clear that the FCC retains ample jurisdiction over BSPs under current law and, as such, reclassification of broadband Internet access as a Title II common carrier telecommunications service is unwarranted. Indeed, the three recent cases reviewed in this article focused directly on the agency's authority and made a number of significant determinations.

First, where applicable, these cases hold that BSPs are still subject to direct jurisdiction under certain portions of Title II, Title III, and Title VI, hence, the FCC's decision to classify broadband Internet access as a Title I information service does not *a fortiori* mean that the FCC has abdicated its authority over BSPs altogether. To the contrary, to the extent BSPs continue to engage in activities that fall within the agency's direct jurisdiction, the FCC's ability to carry out its traditional core mandate (*e.g.*, spectrum allocation, consumer protection, public safety, universal service, etc.) remains very much intact.

Second, these cases hold that the FCC's ancillary jurisdiction over BSPs remains alive and well, provided that the FCC ties the use of that jurisdiction to a specific delegation of authority under Title II, Title III, or Title VI. In this sense, nothing has changed. So, while ancillary authority remains a potent and legally-sound tool in the FCC's regulatory arsenal to remedy policy-relevant harms, especially on a case-by-case basis, the agency must provide its whys-and-wherefores to the court.

Third, with the DC Circuit's ruling in *Verizon*, the FCC now has an *additional hook for ancillary authority* under Section 706 to regulate BSPs, subject to two important limitations: (1) just as with the FCC's use of its traditional ancillary authority, in order to invoke Section 706 the FCC must tie its actions back to a specific delegation of authority in Title II, Title III, or Title VI; and (2) the FCC also must demonstrate that any use of Section 706 is designed to promote infrastructure investment and deployment on a reasonable and timely basis. As shown below, these limitations can be meaningful. For example, because the FCC must tie its invocation of Section 706 to a specific delegation of authority, this requirement probably prevents the FCC from extending regulation to stand-alone edge providers who are not otherwise engaged in jurisdictional activities as some fear. Similarly, because the FCC must tie its use of Section 706 to a specific delegation of authority in the Communications Act, Section 706 probably does not expand the FCC's authority to preempt state laws restricting municipal broadband deployment.

Finally, these cases make clear that because the FCC classified broadband as a Title I information service, the FCC is prohibited by statute from imposing traditional Title II common carrier obligations on BSPs. That is, the agency may not regulate using the traditional "unjust and unreasonable" or "undue discrimination" standards. However, these cases also hold that the FCC may regulate the conduct of BSPs under a "commercially reasonable" standard, which, the courts' reasoned, permits individualized transactions and is thus sufficiently different from common carrier regulation to be lawful. That being said, as the D.C. Circuit held in *Verizon*, evaluation of any new "commercially reasonable" standard will be contingent on "*how* the common carrier reasonableness standard applies in … context, not *whether* the standard is actually the same as the common carrier standard."

While this article is limited to the *legal question* of what are the bounds of the FCC's authority over BSPs, the more salient *policy question* of how the FCC should exercise that authority always looms large in the background. Certainly, there are those who argue that there is no longer a need for an "expert" agency and, as such, the FCC should be stripped of most, if not all of its regulatory functions and to leave resolution of competitive issues to the antitrust authorities.[108] This author disagrees. While the Federal Communications FCC definitely can and should do more to remove prescriptive regulation over BSPs,[109] given both the limits of a traditional antitrust analysis for industries characterized by high fixed and sunk costs and the significant social obligations imposed on the industry by Congress (*e.g.*, universal service), an expert agency with significant oversight to resolve policy problems and disputes on a case-by-case basis remains important.[110] As these cases indicate, the FCC's ability to act in this capacity remains strong.

Accordingly, the real question—as always—is whether the agency will exercise its authority wisely.

NOTES

1. *See*, *e.g.*, In re Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier, FCC 95-427, 11 FCC Rcd. 3271 (1995) and citations therein.
2. Indeed, it should be noted that prior to the enactment of the 1996 Act, the Communications Act did not contain any provisions that would expressly allow the agency to forbear lawfully from applying portions of the Act. Thus, for example, when the FCC tried to eliminate tariff requirements for non-dominant long-distance carriers, the Supreme Court held that the agency lacked this authority. *See* MCI v. AT&T, 512 U.S. 218 (1994).
3. 47 U.S.C. § 160.
4. In the Matter of Federal-State Joint Board on Universal Services, Federal Communications Commission, FCC 98-67, 13 FCC Rcd 11,830, Report to Congress (rel. April 20, 1998) (available at *http://www.fcc.gov/Bureaus/Common_Carrier/Reports/fcc98067.pdf*) at ¶82.
5. For a detailed list of potential regulatory obligations that would be triggered by reclassification, *see*, *e.g.*, AT&T Ex Parte, FCC GN Docket No. 14-28 (May 9, 2014) (available at *http://apps.fcc.gov/ecfs/document/view?id=7521120564*).
6. *See*, *e.g.*, G.S. Ford and L.J. Spiwak, *Section 10 Forbearance: Asking The Right Questions To Get The Right Answers*, 23 CommLaw Conspectus 126 (2014) (available at: *http://scholarship.law.edu/commlaw/vol23/iss1/5*);
7. *See* G.S. Ford and L.J. Spiwak, *Tariffing Internet Termination: Pricing Implications of Classifying Broadband as a Title II Telecommunications Service*, Phoenix Center Policy Bulletin No. 36 (September 2014) (available at: *http://www.phoenix-center.org/PolicyBulletin/PCPB36Final.pdf*) and forthcoming Federal Communications Law Journal 2015; Section 10 Forbearance, *id*.
8. *See* G.S. Ford, L.J. Spiwak and M. Stern, "The Broadband Credibility Gap," 19 *CommLaw Conspectus* 75 (2010) (available at *http://www.phoenix-center.org/papers/CommlawConspectusBroadbandCredibilityGap.pdf*) (hereinafter "Broadband Credibility Gap"); G.S. Ford and L.J. Spiwak, "What is the Effect of Regulation on Broadband Investment? Regulatory Certainty and the Expectation of Returns," *Phoenix Center Policy Perspective No. 12-05:* (September 19, 2012) (available at *http://www.phoenix-center.org/perspectives/Perspective12-05Final.pdf*).
9. 47 U.S.C. § 153(24) defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." This definition is a near-perfect description of Internet access services.
10. *See* Communications Act Section 4(i), 47 U.S.C 154(i), which provides that the FCC "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." For a good summary of the FCC's ancillary authority, *see* B. Esbin and A. Marcus, " 'The Law Is Whatever the Nobles Do:' Undue Process at The FCC," 17 *CommLaw Conspectus* 1 (2009) (available at *http://commlaw.cua.edu/res/docs/Esbin-Marcus-Revised-2.pdf*).
11. *See*, *e.g.*, In re Petition for Declaratory Ruing that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, FCC 04-27, 19 FCC Rcd 3307, Memorandum and Order (rel. February 19, 2004) (hereinafter the "Pulver Order").
12. National Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).
13. *See* In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, FCC 05-150, 20 FCC Rcd 14853, 14862, Report and Order and Notice of Proposed Rulemaking (rel. September 23, 2005), *aff'd* Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007).
14. In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, FCC 07-30, 22 FCC Rcd 5901, Declaratory Ruling (rel. March 23, 2007).
15. In re United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, FCC 06-165, 21 FCC Rcd 13281, 13281, Memorandum Opinion and Order (November 7, 2006).
16. *See*, *e.g.*, K. High, "Digital Pioneers Remember Past, Forecast Future of the Internet," *Politics365* (December 6, 2013) (available at *http://politic365.com/2013/12/06/digital-pioneers-remember-past-forecast-future-of-the-internet/v*).
17. For example, one argument in favor of reclassification is that Title II would bar "fast lanes" versus "slow lanes." However, a basic review of both the case law and economic theory would demonstrate this to be a false argument. *See* G.S. Ford and L.J. Spiwak, "Non-Discrimination or Just Non-Sense: A Law and Economics Review of the FCC's New Net Neutrality Principle," *Phoenix Center Perspective No. 10-03* (March 24, 2010) (*http://www.phoenix-center.org/perspectives/Perspective10-03Final.pdf*).
18. *See*, *e.g.*, M. Ammori, "Net Neutrality's Legal Binary: an Either/Or With No 'Third Way' " (May 13, 2014) ("If we want a rule against discrimination and against new access fees, we need Title II.") (available at *http://ammori.org/2014/05/13/net-neutralitys-legal-binary-an-eitheror-with-no-third-way*); Comments of Public Knowledge and Common Cause, FCC Docket No. 14-28 (March 21, 2014) ("Title II is the proper regulatory framework for telecommunications services such as broadband.") (available at *http://apps.fcc.gov/ecfs/document/view?id=7521094713#page=1&zoom=auto,-265,547*); Comments of Voices for Internet Freedom, FCC Docket No. 14-28 (March 21, 2014) ("Title II cannot just be on the table; Title II needs to be the main course.") (available at *http://apps.fcc.gov/ecfs/document/view?id=7521094791*).
19. In the Matter of Technology Transitions, AT&T Petition to Launch a Proceeding Concerning the TDM to IP Transition; Connect America Fund; Structure and Practices of the Video Relay Service Program; Telecommunications Relay Services And Speech to Speech Services for Individuals with Hearing and Speech Disabilities; Numbering Policies for Modern Communications, FCC 14-5, 29 FCC Rcd 1433, Order, Report And Order And Further Notice Of Proposed Rulemaking, Report And Order, Order And Further Notice Of Proposed Rulemaking, Proposal For Ongoing Data Initiative (rel. January

31, 2014) (available at *http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0131/FCC-14-5A1.pdf*).

20. In the Matter of Protecting and Promoting the Open Internet, FCC 14-61, 29 FCC Rcd 8305, Notice of Proposed Rulemaking (rel. May 15, 2014) (hereinafter "2014 Open Internet NPRM").
21. Significantly, the Supreme Court recently strengthened the Chevron Doctrine to give the FCC—as the "expert agency"—great deference to interpret the Communications Act in the digital age. *See* City of Arlington, Texas v. FCC, 133 S.Ct. 1863 (2013). For an interesting examination of this case, *see* S.L. Feder, M.E. Price, A.C. Noll, "*City of Arlington v. FCC*: The Death of Chevron Step Zero?," 66 *Federal Communications Law Journal* 47 (2013).
22. Comcast v. FCC, 600 F.3d 642 (D.C. Cir. 2010).
23. Cellco Partnership v. Verizon, 700 F.3d 534 (D.C. Cir. 2012).
24. Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).
25. Given that national security and law enforcement issues often are governed by other statutes (*e.g.,* CALEA) which have a "wholly distinct legislative history and Congressional purpose" from that of the Communications Act, *see*, *e.g.*, Time Warner Telecom v. FCC, 507 F.3d 205, 119-220 (3d Cir. 2007), any discussion about how the FCC's decision to classify broadband Internet access as an information service impacts the FCC's authority to comply with these type of statutes is beyond the scope of this article.
26. *See* 47 U.S.C. § 153(51) ("A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services…")
27. For a good general overview of the "just and reasonable" and "unreasonable discrimination" standards, see L. J. Spiwak, *Understanding the Net Neutrality Debate: A Basic Legal Primer,* Bloomberg BNA (July 23, 2014) (available at: *http://www.phoenix-center.org/BloombergBNA23July2014.pdf*).
28. *Verizon,* 740 F.3d at 657 (citations omitted and emphasis in original).
29. In re Formal Complaint of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, FCC 08-183, 23 FCC Rcd. 13,028, Memorandum and Order (rel. August 20, 2008).
30. *Comcast*, 600 F.3d at 644.
31. *See supra* n. 10.
32. *See*, *e.g.*, the preamble of the Telecommunications Act of 1996, which provides that the Act is intended "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced information technologies and services to all Americans by opening all telecommunications markets to competition." Conference Report, Telecommunications Act of 1996, House of Representatives, 104th Congress, 2d Session, H. Rpt. 104-458, at p. 1.
33. Section 230(b), 47 U.S.C. § 230(b), provides that:

    It is the policy of the United States—

    (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

    (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

    (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

    (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

    (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.
34. Section 1, 47 U.S. Code § 151, provides, in relevant part, that: "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States…a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges…there is created a commission to be known as the 'Federal Communications Commission'…"
35. *Comcast*, 600 F.3d at 654.
36. *Id.* at 655 (citations omitted).
37. *Comcast*, 600 F.3d at 658-659. As noted *infra*, subsequent to this decision, the FCC reversed course and found that Section 706 did, in fact, provide it with a separate source of authority.
38. 47 U.S.C. § 256(b)(1).
39. *Comcast*, 600 F.3d at 659.
40. 47 U.S.C. § 257.
41. *Comcast*, 600 F.3d at 659-660.
42. For example, University of Pennsylvania Professor Kevin Werbach argued that a better legal strategy for the FCC would have been to use its ancillary authority under Section 251 of the Telecommunications Act. Kevin D. Werbach, "Off the Hook," 95 *Cornell L. Rev.* 535 (2010). While I thought Professor Werbach perhaps went a bit too far with the application of his theory, I readily conceded that the argument had some merit. *See* The Broadband Credibility Gap, *supra* n. 8.
43. *See generally*, Esbin and Marcus, *supra* n. 10.
44. Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile data services, FCC 11-52, 26 FCC Rcd 5411, Second Report And Order (rel. April 7, 2011) (hereinafter "Data Roaming Order").
45. In re Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, FCC 07-143, 22 FCC Rcd. 15817, Report And Order And Further Notice Of Proposed Rulemaking (rel. August 16, 2007) (hereinafter "2007 Voice Roaming Order") (codifying that automatic roaming is a common carrier service subject to the protections of Sections 201 and 202 of the Communications Act); In re Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile data services, FCC 10-59, 25 FCC Rcd. 4181, Order on Reconsideration and Second Further Notice of Proposed Rulemaking (rel. April 21, 2010) (hereinafter "2010 Voice Roaming Order").
46. 47 USC § 332(c)(2) (emphasis supplied).
47. *Cellco*, 700 F.3d at 541.
48. 47 U.S.C. § 303(b).
49. 47 U.S.C. § 303(r).
50. *Cellco*, 700 F.3d at 542.
51. *Id.* at 542-543.
52. 46 U.S.C. § 316.
53. *Cellco*, 700 F.3d at 543-544.
54. As noted above, under Section 332 of the Communications Act, providers of "commercial mobile services," such as wireless voice-telephone services, are common carriers, whereas providers of other mobile services are exempt from common carrier status. *See* 47 U.S.C. § 332(d)(2), 46 U.S.C. § 332(c)(2).
55. 47 U.S.C. § 153(11).
56. Cellco, 700 F.3d at 538.
57. *Id.* at 546.
58. *Id.*

59. *Id.* at 547.
60. *Id.* at 547 (citations omitted).
61. *Id.* at 548.
62. *See* Pulver Order, *supra* n. 11.
63. *C.f.*, In re FCC 11-161, 753 F.3d 1015 (10th Cir., May 23, 2014) (upholding FCC's plan to allocate Universal Service Funds to pay for broadband, rather than traditional POTS, networks under Title II).
64. *See*, *e.g.*, 47 U.S.C. §201(b) ("All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful").
65. *See*, *e.g.*, 47 USC § 202(a) ("It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.")
66. *See* In re Preserving The Open Internet, FCC 10-201, 25 FCC Rcd 17905, Report and Order (rel. December 23, 2010) (hereinafter "Open Internet Order").
67. Recalling from the discussion of *Comcast*, supra, the FCC had originally attempted to rely on Section 706, but the court shot down that argument on the grounds that because the agency, at the time of *Comcast*, had stated that Section 706 did not grant it independent authority. Subsequent to *Comcast* and prior to *Verizon*, however, the FCC reversed course and found that, in fact, Section 706 did grant it authority. The court accepted the FCC's change in policy, noting that "even a federal agency is entitled to a little pride." *Id.* at 636-637.
68. *See supra* n. 26.
69. 47 U.S.C. § 1302(a).
70. 47 U.S.C. § 1302(b).
71. *Id.*
72. 47 U.S.C. § 1302(d)(1).
73. *Verizon*, 740 F.3d at 638-639.
74. *Id.* at 639-640 (emphasis supplied).
75. *Id.* at 640.
76. *See* In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, FCC 10-129, 25 FCC Rcd 9556, Sixth Broadband Deployment Report (rel. July 20, 2010) (available at *https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-129A1_Rcd.pdf*).
77. *Id.* at 642.
78. *Id.* at 641.
79. *Id.* at 642.
80. *Verizon*, 740 F.3d at 642-643 (citations omitted).
81. *Id.* at 645.
82. *See*, *e.g.*, G.S. Ford, T.M. Koutsky and L.J. Spiwak, "The Welfare Impacts of Broadband Network Management: Can Broadband Service Providers be Trusted?" *Phoenix Center Policy Paper No. 32* (March 2008) (available at *http://www.phoenix-center.org/pcpp/PCPP32Final.pdf*).
83. *Verizon*, 740 F.3d at 645-646.
84. *Id.* at 646. In the same vein, the court upheld the FCC's reasoning that the "ability to act as a 'gatekeeper' distinguishes broadband providers from other participants in the Internet marketplace—including prominent and potentially powerful edge providers such as Google and Apple—who have no similar 'control [over] access to the Internet for their subscribers and for anyone wishing to reach those subscribers.'" *Id.*
85. Noticeably, the court ignored the presence of multiple mobile broadband providers. Unfortunately, the DC Circuit is not the only court of general jurisdiction to discount the effect of wireless substitution. *See*, *e.g.*, Qwest v. FCC, 689 F.3d 1214 (10th Cir. 2012) (upholding FCC's Phoenix Forbearance Order).
86. *Verizon,* 740 F.3d at 646-647.
87. *Id.* at 648 (citations omitted).
88. *See*, *e.g.*, Open Internet Order, *supra* n. 66 at ¶ 32 ("… these threats to Internet-enabled innovation, growth, and competition do not depend upon broadband providers having market power with respect to end users …") and at n. 87 ("Because broadband providers have the ability to act as gatekeepers even in the absence of market power with respect to end users, we need not conduct a market power analysis.").
89. *See* 47 U.S.C. § 153(51), *supra* n. 26.
90. *See*, *e.g.*, G.S. Ford and M. Stern, "*Sabotaging Content Competition: Do Proposed Net Neutrality Regulations Promote Exclusion?" Phoenix Center Perspective No. 10-02*: (March 4, 2010) (available at *http://www.phoenix-center.org/perspectives/Perspective10-02Final.pdf*).
91. *Verizon*, 740 F.3d at 654 (emphasis supplied).
92. *Id.* at 657 (citations omitted and emphasis in original).
93. *Id.* at 658 (emphasis supplied).
94. *Id.* at 657 (emphasis in original).
95. *Id.* at 658.
96. 2014 Open Internet NPRM, *supra* n. 20 at ¶¶ 91-109.
97. Verizon, 740 F.3d at 659.
98. *See*, *e.g.*, M. O'Rielly, "FCC's Grab For New Regulatory Power Could Go Beyond Broadband Providers," *The Hill* (May 5, 2014)

    ("Congress never intended to give the FCC that authority. I know because I was in the room, as a congressional staffer, when that deal was made.") (available at *http://thehill.com/special-reports/technology-may-5-2014/205260-fccs-grab-for-new-regulatory-power-could-go-beyond*).
99. *See*, *e.g.*, Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809 (1989).
100. G.S. Ford and L.J. Spiwak, "*Justifying the Ends: Section 706 and the Regulation of Broadband*," 16 *Journal of Internet Law* 1 (January 2013) (available at *http://www.phoenix-center.org/papers/JournalofInternetLawSection706.pdf*); L. Spiwak, "The FCC Contradicts Their Facts (Again) To Justify Expanded Broadband Regulation," *@lawandeconomics* (February 20, 2013) (available at *http://phoenix-center.org/blog/archives/1185*).
101. *See Verizon*, 740 F.3d 640-641, where the court noted that when the FCC first established its definition of broadband of 200 kps in 1999, "the Commission recognized that technological developments might someday require it to reassess the 200 kbps threshold. In the Sixth Broadband Deployment Report, the Commission decided that day had finally arrived." (Citations omitted.)
102. For an additional exploration into the fallacies of a "Broadband Nirvana", *see*, *e.g.*, T.R. Beard, G.S. Ford, L.J. Spiwak, M. Stern, "The Broadband Adoption Index: Improving Measurements and Comparisons of Broadband Deployment and Adoption," 62 *Federal Communications Law Journal* 343 (2010).

103. *See*, *e.g.*, G.S. Ford, "Sloppy Research Sinks Susan Crawford's Book," *@lawandeconomics* (January 18, 2013) (available at *http://phoenix-center.org/blog/archives/1075*) (demonstrating that Professor Susan Crawford's claims that the cost of building ubiquitous fiber to be only $50-$90 billion was based on a failure to quote sources correctly and that a legitimate estimate of ubiquitous fiber was around $350 billion).

104. *See* 2014 Open Internet NPRM, *supra* n. 20___ at ¶ 143. (According to the FCC, it now views "sections 706(a) and (b) as independent and overlapping grants of authority that give the FCC the flexibility to encourage deployment of broadband Internet access service through a variety of regulatory methods, including removal of barriers to infrastructure investment and promoting competition in the telecommunications market, and, in the case of section 706(b), giving the FCC the authority to act swiftly when it makes a negative finding of adequate deployment.")

105. *Id.* at ¶ 145 ("[W]e note that Congress did not define 'deployment.' We believe Congress intended this term to be construed broadly, and thus, consistent with precedent, we have interpreted it to include the extension of networks as well as the extension of the capabilities and capacities of those networks.")

106. As noted *supra* in n. 84, the court in Verizon went out of its way to note that if the FCC wanted to extend its Section 706 authority to edge providers, then the agency would have to demonstrate that such edge providers are able to act in a "gatekeeper" capacity.

107. For a full explanation of this point, *see,* L.J. Spiwak, *FCC Has No Authority to Preempt State Municipal Broadband Laws,* Bloomberg BNA (August 6, 2014) (available at *http://www.phoenix-center.org/BloombergBNAMuniBroadband.pdf*).

108. *See*, *e.g.*, R. Bennett, J.A. Eisenach, J.K. Glassman, B.E. Howell, J. Hurwitz, R. Layton and B. Swanson, "Comments on Communications Act Modernization" (January 31, 2014) (available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2388723*); R.E. Litan and H.J. Singer, "The Need for Speed: A New Framework for Telecommunications Policy for the 21st Century" (Brookings Institution Press 2013).

109. *See, e.g.*, "The Impossible Dream: Forbearance After the Phoenix Order," *supra* n. 6; T. Randolph Beard, George S. Ford and Lawrence J. Spiwak, *Market Definition and the Economic Effects of Special Access Price Regulation,* 22 CommLaw Conspectus 237 (2014) (available at: *http://scholarship.law.edu/commlaw/vol22/iss2/10*).

110. *See*, *e.g.*, "A Fresh Analytical Start at the FCC," *@lawandeconomics* (October 11, 2013) (available at *http://phoenix-center.org/blog/archives/1518*); G.S. Ford and L.J. Spiwak, "*Equalizing Competition Among Competitors: A Review of the DOJ's Spectrum Screen Ex Parte Filing,*" *Phoenix Center Policy Bulletin No. 33* (May 2013) (available at *http://www.phoenix-center.org/PolicyBulletin/PCPB33Final.pdf*); T.R. Beard, G.S Ford, L.J. Spiwak and M. Stern, "*Wireless Competition Under Spectrum Exhaust*," 65 *Federal Communications Law Journal* 79 (2012); T.M. Koutsky and L.J. Spiwak, "*Separating Politics from Policy in FCC Merger Reviews: A Basic Legal Primer of The 'Public Interest' Standard*," 18 *CommLaw Conspectus* 329 (2010); G.S. Ford, T.M. Koutsky, L.J. Spiwak, "*Competition After Unbundling: Entry, Industry Structure and Convergence*," 59 *Federal Communications Law Journal* 331 (2007).