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Net Neutrality: Selected Legal Issues Raised by the FCC's 2015 Open Internet Order

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Summary

In February 2015, the Federal Communications Commission (FCC) adopted an order that will impose rules governing the management of Internet traffic as it passes over broadband Internet access services (BIAS), whether those services are fixed or wireless. The rules are commonly known as "net neutrality" rules. The order was released in March 2015 and published in the *Federal Register* on April 13, 2015. The order took effect on June 12, 2015. According to the order, the rules ban the blocking of legal content, forbid paid prioritization of affiliated or proprietary content, and prohibit the throttling of legal content by broadband Internet access service providers (BIAS providers). The rules are subject to reasonable network management, as that term is defined by the FCC.

This is not the first time the FCC has attempted to impose some version of net neutrality rules. Most recently, the FCC issued the Open Internet Order in 2010, which would have created similar rules for the provision of broadband Internet access services. However, the bulk of those rules, with the sole exception of a disclosure rule, were struck down by the D.C. Circuit Court of Appeals. The court found that the FCC did have broad enough authority under Section 706 of the Telecommunications Act of 1996 to impose the rules. However, the Communications Act of 1934, as amended by the Telecommunications Act of 1996, permits only "telecommunications services" to be regulated as common carriers. Broadband Internet access services were classified as "information services" under the act by the FCC. Because the court found some of the rules imposed by the Open Internet Order to be common carrier regulation *per se*, the court found that the rules could not be applied to broadband Internet access services.

Following this decision, the FCC essentially had three options. The Commission could have enforced the remaining disclosure rules as they were. The Commission could have returned to the drawing board to create more flexible rules that would not be found to be *per se* common carrier rules. The D.C. Circuit had suggested in its opinion striking down the rules that such a path was possible. The third option was the option to reclassify broadband Internet access services as telecommunications services, and to impose the strong rules the FCC had sought to impose initially, but on a firmer statutory footing.

After issuing a Notice of Proposed Rulemaking (NPRM) seeking comment on all three of these options, the FCC has chosen the third option. The agency voted to reclassify broadband Internet access services as telecommunications services under the Communications Act. If upheld in court, this decision could represent a significant shift in the FCC's ability to regulate these services. Reclassification arguably would provide the FCC with clear authority to impose network neutrality rules. Notably, reclassification may also give the FCC direct authority, under Title II of the Communications Act, to regulate other aspects of the provision of broadband Internet access services. This report will analyze the primary legal issues raised by the FCC's order reclassifying broadband Internet access services. It has also been updated to include a discussion of H.R. 2666, the No Rate Regulation of Broadband Internet Access Act in the Recent Developments section.

For more information on the policy debate and the history of net neutrality rules, see CRS Report R40616, *Access to Broadband Networks: The Net Neutrality Debate*, by Angele A. Gilroy.

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Introduction

In February 2015, the Federal Communications Commission (FCC) adopted an order that imposes rules governing the management of Internet traffic as it passes over broadband Internet access services (BIAS), whether those services are fixed or wireless.[1] The rules are commonly known as "net neutrality" rules. The order was released in March 2015 and published in the *Federal Register* on April 13, 2015.[2] The order took effect on June 12, 2015.[3] According to the order, the rules ban the blocking of legal content, forbid paid prioritization of content for consideration or to benefit an affiliate, and prohibit the throttling of legal content by broadband Internet service providers (BIAS providers). The rules are subject to reasonable network management, as that term is defined by the FCC.[4]

This is not the first time the FCC has attempted to impose some version of net neutrality rules.[5] Most recently, the FCC issued the Open Internet Order in 2010, which would have created similar rules for the provision of broadband Internet access services.[6] However, in *Verizon v. FCC*, the bulk of those rules, with the sole exception of a disclosure rule, were struck down by the D.C. Circuit Court of Appeals.[7] The court found that the FCC did have broad enough authority under Section 706 of the Telecommunications Act of 1996 to impose the rules. However, the Communications Act of 1934, as amended by the Telecommunications Act of 1996, permits only "telecommunications services" to be regulated as common carriers. Broadband Internet access services were classified as "information services" under the act by the FCC. Because the court found some of the rules imposed by the Open Internet Order to be common carrier regulation *per se*, the court found that the rules could not be applied to broadband Internet access services.

Following that decision, the FCC essentially had three options. It could have enforced the remaining disclosure rules as they were. It could have returned to the drawing board to create more flexible rules that would not be found to be *per se* common carrier rules. The D.C. Circuit had suggested in its opinion striking down the rules that such a path was possible. The third option was the option to reclassify broadband Internet access services as telecommunications services, and to impose the strong rules the FCC had sought to impose initially, but on a firmer statutory footing.

After issuing a Notice of Proposed Rulemaking (NPRM) seeking comment on all of those options,[8] the FCC has chosen reclassification.[9] The agency voted to reclassify broadband Internet access services as telecommunications services under the Communications Act. If upheld in court, this decision could represent a significant shift in the FCC's ability to regulate these services. Reclassification arguably would provide the FCC with clear authority to impose

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[1] In the Matter of Protecting and Promoting the Open Internet, Report and Order, FCC 15-24 (2015). [hereinafter "2015 Order"].

[2] 80 Fed. Reg. 19737 (April 13, 2015).

[3] *Id*.

[4] Reasonable network management refers to technical management of a broadband network, but does not refer to management done for other business reasons, like promotion of proprietary content. See discussion, *infra* page 4.

[5] CRS Report R40234, *Net Neutrality: The FCC's Authority to Regulate Broadband Internet Traffic Management*, by Kathleen Ann Ruane.

[6] In re Preserving the Open Internet, Report and Order, 25 F.C.C.R. 17905 (2010). [hereinafter "2010 Order"].

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

[8] In re Protecting & Promoting the Open Internet, Notice of Proposed Rulemaking, 2014 FCC LEXIS 1689 (2014). [hereinafter "2014 NPRM"].

[9] 2015 Order ¶ 60, *et. seq*.

network neutrality rules. Notably, reclassification also gives the FCC direct authority, under Title II of the Communications Act, to regulate other aspects of the provision of broadband Internet access services.

This report will discuss the primary legal issues raised by the FCC's 2015 Open Internet Order: the FCC's authority to reclassify broadband Internet access services, the FCC's authority to forbear from the imposition of Title II regulations following reclassification, the FCC's authority under Section 706 of the Telecommunications Act of 1996, and whether the FCC properly complied with the Administrative Procedure Act.

Important Terminology

Before beginning this discussion, it is first helpful to review the lexicon employed by the FCC and the participants in the Internet ecosystem. The *Verizon* court identified four major participants in the relevant marketplace that remain relevant to the 2015 Open Internet Order: backbone networks, broadband providers, edge providers, and end users.[10]

"Backbone networks are interconnected, long-haul fiber-optic links and high-speed routers capable of transmitting vast amounts of data." Internet users connect to the backbone networks, and ultimately to each other and to the rest of the public Internet, through local broadband service providers who operate "last-mile" transmission services. Broadband services are high-speed communications technologies like cable modem services or fiber services. "Edge Providers are those who, like Amazon or Google, provide content, services, and applications over the Internet." Finally, "end users are those who consume edge providers' content."

None of these definitions is mutually exclusive. End users may upload pictures and other content to the web, thereby acting as edge service providers. Broadband providers may offer proprietary content to end users thereby becoming edge service providers, to the extent that they provide content, as well. The definitions are, therefore, activity-based rather than entity-based. They permit persons and entities to be more than one participant in the Internet ecosystem at once.

Also helpful in focusing the discussion of net neutrality is a brief and very basic description of how content travels over the Internet. The *Verizon* court provided the following:

> When an edge provider such as YouTube transmits some sort of content—say, a video of a cat—to an end user, that content is broken down into packets of information, which are carried by the edge provider's local access provider to the backbone network, which transmits these packets to the end user's local access provider, which, in turn, transmits that information to the end user, who then views, and hopefully enjoys the cat.[11]

Net neutrality rules, such as those issued in the 2015 order under discussion, are concerned with the management of content between the moment when the video arrives on the local broadband access provider's network, and the moment that it reaches the end user and is consumed. In the example of the cat video above, net neutrality rules would apply only to the portion of the example wherein the end user's local access provider transmits the information to the end user, "who then views, and hopefully enjoys the cat."

[10] *Verizon*, 740 F.3d at 628.

[11] *Id*. at 629.

2015 Open Internet Order

The 2015 Open Internet Order imposes clear bright-line rules for the management of broadband Internet access services (BIAS).[12] To place its authority to issue those rules on firm legal ground, the FCC also issued a declaratory order reclassifying BIAS as telecommunications services. Reclassification, assuming it is upheld in court, would have imposed all of Title II of the Communications Act upon BIAS providers, insofar as they provide BIAS. Title II permits common-carrier-like regulation of telecommunications services. The FCC, finding it inappropriate to impose all Title II requirements upon BIAS providers, also issued an order forbearing from the application of many Title II regulations to BIAS providers. Each of these actions raises important legal questions. First, however, a more detailed summary of what the Commission purports to have done with its 2015 order is provided.

Net Neutrality Rules

First and foremost, the 2015 order creates new net neutrality rules. The rules are bright-line rules that ban certain activities.[13] These rules arguably go further in regulating the conduct of BIAS providers than the FCC's previous 2010 Open Internet Order. For example, the 2010 order left open the possibility that some paid prioritization arrangements would be permissible under the rule banning discrimination, though the 2010 order articulated a presumption that paid prioritization would not be permissible. The 2015 order bans paid prioritization outright, in a separate rule unto itself.

Scope of the Rules: Broadband Internet Access Services

The Order defines broadband Internet access services as mass-market retail services that allow access to the entire Internet, and it includes both wired (e.g., cable broadband, or fiber broadband) and wireless (e.g., satellite, wireless data) services.[14] BIAS are also defined by what they are not. They are not what the FCC has termed "specialized services." Specialized services, though they might use Internet protocol and may travel over the same wires or airwaves as a broadband Internet access service, do not "provide access to the Internet generally." The Commission offers "heart monitors or energy consumption sensors" as examples of specialized services. However, the definition of BIAS permits the Commission to include any service in the definition of BIAS if the agency finds that the service is providing the "functional equivalent" of broadband services. In other words, if it appears to the agency that a BIAS provider is attempting to evade the Open Internet regulations by calling broadband Internet access service a "specialized service" or some other type of service, the FCC reserves the right to include that service in the definition of BIAS and to apply the Open Internet rules.

[12] 2015 Order ¶ ¶ 14-40. See also CRS Report R40616, *Access to Broadband Networks: The Net Neutrality Debate*, by Angele A. Gilroy.

[13] The net neutrality rules will not apply to the interconnection between BIAS and other Internet transmission services, like content delivery networks. However, the Order does make clear that the Commission will be regulating the interconnection agreements between these entities to some degree. See discussion, *infra* page 8.

[14] *Id*. ¶ ¶ 186-193.

No Blocking

The 2015 order bans the blocking of all legal content, including all applications and services, on the Internet by BIAS providers.[15]

No Throttling

BIAS providers are forbidden from "throttling" lawful content as well. Specifically, BIAS providers may not "impair or degrade lawful Internet traffic on the basis of content, application, service, or use of a non-harmful device."[16]

No Paid Prioritization

This rule prohibits BIAS providers from accepting consideration (i.e., money or other valuable incentive) to "directly or indirectly favor some traffic over other traffic."[17] The rule would also ban the practice of favoring traffic provided by an affiliated entity.

No Unreasonable Interference or Disadvantage to Consumers or Edge Providers

Finally, the FCC created a catchall rule intended to prohibit any practices that disadvantage consumers or edge service providers of which the Commission had not thought. According to the FCC, the power of BIAS providers, as gatekeepers to the Internet, "can be exercised through a variety of technical and economic means, and without a catch-all standard, it would be that ... 'a little neglect may breed great mischief.'"[18] Therefore, the Order also creates a rule that prevents BIAS providers from unreasonably interfering with or unreasonably disadvantaging edge service providers' access to end users, and end users' ability to access all lawful content made available by edge service providers.[19]

Reasonable Network Management

Each of the rules described above, with the exception of the paid prioritization ban, is subject to reasonable network management. The term is defined to include any network management practice so long as it is done for primarily technical reasons, and not for any other business reason.[20] The rule permits flexibility in the determination of what is reasonable based upon a network's particular structure. It is this flexibility that the FCC argues permits the agency the ability to apply the same rules to both mobile and fixed BIAS.

Paid prioritization is not subject to reasonable network management because it applies to a business arrangement. In the FCC's words, "it does not primarily have a technical network management purpose."[21]

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[15] *Id*. ¶ 111.

[16] *Id*. ¶ 119.

[17] *Id*. ¶ 125.

[18] *Id*. ¶ 21.

[19] 2015 Order ¶ 136.

[20] *Id*. ¶ 215.

[21] *Id*. ¶ 217.

Disclosure/Transparency

The order also maintains and enhances the disclosure rules for BIAS providers. They are required to "publicly disclose accurate information regarding the network management practices, performance, and commercial terms of" their BIAS, which is sufficient for consumers to make informed decisions about whether to subscribe to those services.[22]

Reclassification

As noted above, the *Verizon* court struck down the FCC's no blocking and no unreasonable discrimination rules in the 2010 Open Internet Order, because the Communications Act forbids the treatment of any services other than telecommunications services as common carrier services.[23] Thus, it was clear that if the FCC wished to impose bright-line rules that forbid blocking and discrimination against content, similar to the rules it had adopted in 2010, the agency would need to reclassify broadband Internet access services from information services to telecommunications services under the act. That is precisely what the 2015 order purports to do.

First, the 2015 order reclassifies both fixed and wireless broadband Internet access services as telecommunications services under the Communications Act.[24] Second, the Order reclassifies mobile broadband Internet access services as commercial mobile radio services, rather than as private mobile radio services.[25] The legal basis for these decisions, as well as the legal questions raised by these decisions, will be discussed further below.

Assuming that the FCC's reclassification decisions are upheld, broadband Internet access service providers, insofar as they provide those services, are now subject to Title II of the Communications Act. Title II provides the FCC a great deal of authority to regulate the services to which it applies.

Title II and Forbearance

Title II grants the FCC clear authority to regulate telecommunications services.[26] The Commission is empowered to prohibit unreasonable discrimination, to require the provision of service in some circumstances, to regulate rates, to unbundle networks, and to regulate interconnection between service providers, among other things.[27] The comprehensive regulatory scheme was geared towards the providers of telephone service, who were perceived to be the holders of natural monopolies in particular geographic areas.[28] The extent of the regulations was intended to safeguard against the danger of consumer abuse by companies holding monopoly power.[29] The idea of competition for the provision of telecommunications services was introduced most fully into the statute in the Telecommunications Act of 1996, and with this idea came a

[22] *Id*. ¶ 157.

[23] *Verizon*, 740 F.3d at 650.

[24] 2015 Order ¶ ¶ 306-387.

[25] *Id*. ¶ ¶ 388-408.

[26] See 47 U.S.C. §§ 201 *et seq*.

[27] *Id*.

[28] See Verizon v. FCC, 535 U.S. 467, 477 (2002) ("Companies providing telephone service have traditionally been regulated as monopolistic public utilities.").

[29] *Id*. ("in order to offset monopoly power and ensure affordable, stable public access to a utility's goods or services, legislatures enacted rate schedules to fix the prices a utility could charge").

reduction in the regulatory load for telecommunications service providers.[30] Among other deregulatory measures, Congress granted the FCC the authority to forbear from regulations if the agency found that the regulations in question were no longer in the public interest as applied to a particular company, service, and/or geographic area.[31] The provision permits the FCC to roll back regulations as necessary, and has been used with some degree of frequency in the past, particularly for wireless services.[32]

Because broadband Internet services are now telecommunications services, all of Title II of the Communications Act could apply to them. In recognition of the fact that regulating BIAS under Title II is both a large regulatory shift in the treatment of such services, and that some aspects of Title II regulations may either not be appropriate to apply to BIAS or may be unnecessary to apply, the Commission made clear in its 2015 order which parts of Title II would be applied to BIAS and issued a forbearance order from the rest of Title II.[33]

The Application of Title II of the Communications Act to BIAS

The FCC made clear in its 2015 order which aspects of Title II will be applied to broadband Internet access services. First, the FCC declined to forbear from Sections 201, 202, 208, and other related provisions granting the agency enforcement power.[34] These provisions, along with Section 706, are necessary for the FCC's authority to impose the net neutrality rules themselves, as well as some other regulations. Second, the FCC listed a number of other provisions that, while not necessary to support the agency's authority to impose net neutrality rules, it deemed "necessary to ensure consumers are protected, promote competition, and advance universal service access, all of which will foster network investment, thereby helping to promote broadband deployment."[35]

Authority to Impose Open Internet Rules

The FCC grounds its authority to issue the Open Internet Order in Sections 201 and 202 of the Communications Act, as well as in Section 706 of the Telecommunications Act of 1996. Section 201(a) requires telecommunications carriers (i.e., providers of telecommunications services) to furnish telecommunications services upon reasonable request and to establish physical connections with other carriers.[36] Section 201(b) requires charges and all practices in connection with the provision of a telecommunications service to be just and reasonable, and that all unjust

[30] See, Eli M. Noam, Deregulation and Market Concentration: An Analysis of Post-1996 Consolidations, 58 Fed. Comm. L.J. 539 (2006) ("For several decades, U.S. policy in telecommunications and electronic mass media focused on the encouragement of competition. This policy, usually known as deregulation but more accurately described as liberalization, is aimed at an opening of the market to competitors and a reduction of market power. There were numerous elements and proceedings to this policy by the Federal Communications Commission, the states' public service Commissions and legislatures, the courts, and Congress. Of these actions, none was more comprehensive than the Telecommunications Act of 1996.").

[31] 47 U.S.C. § 160.

[32] 47 U.S.C. § 332 directs the FCC to forbear from Title II regulations of commercial mobile radio services (CMRS) when certain conditions are met, but forbids the agency to forbear from Sections 201, 202, or 208. See also, 2015 Order ¶ 444 (drawing parallels between the applications of 47 U.S.C. §§ 201-202 in both the CMRS and BIAS contexts).

[33] 2015 Order ¶ ¶ 434-542.

[34] *Id*. ¶ 51. In addition to sections 201, 202, and 208, the FCC will apply sections 206, 207, 209, 216, and 217. *Id*. at FN 46.

[35] *Id*. ¶ 52.

[36] 47 U.S.C. § 201(a).

and unreasonable practices and charges are unlawful.[37] Section 202 makes it "unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services" or to give any undue or unreasonable preference to any person or class of person.[38] The FCC argues that these provisions taken together grant the FCC ample authority to issue net neutrality rules.

Furthermore, the FCC cites Section 706 of the Telecommunications Act, in conjunction with its decision to reclassify BIAS as a telecommunications service, as additional authority to impose the rules. Section 706 (a) states that the FCC and any state public utility Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ... by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[39] The FCC reasons that ensuring the openness of the Internet and the ability of consumers to access all the legal content and applications of their choice will drive demand for broadband Internet access.[40] The increased demand for services will, therefore, lead to greater infrastructure investment on the part of BIAS providers. Greater investment will lead to greater deployment and greater capacity for all Americans in fulfillment of Section 706(a), under the FCC's theory.

The *Verizon* court accepted the FCC's rationale regarding its authority under Section 706 when reviewing the 2010 Open Internet Order.[41] First, the court found that the FCC had reasonably interpreted Section 706 (a) to be an independent grant of authority upon which the FCC could base regulatory action.[42] Second, the court also found that the agency had reasonably concluded, based upon available evidence, that net neutrality rules would "protect and promote edge-provider investment and development, which in turn drives end-user demand for more and better broadband technologies, which in turn stimulates competition among broadband providers to further invest in broadband."[43] The court found, therefore, that the FCC had reasonably interpreted its Section 706 authority to include regulation of network management practices of BIAS providers. The court invalidated the no blocking and nondiscrimination rules only because the services were not classified as telecommunications services, not because the court found that the FCC did not have sufficient authority pursuant to Section 706.[44]

Assuming the FCC's reclassification orders are upheld, it appears that the FCC has based its new net neutrality rules on firm statutory ground. The FCC has reasonably interpreted itself to have authority to impose the rules pursuant to Section 706, according to the D.C. Circuit in *Verizon*, and the services, now, are telecommunications services, which can be regulated as common carriers *per se*. Furthermore, Sections 201 and 202 provide even greater authority for the FCC to regulate discrimination and unjust and unreasonable practices, both of which are arguably

[37] 47 U.S.C. § 201 (b).

[38] 47 U.S.C. § 202.

[39] codified at 47 U.S.C. § 1302(a).

[40] 2015 Order ¶ ¶ 275-283.

[41] *Verizon*, 740 F.3d at 643 (finding that "[th]e Commission could reasonably have thought that its authority to promulgate regulations that promote broadband deployment encompasses the power to regulate broadband providers' economic relationships with edge providers if, in fact, the nature of those relationships influences the rate and extent to which broadband providers develop and expand their services for end users.").

[42] *Id*. at 638-39.

[43] *Id*. at 642.

[44] *Id*. at 650-660.

addressed by the net neutrality rules. Taken together, these authorities will likely be sufficient to sustain the FCC's net neutrality rules.

Interconnection

The FCC also cites Sections 201 and 202 as sources of authority to regulate commercial agreements for the exchange of traffic between broadband Internet access services providers and other entities that transport content over the Internet (e.g., content delivery networks, or the Internet backbone).[45] The Commission refrained from imposing any prophylactic rules for interconnection. Instead it "will be available to hear disputes raised under Sections 201 and 202 on a case-by-case basis."[46] The FCC does not impose net neutrality rules to interconnection between networks.

This rule would permit the FCC to step in when there are disputes like the disagreements that occurred between Netflix and broadband providers like Comcast, Verizon, and Time Warner when Netflix was attempting to reach agreements to directly interconnect with those networks, in order for Netflix to be able to deliver content more efficiently.[47] Netflix alleged that Comcast engaged in unfair tactics during the negotiation, an accusation that Comcast denied.[48] Had this rule been in place, the parties could have appealed to the FCC to step in and settle the disputes.

Privacy

The FCC declined to forbear from applying Section 222 of the Communications to BIAS.[49] Section 222 places certain obligations on the providers of telecommunications services to protect customer data shared with the service provider solely as a result of the provision of that service.[50] Service providers must also protect "customer proprietary network information," as it is defined by statute and regulation. The FCC found that consumers' privacy interests are no less important when communicating via broadband than when communicating over the telephone and that refraining from applying robust privacy rules might deter consumers from using broadband services, harming innovation and infrastructure deployment. Despite finding that privacy rules would be applied, the Commission declined to apply current privacy regulations under Section 222 to BIAS.[51] Instead, the agency issued temporary forbearance from the application of those rules, and promised a dedicated rulemaking that will analyze how Section 222 will apply to BIAS. That rulemaking began on April 1, 2016, when the FCC released a Notice of Proposed

[45] 2015 Order ¶ ¶ 194-206.

[46] 2015 Order ¶ 29.

[47] Shalini Ramachandran, Netflix to Pay Comcast for Smoother Streaming, Wall St. J. (Feb. 23, 2014) available at http://www.wsj.com/news/articles/SB10001424052702304834704579401071892041790?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052702304834704579401071892041790.html&fpid=2,7,121,122,201,401,641,1009.

[48] Drew FitzGerald and Shalini Ramachandran, Netflix-Traffic Feud Leads to Video Slowdown, Wall St. J. (Feb. 18, 2014) available at http://www.wsj.com/news/article_email/SB10001424052702304899704579391223249896550-lMyQjAxMTA0MDEwODExNDgyWj; Sam Gustin, Here's Why Your Netflix is Slowing Down, Time (Feb. 19, 2014) available at http://time.com/8681/netflix-verizon-peering/.

[49] 2015 Order ¶ ¶ 462-467.

[50] 47 U.S.C. § 222.

[51] 2015 Order ¶ 467.

Rulemaking containing a proposed framework for privacy rules that would apply to BIAS providers.[52]

Universal Service

Section 254 of the Communications Act (along with interrelated requirements in Section 214(e))[53] "promotes the deployment and availability of communications networks to all Americans, including rural and low-income Americans."[54] This provision is widely known as universal service. A universal service fund was created to which all telecommunications carriers that provide interstate service are required to contribute.[55] The funds are then distributed in order to promote deployment of telecommunications services, particularly to those in rural areas where investment costs might be too high to justify deployment, to low-income individuals who cannot afford the services without a discount or a subsidy, to schools and libraries, and to rural health care providers.[56] Reclassification makes clear that broadband Internet access services are able to receive universal service subsidies.[57] Importantly, the FCC chose to forbear, at this time, from requiring BIAS providers to contribute to the universal service fund. However, it did reserve the right to impose mandatory contributions on those service providers (and, by extension, their customers) in the future.[58] An ongoing USF rulemaking that is set to be finalized in April 2015 may be the vehicle for the imposition of universal service contributions upon BIAS providers.[59] Whether the FCC will choose to impose those charges remains to be seen, and may depend on the legal status of the 2015 Open Internet Order at the time the universal service order is issued.

Access for Persons with Disabilities

Sections 225, 255, and 251(a), and the FCC's implementing regulations require telecommunications carriers to ensure that their services are accessible to persons with disabilities to the extent reasonably achievable.[60] The FCC applied all of these regulations to BIAS. However, the FCC did forbear from applying any requirement that BIAS providers contribute to the Telecommunications Relay Service (TRS) Fund at this time.[61]

Pole Attachments

The FCC also declined to forbear from Section 224 of the act, which governs the FCC's regulation of pole attachments.[62] Pole attachments are portions of network architecture that may be placed on a pole, duct, or other right-of-way to enable the operation of a network. A pole

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[52] See *In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, NPRM, FCC 16-39 (April 1, 2016), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0401/FCC-16-39A1.pdf.

[53] 47 U.S.C. §§ 214(e), 254.

[54] 2015 Order ¶ 57.

[55] 47 U.S.C. § 254(d).

[56] CRS Report RL33979, *Universal Service Fund: Background and Options for Reform*, by Angele A. Gilroy.

[57] 2015 Order ¶ ¶ 486-492.

[58] *Id*. ¶ 488.

[59] *Id*. ¶ 489.

[60] *Id*. ¶ 468.

[61] *Id*. ¶ 470.

[62] 2015 Order ¶ ¶ 478-485.

attachment might, for example, strengthen the signal of a wireless carrier in a particular geographic area. Section 224(f)(1) "requires utilities to provide cable system operators and telecommunications carriers" nondiscriminatory access to any poles, ducts, conduits, or right-of-way owned by the utilities.[63] The FCC argued that imposing this section would advance the deployment of broadband infrastructure in support of its duties under Section 706.

Forbearance

Aside from the above listed provisions, the FCC issued an order forbearing from the application of every other section and rule under Title II of the Communications Act.[64] Section 10 of the Telecommunications Act of 1996 grants the FCC the ability to forbear from Communications Act provisions and regulations that the Commission finds are no longer in the public interest, as defined by the statutory standard. The Commission found that for every other provision, the forbearance standard was met. Most importantly, the Commission will not apply rate regulation, tariffing, or unbundling requirements to broadband services.[65]

Legal Issues Raised by the 2015 Open Internet Order

Given the breadth and depth of what the FCC attempted to accomplish in the 2015 Open Internet Order, it may be impossible to address every legal question that the order raises. However, four main legal questions related to the FCC's authority to issue the order stand out. The first, and the most crucial, is whether the FCC appropriately reclassified both fixed and mobile BIAS as telecommunications services, and whether the reclassification of mobile broadband as a commercial mobile radio service was properly achieved. If the FCC did not properly justify these actions under the statute, or under the Administrative Procedure Act (APA), the entire regulatory structure the FCC began to build in the order likely would collapse.

The second question, assuming reclassification of fixed and mobile BIAS is upheld, is whether the FCC appropriately exercised its forbearance authority. In order to forbear from Title II requirements the FCC must find that a particular statutory standard has been met. The approach to forbearance the FCC took in the order is unorthodox, in that it grants broad forbearance from a number of provisions to an entire class of service on a national scale. Consequently, a number of legal questions arise.

The third question involves the parameters of the FCC's authority under Section 706 of the Telecommunications Act. The FCC has held that Section 706 grants it independent authority and that net neutrality rules are within the scope of that authority. The D.C. Circuit Court of Appeals, when reviewing this interpretation in the 2010 Open Internet Order, granted the FCC's interpretation deference and found the agency's interpretation to be reasonable. Some argue, however, that Section 706 was never meant to grant the FCC an independent source of authority, and was, instead, merely "an admonition" from Congress to use specific authorities granted elsewhere in the Communications Act to encourage broadband deployment. If Section 706 is not an independent grant of authority, or the FCC's interpretation of the extent of its authority under Section 706 is not found to be reasonable, that may have important consequences for the 2015 Open Internet Order, particularly if the order to reclassify is overturned.

[63] 47 U.S.C. § 224.

[64] 2015 Order ¶ 493.

[65] *Id*. ¶ ¶ 497-514.

The fourth, major legal question facing the Open Internet Order is whether the FCC complied with the Administrative Procedure Act in the process of issuing the new rules. Some have argued that the FCC did not provide sufficient notice that the agency would reclassify broadband Internet access services. If proper notice was not provided, the entire order may be struck down and the FCC would likely need to issue a new notice of proposed rulemaking with additional comment and reply periods before being able to officially reclassify BIAS and impose net neutrality rules.

Reclassification

The Commission issued a declaratory order reclassifying broadband Internet access services as telecommunications services.[66] The order also reclassified mobile broadband services as commercial mobile services. Both of these rulings were necessary to impose Title II regulations and bright-line net neutrality rules on the provision of broadband Internet access services.

Telecommunications Services

Prior to the issuance of the 2015 order, broadband Internet access services, both fixed and mobile, were classified as information services under the Communications Act.[67] The order changed that classification, making them telecommunications services under the act. To understand whether and how the FCC was able to justify that regulatory action, it is necessary to turn first to the statute.[68]

A few definitions are important here. First, a "telecommunications service" is defined as the offering of telecommunications for a fee directly to the public.[69] The definition of a telecommunications service, therefore, depends on the definition of telecommunications. Telecommunications means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[70] A telecommunications carrier is an entity that provides telecommunications services.[71] Furthermore, the statute makes clear that a telecommunications carrier may only be treated as a common carrier to the extent that the carrier is providing a telecommunications service. If the carrier provides any other service (e.g., a cable service or an information service), the carrier cannot be subject to common carrier regulations to the extent that the carrier provides that separate service.

By contrast, an information service is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[72] No specific title of the act governs the provision of these services.

[66] 2015 Order ¶ ¶ 306-433.

[67] *Id*. ¶ ¶ 314-330.

[68] *Id*. ¶ ¶ 336-381.

[69] 47 U.S.C. § 153 (53).

[70] *Id.* (50).

[71] *Id*. (51).

[72] *Id*. (24).

While these definitions may appear vague, they were not created by Congress in a vacuum. Instead, they track the FCC's previous definitions for what were known as "basic" services, which resembled telecommunications services, and "enhanced" services, which resembled information services.[73] Basic services were "pure communications" services. That is to say that they were "virtually transparent in terms of [their] interaction with customer supplied information."[74] The most common example of a basic service would be a telephone call. Coincidentally, the most common example of a telecommunications service, prior to the 2015 Open Internet Order, was also a telephone call.

Enhanced services, on the other hand, involved "computer processing applications ... used to act on the content, code, protocol, and other aspects of the subscriber's information."[75] This definition encompassed services that provided end users with a connection to the Internet. Like telecommunications services under the Communications Act, basic services were subject to common carrier regulation, and, like information services, enhanced services were not.

Because the statutory definitions so strongly resembled previous regulatory definitions, the FCC tracked its previous regulatory distinctions when interpreting which services fell into the categories of telecommunications services and information services. The FCC generally treated the provision of the "pure transmission" services, such as telephone services, as telecommunications services, but treated the provision of "Internet access services," as well as Internet applications like websites and email services, as information services.[76] However, in the late 1990s those services were still most often provided by separate entities to consumers. In other words, consumers often subscribed to an Internet service provider (e.g., America OnLine) *and* a telephone provider (e.g., AT&T). The bifurcation of access to the Internet would eventually end for most consumers.

With the advent of the provision of digital subscriber line (DSL) services, which are broadband Internet connections provided over telephone lines, that bifurcation did end. When initially interpreting how to regulate DSL services, the FCC continued to treat these services as "telecommunications services," and subjected them to common carrier regulations.[77] This decision may have signaled that high-speed Internet access service would also be considered a telecommunications service, regardless of the provider of that service. However, in 2002, when analyzing whether cable broadband services were telecommunications services, information services, or both, the Commission apparently changed course.[78] Rather than treating cable broadband as a telecommunications service, as it had held in its previous interpretation of DSL service, the Commission determined that cable companies were providing an integrated information service.[79] As a result of this interpretation, cable broadband service providers were exempt from Title II common carrier regulations.

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[73] See, *Verizon* 740 F.3d at 629-630; In Re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C. 2d 384 (1980) ("Computer II").

[74] Computer II, *supra* note 67 at 420.

[75] *Id*.

[76] See, e.g., In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 F.C.C.R. 24013 (1998).

[77] *Id*.

[78] In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, 17 F.C.C.R. 4798, 4824 (2002). [hereinafter "Cable Broadband Order"].

[79] *Id*.

The Supreme Court upheld the FCC's decision to classify cable broadband service as an information service.[80] The Court found that the definition of telecommunications service in the Communications Act was ambiguous. Because the definition was ambiguous, the agency's interpretation of the definition deserved deference, under a standard widely known as *Chevron* deference.[81] In *Chevron*, the Supreme Court articulated a two-part test for determining whether an agency had properly interpreted a statute.[82] First, a reviewing court must look to whether the statutory language is ambiguous. If it is, as the Supreme Court found in the case of the definition of telecommunications service, a reviewing court must defer to the agency's expert judgment related to the meaning of the statute, so long as the agency's judgment was reasonable. In the majority's opinion, the FCC had reasonably interpreted these ambiguous definitions.[83] As a result, it was within the FCC's discretion to determine whether Internet access services should be regulated under Title II as telecommunications services subject to common carrier regulation, or, less onerously, under Title I as information services. The Supreme Court upheld the FCC's classification of cable modem services as information services, as a result. Following the *Brand X* decision, the FCC ultimately decided to treat all types of broadband Internet access services, both fixed and mobile, as information services.[84]

With the 2015 Open Internet Order the FCC reversed all of those previous decisions and decided that broadband Internet access services should be classified as telecommunications services.[85] This decision presents the question of whether, once having classified these services as information services over a decade ago, the FCC has the legal authority to essentially undo its precedent.

Legal Standard

In reviewing the FCC's original classification of cable modem service as an information service, the Supreme Court found that the definition of telecommunications service, as it was applied to cable modem service, was ambiguous.[86] In order to provide a telecommunications service, an entity must "offer" telecommunications directly to the public. According to the statute, telecommunications is the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[87] The provision of cable modem services involves telecommunications, without a doubt. There is a pure transmission element to the provision of cable modem services. However, the pure transmission service was included with other information processing elements that made it possible to access, view, and use the Internet. The question for the Court was whether cable modem services were "offering" telecommunications services directly to the public.[88] The Court found that the word "offer" in this context was ambiguous. To illustrate, the Court used an

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

[81] *Id*. at 90 (citing 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)).

[82] *Chevron*, 467 U.S. at 865-866.

[83] *Brand X*, 545 U.S. at 1000.

[84] *See, e.g*., In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 20 F.C.C.R. 14853 (2005), In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, 22 F.C.C.R. 5901 (2007).

[85] 2015 Order ¶ ¶ 306-433.

[86] *Brand X*, 545 U.S. at 989.

[87] 47 U.S.C. § 153.

[88] *Brand X*, 545 U.S. at 990.

example. The majority queried whether a car salesperson was offering engines for sale, or if he was only offering cars, despite the fact that every car came with an engine.[89] When applied to cable modem services the question becomes whether cable companies are offering telecommunications (i.e., the pure transmission element) for sale, or whether they are offering only Internet access service, despite the fact that telecommunications are an integral part of that service. Because the majority felt that the word "offer" was subject to at least two different interpretations under the act, the Court found that the statute was ambiguous and that the FCC was entitled to deference in its interpretation of the statute. The Court went on to find that the FCC's determination that cable modem service was not a telecommunications service, but was instead an information service, was reasonable.

Important for the discussion of the 2015 reclassification order, the FCC, in *Brand X*, appeared to interpret access to the Internet itself as an information service.[90] The opposing parties in *Brand X* had argued that cable modem service was *both* telecommunications service and an information service.[91] These parties agreed that the provision of email services or the ability to create a home page provided by the cable modem company were certainly information services. However, they argued that "when a consumer goes beyond those offerings and accesses content provided by parties *other* than the cable company ..., the consumer uses a 'pure transmission' service that should be classified as a telecommunications service."[92] By contrast, according to the FCC's interpretation, when an end user accesses third-party content via a cable modem service, "he is using the information service provided by the cable company that offers him Internet access as when he accesses the company's" proprietary services.[93] According to the court, "the service that Internet access providers offer to members of the public is Internet access ... not a transparent ability to transmit information."[94] The Supreme Court held that interpretation to be reasonable and upheld the classification of cable modem services as information services.

The FCC's previous interpretation of Internet access services as information services is not permanent, however. In *Brand X*, the Supreme Court pointed out that "an initial agency interpretation is not instantly carved in stone. On the contrary, the agency ... must consider varying interpretations and the wisdom of its policy on a continuing basis."[95] Under this language, it could be argued that the FCC has a duty to continuously reconsider its interpretations of these definitions. If it may reconsider its previous interpretations, it may also change those interpretations. In *FCC v. Fox Television*, the Supreme Court held that an agency may revisit its previous decisions regarding its interpretation of an ambiguous statute and may reinterpret a statute in light of changing circumstances.[96] In doing so, according to the Court, an agency need not justify its reinterpretation in light of its previous interpretation. In other words, an agency need not explain why its new interpretation is better or more reasonable than its old interpretation. It need only justify its new interpretation as being reasonable in light of the text of the statute and current circumstance. Consequently, in reclassifying broadband Internet access services as

[89] *Id*.

[90] *Id*. at 988 (Internet access allows users to "access the World Wide Web, newsgroups, and so forth, rather than 'transparently' to transmit and receive ordinary-language messages without computer processing or storage of the messages.").

[91] *Id*. at 998-999.

[92] *Id*. at 998.

[93] *Id*. at 999.

[94] *Id*. at 1000. (citation omitted).

[95] *Id*. at 981 (quoting *Chevron*, 467 U.S. at 863-864).

[96] FCC v. Fox Television, 129 S.Ct. 1800 (2009).

telecommunications services (or as commercial mobile services, in the case of mobile broadband Internet access), the FCC will only need to show that its new interpretation of these services is a reasonable reading of the statute in light of current circumstances.

Decision to Reclassify

In deciding to reclassify, the FCC has departed significantly from the interpretation of broadband Internet access services that it had advanced in the case that appeared before the Supreme Court in 2005. In *Brand X*, the Supreme Court gave deference to the FCC's assessment that Internet access was not a "pure transmission" service, and that an essential element of accessing the Internet was computer processing and manipulation of data.[97] That processing necessarily removed broadband Internet access services from the definition of telecommunications services. In 2015, the Commission has held differently, and has instead adopted the interpretation of Justice Scalia in his *Brand X* dissent. The Commission held that "broadband Internet access services, as offered by both fixed and mobile providers, is best seen, and is in fact most commonly seen, as an offering ... 'consisting of two separate things': '*both* high-speed access to the Internet *and* other applications and functions.'"[98] Unlike its 2002 interpretation, the Commission has decided that the provision of Internet access service is a *pure transmission* service that is offered along with other information services, such as email and online storage.

In making this change, the FCC examined it from the perspective of the end user. Historically, in the eyes of the FCC, how a service is classified "turned on the nature of the functions the *end user* is offered," rather than on the type of facilities used to provide the service.[99] It was this standard that governed the FCC's initial classification of cable modem services as information services in 2002. In examining the end user's perspective 13 years later, the Commission determined that much had changed.[100] End users, by and large, viewed broadband services as "pure transmission" services, to which the service provider contributed nothing but a pathway for the delivery of unaltered content, according to the Commission.[101] Furthermore, broadband Internet service providers *marketed* themselves that way.[102] Much of the advertising for fixed and mobile services touts faster speeds and greater data capacity, not ancillary processing services or applications. Furthermore, the FCC found that broadband services are "telecommunications." Specifically, it found that broadband services allow "the transmission between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received," which is the very definition of a telecommunications service.[103] The agency argued that this finding is consistent not only with the consumer's understanding of broadband services, but also with the structure of the Communications Act. Notably, this interpretation appears to read out of the definition of broadband services any information processing that may be necessary on the part of the service provider to allow Internet access.

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[97] *Brand X*. 545 U.S. at 988 (Internet access allows users to "access the World Wide Web, newsgroups, and so forth, rather than 'transparently' to transmit and receive ordinary-language messages without computer processing or storage of the messages.").

[98] 2015 Order ¶ 365 (quoting *Brand X*, 545 U.S. at 1008 (Scalia, J. dissenting)).

[99] *Brand X*, 545 U.S. at 986.

[100] 2015 Order ¶ 361.

[101] *Id*. ¶ 346.

[102] *Id*. ¶ 351.

[103] 47 U.S.C. § 153.

There are at least two necessary information processing components of Internet access service: Domain Name Service (DNS) and caching. DNS service is most often used to convert website addresses, like "crs.gov," into numerical IP addresses that are used by the network to locate the desired content.[104] Caching is the storing of copies of content on the servers of the service provider in locations closer to the end user in order to provide faster access to content.[105] The FCC recognizes that caching and DNS services involve "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," which is the very definition of an information service. However, the FCC argues that DNS and caching, rather than converting broadband services into an information service, fall within the exception to the definition of information services for telecommunications service management.[106] The statute makes clear that information services involve the processing of information, "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."[107]

In sum, the FCC decided to reclassify broadband services as telecommunications services because consumers and the service providers themselves have come to see it as a "pure transmission service." The statutory definitions have been held to be ambiguous when applied to these services. Consequently, the FCC has discretion to revisit its interpretation of these definitions. In doing so, the agency found that broadband services, as they exist now, are better classified as telecommunications services, and that any information or computer processing involved in the provision of those services falls within a statutory exception to the definition of "information service."

Analysis

In *Brand X*, the Supreme Court held that the definitions at issue in the 2015 Open Internet Order are ambiguous, and accorded the FCC deference in its interpretations of the application of those definitions to broadband services.[108] Consequently, it is likely that the agency will receive deference for its decision to reclassify broadband services as telecommunications services by a reviewing court. Many of the competing interpretations of the definitions as they are applied to broadband services were also at issue in the *Brand X* case. The FCC will stand on the other side of the argument this time. A review of the Court's assessment of the competing interpretations in *Brand X* is therefore instructive.

Before the Court were competing interpretations of the application of the term telecommunications service to cable modem service. In the first interpretation, the Ninth Circuit Court of Appeals had found that, while the statutory terms were ambiguous, cable modem services were better classified as telecommunications services.[109] In the second, the FCC had found the opposite.[110] In reviewing these competing interpretations, the Court found that *Chevron* required deference to the agency interpretation of the statute. However, the Court made clear that

[104] 2015 Order at FN 972.

[105] 2015 Order at FN 973.

[106] *Id*. ¶ 356.

[107] *Id*.

[108] *Brand X*, 545 U.S. at 999.

[109] AT&T Corp. v. Portland, 216 F. 3d 871 (9th Cir. 2000).

[110] In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd 4798 (2002).

its decision left "untouched [the Ninth Circuit's] holding that the Commission's interpretation is not the *best* reading of the statute."[111] Justice Stevens, in concurrence, pointed out that he joined the Court's decision because the FCC's interpretation fell "within the scope of its statutorily delegated authority—though perhaps just barely."[112] It appears, therefore, while the majority of the Justices may have felt that a better reading of the statute would have been to classify cable modem services as telecommunications services, *Chevron* deference did not permit the Court to substitute its judgment for the agency's, so long as the agency had interpreted the statute reasonably.[113]

The dissent in *Brand X*, authored by Justice Scalia, took a different view. Justice Scalia argued that the definitions in the statute were clear, and that the agency's interpretation should not be accorded deference, as a result. In Justice Scalia's analysis, it was "perfectly clear that someone who sells cable-modem service is 'offering' telecommunications."[114] Consequently, these services were telecommunications services under the statute and should be regulated accordingly. Justice Scalia also argued, much like the FCC does in its 2015 Order, that DNS and caching services fell within the exception to the definition of information services, and could not be read to make cable broadband services information services in their entirety, despite providing some measure of computer processing.[115]

Neither the services being classified nor the definitions being interpreted have changed since the Court's decision in *Brand X*. Consequently, the FCC's decision to reclassify will likely be accorded deference by a reviewing court, in accordance with the Supreme Court's holding in *Brand X*. The question, therefore, will turn on whether the FCC's new interpretation of the statute is reasonable in light of the statute and available evidence. As discussed in *Chevron*, *Brand X*, and *Fox Television*, agencies are permitted—indeed, are required—to constantly examine their interpretations of their statutes in light of changing circumstances. Under *Fox*, when issuing a new, even a contradictory, interpretation of a previous agency decision, the agency need not justify why its new interpretation is *better* than its old interpretation.[116] It need only justify that the new interpretation is a reasonable interpretation of the statute and its reasons for the change in interpretation in light of evolving circumstances.

The FCC's new interpretation rests on a refreshed record regarding the provision of broadband services, including evidence of the rapid increase in the use of the service, consumer perception of the service as a pure transmission service, and other evidence.[117] There is a decision from the Ninth Circuit Court of Appeals arguing that an interpretation similar to the FCC's new interpretation of broadband services as telecommunications services is the better reading of the statute.[118] There is also a Supreme Court dissenting opinion that argues that the classification of broadband services as telecommunications services is the *only* reading of the statute.[119] And there is language in the majority's *Brand X* decision indicating that interpreting broadband services to

[111] *Brand X*, 545 U.S. at 986.

[112] *Id*. at 1003 (Stevens, J. concurring).

[113] *Id*. at 981.

[114] *Id*. at 1014 (Scalia, J. dissenting).

[115] *Id*. at 1013.

[116] FCC v. Fox Television, 556 U.S. 502, 512 (2009).

[117] 2015 Order ¶ ¶ 328-331.

[118] AT&T Corp. v. Portland, 216 F. 3d 871 (9th Cir. 2000).

[119] *Brand X*, 545 U.S. at 1014 (Scalia, J. dissenting).

be telecommunications services might be the *better* reading of the statutory terms.[120] If a reviewing court applies deference to the agency's decision to reclassify, the FCC's reasoning taken together with various court precedent, including Supreme Court precedent, might lead the court to uphold the FCC's reclassification of broadband services as telecommunications services.

Some argue that the FCC's reclassification of broadband services should receive heightened scrutiny from a reviewing court.[121] The Supreme Court, when setting out its otherwise deferential standard for judicial review of agency reinterpretations of statutory text, made clear that when an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account," the agency's decision should be subjected to a more searching review.[122] It could be argued that both of those conditions are present in this case.[123] First, it could be argued that the circumstances that the FCC points to in order to justify its change in interpretation are not new or changed at all. There may be evidence that consumers have always viewed broadband services as conduits for information rather than as providers of services such as email or other information services. This very argument was advanced in the *Brand X* case.[124] There may also be evidence that broadband providers always emphasized speed of transmission in their marketing materials. If this was always the case, and prior FCC policies reflected the exact opposite interpretation based upon the same factual record, it could be argued that heightened scrutiny should be applied to the reclassification decision. It could also be argued that the FCC's previous classification "engendered serious reliance interests" in the broadband service provider community. FCC Commissioner Pai observed that "if there ever could be a case where an agency has engendered serious reliance interests, this is it."[125] Broadband services providers have just been transferred from a light-to-non-existent regulatory environment to a robust regime of Title II common carrier regulation, albeit with substantial forbearance. The magnitude of that change may convince a court to undergo a more searching review of the FCC's analysis of the statutory terms and its reasons for making the change.

If that does happen, a court might be more receptive to arguments that the FCC's interpretation of the statutory definitions is unreasonable, or, as Commissioner Pai would argue, is not permitted by the statute in light of current technology for the provision of these services.[126] It could be argued, for example, that DNS service is essential to the provision of Internet access and that its presence makes it clear that broadband services do not merely transmit information between points specified by the user. A commenter pointed out that "it is literally *impossible* for a broadband user to specify the 'points' of an Internet 'transmission' on the web."[127] What the user is really doing is identifying the original *source of the information* and the network uses that information to choose the appropriate IP address among a list of alternatives.[128] In this analysis,

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[120] *Id*. at 986.

[121] 2015 Order ¶ 357; Commissioner Ajit Pai, Dissenting Statement Re: Protecting and Promoting the Open Internet, GN Docket No. 14-28 (2015). [hereinafter "Pai Dissent"].

[122] *Fox Television*, 556 U.S. at 512.

[123] See, Pai Dissent, *supra* note 118.

[124] *Brand X*, 545 U.S. at 988.

[125] See, Pai Dissent, *supra* note 118.

[126] *Id*.

[127] Fred B. Campbell, Center for Boundless Innovation in Technology, Broadband Transmissions Are Not "Telecommunications," GN Docket No. 14-28, at 30 (Feb. 18, 2014), available at http://go.usa.gov/3aUWA.

[128] *Id*., see also Pai Dissent, supra note 118.

DNS service is not "scarcely more than routing information,"[129] but instead a classic "enhanced service" without which broadband Internet access would be impossible for the end user.[130]

Nevertheless, even under a heightened standard, the agency will likely be accorded some measure of deference by a reviewing court, unless of course the statute is found to be unambiguous in its application. It seems unlikely that a court would find the statute to be unambiguous. Supreme Court precedent has clearly found the opposite. Consequently, the FCC's interpretation would still likely receive deference. Given the highly technical nature of the services and the statute being interpreted, a court might find, like the Supreme Court in *Brand X*, that "the questions the Commission resolved in the order under review involve a 'subject matter [that] is technical, complex, and dynamic.' The Commission is in a far better position to address these questions than ... " a court is.[131]

Commercial Mobile Radio Services

A separate, but equally important, question for the reclassification of mobile broadband services under Title II is whether they may be reclassified as commercial mobile radio services (CMRS) pursuant to Section 332 of the Communications Act.[132] Under Section 332, CMRS are common carriers and may be regulated accordingly. Private mobile service providers are not, and may not be regulated as common carriers. Prior to the FCC's 2015 order, mobile broadband services were classified as private mobile services.[133] Again, the analysis begins with the statutory definitions at issue.

CMRS are defined as "any mobile service ... that is provided for profit and makes interconnected service available."[134] Interconnected service means "service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission)."[135] Private mobile service "means any mobile service ... that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission."[136]

Notably, in order to be considered a CMRS, a mobile service must interconnect with the public switch network, as that term is defined by the FCC. Prior to the 2015 order, the Commission defined the "public switched network" as "the common carrier switched network ... that use[s] the North American Numbering Plan in connection with the provision of switched services."[137] The North American Numbering Plan is the numbering system that enables the assignment of telephone numbers, as well as telephone calls.[138] In other words, the public switched telephone network is the network that permits regular voice phone calls to be made. There is no doubt that mobile broadband services do not use the North American Numbering Plan. The Commission

[129] *Brand X*, 545 U.S. at 1014 (Scalia, J. dissenting).

[130] See, Pai Dissent, supra note 118.

[131] *Brand X*, 545 U.S. at 1002-1003. (internal citations omitted).

[132] 47 U.S.C. § 332.

[133] 2015 Order ¶ 338.

[134] 47 U.S.C. § 332(d).

[135] *Id*.

[136] *Id*.

[137] 47 C.F.R. § 20.3.

[138] North American Numbering Plan Administration, About the North American Numbering Plan, http://www.nanpa.com/about_us/abt_nanp.html.

acknowledges as much.[139] Consequently, under the FCC's previous interpretation of "interconnected service," mobile broadband fell clearly outside the definition of CMRS. Consequently, mobile broadband services could only be classified as CMRS if either the definition of "public switched network" changed, or mobile broadband is the "functional equivalent" of CMRS.

Decision to Reclassify

In order to fit mobile broadband into the definition of CMRS, the FCC advanced two arguments. First, it reinterpreted the definition of public switched network to include services that offer access to the Internet. The term now means "the network that includes any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use[s] the North American Numbering Plan *or public IP addresses*, in connection with the provision of switched services."[140] The addition of the words "or public IP addresses" in the definition of public switched network would mean that mobile broadband services interconnect with the public switched network to provide service. The change, if upheld, would permit the inclusion of mobile broadband in the definition of CMRS, thereby permitting those services to be treated as common carriers, as the Open Internet Order does. Second, the FCC argued that even if it could not include access to the Internet in the definition of public switched network, mobile broadband services provide the functional equivalent of a CMRS and therefore should no longer be classified as a private mobile service.

Analysis

As noted above, in order to be a CMRS, a mobile service must be an interconnected service. An interconnected service, under Section 332, must interconnect with the public switched network "as such terms are defined by regulation by the Commission."[141] The Commission argues that this language, delegating responsibility to the Commission to determine what the public switched network is, provides the agency with the authority to add the public Internet to the public switched network.[142] Others argue that, by the term "public switched network," Congress clearly meant the "public switched *telephone* network," and the public Internet may not be added to the definition without congressional action.[143]

Section 332 clearly does grant the FCC the authority to define the term "public switched network."[144] It could be argued that language presumes ambiguity in the parameters of the definition of "public switched network" to which the agency has been delegated the authority to fill in the gaps.[145] The FCC might further argue that its interpretation of "public switched network" never limited the term to the public switched *telephone* network.[146] Instead, the agency

[139] 2015 Order at Para 391.

[140] 2015 Order ¶ 391. Emphasis added.

[141] 47 U.S.C. § 332(d).

[142] 2015 Order ¶ 396.

[143] *Id*. ¶ 395; Pai Dissent, *supra* note 118.

[144] 47 U.S.C. § 332(d).

[145] 2015 Order ¶ 396.

[146] *Id*. (noting that the "Commission expressly rejected calls in 1994 to defined the public switched network as the 'public switched telephone network' finding that a broader definition was consistent with Congress's decision to use the term 'public switched network,' rather 'than the more technologically based term 'public switched telephone network.'").

has previously concluded that the term "should not be defined in a static way and recognized that the network is continuously growing and changing because of new technology and increasing demand." In looking to the statute itself, the Commission has previously found that Congress's choice *not* to use the term "public switched *telephone* network" was a signal that Congress agreed that the term should be malleable, interpreted over time to reflect changes in the network and technology.[147] The clarity of the statute in delegating the meaning of the term to the Commission's interpretation, and the fact that the Commission never limited its definition of the "public switched network" to the "public switched *telephone* network" would likely lead a court to conclude that the FCC has the authority to define the term to include the public Internet.

Some nonetheless argue that "public switched network" clearly refers only to the public switched *telephone* network, and no amount of discretion on the part of the agency would permit a definition that runs contrary to that limitation.[148] The term "public switched network" appears only twice in federal statute. The first is in Section 332. The second is in 47 U.S.C. § 1422, which creates the public safety broadband network and requires the network to provide connectivity between the radio access network and the "public internet, or the public switched network, or both." This language might suggest that Congress believed that the public Internet and the public switched network are separate networks; therefore, the public switched network cannot include the public Internet. Furthermore, there is both FCC[149] and court precedent suggesting that the terms public switched network and public switched telephone network were used interchangeably prior to the adoption of the Telecommunications Act.[150] Given these arguments, it is possible that a reviewing court might decide that the term "public switched network" refers only to the "public switched *telephone* network" and cannot include the public Internet.

However, it could be argued that the existence of the term "public switched network" along with "public internet" in Section 1422 does not necessarily mean that Congress believed that the terms were required by statute to be mutually exclusive. Instead, their separate mentions in that section may simply have been a reflection of reality at the time. As already discussed, Section 332 delegated the interpretation of the term "public switched network" to the Commission. At the time of the enactment of Section 1422, the Commission limited the definition of public switched network to those that use the North American Numbering Plan, a definition that excludes the public Internet. Consequently, it could be argued that Congress may have reasonably decided to include both terms in Section 1422 to ensure that the public safety network would have the authority to interconnect with both, if necessary. Such a decision would not necessarily preclude the FCC from altering its definition of public switched network to include the public Internet under Section 332. Consequently, it appears likely that the FCC's authority to redefine "public switched network" to include the public Internet will be upheld.

In the event that a reviewing court does not uphold the FCC's decision to redefine "public switched network," the FCC has held that mobile broadband should be classified as a CMRS for a second reason. The definition of CMRS includes services that are the "functional equivalent" of a

[147] *Id*.

[148] See *Chevron*, 467 U.S. at 865-866.

[149] MTS and WATS Market Structure; Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos.78-72, 80-286, Order Inviting Further Comments, 50 Fed. Reg. 31749, 41749 (Fed.-State Bd. 1985).

[150] Ad Hoc Telecommunications Users Committee v. FCC, 680 F.2d 790, 793 (D.C. Cir. 1982).

CMRS.[151] The FCC has found that mobile broadband is a "functional equivalent."[152] It reasoned that mobile broadband provides users with the capability to access interconnected VoIP services, which access the public switched network, as it is currently defined; therefore, mobile broadband users have the "capability" to communicate with numbers using the North American Numbering Plan. Consequently, the FCC found that these services are functionally equivalent.

Commissioner Pai, in his dissent, pointed out that interconnected VoIP services and mobile broadband services are distinct services, and that "there is no question that a subscriber to mobile broadband Internet service, without interconnected VoIP service, *cannot* reach the public switched telephone network."[153] Consequently, mobile broadband, though it may provide *access* to a service that is a CMRS, is not a functional equivalent on its own, and cannot be so interpreted. To illustrate the point further, Commissioner Pai wrote "no consumer that I know types a phone number into a web browser to make a call, and no one tries to dial a URL into their phone."[154] If the definition of CMRS remains restricted to services that interconnect to the public switched telephone network, which seems unlikely given the language of Section 332 delegating the interpretation of the term to the FCC, it may be difficult for the FCC to justify its finding that mobile broadband is the functional equivalent of a CMRS, because mobile broadband simply does not appear to provide an equivalent service, though it may enable access to an equivalent service via a separate application.

Forbearance

As discussed above, assuming that the reclassification of broadband services is upheld by a reviewing court, the entirety of Title II of the Communications Act would apply to broadband Internet access services. The FCC, however, found that applying the entirety of Title II to broadband services would not be in the best interest of the public, nor would it fulfill the Commission's statutory obligations under Section 706 of the Communications Act to encourage the deployment of advanced services to all Americans.[155] Consequently, the FCC issued an order forbearing from many provisions of Title II. Most importantly, the Commission will forbear from applying rate regulation and tariffs under Sections 203 and 204;[156] information collection and reporting provisions in Sections 211, 212, 213, and 218-20;[157] the statutory framework governing interconnection and unbundling in Sections 251, 252, and 256;[158] and Section 258,[159] which prohibits unauthorized carrier changes.

Legal Framework

Section 10 of the Telecommunications Act of 1996 grants the FCC the authority to forbear from applying provisions of Title II of the Communications Act to telecommunications services, and creates the standard by which the FCC must abide to grant that forbearance. Specifically, the statute states, in relevant part,

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[151] 47 U.S.C. § 332(d).

[152] 2015 Order ¶ 400.

[153] Pai Dissent, *supra* note 118.

[154] *Id*.

[155] 2015 Order ¶ 434.

[156] 47 U.S.C. §§ 203, 204.

[157] 47 U.S.C. §§ 211, 212, 213, 218-220.

[158] 47 U.S.C. §§ 251, 252, 256.

[159] 47 U.S.C. § 258.

> (a) ... [T]he Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that –
>
> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.
>
> (b) Competitive effect to be weighed. In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.[160]

A plain reading of the statute indicates that the Commission may grant forbearance to entire classes of telecommunications carriers or telecommunications services. In this case, the FCC has decided to grant forbearance to the entire class of telecommunications services that include broadband Internet access services. Furthermore, nationwide grants of forbearance have also been upheld to be permissible.[161] Consequently, if the other statutory criteria for granting forbearance are met, it appears that the FCC may grant forbearance to all broadband services on a nationwide basis.

Furthermore, Section 706 of the Telecommunications Act of 1996 directs the FCC to use forbearance to "encourage the deployment" of advanced services, including broadband Internet access services, to all Americans.[162] In making forbearance decisions pursuant to Section 10, the Commission has been known to take the goals of Section 706 into account.

Analysis

The D.C. Circuit Court of Appeals has acknowledged that the FCC may take Section 706 into account when granting forbearance under Section 10.[163] In *EarthLink, Inc. v. FCC,* the D.C. Circuit upheld an FCC order to forbear from applying unbundling requirements to fiber-based network facilities owned by Bell Operating Companies (BOC).[164] EarthLink, a company that provided Internet access over these fiber-based facilities, claimed that forbearance was inappropriate because the FCC's order would harm competition. The D.C. Circuit agreed that the forbearance order would harm competition between EarthLink and the owner of the facilities, but that did not make the FCC's order invalid. In its decision, the FCC had considered intermodal

[160] 47 U.S.C. § 160.

[161] See, USTA II, 359 F.3d at 578 (upholding FCC's nationwide forbearance from Section 251 unbundling requirements).

[162] 47 U.S.C. § 1302.

[163] EarthLink, Inc. v. FCC, 462 F.3d 1 (D.C. Cir. 2006).

[164] *Id*.

competition in the market (e.g., competition between the owner of the fiber networks and cable companies providing cable modem services).[165] The FCC noted that cable modem service providers were undoubtedly the dominant figures in the market for high-speed Internet services, and determined that eliminating the unbundling requirement for BOC's fiber networks would spur competition between BOC and the dominant cable providers.

The court and the FCC found that Section 706 directs the FCC to use its forbearance powers to advance the deployment of telecommunications services to all Americans. The FCC had made the decision to balance "short-term competitive effects and future developments" when issuing its forbearance order.[166] The idea, on the part of the agency, was that forbearance from the unbundling requirement would spur investment in Bell Operating Companies' fiber networks, which would eventually increase competition with dominant providers of cable broadband services. In this way, the FCC's Section 10 forbearance analysis may be informed by the goals of Section 706, and the agency was permitted to discount short-term competitive harms in favor of potential long-term competitive benefits as well as the fulfillment of the agency's duty to remove barriers to infrastructure investment under Section 706.

Furthermore, in 2014, the FCC found that broadband services were not being deployed at a sufficiently rapid pace under Section 706(b).[167] The agency, therefore, is required to take action to remove barriers to infrastructure investment.[168] Rate regulation, tariffing, and unbundling requirements are often argued to be barriers to infrastructure investment.[169] Overregulation might also be argued to be a barrier to investment, as money spent to comply with regulations is money that is not spent on building out and improving a network.

Consequently, the FCC argues that its broad forbearance meets the standard of Section 10, as informed by its Section 706 mandate. The provisions from which it has chosen to forbear, in the opinion of the agency, are not necessary because their purposes are either otherwise served by the regulatory structure that the agency has outlined elsewhere in the Order, or are not appropriate to apply to broadband services.[170] For those reasons, the FCC argues that applying those regulations to broadband services would erect barriers to infrastructure investment contrary to the FCC's mandate to remove them under Section 706.

Some point out that the FCC's forbearance order does not exhaustively analyze the effect on competition the Order will have, nor does the agency find that the Order will have a positive effect on competition.[171] Section 10(b) explicitly directs the FCC to consider the effect of forbearance on competition in the marketplace.[172] Regardless of whether the FCC conducted a searching competitive analysis, the Commission argues that it is not required by Section 10 to

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[165] *Id.* at 7.

[166] *Id*. at 11.

[167] In the Matter of Inquiry Concerning the Deployment of Advanced Services 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 (2015).

[168] 47 U.S.C. § 1302(b).

[169] See, e.g., Hal Singer, Want To Keep Telecom Investment Going Strong? Avoid Rate Regulation Under Title II, Forbes (Sept. 10, 2014) available at http://www.forbes.com/sites/halsinger/2014/09/10/want-to-keep-telecom-investment-going-strong-avoid-rate-regulation-under-title-ii/.

[170] 2015 Order ¶ ¶ 493-536.

[171] *Id*. at para 439; Pai Dissent, *supra* note 118.

[172] 47 U.S.C. § 160(b).

find that the Order will have a positive effect on competition to conclude that forbearance is in the public interest under Section 10(a)(3). "The Commission has in the past granted forbearance from particular provisions of the Act or regulations where it found the application of other requirements (rather than marketplace competition) adequate to satisfy the section 10(a) [public interest] criteria."[173] The language of the statute appears to support the FCC's argument. Section 10(b) directs the agency to consider whether forbearance will increase competition, and, if it will, such increased competition should be considered *sufficient* to find that forbearance is in the public interest under Section 10(a). The FCC does consider the effect on competition that its forbearance decision will have, and finds that "the record ... does not provide a strong basis for concluding that the forbearance granted in this Order is likely to directly impact the competitiveness of the marketplace for broadband Internet access services."[174] The FCC points out that nothing in Section 10(b) indicates that promotion of competitive market conditions is *necessary* to find that forbearance is in the public interest, though the FCC must *consider* competition under its 10(a)(3) analysis. Considering that the FCC has interpreted the public interest more broadly than competition enhancement,[175] it seems likely that the FCC is correct that it may forbear from applying regulations under Section 10 even when the regulation is found by the agency to be, at best, competitively neutral.

Commissioner Pai argues that the FCC has always examined competition when the regulations to be repealed were economic in nature and found that forbearance would benefit a competitive marketplace.[176] Commissioner Pai also points out that the decision of the D.C. Circuit that supports the FCC's argument that it may take Section 706 into account when issuing forbearance orders, reviewed a forbearance order that found that forbearance would *promote* competition. However, nothing in Section 10 delineates economic provisions of the Communications Act from any other provision. It seems unlikely that a reviewing court would find a distinction between the two, such that one category requires competitive analysis and the other does not, when the statute itself makes no distinction.

The FCC's decision to forbear, in whole or in part, from many statutory provisions and regulations seems unique.[177] The wholesale nature of this decision arguably creates uncertainty in and of itself. Will a reviewing court look at each of the individual provisions, assuming they are also challenged wholesale, to determine whether all of the Section 10 criteria were met in each case? Considering the FCC's abbreviated analysis of many of the provisions from which it forbears, it could be argued that the criteria for Section 10 forbearance have not been met properly.[178]

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[173] 2015 Order ¶ 439.

[174] *Id*. at ¶ 501. In drawing this conclusion, the FCC incorporates by reference Section III.B.2. of the Order, which discusses in detail the market incentives for BIAS providers to limit the openness of Internet access. In this section, the FCC engages in a more detailed discussion of the BIAS marketplace and the status of competition within it, including intermodal competition, switching costs, and the differences between the fixed and mobile competitive markets. *Id*. at ¶¶ 78-101.

[175] *Id*. at FN 1305.

[176] Pai Dissent, *supra* note 118.

[177] 2015 Order ¶ 493.

[178] See Pai Dissent, *supra* note 118 ("In just 109 paragraphs, the Commission purports to analyze whether to forbear from every statutory provision and regulation applicable to Title II services on a nationwide basis for every broadband Internet service provider in the country.").

For its part, the FCC pleads for patience. In its forbearance decision, it makes clear that it is forbearing from these provisions "at this time."[179] "It is within the agency's discretion to proceed incrementally."[180] In the Order, the FCC maintains that it was "guided by section 706," and consequently "permissibly may decide to balance the future benefits of' encouraging broadband deployment 'against the short term impact from a grant of forbearance."[181] In the agency's estimation, the provisions from which it forbears would have erected barriers to deployment in contravention of Section 706, and adequate safeguards against potential consumer harms are provided by the provisions of Title II that the FCC does apply as well as the net neutrality rules themselves. Considering the novelty of the FCC's forbearance decision in the 2015 Open Internet Order, it is unclear how a court will respond.

Section 706 of the Telecommunications Act of 1996

In its 2010 Open Internet Order, the FCC determined that Section 706 of the Telecommunications Act is an independent source of regulatory authority for the agency.[182] The Commission also found that network neutrality rules would fulfill their statutory obligations under Section 706. In its suit challenging the FCC's authority to issue the 2010 order, Verizon challenged both of these conclusions.[183] In *Verizon*, the Court of Appeals for the D.C. Circuit had accorded deference to the FCC's interpretation of Section 706 and upheld the agency's exercise of that authority. Despite this precedent, arguments over the true extent of the FCC's authority under Section 706 will likely resurface in the legal challenges to the 2015 order.

Legal Framework

Section 706 was enacted as a part of the Telecommunications Act of 1996. Section 706(a) provides the following:

> (a) The Commission and each State 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.[184]

Section 706(b) directs the FCC to periodically review the availability of advanced telecommunications services (which include broadband services). If the Commission finds that those services are not being deployed in a reasonable and timely fashion, as it found in 2014, Section 706(b) calls upon the FCC to take action to remove barriers to infrastructure investment and promote competition. The FCC bases its authority to enforce net neutrality rules on both of these subsections.

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[179] 2015 Order at 493.

[180] *Id*. at 495 (citing *Fox*, 556 U.S. at 522 ("Nothing prohibits federal agencies from moving in an incremental manner.")).

[181] *Id*. (internal citations omitted).

[182] 2010 Order, *supra* note 3.

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

[184] 47 U.S.C. § 1302(a).

Language in the Telecommunications Act indicates that the act is to be a part of the Communications Act of 1934. For example, Section 1(b) states, "whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 ... "[185] Language such as this has led the Supreme Court to hold that "Congress expressly directed that the 1996 Act ... be inserted into the Communications Act."[186] Inserting the Telecommunications Act into the Communications Act of 1934 has important consequences. For example, in portions of the Telecommunications Act where the FCC is directed to accomplish a goal, but no direction is given as to how the agency is to achieve it, general provisions of the Communications Act, like Section 4(i), which grants the agency the authority to make rules, provide the agency the authority to take action.[187]

Section 706 was not inserted into any particular title of the Communications Act. Instead, it was left as a freestanding provision of law. Other provisions of the Telecommunications Act also remained freestanding.[188] Questions have arisen as to whether the fact that Section 706 remains a freestanding provision indicate that Section 706 was not actually inserted into the Communications Act, and, if it was not, whether that has an effect on the FCC's authority to act under that section. Other questions related to the Commission's interpretation of its authority under Section 706 also remain.

Analysis

There are two primary arguments against the FCC's authority under Section 706. The first is that Section 706 is not an independent grant of authority for the agency to take action. The second is that, even if Section 706 is an independent grant of authority, that authority does not encompass the imposition of network neutrality rules.

In its 1998 interpretation of Section 706, the FCC found that it was not a grant of independent authority. The Commission wrote, "section 706(a) does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods."[189] In 2010, the D.C. Circuit, examining the FCC's authority under Section 706, noted that the language of the statute at least suggested that the FCC might have independent authority to act pursuant to Section 706, but the court found that the agency was bound by its prior decision that the provision granted no independent authority.[190] In the 2010 Open Internet Order, the FCC reinterpreted Section 706 as an independent grant of authority to act to ensure the deployment of broadband services.[191] The agency argued that net neutrality rules would ensure the openness of the Internet, which would drive demand for broadband services, which would, in turn, spur deployment. The FCC essentially argued that the possibility of unfair discrimination or the blocking of legal content on the Internet was *itself* a barrier to infrastructure investment and that net neutrality rules would remove that barrier.

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[185] P.L. 104-104, 110 Stat. 56 (1996).

[186] AT&T v. Iowa Utils. Bd., 525 U.S. 366, 377 (1999).

[187] Codified at 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.").

[188] See, Telecommunications Act §§ 202(h), 704(c).

[189] In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 FCC Rcd 24011, 24044 (1998).

[190] Comcast v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

[191] 2010 Order, *supra* note 3.

The *Verizon* court upheld these interpretations.[192] First, the court found that Section 706 was ambiguous as to whether it granted the FCC independent authority. As discussed above, Supreme Court precedent indicates that where a statute is ambiguous, courts are to grant deference to the agency in interpreting this ambiguity.[193] In a recent case, the Supreme Court extended this principle to ambiguity regarding the scope of an agency's authority. As a result, the D.C. Circuit Court of Appeals granted the FCC's interpretation of Section 706 deference. The court found that Section 706 does provide that the FCC "shall encourage the deployment" of advanced telecommunications services, including broadband services, and it lists various actions that the agency should take to accomplish that goal; therefore, it was reasonable for the agency to interpret such language as an independent grant of authority. The court also went on to find that it was reasonable for the agency to interpret net neutrality rules as advancing the deployment of broadband services.

The recently filed legal challenge to the FCC's 2015 Open Internet Order will be heard by the D.C. Circuit Court of Appeals. Consequently, the reviewing panel will be bound by the precedent set by the *Verizon* Court and will likely uphold the FCC's interpretation of its Section 706 authority.[194] However, parties may still argue that the FCC lacks independent authority to act under Section 706 to preserve the argument for later appeal to either an *en banc* panel of the D.C. Circuit or to the Supreme Court.

Verizon, in its previous challenge to the FCC's 2010 order, and Commissioner Pai, in his dissent to the 2015 order, argued that Section 706 is not an independent grant of authority.[195] Instead, they argue that it is merely "an admonition" from Congress to use authority, *granted elsewhere in the Communications Act*, towards the goal of deploying advanced telecommunications services to all Americans.[196] To support this argument, they point out that the list of actions the FCC and state Commissions are directed to take by Section 706 are actions defined by other sections of the law.[197] They also argue that the fact that Section 706 was left as a freestanding provision of law indicates that it was never meant to be inserted into the Communications Act.[198] Taken together, opponents of independent authority under Section 706 argue that these facts indicate that Congress never intended Section 706 to be an independent grant of authority for the FCC to do anything. Instead, it was intended to direct the agency and state Commissions to use authority granted elsewhere in the act to support the goal of universal broadband deployment.

Whether a reviewing court would accept this argument will turn again on the clarity of the statutory language. While there are good arguments that Section 706(a) perhaps was not meant to be an independent grant of regulatory authority, a court will always begin its analysis with the

[192] *Verizon*, 740 F.3d at 623.

[193] City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013).

[194] In Re Federal Communications Commission, In the Matter of Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24 (Released March 12, 2015), MDL Consolidation Order, D.C. Cir. No. 15-1063; Fifth Cir. No. 15-60201 (March 30, 2015) (consolidating the cases in the D.C. Circuit). available at https://prodnet.www.neca.org/publicationsdocs/wwpdf/33015nncourt.pdf.

[195] *Verizon*, 740 F.3d at 636; Pai, Dissent, *supra* note 118.

[196] Pai, Dissent, *supra* note 118.

[197] Section 706(a) directs the use of price cap regulation, forbearance, and other measures the promote competitive markets. The agency has had authority to use price cap regulation since the 1990's. Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 5 FCC Rcd 6786 (1990). Section 10 of the Telecommunications Act grants the agency forbearance authority. 47 U.S.C. 160. 47 U.S.C. 251 grants the agency "regulatory forbearance" authority.

[198] Pai, Dissent, *supra* note 118.

words of the statute itself. Section 706(a) clearly states that the Commission "shall encourage deployment ... by utilizing" various regulatory measures.[199] This language, coupled with the arguments that there is evidence that Congress did not intend the language to be an independent grant of authority, added to the *Verizon* Court's finding that the language is ambiguous, might lead a reviewing court to conclude that Section 706 is ambiguous as to whether it grants independent authority. The Supreme Court has said that courts should accord deference to the agency's interpretation of a statute, even when that ambiguity involves the scope of the agency's authority.[200] Consequently, it is possible that a court reviewing the FCC's authority under Section 706 would find that the agency's interpretation should be accorded deference.

If a court finds that deference is owed to the FCC's interpretation of its authority under Section 706, the court will not substitute its judgment for the agency's absent a finding that the agency's interpretation of the statute is unreasonable.[201] The *Verizon* court found that, when setting forth its analysis that Section 706 grants the FCC independent authority, the agency "analyzed the statute's text, its legislative history, and the resultant scope of the Commission's authority, concluding that each of these considerations supports the view that Section 706(a) constitutes an affirmative grant of regulatory authority."[202] Unless a reviewing court disagrees with the assessment that the FCC provided a reasoned explanation for its interpretation of Section 706, the agency's interpretation will likely be upheld again.

The same question of reasonability applies to the question of whether the FCC properly interpreted the scope of its authority under Section 706 to include the imposition of net neutrality rules. Section 706(a) directs the agency to remove barriers to infrastructure investment. In its 2010 order, the FCC essentially argued that the possibility of unfair discrimination and blocking of legal content on the Internet was itself a barrier to infrastructure investment, and that net neutrality rules would remove that barrier.[203] The *Verizon* court deferred to the Commission's judgment, finding it to be reasonable.

It is worthwhile to note, at this time, that the FCC's authority pursuant to Section 706 may not be of primary concern under the 2015 order. Because the 2015 order relies on Sections 201 and 202 of the Communications Act, which generally prohibit unjust and unreasonable discrimination in charges and practices, in addition to Section 706, if the FCC is found to lack independent authority to act under Section 706, the FCC could still assert Sections 201 and 202 to impose net neutrality rules.[204] If, however, the FCC has failed to properly justify the reclassification of either broadband service as a telecommunications services or mobile broadband as commercial mobile radio services, the FCC would no longer be able to cite Sections 201 or 202 as sources of authority for implementing the rules, and Section 706 would again rise to prominence in the debate.

[199] 47 U.S.C. § 1302(a).

[200] City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013).

[201] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) ("a court is not to substitute its judgment for that of the agency.").

[202] *Verizon*, 740 F.3d at 637.

[203] 2010 Order, *supra* note 3.

[204] See 2015 Order ¶ ¶ 273-287.

Administrative Procedure Act

The last major legal question raised by the 2015 Open Internet Order is one of process. Commissioner Pai, in his dissent to the 2015 order, has argued that the FCC did not comply with the Administrative Procedure Act in its issuance of the final rules.[205] The Commissioner advances two primary arguments: that the FCC did not give proper notice of reclassification, as well as other major actions taken in the order, in its Notice of Proposed Rulemaking, and that the final rules are not a "logical outgrowth" of the proposed rules.

Legal Framework

The APA requires agencies engaged in informal rulemaking to publish "general notice of proposed rule making ... in the Federal register."[206] Agencies are not required to publish the precise rules that they plan to adopt in the published notice. Instead, "the adequacy of notice must be tested by determining whether it would fairly apprise interested persons of the 'subjects and issues' before the agency."[207] Though this standard does permit a level of generality in a notice of proposed rulemaking, the agency cannot be too general in its proposal. "[A]n agency proposing informal rulemaking has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible."[208]

Related to the requirement that notice be sufficient is a requirement that the final rules be a "logical outgrowth" of the notice of proposed rulemaking.[209] The APA's structure presumes that a final rule will differ at least in some ways from the rules initially proposed. An agency will not be required to engage in a new round of notice and comment on proposed rules, so long as the final rules are a logical outgrowth of the notice of proposed rulemaking. The test for whether the final rules are a logical outgrowth of the proposed rules is satisfied "depends ... on whether the affected party 'should have anticipated' the agency's final course in light of the initial notice."[210]

Analysis

The Commission argues that it provided sufficient notice and that the final rules are a "logical outgrowth" of the proposed rules.[211] The Commission adopted its Notice of Proposed Rulemaking, which eventually became the 2015 Open Internet Order, on May 15, 2014.[212] The proposal was a direct response to the remand ordered by the *Verizon* court. As discussed earlier, the *Verizon* decision had struck down the FCC's no-blocking and anti-discrimination rules because they impermissibly treated broadband service providers, which were not telecommunications services at the time, as common carriers, *per se*, in contravention of the Communications Act. In responding to the remand order, the Commission expressed a desire to

[205] Pai, Dissent, *supra* note 118.

[206] 5 U.S.C. § 553 (b).

[207] Prometheus Radio Project v. FCC, 373 F.3d 372, 411 (3d Cir. 2004). (citations omitted) ("*Prometheus I*").

[208] Home Box Office, Inc. v. FCC, 567 F.2d 9, 35-36 (D.C. Cir. 1977).

[209] Crawford v. FCC, 417 F.3d 1289, 1295 (D.C. Cir. 2005).

[210] *Id*. (quoting Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 549 (D.C. Cir. 1983)).

[211] 2015 Order ¶ 206.

[212] 2014 NPRM, *supra* note 5.

create robust and legally sustainable network neutrality rules, and asked for comment on how to accomplish that goal.[213]

To direct the discussion, the Commission made a detailed proposal, using the *Verizon* Court's decision for guidance, of new rules to govern the management of broadband access services.[214] The more detailed portion of the notice offered rules that the Commission believed it could impose, consistent with the *Verizon* decision, without reclassifying broadband Internet access services under Title II. Despite appearing to lean in the direction of avoiding reclassification, the Commission asked for comment on whether and how to reclassify broadband Internet services under Title II.[215] Furthermore, the Commission made clear at the beginning of the NPRM that it would "seriously consider the use of Title II of the Communications Act as the basis for legal authority."[216] The Commission also asked for comment on whether mobile broadband could be considered a commercial mobile radio services.[217] As for forbearance, the agency noted that, if reclassification was the pathway chosen by the agency, forbearance from portions of Title II might be appropriate.[218] Aside from applying Sections 201, 202, and 208 to broadband services, the Commission asked for comment about which other provisions of Title II should apply to broadband services and which provisions should not. It also asked for arguments as to how the Section 10 forbearance standard was met in relation to the Title II provisions that commenters believed should not apply to broadband services.

Critics of the sufficiency of the FCC's notice point out that the vast majority of the NPRM focused on proposing rules that would not have required reclassification.[219] In comparison to that portion of the proposal, the section asking about how and whether to apply Title II was lacking in specificity. For example, nowhere in the NPRM does the Commission provide notice that it is considering changing the definition of "public switched network," yet that is one of the things that the agency did in the 2015 order. The only arguable signal that this change was a possibility was the question in the order about whether mobile broadband could be considered a commercial mobile radio service.[220] Critics therefore argue that the proposal did not provide sufficient notice of the eventual final rules.

The Commission, however, argues that notice was sufficient and that the final rules are a logical outgrowth of the NPRM. The Commission never removed Title II reclassification as a possibility in its notice of proposed rulemaking. It made clear that its ultimate goal was to create strong and legally sustainable network neutrality rules that would include some version of a no-blocking and anti-discrimination rule. The only question was how strong those rules would be. The agency argues that bright-line network neutrality rules are a logical outgrowth of a notice that proposed reclassifying broadband services. Furthermore, assuming reclassification was the chosen option, it was also logical to assume the application of Title II, at least to some extent. The Commission had requested comment about forbearance and how it should be applied, in the event that Title II reclassification was chosen as the solution to imposing sustainable net neutrality rules. To support its argument that notice was sufficient, and that the final rules are a logical outgrowth of the

[213] *Id*. ¶ 4.

[214] *Id*. ¶ ¶ 25-141.

[215] *Id*. ¶ ¶ 148-155.

[216] *Id*. ¶ 4.

[217] *Id*. ¶ ¶ 153-155.

[218] *Id*.

[219] Pai, Dissent, *supra* note 118.

[220] See 2014 NPRM at para 149.

notice of proposed rulemaking, the agency points out that it received comment from the public on each major interpretive decision that it made, including the decision to redefine public switched network.[221] Considering that so many public commenters seemed to understand the potential changes an order that reclassified broadband services would require, the Commission argued that the public was on notice that reclassification, and all of its attendant consequences, was a possible final result, and that the final rules were a logical outgrowth of the NPRM because interested parties not only should have anticipated, but *did anticipate* the agency's final rule.

Rules implemented by the FCC have been struck down for insufficiency of notice in the past. For example, in 2011, the Third Circuit struck down the agency's order creating a new standard for the newspaper-broadcast cross-ownership rules.[222] In that proceeding, the Commission had included only two general questions related to the newspaper-broadcast cross-ownership rule.[223] Erstwhile Chairman Kevin Martin published an op-ed proposing amendments to the rule following the close of the comment and reply periods and allowed another period of time for the public to comment on the proposal announced in his op-ed. Following the closure of that period, the Commission adopted Chairman Martin's proposed rule. In reviewing that order, the Third Circuit found that Chairman Martin's op-ed did not serve as notice under the APA at all; therefore, the agency was left with the two general questions in the original NPRM upon which to base its argument that it had provided sufficient notice. The court held that it was not because "it was not clear from the FNPR which characteristics the Commission was considering or why."[224] Key aspects of the factors underlying the final rule were not included in the FNPR, and they could not have been anticipated by affected parties based upon the general questions in the rule.

Commissioner Pai, in his dissent, cites this incident as being similar to the deficiencies that he sees in the notice provided prior to the 2015 order.[225] He points out that the Commission asked only general questions about Title II reclassification in the NPRM, and that it provided virtually no specificity as to which aspects of Title II might be subject to forbearance. Moreover, Commissioner Pai takes particular issue with the reclassification of mobile broadband as a commercial mobile radio service. Nowhere in the FCC's NPRM did the agency mention that it might be thinking about redefining the term "public switched network." Even assuming that the FCC *has authority* to redefine that term to include the public Internet, which Commissioner Pai disputes, the Commission provided no notice that it was considering this action in the range of alternatives before it.

"A notice that contains no rule proposals complies with the APA so long as it is 'sufficient to fairly apprise interested parties of all significant subjects and issues involved.'"[226] In order to satisfy this standard, an agency "must 'describe the range of alternatives being considered with reasonable specificity.'"[227] The FCC did not expound on Title II reclassification at length in its NPRM, but it did pose important questions about the legal authority to reclassify, how reclassification might affect its ability to impose net neutrality rules, and whether and how to apply its forbearance authority.[228] These questions all related to an already extant and operable

[221] 2015 Order ¶ 394.

[222] Prometheus Radio Project v. FCC, 652 F.3d 431, 449 (3d Cir. 2011). ("*Prometheus II*").

[223] *Id*. at 449.

[224] *Id*. at 450.

[225] Pai, Dissent, *supra* note 118.

[226] *Prometheus II*, 652 F.3d at 450. (internal citations omitted).

[227] *Id*. (citing Horsehead Res. Dev. Co. v. Browner, 16 F.3d 1246 (D.C. Cir. 1994)).

[228] 2014 NPRM, *supra* note 5, ¶ ¶ 148-155.

statutory regime, with which many interested parties were familiar, and if they were not, they had the opportunity to become familiar. Unlike the newspaper-broadcast cross-ownership rule that was struck down, the FCC did not invent a new standard for assessing the application of a rule between the NPRM and the final rule. Instead, it asked about its authority to reclassify, a discussion in which the agency had engaged in the past, not only in rulemakings related to net neutrality, but also in proceedings that resulted in a Supreme Court decision. It also asked about how a statutory scheme might apply to services, which arguably could be covered by it. Furthermore, many commenters in the proceeding appeared to be aware that reclassification, and Title II regulation, were a possibility.[229] It seems, therefore, that the FCC could plausibly argue that notice, in this case, was sufficient. While it may have been more prudent for the agency to have issued a further notice of proposed rulemaking with additional comment and reply comment periods, considering the magnitude of the regulatory shift the order implements, it is unclear that the FCC was *required* to issue a further notice under the APA in order for the rules to be upheld.

A closer question might be presented by the FCC's decision to reclassify mobile broadband as a commercial mobile radio service. Nowhere in its notice did the agency present the question of whether it should amend the definition of "public switched network." It could be argued that the definition of commercial mobile radio services depends on the definition of interconnected service which depends on the definition of public switched network, and, therefore, interested parties would be on notice that if the Commission was considering redefining services included in the definition of commercial mobile radio service, it would necessarily consider the definition of the public switched network.[230] However, the Commission did not ask if it should change the definition of commercial mobile radio service. It simply asked whether mobile broadband could be considered a commercial mobile radio service.[231] It could be argued that the notice, at least insofar as it posed questions about mobile broadband as a commercial mobile radio service, did not "describe the range of alternatives being considered with reasonable specificity"[232] because it did not mention that the FCC was considering changing its definition of commercial mobile radio service.

If the agency failed to provide sufficient notice for any of the major changes accomplished by the order, those portions of the order would likely be remanded to the Commission for further proceedings. A decision striking down any portion of the Order on procedural grounds could delay the implementation of the rest of the order, as well.

Recent Developments

Numerous parties have appealed the FCC's 2015 Open Internet Order.[233] Those cases have been consolidated in the U.S. Court of Appeals for the D.C. Circuit under the caption, *United States*

[229] 2015 Order; see also, Knight Foundation, Decoding the Net Neutrality Debate, available at http://www.knightfoundation.org/features/netneutrality/ (analyzing comments received by the FCC from the public in the Open Internet proceeding and finding numerous references to reclassification).

[230] See 2015 Order ¶ 394.

[231] 2014 NPRM, *supra* note 5, ¶ 149.

[232] *Prometheus II*, 652 F.3d at 450.

[233] U.S. Telecom Association v. FCC, D.C. Cir. No. 15-1086 (Petition for Review, filed Apr. 13, 2015); National Cable & Telecommunications Association v. FCC, D.C. Cir. No. 15-1090 (Petition for Review, filed Apr. 14, 2015); CTIA-The Wireless Association v. FCC, D.C. Cir. No. 15-1091 (Petition for Review, filed Apr. 14, 2015); AT&T v. FCC, D.C. Cir. No. 15-1092 (Petition for Review, filed Apr. 14, 2015); American Cable Association v. FCC, D.C. Cir. No. 15-1095 (Petition for Review, filed Apr. 15, 2015).

Telecom Association, et al. v. Federal Communications Commission.[234] The *Federal Register* publication of the order indicated that the order would take effect on June 12, 2015.[235] Parties appealing the order filed a motion with the appellate court to stay the effective date of the order pending review. The court of appeals denied that motion, allowing the new rules to take effect on June 12.[236] The court of appeals also granted a motion for expedited review of the case, instructing the parties to formulate a briefing schedule.[237] Oral argument was heard in December of 2015.[238] A decision is expected sometime in 2016.

In Congress, H.R. 2666, entitled the No Rate Regulation of Broadband Internet Access Act, has been reported out of the House Committee on Energy and Commerce, and will be voted upon by the full House of Representatives. As noted above, assuming that the 2015 Open Internet Order is upheld in court, the FCC has the authority to regulate the rates charged for broadband Internet access services, but decided to forbear from regulating those rates directly.[239] Some Members of Congress are seeking to enact in statute Chairman Wheeler's promise not to regulate broadband rates.[240] H.R. 2666, if enacted, would prohibit the FCC from regulating the rates charged for BIAS, as those services are defined in the FCC's Open Internet Order. Rates would be defined by the bill to mean the amount charged by a BIAS provider for the delivery of Internet traffic and regulation would be defined to mean "the use by the Commission of rulemaking or enforcement authority to establish, declare or review the reasonableness of" a rate. H.R. 2666, as reported, also makes clear that the prohibition on rate regulation does not affect the FCC's authority to condition the receipt of universal service support on the regulation of rates charged for the supported service, to enforce the truth-in-billing-rules, or to enforce rules related to paid prioritization.

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[234] U.S. Telecom Association v. FCC, D.C. Cir. No. 15-1063.

[235] 80 Fed. Reg. 19737 (April 13, 2015).

[236] U.S. Telecom Association v. FCC, D.C. Cir. No. 15-1063, Order Denying Motion for Stay and Granting Motion for Expedited Review (June 11, 2015) available at http://docs.techfreedom.org/oiostaydenial.pdf.

[237] *Id*.

[238] Alina Selyukh, 5 Things to Know: Net Neutrality is Back in Court, NPR (Dec. 4, 2015), available at http://www.npr.org/sections/thetwo-way/2015/12/04/458444673/5-things-to-know-net-neutrality-is-back-in-court.

[239] Under the Communications Act, all telecommunications services, including broadband services, are required by Sections 201 and 202 of the Communications Act to be offered on a non-discriminatory basis, and on terms that are not unjust or unreasonable. 47 U.S.C. §§ 201, 202. These provisions do provide the FCC with some authority to regulate rates charged both directly and indirectly. Furthermore, Sections 203, 204, and 205, among others, also provide the FCC with the authority to affirmatively regulate the rates charged for broadband services. 47 U.S.C. §§ 203, 204, 205. Under those provisions, the FCC could require broadband service providers to file schedules of charges that would be binding upon the providers. The FCC could also set reasonable rates, or a reasonable range of rates, that service providers could charge for broadband service, depriving providers of the ability to set their own rates. Within the 2015 Open Internet Order, the FCC did assert its authority under Sections 201 and 202 to regulate the provision of broadband services. As discussed above, the FCC's authority to issue the net neutrality rules are partially based upon the FCC's authority under Sections 201 and 202 to prohibit unreasonable discrimination in the provision of service. However, the FCC did not assert its authority under Sections 201 and 202 to regulate the reasonability of prices charged for broadband services. Furthermore, the FCC examined whether it should exercise its authority to affirmatively regulate broadband rates under Sections 203, 204, and 205, and determined that it would not do so. 2015 Order ¶¶ 497-507.

[240] *Full Committee Markup of* H.R. 2666, *The No Rate Regulation of Broadband Act Before the H. Comm. on Energy and Commerce*, 114th Cong. __ (2016) (opening statement of Rep. Greg Walden), available at http://docs.house.gov/meetings/IF/IF00/20160314/104684/HMKP-114-IF00-MState-W000791-20160314.pdf.

These clarifications appear to be aimed at addressing concerns raised by some who opposed the introduced version of H.R. 2666.[241] Some Members of Congress[242] and interest groups,[243] when discussing the introduced version of H.R. 2666, had noted that there may be a difference between a prohibition on "the regulation of the rates charged" for broadband services and a prohibition on the use of the "rate-setting" authorities granted to the FCC in Title II, because many regulations could have an effect on the rates charged for services, while not actually setting a rate, or a range of rates, for the service.[244] In other words, in the view of its opponents, the bill's language, as it was introduced, could have constrained the FCC's authority further than the FCC has already restrained itself in the Open Internet Order. The added language may alleviate some of these concerns, in that the definitions of "rate" and "regulation" appear to be more narrowly drawn, and the bill also makes clear that the FCC will still have the authority to enforce some rules that may affect the rates charged for broadband; however, the reported bill may still be considered too broad for its opponents to endorse.[245]

Lastly, the FCC stated in the 2015 Open Internet Order that it would be creating new privacy rules under Section 222 of the Communications Act for broadband Internet access service providers. On April 1, 2016, the FCC released a Notice of Proposed Rulemaking as a first step in the administrative process of creating those rules. The comment period closes on May 27, 2016.[246]

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[241] H.Rept. 114-478 ("Section 3 details specific exceptions from the prohibition, intended to prevent unintended effects, many of which were identified by members and witnesses during Committee consideration of the legislation... [the definition of regulation] is intended to reach one of the motivating concerns behind the bill: after-the-fact rate regulation through enforcement.").

[242] See Paul Weiss, LLP, Current Telecom Developments (Jan. 15, 2015)("Other Democrats on the panel warned that H.R. 2666 is overly broad and could sweep away protections against anticompetitive interconnection charges and monopoly rates. Ranking subcommittee member Anna Eshoo (D-CA) also cautioned that passage of H.R. 2666 could impact the FCC's ability to regulate special access and universal service.").

[243] See, e.g., Matt Wood, The Truth Behind the Doublespeak on Internet Rate Regulation, BLOOMBERG BNA (Feb. 11, 2016).

[244] *Id*. ("[H.R. 2666] endangers those very same principles. It doesn't just take rate setting off the table, or cement in a new statute what the FCC has already decided to do by forbearing from Sections 203 and 205. It would prevent the FCC from assessing entire categories of unfair broadband-provider practices.").

[245] See H.Rept. 114-478 (dissenting views).

[246] *In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, NPRM, FCC 16-39 (April 1, 2016), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0401/FCC-16-39A1.pdf.

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