

**DISSENTING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Protecting and Promoting the Open Internet*, GN Docket No. 14-28.

Today a majority of the Commission attempts to usurp the authority of Congress by re-writing the Communications Act to suit its own “values” and political ends. The item claims to forbear from certain monopoly-era Title II regulations while reserving the right to impose them using other provisions or at some point in the future. The Commission abdicates its role as an expert agency by defining and classifying services based on unsupported and unreasonable findings. It fails to account for substantial differences between fixed and mobile technologies. It opens the door to apply these rules to edge providers. It delegates substantial authority to the Bureaus, including how the rules will be interpreted and enforced on a case-by-case basis. And, lest we forget how this proceeding started, it also reinstates net neutrality rules. Indeed, it seems that every bad idea ever floated in the name of net neutrality has come home to roost in this item.¹

To read public statements over the last few weeks, one might think that this item uses Title II in some limited way solely to provide support for net neutrality rules and to protect consumers. And a casual observer might be misled to believe that the ends justify the means.

Along the way, however, the means became the end. Net neutrality is now the pretext for deploying Title II to a far greater extent than anyone could have imagined just months ago. And that is the reality that the Commission tried to hide by keeping the draft from the public and releasing a carefully worded “fact” sheet in its place.

While I see no need for net neutrality rules, I am far more troubled by the dangerous course that the Commission is now charting on Title II and the consequences it will have for broadband investment, edge providers, and consumers. The Commission attempts to downplay the significance of Title II, but make no mistake: this is not some make believe modernized Title II light that is somehow tailored to preserve investment while protecting consumers from blocking or throttling. It is fauxbearance: all of Title II applied through the backdoor of sections 201 and 202 of the Act, and section 706 of the 1996 Act. Moreover, all of it is premised on a mythical “virtuous cycle”—not actual harms to edge providers or consumers.

In some ways, this evolution is not surprising. I have consistently expressed concerns, across a number of proceedings—tech transitions, text-to-911, over-the-top video, VoIP symmetry, etc.—that this Commission has been slowly but steadily attempting to bring over-the-top and other IP services within its reach. Now the Commission goes all in and subjects broadband networks—the foundation of the Internet—to Title II itself. Furthermore, because there is no limiting principle, other providers will eventually be drawn in as well. I cannot support this monumental and unlawful power grab.

The Proceeding Did Not Provide Sufficient Notice and Opportunity for Comment

While the item claims that the decisions are a logical outgrowth of a few open ended questions tacked on the NPRM, that argument is not at all persuasive. This is a clearly a situation where “interested

¹ Perhaps not *every* bad idea. At least the Commission won't be separately classifying and regulating “broadband subscriber access service,” which was widely regarded to be an imaginary service.

parties would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule."²

Interested parties effectively had no notice or opportunity to respond to the vast evolution that took place from NPRM to final order. Key points include: the scope of the newly defined services, including how they relate to each other; the legal analysis underlying the classification or reclassification of each service; how forbearance would apply in the context of these newly defined services; and the theory underlying forbearance, including using sections 201, 202, and 706 to backfill other provisions.³

The Findings are Not Supported by Evidence of Actual Harms

Even after enduring three weeks of spin, it is hard for me to believe that the Commission is establishing an entire Title II/net neutrality regime to protect against hypothetical harms.⁴ There is not a shred of evidence that any aspect of this structure is necessary. The D.C. Circuit called the prior, scaled-down version a “prophylactic” approach. I call it guilt by imagination.

Moreover, the Commission, once again, takes a pass on performing a market power analysis in favor of repetitive invocation of the “virtuous cycle” nonsense. That may have been good enough to narrowly survive review when all that was at stake was net neutrality rules. But that’s no guarantee that such flimsy reasoning will withstand another round (or two) of scrutiny now that all of Title II hangs in the balance as well.

² *Agape Church, Inc. v. FCC*, 738 F.3d 397, 411 (D.C. Cir. 2013).

³ See, e.g., Letter from Henry G. Hultquist, AT&T to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 & 10-127 at 2 (filed Feb. 19, 2015) (AT&T Feb. 19, 2015 Ex Parte Letter), <http://apps.fcc.gov/ecfs/document/view?id=60001031079> (“The Commission’s failure to provide adequate notice for a number of the proposals under consideration has resulted in a record that is bereft of support for the Commission’s actions. For example, the Commission has no record basis on which it could determine that every ISP holds itself out as a common carrier. To give just one example, AT&T does not offer its GigaPower service indifferently to the public, and there is no basis in the record on which the Commission could mandate that AT&T do so.”); Letter from William H. Johnson, Verizon to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 & 10-127 at 4 (filed Feb. 19, 2015) (Verizon Feb. 19, 2015 Title II Ex Parte Letter), <http://apps.fcc.gov/ecfs/document/view?id=60001031374> (“For starters, the Open Internet NPRM did not even mention “adjunct-to-basic” services, so the Commission cannot justify its action on that rationale.”); Letter from Scott K. Bergmann, CTIA to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 & 10-127 at 6 (filed Dec. 22, 2014) (CTIA Dec. 22, 2014 White Paper), <http://apps.fcc.gov/ecfs/document/view?id=60001014008> (“[T]he Notice asked only whether mobile broadband Internet access service ‘fit[s] ... the definition of ‘commercial mobile radio service.’” ... “It never asked whether ‘the definition’ – set out in Section 20.3 – should be changed, or provided notice that it might be.”)(internal citation omitted); Letter from Kathryn A. Zachem, Comcast to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 & 10-127 at 6 (filed Jan. 30, 2015) (Comcast Jan. 30, 2015 Ex Parte Letter), <http://apps.fcc.gov/ecfs/document/view?id=60001024748> (“As an initial matter, the Open Internet NPRM gave no notice of any proposal to reclassify Internet traffic exchange as a Title II service. Although the NPRM raised the prospect that the FCC could depart from its historical approach of excluding interconnection issues from open Internet rules – asking whether it “should expand the scope of the open Internet rules to cover issues related to traffic exchange” – it nowhere suggested that the Commission might reclassify ISPs’ interconnection-related services to achieve that end.”) (internal citation omitted); Letter from Matthew A. Brill, Counsel to National Cable & Telecommunications Association, to Marlene H. Dortch, FCC, GN Docket Nos. 14-28, 10-127 (Jan. 14, 2015) (NCTA Jan. 14, 2015 Ex Parte Letter).

⁴ *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 844 (D.C. Cir. 2006) (finding that “if [an agency] chooses to rely solely on a theoretical threat, it will need to explain how the potential danger ... unsupported by a record of abuse, justifies such costly prophylactic rules”).

Title II is an Extreme Solution to an Imaginary Problem

While some providers may have been willing to live with net neutrality rules under section 706 based on nothing more than speculative harms, it is an entirely different matter to impose Title II without concrete evidence that doing so is absolutely necessary. The item supposedly invokes Title II in order to put the net neutrality rules on the firmest legal footing. But Title II is far more than a convenient legal theory—it is a comprehensive set of regulations designed to rein in monopoly telephone companies. And it is laden with decades of precedent that cannot be shrugged off with simple incantations like, “To the extent our prior precedents suggest otherwise, for the reasons discussed in the text, we disavow such an interpretation as applied to the open Internet context.”⁵

There is a reason that Title II has been called the nuclear option. No matter what the FCC tries to do to limit the fallout (and it is not trying very hard to do that here) the decision will still impact investments. As one analyst reportedly wrote just last week, “terminal growth rate assumptions need to be lowered... Title II is about price regulation. It would be naïve to believe that the imposition of a regime that is fundamentally about price regulation, in an industry that the FCC has now repeatedly declared to be non-competitive, wouldn’t introduce risk to future pricing power.”⁶

While the FCC tailors certain statements from providers to reject assertions that Title II will “substantially diminish overall broadband investment”, that doesn’t give me a lot of comfort.⁷ Even a *modest* reduction is too great a price to pay when weighed against purely speculative harms. Moreover, the harms to small ISPs will be disproportionately severe and the FCC gives them no reprieve from Title II whatsoever.

Incredibly, the item gives significant weight to a theoretical cost of forgone innovation but gives essentially no weight to the cost of forgone investment. I am far more concerned about the Americans that will remain unserved as a result of our rules. Forget about an open Internet; they have no Internet. We need to be focused on ways to promote deployment, and not in some roundabout virtuous cycle way, but through proven deregulatory measures. I am very concerned that, far from a virtuous cycle, we are creating a vicious cycle where regulation deters investment in broadband and that begets more regulation to stimulate competition and deployment that will further deter investment. In other words, the beatings will continue until morale improves.

The Commission's Decision to Classify Broadband Internet Access Service as a Telecommunications Service is Contrary to Law and Fact

Notably, the item not only reverses its decision to treat broadband Internet access service as an information service, but it also determines, for the first time, that Title II applies to the entire service—not just a transmission component. As one provider put it, “the conclusion that retail ‘broadband Internet access’ is a telecommunications service is contrary to the plain text of multiple provisions of the

⁵ See, e.g., *supra* note 715.

⁶ Kery Murakami, *Wheeler Defends Proposed Net Neutrality Rules at NARUC*, COMM. DAILY, Feb. 18, 2015, at 4, 6 (quoting Craig Moffett).

⁷ *Supra* para. 411.

Communications Act, decades of Commission decisions, and the views of all nine Supreme Court Justices in [*Brand X*].”⁸

The item also gives short shrift to the argument that prior decisions to classify broadband Internet access service as an information service “engendered serious reliance interests that must be taken into account.”⁹

I am just as troubled by the substantial factual errors underlying the decision. Adherence to “factually unsupportable assertion[s]” shows that the Commission has “abdicate[d] its role as the expert federal agency on communications networks and services, and ignore[d] the administrative record in this proceeding.”¹⁰

The Commission Cannot “Subsume” Internet Traffic Exchange into Broadband Internet Access Service to Regulate it Under Title II

The record is replete with evidence that content providers and network operators enter into interconnection relationships with ISPs through individually negotiated private agreements.¹¹ Regardless of the form they take—“peering,” “transit,” or “on-net-only”—providers do not hold themselves out to serve the public indifferently.¹² As such, these arrangements, which some mistakenly refer to as “interconnection”, have never been regulated as common carriage services subject to Title II.¹³

Undeterred by this long history, the item concocts a novel service laundering scheme. It attempts to transform this “interconnection” into a telecommunications service by “subsuming” it into another service—broadband Internet access service. And just like that, retail broadband Internet access service is no longer a last mile service; it is the entire “Internet traffic path”, including all Internet traffic relationships.

This approach is riddled with holes. First, such “interconnection” has always been understood to be distinct from the last mile, including in this proceeding.¹⁴ Second, the item does not show how this

⁸ Letter from Gary L. Phillips, AT&T to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 &10-127 at 1 (filed Feb. 18, 2015) (AT&T Feb. 18, 2015 Fact Sheet Ex Parte Letter), <http://apps.fcc.gov/ecfs/document/view?id=60001030836>.

⁹ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

¹⁰ Letter from Austin H. Schlick, Google to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 &10-127 at 3 (filed Feb. 20, 2015) (Google Feb. 20, 2015 Ex Parte Letter), <http://apps.fcc.gov/ecfs/document/view?id=60001032150>.

¹¹ *See id. at 1*. *See also, e.g.*, Letter from William H. Johnson, Verizon to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 &10-127 at 1, 4-5 (filed Dec. 17, 2014) (Verizon Dec. 17, 2014 Interconnection Ex Parte Letter), <http://apps.fcc.gov/ecfs/document/view?id=60001010005>; Letter from Gary L. Phillips, AT&T to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 &10-127 at 7-8 (filed Feb. 2, 2015) (AT&T Feb. 2, 2015 Common Carrier Ex Parte Letter), <http://apps.fcc.gov/ecfs/document/view?id=60001025387>; Comcast Jan. 30, 2015 Ex Parte Letter at 2-6.

¹² AT&T Feb. 2, 2015 Common Carrier Ex Parte Letter at 7-8.

¹³ *See, e.g., Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, ¶ 133 (2005) (“[I]nterconnection between Internet backbone providers has never been subject to direct government regulation.”).

¹⁴ *See, e.g., Verizon Dec. 17, 2014 Interconnection Ex Parte Letter at 1* (“Both the previous Open Internet rules and the Notice of Proposed Rulemaking in this proceeding focused on concerns relating to the management of traffic

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service laundering scheme is consistent with precedent. Third, it depends on broadband Internet access service being a telecommunications service, which it is not. Fourth, there was absolutely no notice for this novel approach. Even parties that guessed that interconnection might be subject to Title II (despite the lack of notice) clearly did not understand that the primary mechanism for doing so would be to re-interpret broadband Internet access service to include interconnection.¹⁵

Moreover, this shift to regulate Internet traffic exchange highlights that the Commission's real end game has become imposing Title II on all parts of the Internet, not just setting up net neutrality rules. In subjecting a thriving, competitive market to regulation in the name of net neutrality, the Commission is trying to use a small hook and a thin line to reel in a very large whale. This line will surely break.

Mobile broadband services warrant different regulatory treatment

Similarly, this order, for the first time, subsumes mobile broadband services under Title II common carrier regulation, reversing decades of precedent. Until now, the Commission has followed Congress's mandate under section 332 of the Communications Act and has correctly exercised regulatory restraint by classifying mobile broadband as an information service free from common carrier regulation as required by the statute.¹⁶ Yet today, we use sleight of hand to change our definitions so that overnight mobile broadband magically falls under the confines of Title II.

In subjecting wireless broadband to Title II, the majority ignores fundamental differences between the wireless and fixed broadband industries and technologies. Unlike last century's voice-only telephone service, the wireless sector has developed and flourished in a fiercely competitive

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within a broadband provider's local network and over the last-mile connection to a subscriber. By contrast, interconnection agreements inherently involve routing traffic between networks. Issues surrounding these agreements, which relate to the physical connections between networks, are "very distinct" from issues concerning the management of traffic over the last-mile...." (internal citation omitted).

¹⁵ See, e.g., Comcast Jan. 30, 2015 Ex Parte Letter at 6 ("As an initial matter, the Open Internet NPRM gave no notice of any proposal to reclassify Internet traffic exchange as a Title II service. Although the NPRM raised the prospect that the FCC could depart from its historical approach of excluding interconnection issues from open Internet rules – asking whether it 'should expand the scope of the open Internet rules to cover issues related to traffic exchange' – it nowhere suggested that the Commission might reclassify ISPs' interconnection-related services to achieve that end"). As a backstop, the item notes in passing that BIAS provider practices with respect to such interconnection are "for and in connection with" the BIAS service. This last second addition based on a last minute ex parte filing cannot salvage this effort because there is no notice for this theory either.

¹⁶ 47 U.S.C. § 332. In 1993, Congress codified section 332(c) differentiating between commercial and private mobile services. Compare 47 U.S.C. § 332(c)(1) with *id.* § 332(c)(1); see also *id.* § 332(d) (providing definitions); Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312. Under the law, mobile broadband has been treated as a "private mobile service" as opposed to a "commercial mobile service or the functional equivalent of a commercial mobile service." A "commercial mobile service" interconnects with the public switched telephone network; whereas, a "private mobile service" does not. Because mobile broadband is not interconnected and, therefore, a "commercial mobile service," Section 332 of the Communications Act prevents the Commission from regulating mobile broadband under Title II. Instead, mobile broadband is a "private mobile service" free from common carrier regulation. See, e.g., *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1434 ¶¶ 54 (1994); *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5915–21 ¶¶ 37–56 (2007); *Cellco Partnership v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012); *Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014); see also Testimony of Robert M. McDowell, Partner, Wiley Rein LLP & Senior Fellow, Hudson Institute, before the Senate Committee on Commerce, Science & Transportation, at 14-15, http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=14755dd8-95c7-45e0-a7b9-bfb33f222f45.

environment.¹⁷ Wireless consumers have ample choices and can readily switch between offerings.¹⁸ This competition has yielded unparalleled investment and innovation, lower prices, higher speeds and product differentiation as sector participants vie for an edge to attract and retain subscribers.¹⁹ Applying a regulatory regime established for monopoly voice service to the dynamic mobile sector defies logic.

The majority also flagrantly ignores the fundamental technical and operational requirements necessary for mobile broadband networks. Unlike fixed systems, mobile network capacity is constrained by the relative scarcity of spectrum resources. Given this unique limitation, wireless providers must maintain their ability to vigorously and nimbly mitigate the congestion inherent to wireless networks.²⁰ I expect that the rigid Title II rules adopted today will hamstring the smooth functioning of these networks. Although some may argue that the exception for reasonable network management will allow such flexibility, a case-by-case approach whereby a wireless provider's congestion management practices are judged after the fact by the Commission's Enforcement Bureau is unlikely to provide much comfort to wireless providers.

Finally, the majority defines mobile broadband as a telecommunications service without adequately explaining its rationale for the drastic change of course.²¹ In addition, there has been no meaningful opportunity for public comment on this change of definition.²² This action is nothing less than an attempt to improperly capture mobile broadband under Title II, in direct contravention of congressional intent,²³ and it is not likely to survive judicial scrutiny.

¹⁷ See, e.g., *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 13-135, Seventeenth Report, 29 FCC Rcd 15311, 15336 Chart III.2.A (WTB 2014) (stating that approximately 99 percent of consumers have a choice of two or more competitors and more than 82 percent of Americans today have a choice of four or more mobile providers.).

¹⁸ Now more than any time in history, wireless consumers have the freedom to take advantage of myriad incentives to switch providers, whether through early termination fee buyouts, unlocking, or one of various options to buy or finance the latest mobile devices. See, e.g., Letter from Scott K. Bergmann, Vice President – Regulatory Affairs, CTIA – The Wireless Association, to Marlene H. Dortch, GN Docket Nos. 14-28 & 10-127, at 3-5 (Feb. 10, 2015) (CTIA Feb. 10, 2015 Ex Parte Letter).

¹⁹ And, to remain competitive, carriers will continue to deploy new technologies, upgrade current networks, improve service offerings, and evolve to consistently meet or exceed consumer expectations. See, e.g., Testimony of Meredith Attwell Baker, President and CEO, CTIA – The Wireless Association, before the House Energy & Commerce Subcommittee on Communications and Technology, at 5 (Jan. 21, 2015), <http://docs.house.gov/meetings/IF/IF16/20150121/102832/HHRG-114-IF16-Wstate-BakerM-20150121-U1.pdf>.

²⁰ See, e.g., *id.* at 4 (stating that a single strand of fiber can carry more traffic than the entirety of spectrum allocated for commercial wireless use); Letter from Scott Bergman, Vice President – Regulatory Affairs, CTIA – The Wireless Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 14-28 & 10-127 (Oct. 6, 2014).

²¹ By doing so, my colleagues in the majority bring an end to the regulatory approach established by Congress, implemented by the Commission and relied upon by the wireless sector. See CTIA Feb. 10, 2015 Ex Parte Letter at 5-10.

²² See, e.g., Letter from Gary L. Phillips, General Attorney & Assoc. General Counsel, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 3 (Feb. 2, 2015) (AT&T Feb. 2, 2015 Ex Parte Letter); CTIA Feb. 10, 2015 Ex Parte Letter at 13-14; CTIA Dec. 22, 2014 White Paper at 6; Letter from William H. Johnson, Vice President & Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 5-6 (Verizon Dec. 24, 2014 Ex Parte Letter).

²³ See, e.g., AT&T Jan. 8, 2015 Ex Parte Letter; AT&T Feb. 2, 2015 Ex Parte Letter; CTIA Feb. 10, 2015 Ex Parte Letter at 14-16; CTIA Dec. 22, 2014 White Paper at 2-19; Verizon Dec. 24, 2014 Ex Parte Letter.

The Promised Forbearance is Fauxbearance

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

The item is quite candid about this strategy, stating, “[A]pplying [sections 201 and 202] enables us to protect consumers of broadband Internet access service from potentially harmful conduct by broadband providers both by providing a basis for our open Internet rules *and for the important statutory backstop they provide regarding broadband provider practices more generally.*”²⁴ Indeed, in section after section, the item claims to forbear from a provision but then quickly points to available protections in other provisions that effectively gut the forbearance. It’s an end run for purposes of spin and allows proponents to claim that it’s a new “modern Title II” when really it only would exclude 56 percent directly and even then allow the inexcusably broad language of certain sections to govern. Suffice it to say, the majority seems to be comfortable with suggesting that they can forbear from parts of Title II because section 201 does it all anyway. I will highlight a just few examples in this meeting to make my point:

Fauxbearance from Tariffing (sections 203, 204): To quote the item, “It is our predictive judgment that [the protections in sections 201 and 202 of the Act] will be adequate to protect the interests of consumers—including the interest in just, reasonable, and nondiscriminatory conduct—that might otherwise be threatened by the actions of broadband providers. Importantly, broadband providers also are subject to complaints and Commission enforcement in the event that they violate sections 201 or 202 of the Act, the Open Internet Rules, or other elements of the core broadband Internet access requirements.”²⁵ This is backdoor rate-setting authority.

Fauxbearance from Discontinuance Approval (section 214(a)): “Further, the conduct standards in our open Internet rules provide important protections against reduction or impairment of broadband Internet access service short of the complete cessation of providing that service.”²⁶

Fauxbearance from Interconnection and Market-Opening (sections 251, 252, 256): “The Commission retains authority under sections 201, 202 and the open Internet rules to require a provider of broadband Internet access to address interconnection issues should they arise, including through evaluating whether broadband providers’ conduct is just and reasonable on a case-by-case basis. We therefore conclude that these remaining legal protections that apply with respect to providers of broadband Internet access service will enable us to act if needed to ensure that a broadband provider does not unreasonably refuse to provide service or interconnect.”²⁷

The Commission Does Not Have Authority to Re-Write the Act

²⁴ *Supra* para. 443 (emphasis added).

²⁵ *Supra* para. 494.

²⁶ *Supra* para. 505.

²⁷ *Supra* para. 509.

The Supreme Court has made clear that “an agency has no power to ‘tailor’ legislation to bureaucratic policy goals” by interpreting a statute to create a regulatory system “unrecognizable to the Congress that designed it.”²⁸ Yet the item attempts to do just that by engaging in a wholesale re-write of the Communications Act to advance its own vision for the Internet.

The item casts its re-write as a “modernized” version of Title II. In doing so, the Commission forgets that “it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.”²⁹ Congress gave us 48 provisions in Title II, but apparently all we really need is section 151 (which establishes the FCC and gives it authority over all interstate service) and 201 (which provides the substantive basis for all FCC rules). Or, to put it another way: “Presto, we have a new statute”.³⁰

Moreover, the Commission cannot cast aside specific provisions in favor of more general provisions of the Act. If Congress had thought that sections 201 and 202 provided the authority necessary to regulate interconnection, for example, then why was it compelled to add section 251 in 1996?

Additionally, the fact that the agency has forbearance authority does not justify the re-write. Using Title II combined with forbearance to cherry pick its preferred provisions is an egregious abuse of forbearance authority. As the D.C. Circuit has explained, “To further the deregulatory aims underlying the 1996 overhaul of the Communications Act, Congress provided the FCC with the unusual authority to forbear from enforcing provisions of the Act as well as its own regulations.”³¹ That is, forbearance was intended to *relieve* carriers of *existing* regulations during a time of regulatory transition. It was not meant to be used as a tool to selectively subject new services to previously inapplicable provisions.

This usurpation of Congressional authority is especially troubling given that Congress started the process to legislate in this space. The FCC leadership did not even consider a brief pause to see that process play out. Instead, they invited Congress to supplement the FCC’s re-write. Not surprisingly, the FCC’s arrogance has already invited greater Congressional scrutiny and the FCC ultimately could see its authority curtailed in many areas.

Case-by-case Enforcement Will be a Trap for the Unwary

The FCC “fact” sheet promised bright line rules, but the reality is that the bulk of this rulemaking will be conducted through case-by-case adjudication, mostly at the Bureau level and in the courts. To be sure, there are three bright line rules: no blocking, no throttling, and no paid prioritization. But those are mere needles in a Title II haystack.

Many practices will be reviewed under the general conduct standard that will be, quite literally, a catch-*all*. Moreover, rates, charges, and classifications will also be reviewed under the amorphous just and reasonable standard in sections 201 and 202. Parties will have no way of knowing, in advance, how a Bureau or the Commission—much less courts acting pursuant to sections 206 and 207³²—will rule on a

²⁸ *Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, at 2444, 2445 (2014).

²⁹ *Ragsdale v Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002) (internal quotation marks omitted).

³⁰ *Verizon v. FCC*, 740 F.3d 623, 663 (D.C. Cir. 2014) (Silberman, J., concurring in part and dissenting in part)).

³¹ *Verizon and AT&T Inc. v. FCC*, 770 F.3d 961, 964 (D.C. Cir. 2014).

³² Letter from Matthew A. Brill, NCTA to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 & 10-127 at 5 (filed Feb. 20, 2015) (NCTA Feb. 20, 2015 Ex Parte Letter), <http://apps.fcc.gov/ecfs/document/view?id=60001031778> (“Private suits and damages awards have never been necessary to protect broadband consumers in the past, and

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particular matter. There will be no certainty. Indeed, one public interest group called the catch-all a “recipe for overreach and confusion”.³³

The item notes that parties may seek an advisory opinion, which appears utterly useless: they are only available in certain circumstances and are not binding. (I’m also not sure why any party would want to refer itself to the Enforcement Bureau when its request could be used against it later.)

This is Just the Beginning

Although there are many caveats about what “this item” does, the Commission’s path forward is clear. For example, the Commission claims that this item does not require broadband providers to contribute to the federal universal service fund at this time. But that’s because it defers that decision to a pending proceeding which is likely to result in new fees on broadband service.

Nor can providers take any comfort in the item’s other promises to refrain from further regulation. In particular, the item repeatedly disavows any present intent to adopt *ex ante* rate regulation. Banning paid prioritization is, itself, a form of *ex ante* rate regulation. The Commission expressly contemplates examining, on a case-by-case basis, whether interconnection agreements are just and reasonable under sections 201 and 202. That necessarily includes an evaluation of the rates, terms, and conditions of such arrangements. The Commission also intends to review data allowances and usage-based pricing plans on a case-by-case basis.

Moreover, last-mile ISPs aren’t the only ones that should be concerned by today’s actions. The item attempts—albeit in a failed way—to carve out, for now, CDNs, transit providers, backbone providers, edge providers, and certain specialized services, including e-readers. But the new legal framework for telecommunications services has let the proverbial genie out of the bottle. The fact that certain decisions will happen later does nothing to diminish the culpability of the current majority.

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leaving these two provisions in place would be immensely destabilizing to the broadband industry... The Commission is all too familiar with the growing trend of class action lawsuits that aim to capitalize on ambiguities in the Commission’s rulings—most notably in the context of the Telephone Consumer Protection Act (‘TCPA’). A regime that exposes the broadband industry to similar threats of abusive litigation would be anything but ‘light touch,’ and could be particularly devastating for smaller ISPs, many of which cannot afford the cost of litigating or settling class action lawsuits.”) (internal citation omitted).

³³ Electronic Frontier Foundation, *Dear FCC: Rethink The Vague “General Conduct” Rule* (Feb. 24, 2015), <https://www.eff.org/deeplinks/2015/02/dear-fcc-rethink-those-vague-general-conduct-rules>.