

**Remarks of FCC Commissioner Michael O’Rielly
Before the Hudson Institute
October 13, 2016**

Let me start by extending my deepest appreciation to the Hudson Institute, with a special note of thanks to former Commissioner Furchtgott-Roth, for allowing me to return to discuss important matters before the Federal Communications Commission. This setting will always be special to me, as this is where I delivered my first speech as an FCC Commissioner almost three years ago. Given the prominence of this venue and Hudson Institute’s legacy of addressing more substantive issues, I thought it would be appropriate to discuss a topic often not addressed by FCC Commissioners: certain tenets of judicial review of FCC items.

Traditionally, many within the legislative and administrative branches of government tend to shy away from discussing particular outcomes of court cases or the collective approach of judicial review. Perhaps hoping that the lack of criticism or comments will prevent a bad outcome in the next case, they avoid discussing altogether or temper their review of instances where the courts have misapplied the law or pursued a line of reasoning devoid of logic or common sense. Having witnessed a number of bad decisions recently, however, I have less compulsion to keep mum about the judicial branch, although I hope the following does so in a relatively respectful way. Additionally, I would argue that the lack of review or analysis of decisions generally deemed out of the mainstream, even by those supportive of a particular outcome, does a disservice to the American people and the court system as a whole.

To do this, I will use court review of the Commission’s Net Neutrality rules as a basis for examination. From the outset, let me state that I do not intend, in the next few moments, to relitigate the particulars of the underlying policy debate surrounding the issue. My views on the subject are well known, and debating the concepts here likely would send us off in difficult tangents of the theoretical versus the practical. Instead, I suggest that the court review of the Commission’s “work” both lacked appropriate rigor necessary for the conclusion reached and established a host of dreadful precedents that will haunt communications policy and administrative law for years to come.

With that understanding, let’s delve into the specifics.

Willful Indifference Instead of Conscientious Deference

For decades, the framework for such court review of FCC matters has been governed by doctrine resulting from the Supreme Court’s *Chevron* decision.¹ Under this precedent, if “Congress has directly spoken to the precise question at issue” and the “intent of Congress is clear,” then the court and agency must effectuate it.² If, however, “the statute is silent or ambiguous,” then the court must decide “whether the agency’s answer is based on a permissible construction of the statute” and defer to any “reasonable” interpretation.³

Yet even where a provision is truly ambiguous, there are still circumstances where deference is not owed or should be viewed skeptically.⁴ Indeed, given the expansive reach of the modern administrative state,⁵ recent Supreme Court decisions have reemphasized certain limits on *Chevron*. For instance, the Court stated that “[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy,’ we typically greet its announcement with a measure of skepticism.”⁶ The Court also made clear that “[a]n agency has no power to ‘tailor’ legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.”⁷

This year, the Supreme Court cautioned that “*Chevron* deference is not warranted where the regulation is ‘procedurally defective.’”⁸ The Court explained that “[o]ne of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions.” Specifically, the agency “must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”⁹

By clarifying that an arbitrary and capricious regulation receives no deference, the Court drew a closer connection between *Chevron* and the Administrative Procedure Act (APA). To receive deference, the agency’s conclusions must be the product of a reasoned decision-making process. Or to paraphrase one scholar, the court cannot simply rely on the reasons proffered by an agency, it must inquire whether the reasons are reasonable.¹⁰

While Supreme Court decisions have provided avenues to check agency power grabs, the D.C. Circuit, which hears many key disputes regarding the FCC, has provided the agency an excessive level of deference to date.¹¹ Case in point is the previously mentioned Net Neutrality decision, in which a divided panel afforded the agency upmost deference to an order that least deserved it, particularly from an APA perspective.¹² As Judge Williams detailed in his opinion dissenting in part, and Commissioner Pai and I explained in our dissenting statements, the Net Neutrality order did not comply with the APA on numerous counts.

To start, the FCC did not provide a reasoned explanation to justify several key decisions. In reclassifying broadband as a telecommunications service, the order attempted to rely on changed facts and a new rationale. It focused on how providers offer and advertise broadband, as well as how consumers perceive and use it—but failed to demonstrate how this is any different than when the Commission previously argued that broadband should be classified as an information service.

The order likewise subjected mobile broadband to common carrier treatment without adequately explaining its rationale for the radical departure from longstanding definitions and precedent, beyond the Commission’s desire to regulate such a successful and ubiquitous service.¹³ For instance, to accomplish reclassification, the Commission, literally overnight, changed the definition of “interconnected with the public switched network”¹⁴ from one where subscribers must be able “to communicate to or receive communications from all other users” via the traditional telephone network¹⁵ to another where a “substantial portion” of the public

must be able to communicate via a “single network comprised of public IP addresses and [telephone] numbers.”¹⁶ Much different.

When making these monumental changes, the order also failed to take into account the serious reliance interests of providers, who had invested more than \$800 billion in broadband based on the FCC’s prior classification. In earlier decisions, the FCC took the position that classification of broadband directly affects investment, and there was plenty of record evidence that continued to back these statements. Nonetheless, the Net Neutrality order baldly claimed that any impact would be indirect at best.

Another example was the FCC’s failure, as Judge Williams highlighted, to reconcile and justify its combined reclassification-forbearance decision, including by conducting a market power analysis. The order made market power-like statements, expressing concerns that ISPs are “gatekeepers” and that consumers face high switching costs, in order to impose net neutrality rules. But it did so “without going through any of the fact-gathering or analysis needed to sustain such claims.”¹⁷ And then it turned on a dime and seemed to assume that there is enough competition to justify broad forbearance. Judge Williams found this “strategic ambiguity” to be arbitrary and capricious.¹⁸

In other instances, where the FCC changed course, it provided even less explanation. For example, in a few footnotes, the order contained statements like: “To the extent our prior precedents might suggest otherwise, we disavow such an interpretation in this context.”¹⁹ That’s it. The FCC did not even take the time to explain what those precedents or interpretations were or why this context is any different. I expect it would have reached the same conclusion if it had, but it did not even bother to do the work.

The FCC also selectively ignored the record. Throughout the proceeding, we were constantly lectured that some four million commenters supposedly supported Net Neutrality, a dubious number at best. However, the FCC failed to consider arguments and data presented by commenters that expressed opposition to the FCC’s desired outcome. Gone are the days when FCC orders would systematically raise and rebut challenges in the record. Now, it is common to see opposing arguments relegated to footnotes that begin with a “but see” and consist of a string cite with little to no explanation of what the cited cases stand for or why they are being summarily dismissed. It is galling to see thousands of pages of serious legal and economic analysis reduced to a passing reference.

Judge Williams stressed this and other analytical flaws in his case study on paid prioritization. He noted that the order cited four articles that did not support the claimed conclusions; failed to respond to criticisms and alternatives proposed in the record, pointing to several substantive comments that were utterly ignored; and was contradictory in its treatment of different forms of paid prioritization. In short, he found that the FCC’s “opinion-writing staff was asleep at the switch.”²⁰ Asleep at the switch.

Blatant APA Notice Violations Ignored

Turning to the APA's notice and comment rules,²¹ an NPRM must "provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully."²² While the final rule does not need to "be the one proposed in the NPRM,"²³ it needs to be a "logical outgrowth" of the notice,²⁴ meaning that the notice has to "expressly ask for comments on a particular issue or otherwise make clear that the agency is contemplating a particular change."²⁵

While some may think that this is a mere procedural annoyance, the APA's notice provisions ensure that agency regulations are tested via exposure to diverse public comment, ensure fairness to affected parties, and provide stakeholders with the opportunity to make their case in opposition to a rule.²⁶ Not only should an agency take this responsibility seriously, but the courts must vehemently enforce these requirements, instead of whimsically deferring to agencies' ex post facto explanations for why interested parties should have known what was at stake.

Unfortunately, this is what happened in the Net Neutrality decision, where the court went out of its way to explain away the item's deficiencies. This is not easy given the drastic about face in this proceeding. Here, the court managed to find that the APA's notice-and-comment requirements were met in each and every case. To do so, the court cherry-picked select language in some instances and resorted to illogical reasoning in others.

To accomplish the Herculean task of finding that there was notice for broadband reclassification generally, the court focuses on one sentence – out of a 100-page NPRM – to justify that interested parties had notice.²⁷ However, the court ignores that the Commission's specific inquiry was "on the nature and the extent of the Commission's authority to adopt open Internet rules relying on Title II."²⁸

Basically, the court found that expansion of Title II to create a "Modern Title II" "tailored for the 21st Century"²⁹ is a "logical outgrowth" of a proceeding about implementing Net Neutrality rules under section 706.³⁰ But, the D.C. Circuit previously stated that logical outgrowth "does not extend to a final rule that is a brand new rule, since something is not a logical outgrowth of nothing, nor does it apply where interested parties would have to divine the Agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule."³¹

There are several more specific issues that were also not teed up in the notice, but the court came up with tortured explanations for why there was notice. Each of these examples does not comply with the APA, because – similar to the inquiry into reclassification generally – the Commission does not make "its views known to the public in a concrete and focused form" and did not clearly state the "objective of the rulemaking."³² For instance, according to the court, stakeholders knew that they needed to comment on the rationale for reclassification – changes in consumers' perception – because it was discussed, not in the NPRM, but in the Supreme Court's *Brand X* decision over 10 years ago.³³

Similarly, the NPRM did not mention anything about applying Title II to interconnection arrangements. To find notice, the court looks to the tentative conclusion that the net neutrality rules should not apply to interconnection and a follow up question about possibly rethinking this conclusion.³⁴ This was apparently fair warning that interconnection could be regulated under Title II. This, despite the fact that even the Chairman previously admitted that interconnection should be handled separately.³⁵

The court also seems to recognize the notice deficiencies for the reclassification of mobile broadband and the FCC's change in definitions,³⁶ as I discussed earlier. But not a worry: because one party commented on these definitions, another responded in reply comments that the issue was beyond the scope of the rulemaking,³⁷ and others filed ex partes very late in the proceeding,³⁸ the court found that there was actual notice of the final rule, so there was no harm to the parties.³⁹ Apparently, it is no longer necessary for the Commission to give notice of rule changes when commenters can solely raise the issue in its comments, ex partes or letters. It appears that, if there is any discussion in the record whatsoever, then there is notice.⁴⁰

And, a series of vague questions were apparently sufficient to find that people were on notice that the General Conduct Standard could be adopted.⁴¹ But, these questions, such as whether a different rule is needed "to govern broadband providers' practices to protect and promote Internet openness,"⁴² do not meet the requirements that an agency "describe the range of alternatives being considered with reasonable specificity."⁴³

It should be telling that the D.C. Circuit's latest interpretation of what is sufficient notice, as evidenced by this decision, varies greatly from other Circuit Courts. For instance, the Third Circuit applies far more stringent standards, as seen in the *Council Tree* and *Prometheus II* cases, than the D.C. Circuit did in this case. The Third Circuit has held that "implied notice is insufficient unless all interested persons would reasonably be expected to perceive the implication,"⁴⁴ and that two general and open-ended questions were not sufficient to "have fairly apprised the public" of the Commission's intentions.⁴⁵ The Second Circuit also found, in a case involving the FCC, that similarly vague questions were not adequate to provide notice.⁴⁶

Conclusion

So there you have it. A court that went out of its way to bless an item full of holes and problems, an item not consistent with the requirements of the APA, and an item that likely wouldn't be sufficient under review by another court.

Now I realize that many will describe my words as merely being sour grapes. As Chairman Wheeler has said, "the refuge for not liking the decision is to complain about 'process.'"⁴⁷ Others may agree that sound practices were ignored, but it is acceptable because achieving the desired outcome was of paramount concern. I am reminded of a few lines in the book *Atlas Shrugged*, "What if we did skip some technicalities? It was for a good purpose." For those of you who believe these scenarios, I won't be able to change your minds.

But for some of you, even those who agree with the outcome, and those of us who once believed in the FCC as an institution, there is a sense of dread, or should be. Mark my words that the cursory review provided by the court in this instance set precedent that will be used again. It is just a matter of time before a future Commission follows the path outlined by this court. In effect, logical reasoning, evidence-based conclusions, adherence to an item's record, and, of course, providing requisite notice of the direction in a proceeding are no longer required to survive judicial review.

Unless undone by the Supreme Court or Congress, the D.C. Circuit has granted virtually limitless authority to the Commission. That should worry everyone in this room and those watching online. Think about it this way: Today's Tom Wheeler could be tomorrow's next Barry Goldwater. Just imagine what someone could do using the court's path with a different-minded agenda.

¹ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

² *Id.* at 842–43.

³ *Id.* at 843.

⁴ Brief of The International Center For Law And Economics and Justin (Gus) Hurwitz as Amici Curiae Supporting Petitions for En Banc Rehearing at 2-3, *US Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (No. 15-1063) (*ICLE/Hurwitz Brief*), http://laweconcenter.org/images/articles/icle-enbanc_amicus_oio.pdf. See also *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1875 (2013) (Breyer, J., concurring) (“I say that the existence of statutory ambiguity is sometimes not enough to warrant the conclusion that Congress has left a deference-warranting gap for the agency to fill because our cases make clear that other, sometimes context-specific, factors will on occasion prove relevant. (And, given the vast number of government statutes, regulatory programs, and underlying circumstances, that variety is hardly surprising.)”).

⁵ Chief Justice Roberts recognized that “[t]he administrative state wields vast power and touches almost every aspect of daily life” and described *Chevron* as “a powerful weapon in an agency's regulatory arsenal.” *City of Arlington, Tex.*, 133 S. Ct. at 1878, 1879 (2013) (Roberts, J., dissenting) (internal quotation marks omitted). Some have even questioned the constitutionality of *Chevron* deference. Justice Thomas stated that “*Chevron* deference precludes judges from exercising [independent] judgment” thereby “wrest[ing] from Courts the ultimate interpretative authority to ‘say what the law is.’” *Michigan v. EPA*, 135 S. Ct. 2699, 2712, (2015) (Thomas, J., concurring) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)). Moreover, because agencies that are “‘interpreting’ ambiguous statutes” are really “engaged in the ‘formulation of policy’” they are exercising legislative power, which is a function reserved for Congress. *Michigan v. EPA*, 135 S. Ct. at 2713 (Thomas, J., concurring).

⁶ *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (citing *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

⁷ *Id.* at 2445.

⁸ *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

⁹ *Id.* (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)).

¹⁰ See Gus Hurwitz, AEI Tech Policy Daily, *DC Circuit Court of Appeals: So Deferential it's “Asleep at the Switch”* (June 20, 2016), <http://www.techpolicydaily.com/communications/dc-circuit-court-appeals-asleep-switch/>.

¹¹ *Encino* was decided after a panel of the DC Circuit issued the Net Neutrality opinion, and some have argued that is another element supporting an *en banc* rehearing of the panel's decision. See, e.g., *ICLE/Hurwitz Brief*.

¹² I dissented from the Order for several additional reasons, including the fact that it is inconsistent with and not a reasonable interpretation of the Communications Act. I describe these concerns in my dissent, but for purposes of this discussion, I am focusing on the order's APA infirmities.

¹³ See *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5635, 5638 ¶¶ 88, 92 (2015) (“2015 Open Internet Order”); *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 716-17 (D.C. Cir. 2016).

¹⁴ 47 U.S.C. § 332(d)(2); 47 C.F.R. § 20.3 (definitions of “commercial mobile radio service” and “interconnected service.”). Mobile broadband may be regulated under Title II only if it meets the requirements to be a “commercial mobile service” under section 332 and its definitions. 47 U.S.C. § 332(c)(1), (d). The definition at issue is what constitutes an “interconnected service” under section 332(d)(2), *id.* § 332(d)(2), and section 20.3 of the Commission’s rules, 47 C.F.R. § 20.3, which is determined by how the terms “interconnected” and “public switch network” are defined, *id.*

¹⁵ *2015 Open Internet Order*, 30 FCC Rcd at 5779 ¶ 391 (“The Commission has defined ‘interconnected service’ as a service ‘that gives subscribers the capability to communicate to or receive communication *from all other users* on the public switched network.’ The Commission has defined the term ‘public switched network’ to mean ‘[a]ny 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* in connection with the provision of switched services.’” (quoting 47 C.F.R. § 20.3)).

¹⁶ *2015 Open Internet Order*, 30 FCC Rcd at 5779, 5783-84, 5786-88 ¶¶ 391, 396, 399-402, n.1175; *U.S. Telecom Ass’n*, 825 F.3d at 717-23. To get this new definition to work, the order and the court’s decision relies on VoIP applications to argue that mobile broadband can reach all or a substantial portion of users. See *2015 Open Internet Order*, 30 FCC Rcd at 5786-87 ¶ 400; *U.S. Telecom Ass’n*, 825 F.3d at 719-23. But, this is flawed because mobile broadband services on a phone or tablet cannot, on their own, complete calls to phone numbers. Similarly, telephone-only devices cannot contact IP addresses or equipment, such as the Internet of Things. See, e.g., Brief for Petitioner CTIA for Rehearing En Banc at 10-14, *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (No. 15-1063), [http://www.ctia.org/docs/default-source/fcc-filings/ctia-petition-for-rehearing-en-banc-\(with-addendum\).pdf](http://www.ctia.org/docs/default-source/fcc-filings/ctia-petition-for-rehearing-en-banc-(with-addendum).pdf) (last visited Oct. 13, 2016).

¹⁷ *United States Telecom Ass’n*, 825 F.3d at 750 (D.C. Cir. 2016) (Williams, J., concurring in part and dissenting in part).

¹⁸ *Id.* at 774.

¹⁹ *2015 Open Internet Order*, 30 FCC Rcd at 5764 & n.1012.

²⁰ *United States Telecom Ass’n*, 825 F.3d at 776.

²¹ 5 U.S.C. § 553(b)(3) (stating that an NPRM must include “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”).

²² *Honeywell International, Inc. v. EPA*, 372 F.3d 441, 445 (D.C. Cir. 2004).

²³ *Agape Church, Inc. v. FCC*, 738 F.3d 397, 411 (D.C. Cir. 2013).

²⁴ See, e.g., *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007); *Agape Church*, 738 F.3d at 411; *CSX Transp., Inc. v. Surface Transp. Board*, 584 F.3d 1076, 1079 (D.C. Cir. 2009); *Covad Communications Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006); *Env’tl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (“[A]genices [may not] use the rulemaking process to pull a surprise switcheroo on regulated entities.”).

²⁵ *CSX Transp.*, 584 F.3d at 1081. The D.C. Circuit has stated that “[w]hether the ‘logical outgrowth’ test is satisfied depends on whether the affected party ‘should have anticipated’ the agency’s final course in light of the initial notice.” *Covad Communications*, 450 F.3d at 548 (citing *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 548-49 (D.C. Cir. 1983)).

²⁶ See, e.g., *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) (citing *Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 547) (stating that these provisions also enhance the quality of judicial review).

²⁷ See *United States Telecom Ass’n*, 825 F.3d at 700 (citing *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, 5612 ¶ 148 (2014) (“2014 Open Internet NPRM”) (“We seek comment on whether the Commission should rely on its authority under Title II of the Communications Act, including . . . whether we should revisit the Commission’s classification of broadband Internet access service as an information service.”)). This language is located within eight paragraphs discussing whether Title II can be used as legal authority for Net Neutrality rules, *2014 Open Internet NPRM*, 29 FCC Rcd at 5612-16 ¶¶ 148-55, and only two of these paragraphs have abstract questions about whether reclassification. See *id.* at 5613-14 ¶¶ 149-

50. “Vague, open-ended questions or list of general topics for regulation . . . do not cut it; otherwise an agency ‘could issue broad NPRMs only to justify any rule it might be able to devise.’” Brief for Petitioners National Cable & Telecommunications Association and American Cable Association for Rehearing En Banc at 10-14, *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (No. 15-1063), [https://www.ncta.com/sites/prod/files/UST%20et%20al%20v%20FCC.CADC_.2016-07-29.NCTA%20%26%20ACA%20Petition%20for%20Rehearing%20En%20Banc%20\(As%20Filed\).pdf](https://www.ncta.com/sites/prod/files/UST%20et%20al%20v%20FCC.CADC_.2016-07-29.NCTA%20%26%20ACA%20Petition%20for%20Rehearing%20En%20Banc%20(As%20Filed).pdf) (last visited Oct. 13, 2016).

²⁸ *2014 Open Internet NPRM*, 29 FCC Rcd at 5610 ¶ 142; *see also id.* at 5563 ¶ 4 (“The goal of this proceeding is to find the best approach to protecting and promoting Internet openness. Per the blueprint offered by the D.C. Circuit in its decision in *Verizon v. FCC*, the Commission proposes to rely on section 706 of the Telecommunications Act of 1996.”).

²⁹ *2015 Open Internet Order*, 30 FCC Rcd at 5612 ¶ 38.

³⁰ *See, e.g., 2014 Open Internet NPRM*, 29 FCC Rcd at 5563, 5610 ¶¶ 4, 142; *United States Telecom Ass’n*, 825 F.3d at 700.

³¹ *Int’l Union, United Mine Workers of Am.*, 407 F.3d at 1259-60 (internal citations and quotation marks omitted); *see also CSX Transp.*, 584 F.3d at 1080; *Agape Church*, 738 F.3d at 411; *Env’tl. Integrity Proposal*, 425 F.3d at 996.

³² *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977); *Council Tree Communications, Inc. v. FCC*, 619 F.3d 235, 253-54 (3rd Cir. 2010).

³³ *See U.S. Telecom Ass’n*, 825 F.3d at 700.

³⁴ *See 2014 Open Internet NPRM*, 29 FCC Rcd at 5582 ¶ 59.

³⁵ *See id.* at 5647 (Statement of Chairman Tom Wheeler) (“Separate and apart from this connectivity is the question of interconnection (“peering”) between the consumer’s network provider and the various networks that deliver to that ISP. That is a different matter that is better addressed separately. Today’s proposal is all about what happens on the broadband provider’s network and how the consumer’s connection to the Internet may not be interfered with or otherwise compromised.”).

³⁶ The court does not cite to specific language in the NPRM, instead it states that “deficiency of notice is harmless if the challengers had actual notice of the final rule . . . or if they cannot show prejudice in the form of arguments they would have presented to the agency if given a chance.” *U.S. Telecom Ass’n*, 825 F.3d at 725 (internal citations omitted).

³⁷ *See Reply Comments of CTIA at 44-45* (Sept. 15, 2014), <https://ecfsapi.fcc.gov/file/7522631210.pdf> (“The ‘update’ Vonage seeks would also require a revision to the definition of ‘public switched network’ in Section 20.3 of the FCC’s rules, which is beyond the scope of this rulemaking. The Notice asks only whether mobile broadband falls within the existing definition of CMRS, and does not propose any changes to the well-established definitions in Section 20.3 of the FCC’s rules.”).

³⁸ *See Joint Brief for Petitioners at 91-92*, *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (No. 15-1063), <https://www.ustelecom.org/sites/default/files/documents/2016-07-29%20Joint%20Petition.pdf> (last visited Oct. 13, 2016) (stating that the other filings in the docket were “filed long after the comment period had ended.”).

³⁹ *U.S. Telecom Ass’n*, 825 F.3d at 724-25 (citing *Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 549; *Owner-Operator Independent Drivers Ass’n v. Federal Motor Carrier Safety Administration*, 494 F.3d 188, 202 (D.C. Cir. 2007)). *But see, e.g., Ass’n of Priv. Sector Colls. & Univs. V. Duncan*, 681 F.3d 427, 462 (D.C. Cir. 2012) (“This court has made clear that ‘[t]he fact that some commenters actually submitted comments’ addressing the final rule ‘is of little significance.... [T]he [agency] must itself provide notice of a regulatory proposal.’ (citing *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C.Cir.1991) (internal quotation marks and citations omitted)); *Agape Church*, 738 F.3d at 412 (agreeing that “an agency cannot bootstrap notice from a comment . . . or from third-party accounts of what the agency might be considering” (citing *Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 549; *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991))); *Horsehead Resource Development Co., Inc. v. Browner*, 16 F.3d 1246, 1268 (“Ultimately, notice is the agency’s duty because ‘comments by members of the public would not in themselves constitute adequate notice. Under the standards of the APA, notice necessarily must come – if at all – from the Agency.’” (quoting *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991))); *Int’l Union, United Mine Workers of Am.*, 407 F.3d at 1259-60 (noting that public comment may raise the possibility of agency action, but acknowledging that it “illustrates the outer limits of the ‘logical outgrowth’ doctrine” and

recognizing that the court said, in another case, that it “stretch[ed] the concept of ‘logical outgrowth’ to its limits” and, in that instance, the issue was put out for public comment for a very short time prior to the item’s release (internal citations omitted)).

⁴⁰ Ironically, staff clearly knew there was insufficient notice for this reclassification, argued that additional public comment was necessary, and even prepared a draft public notice, which was never released. See Committee on Homeland Security and Governmental Affairs, U.S. Senate, Majority Staff Report, *Regulating the Internet: How the White House Bowled Over FCC Independence*, at 18-22 (Feb. 29, 2016), <http://www.hsgac.senate.gov/download/regulating-the-internet-how-the-white-house-bowled-over-fcc-independence>.

⁴¹ See *U.S. Telecom Ass’n*, 825 F.3d at 735.

⁴² *2014 Open Internet NPRM*, 29 FCC Rcd at 5604 ¶ 121.

⁴³ See, e.g., *Horsehead Res. Dev. Co.*, 16 F.3d at 1268 (D.C. Cir. 1994); *Small Refiner Lead Phase-Down Task Force*, 705 F.2d 506 at 549.

⁴⁴ *Council Tree Communications*, 619 F.3d at 255-56 (finding that implied or inferential notice is insufficient under the APA and rejecting the Commission’s argument that seeking comment “on the length of the bidding-credit repayment schedule attached to any new DE qualifications” was sufficient to update the payment schedule for all qualifications, because interested parties should have known the schedule for all qualifications were being reviewed, as past precedent and rules show that the Commission’s repayment schedule has “always been uniform across all DE qualifications.”).

⁴⁵ *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3rd Cir. 2011) (stating that, although the notice “makes plain that the FCC was planning significant revision” to the newspaper-broadcast cross ownership rules, it asked whether limits should “vary depending upon the characteristics of the markets and, if so, what characteristics should be considered,” however, “characteristics of markets was too open-ended to allow for meaningful comment on the Commission’s approach.” (internal quotation marks and citations omitted)).

⁴⁶ *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 170 (2nd Cir. 2013) (holding that general questions about “whether the FCC should adopt rules to address the complaint process itself and, specifically, whether it should adopt additional rules to protect [programming networks] from potential retaliation if they file a complaint,” was not sufficient to adopt a standstill rule in the context of the Commission’s program carriage rules. (internal quotation and citations marks omitted)).

⁴⁷ Margaret Harding McGill, *FCC, FTC Chiefs Zero In On Data Security, Privacy*, LAW360 (Jan. 6, 2016), <http://www.law360.com/articles/743314/fcc-ftc-chiefs-zero-in-on-data-security-privacy>.