

**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

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.

Last year, the Commission seemed on track to reinstate net neutrality rules under section 706. The D.C. Circuit provided a roadmap for the Commission and, while I strongly disagree with the court's analysis of section 706,² a number of providers appeared ready to accept the new regime.

Hardly anyone at the time thought that the Commission would seriously consider applying Title II. And truth be told, the Commission did not give it much thought either, as is evident from the NPRM. Outside parties warned the Commission to take a few months to seek further comment, but the Commission was not operating on its own timetable because it has to be responsive to the political winds and views of the perpetually outraged. As a result, the item is highly vulnerable because the Commission did not provide adequate notice and opportunity to comment as required by the Administrative Procedure Act (APA).

To put it plainly, this is not the order that the NPRM envisioned. 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 parties would have had to divine the agency’s unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.”³

In fact, even within the agency, staff and Commissioners were left to guess at the ultimate conclusions and reasoning because most of the substance was still “in flux” just a week prior to circulation. A number of critical decisions and rationales were not apparent until I read the circulated draft. It is a page turner—not because it is well written but because I literally could not predict what would come next or why, and when I did arrive at the conclusionary paragraphs, they often lacked foundation and sufficient justification.

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.⁴

² See, e.g., The Free State Foundation, *Section 706, Wild Assumptions, and Regulatory Restraint* (Mar. 31, 2014), <http://freestatefoundation.blogspot.com/2014/03/section-706-wild-assumptions-and.html>.

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

⁴ 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

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Moreover, major changes were made during the waning hours of the Sunshine Period, including the elimination of broadband subscriber access service, which required staff to overhaul the discussions of broadband Internet access service and Internet traffic exchange. Parties had no opportunity to weigh in on these changes.

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.⁵ 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.

Tellingly, although we received a record-breaking number of comments, those comments did not reveal any additional instances of actual harm to consumers. The item is sprinkled with references to what an ISP “may”, “could”, “might”, or “potentially” to do to block or degrade applications, services, or content, but no new tangible violations. To be sure, the item selectively quotes a statement that a provider was interested in exploring commercial arrangements. Yet those “arrangements” were sponsored data plans—something that the Commission has not (as of yet) determined to be a net neutrality violation.⁶

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.

The APA requires an agency to “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”⁷ These rules, however, are not based on facts or data but on unsubstantiated fears of future wrongdoing. The item regurgitates the theory that ISPs act as “gatekeepers” between edge providers and consumers. Specifically, as the provider of access to end users, an ISP supposedly has the ability and incentive to disadvantage other network providers, edge providers, and end users. But while the item makes an economic argument, it does not back it up with economic analysis. The theory that rests on claims that

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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).

⁵ *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”).

⁶ Letter from William H. Johnson, Verizon to Marlene H. Dortch, FCC, GN Docket No. 14-28 at 1-2 (filed Feb. 11, 2015) (Verizon Feb. 11, 2015 Ex Parte Letter), <http://apps.fcc.gov/ecfs/document/view?id=60001028587>. In a single footnote, the item trots out the same three outdated examples it has cited in the past. It does not cite any other subsequent examples.

⁷ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

consumers might not switch providers because consumers “may experience” switching costs, that bundled pricing “can also play a role” in reducing churn, and that consumers “may be confused” about their service.⁸ Difficulty switching providers “is certainly a factor that might contribute to a firm’s having market power, but that itself is not market power.”⁹

Moreover, the theory breaks down completely when it comes to small ISPs.¹⁰ Many small providers—including WISPs, small cable providers, and municipal broadband providers—have made the case that they do not have the leverage to interfere with edge providers. As one group put it, “These ISPs cannot compel payments for unblocking, non-discriminatory treatment or paid prioritization services because each serves too few Internet subscribers to matter to edge providers such as Netflix, Amazon or Hulu, who have hundreds of millions of subscribers combined in the U.S. and internationally.”¹¹ Moreover, it is simply not in the interest of small providers that are trying to grow their businesses and compete against larger providers to block or degrade their customers’ connections.

⁸ *Supra* para. 81.

⁹ *Verizon v. FCC*, 740 F.3d 623, 664 (D.C. Cir. 2014) (Silberman, J., concurring in part and dissenting in part).

Moreover, there is a “significant rate of switching by wireless broadband subscribers.” Letter from Kathleen Grillo, Verizon to Marlene H. Dortch, FCC, GN Docket No. 14-28 (filed Jan. 15, 2015) (Verizon Jan. 15, 2015 Ex Parte Letter), <http://apps.fcc.gov/ecfs/document/view?id=60001013599> (attaching Andres V. Lerner and Janusz A. Ordovery, “*Terminating Access Monopoly*” *Theory and the Provision of Broadband Internet Access*, at 10-11 (Jan. 15, 2015) (“Wireless subscriber monthly churn rates in the third quarter of 2014 were 1.0% for Verizon and AT&T, 1.6% for T-Mobile, and 2.2% for Sprint, which means that 12 percent of Verizon and AT&T customers, 19 percent of T-Mobile customers, and 26 percent of Sprint customers, churn each year.”). Additionally, “[a]ll four nationwide carriers offer pro-rated ETF policies that lower the costs to consumers who transfer services.” Letter from William H. Johnson, Verizon to Marlene H. Dortch, FCC, GN Docket No. 14-28 at 5 (filed Feb. 19, 2015) (Verizon Feb. 19, 2015 Wireless Ex Parte Letter), <http://apps.fcc.gov/ecfs/document/view?id=60001031470>.

“Nor could the Commission find that any participant in the marketplace for Internet interconnection has market power, including those that also provide broadband Internet access.” Letter from Gary L. Phillips, AT&T to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 & 10-127 at 9 (filed Feb. 2, 2015) (AT&T Feb. 2, 2015 Common Carrier Ex Parte Letter), <http://apps.fcc.gov/ecfs/document/view?id=60001025387>. *See also infra* note 37.

¹⁰ The only concession to small providers is a temporary reprieve from the enhanced disclosure requirements. There is no relief from Title II. Moreover, ACA, NCTA and WISPA pointed out that the Commission did not adequately address the impact of Title II on small providers in the NPRM and Initial Regulatory Flexibility Act (IRFA) analysis. *See, e.g.*, Letter from Ross Lieberman, ACA, Lisa Schoenthaler, NCTA, and Stephen Coran, WISPA, to Tom Wheeler, FCC, GN Docket No. 14-28 at 4 (filed Jan. 9, 2015) (“The proposal of the most concern and potential significant negative impact on small broadband providers – whether wireline and wireless, fixed or mobile – is the FCC’s proposal to regulate information services under Title II. However, there is no discussion in the NPRM nor IRFA of the major changes that a Title II regulatory scheme will impose on small broadband providers.”).

¹¹ Matthew M. Polka, American Cable Association, *FCC Must Address Harm to Small and Medium-Sized ISPs from Title II Regulation* (Feb. 9, 2015), <http://americancable.org/node/5189>; Letter from Barbara S. Esbin, Counsel to American Cable Association, to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 & 10-127 at 3-4 (filed Feb. 2, 2015), <http://apps.fcc.gov/ecfs/document/view?id=60001025667>.

“Indeed, across the broad array of broadband providers that USTelecom represents, the vast majority *pay* to request and receive Internet traffic. It belies common sense and economics to suggest that a broadband provider that is paying to receive Internet traffic has a meaningful ‘terminating access monopoly.’” Letter from Jonathan Banks, USTelecom to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 & 10-127 at 3 (filed Feb. 18, 2015) (USTelecom Ex Parte Letter).

While “an agency’s predictive judgments about the likely economic effects of a rule” are entitled to deference, “deference to such ... judgment[s] must be based on some logic and evidence, not sheer speculation.”¹² The predictions in this item are based on pure conjecture and deserve no deference.

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.¹³ 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.”¹⁴

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.”¹⁵

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.¹⁶ 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.

¹² *Sorenson Communications Inc. v. F.C.C.*, 755 F.3d 702, 708 (D.C. Cir. 2014) (quoting *Nat’l Tel. Coop. Ass’n v. FCC*, 563 F.3d 536, 541 (D.C. Cir. 2009); *Verizon v. FCC*, 740 at 663 (Silberman, J., concurring in part and dissenting in part)).

¹³ Letter from Berin Szoka, Tech Freedom et al. to Chairman Wheeler, FCC, GN Docket No. 14-28 at 2 (filed Sept. 15, 2014), <http://apps.fcc.gov/ecfs/document/view?id=7522679800>. Moreover, “Title II would undermine 15 years of American insistence around the world that the Internet shouldn’t be regulated under traditional telecom rules.” *Id.* at 1.

¹⁴ *See, e.g., supra* note 753.

¹⁵ Kery Murakami, *Wheeler Defends Proposed Net Neutrality Rules at NARUC*, COMM. DAILY at 4, 6 (Feb. 18, 2015) (quoting Craig Moffett).

¹⁶ *Supra* para. 414.

The item trots out three examples of Title II “success stories” but they are all inapposite. First, it notes that during the time that mobile voice service has been subject to Title II, investment has flourished. But that assumes that companies were investing in their mobile networks for the sake of *voice* service. That is plainly not the case. That investment was made to improve the capacity of the networks to handle mobile *broadband* traffic.¹⁷

Second, it points to rural carriers that opted to provide a transmission service on a common carriage basis. Many did so, but not for the sake of Title II. They did so to participate in the NECA tariff and pooling process, which helps stabilize cost recovery and reduce administrative costs.¹⁸

Third, it points to forbearance from certain provisions of Title II as applied to enterprise broadband. In that situation, a heavily regulated service was granted some measure of relief, improving the case for investment. Here we would be subjecting services to greater regulation, which is another matter entirely. Furthermore, if enterprise broadband forbearance is such a success story, then why has it taken the Commission so long to act on a pending “me too” enterprise forbearance petition?

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 Communications Act, decades of Commission decisions, and the views of all nine Supreme Court Justices in [*Brand X*].”¹⁹

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.”²⁰ For example, one White Paper noted, “the Commission expressly invited the reliance at issue

¹⁷ Verizon Feb. 19, 2015 Wireless Ex Parte Letter at 1-2 (“Chairman Wheeler, for example, has written that ‘[o]ver the last 21 years, the wireless industry has invested almost \$300 billion’ under rules ‘similar’ to those he is proposing for broadband Internet access, ‘proving that modernized Title II regulation can encourage investment and competition.’ This analogy is misplaced. The wireless industry’s capital expenditures have been driven not primarily by CMRS voice service offerings, but by Title I mobile broadband services offered over 3G and 4G platform.”) (internal citation omitted).

¹⁸ Letter from Richard A. Askoff, NECA et. al to Marlene H. Dortch, FCC, CC Docket No. 02-33 & WC Docket No. 04-36 (July 26, 2005), <http://apps.fcc.gov/ecfs/document/view?id=6518022135> (“Over 900 small telephone companies currently offer Digital Subscriber Line (DSL) transmission services under NECA’s tariff and participate in associated revenue pools. Existing NECA tariff and pooling arrangements permit these companies to offer new services in an efficient and timely manner, while providing stable monthly cash flows and protection against unexpected demand reductions or increased costs. Absent pooling, for example, the potential loss of only one large customer could make a significant difference in whether a rural company can risk investments in new service deployments.”).

¹⁹ 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>.

²⁰ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

here: When it classified mobile broadband as an integrated information service more than seven years ago, it explained that “[t]hrough this classification, we provide the regulatory certainty needed to help spur growth and deployment of these services.”²¹ Under these circumstances, the Commission must “provide a more detailed justification” for changing course “than what would suffice for a new policy created on a blank slate.”²²

The item utterly fails that test. It counters that a few carefully selected statements by providers and investors show that classifications have an indirect impact on investment. It does not respond at all to the White Paper and, as noted above, this type of reasoning doesn’t account for foregone investment. Moreover, statements from 2010 are inapposite because the reclassification under discussion at the time concerned a transmission component. Here we are talking about reclassifying the entire retail broadband service and regulating Internet traffic exchange to boot. There’s simply no comparison. Additionally, arguing that providers should have known since 2000 that this was a real possibility is disingenuous to the extreme given that the FCC leadership itself did not know if or how it would use Title II almost up until today’s vote. And saying that the forbearance keeps reclassification within the bounds of Title I is laughable given that the relief is really fauxbearance.

The significant legal infirmities, which have been persuasively demonstrated in the record and by my colleague Commissioner Pai, are enough to overturn the decision. Yet 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.”²³

Once again, the item relies heavily on providers’ advertisements—this time to claim that the broadband Internet access service that they are offering is merely “a conduit for the transmission of data across the Internet.”²⁴ But that is no basis for changing the classification now; speeds have always been the focus of broadband ads.²⁵ Moreover, as one provider observed, “when consumers use broadband,

²¹ CTIA Dec. 22, 2014 White Paper at 21 (citing *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5911 ¶ 27 (2007)).

²² *FCC v. Fox Television Stations, Inc.*, 556 U.S. at 515.

²³ 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>.

²⁴ *Supra* para. 354. The item also points to the ads to determine that ISPs hold themselves out to serve the public indifferently. *Supra* note 965. A smattering of general advertisements, however, is not a substitute for a reasoned analysis, nor does it establish that each and every ISP has made “a conscious decision” to hold itself out to serve the public indifferently. *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994). Moreover, the Commission itself has recognized that ISPs may “decide case-by-case basis whether to serve a particular end user, what connection speed(s) to offer, and at what price” and this “flexibility to customize service arrangements for a particular customer is the hallmark of private carriage, which is the antithesis of common carriage.” *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17951, ¶ 79 (2010) (*2010 Open Internet Order*), *aff’d in part, vacated and remanded in part sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (citing *Sw. Bell Tel. Co. v. FCC*, 19 F.3d at 1481 (“If the carrier chooses its clients on an individual basis and determines in each particular case whether and on what terms to serve and there is no specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular service and the Commission is not at liberty to subject the entity to regulation as a common carrier.”) (internal quotation marks omitted)). Indeed, “[t]aking advantage of this flexibility, AT&T, for example, reserves the right to refuse to provide its wireline broadband Internet access service to potential customers that it perceives as credit risks.” AT&T Feb. 2, 2015 Common Carrier Ex Parte Letter at 7.

²⁵ See Verizon Feb. 19, 2015 Title II Ex Parte Letter at Appendix 1.

their goal is not simply to ‘send’ and ‘receive’ information from one end point to another. Rather, they aim to acquire, retrieve, and manipulate information located on remote servers. These are all fundamental attributes of information services: the driver is the information, not the transportation of the information.”²⁶

Conveniently, the item also determines that other functionalities of Internet access, such as DNS and caching, that were previously considered enhanced services or information services, now fall within the telecommunications management exception to the definition of information services or do not affect the fundamental nature of broadband Internet access service. As such, the item claims that they do not turn broadband Internet access service into a functionally integrated information service. This is absurd. The very essence of functionalities like DNS and caching is to provide the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”²⁷ Thus, these ISP functions do not exist solely to “facilitate” transmission or make it more “useful”,²⁸ they are “what allow consumers to interact with and obtain information, as well as to make their own information available.”²⁹ Indeed, the item points out that CDN caching remains an information service, thereby undercutting the classification of ISP caching, because the only difference between the two, according to the item, is the extent to which CDN caching is deployed within networks. Accordingly, contrary to the item, all services that include such functions also must meet the statutory definition of an information service.³⁰

The item also emphasizes that consumers increasingly use third parties for services such as email, website hosting, DNS, newsgroups, and video streaming. Yet that ignores the Commission’s prior determinations that “[t]he information service classification applies regardless of whether subscribers use all of the functions and capabilities provided as part of the service (e.g., e-mail or web-hosting), and whether every wireline broadband Internet access service provider offers each function and capability that could be included in that service.”³¹

²⁶ *Id.* at 2.

²⁷ 47 U.S.C. § 153(20) (defining an “information service”). Accordingly, these functionalities do not merely “facilitate establishment of a basic transmission path”. *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21958, ¶ 107 (1996).

²⁸ *Supra* paras. 370, 372.

²⁹ Letter from Christopher Heimann, AT&T to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 & 10-127 at 7 (filed Feb. 2, 2015) (AT&T Feb. 2, 2015 Brand X Ex Parte Letter), <http://apps.fcc.gov/ecfs/document/view?id=60001025378>.

³⁰ *See id.* at 1-2, 6-8. *See also* AT&T Feb. 18 Fact Sheet Ex Parte Letter at 5 (“As long as the offering contains more than what the Commission has called a ‘pure transmission path’ — broadband Internet access is an information service.”) (internal citation omitted).

³¹ *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 15 (2005) (*WBIAS Order*) (citing *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*, GN Docket No. 00-785, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 38 (2002), *aff’d*, *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)). The *WBIAS Order* also observed, “This classification appears consistent with Congress’s understanding of the nature of Internet access services. Specifically, in section 230(f)(2) of the Act, Congress defined the term ‘interactive computer service’ to mean ‘any information service, . . . including
(continued...)”

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.³² Regardless of the form they take—“peering,” “transit,” or “on-net-only”—providers do not hold themselves out to serve the public indifferently.³³ When considering whether to enter into these “voluntary, market-based agreements,” providers “independently make decisions about interconnection by weighing the benefits and costs on a case-by-case basis.”³⁴ As one provider stated, “the exchange of Internet traffic invariably entails arrangements between sophisticated commercial parties with very large amounts of traffic and their own network facilities – parties that directly connect only when they perceive mutual value in doing so.”³⁵ Indeed, another provider noted that providers reserve the right not to enter into agreements even where guidelines are met.³⁶ This “flexibility to customize service arrangements for a particular customer is the hallmark of private carriage, which is the antithesis of common carriage.”³⁷ As such, these arrangements, which some mistakenly refer to as “interconnection”, have never been regulated as common carriage services subject to Title II.³⁸

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specifically a service or system that provides access to the Internet....” *WBIAS Order* at fn. 41 (citing 47 U.S.C. § 230(f)(2)).

³² See Google Feb. 20, 2015 Ex Parte Letter 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>; AT&T Feb. 2, 2015 Common Carrier Ex Parte Letter at 7-8; Comcast Jan. 30, 2015 Ex Parte Letter at 2-6.

³³ AT&T Feb. 2, 2015 Common Carrier Ex Parte Letter at 7-8.

³⁴ Federal Trade Commission, *Broadband Connectivity Competition Policy* at 25 (June 2007), <http://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf>.

³⁵ Comcast Jan. 30, 2015 Ex Parte Letter at 3.

³⁶ See AT&T Feb. 2, 2015 Common Carrier Ex Parte Letter at 8 (“For example, AT&T’s peering policy expressly states that “[m]eeting the peering guidelines set forth herein is not a guarantee that a peering relationship with AT&T will be established,” that AT&T will “evaluate a number of business factors” before entering into a peering agreement, and “reserves the right not to enter into a peering agreement with an otherwise qualified applicant.”) (citing AT&T Global IP Network Settlement-Free Peering Policy, <http://www.corp.att.com/peering>).

³⁷ *Open Internet Order*, 25 FCC Rcd at 17951, ¶ 79. Moreover, this market is highly competitive. See, e.g., AT&T Feb. 2, 2015 Common Carrier Ex Parte at 9 (“At the same time that transit rates are declining rapidly, the volume of Internet traffic flowing over peering and transit arrangements has been growing at a remarkable pace. This combination of falling prices and increased output is exactly the opposite of what occurs where providers have market power, which is the ability ‘to raise price and restrict output.’ On the contrary, these facts lead inexorably to the conclusion that there is robust competition among competing networks of all types, fueled by massive continuing investments in fiber and IP platforms — investments that were made in reliance on the Commission’s long-standing, hands-off policy with respect to Internet access services and Internet interconnection arrangements.”) (internal citations omitted); Comcast Jan. 30, 2015 Ex Parte Letter at 5 (“Thanks to fierce competition, unit prices for transit services have dropped over 99% in the past 15 years.”).

³⁸ 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.”); *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17663, ¶ 1338 (2011) (*USF/ICC Transformation Order*), *aff’d sub nom. In re FCC 11-161*, 753F.3d 1015 (10th Cir. 2014).

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. Specifically, because providers supposedly hold themselves out to provide broadband Internet access service, that includes a “representation” to customers that they will be able to reach “all or substantially all Internet endpoints”, and that representation necessarily includes the “promise” to make the interconnection arrangements necessary to allow that access.³⁹ 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.⁴⁰ Second, the item does not show how this 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.⁴¹

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. Parties noted that interconnection arrangements are unrelated to last-mile net neutrality concerns.⁴² But the item doesn’t attempt to apply the net neutrality rules to Internet traffic exchange; it applies Title II. To be sure, it does so under the guise of net neutrality. But the market for Internet traffic exchange serves a far broader purpose than ensuring that retail consumers are able to reach points on the Internet.⁴³ In

³⁹ *Supra* para. 204.

⁴⁰ *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 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).

⁴¹ *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.

⁴² *See id.* at 1-3 (“These [traffic exchange] arrangements are distinct from the issues that are the subject of the Commission’s open Internet rules, such as the ability of end-users to access particular content or the priority with which content might be delivered to end-users over an ISP’s last-mile network.”). *See also, e.g.*, Verizon Dec. 17, 2014 Interconnection Ex Parte at 1 (“[I]nterconnection agreements involve issues that are distinct from net neutrality, which has always focused on broadband Internet access providers’ handling of traffic over the last-mile connection to consumers.”).

⁴³ Comcast Jan. 30, 2015 Ex Parte Letter at 2-3 (“Traffic-exchange arrangements concern the transport of Internet traffic across the increasingly complex and dynamic backbone architecture of the Internet, and are negotiated based on the amounts of traffic – not the type, content, or source of traffic – being delivered to each party’s network by the other.”).

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 item, 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.⁴⁴ 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 environment.⁴⁵ Wireless consumers have ample choices and can readily switch between offerings.⁴⁶ 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.⁴⁷ Applying a regulatory regime established for monopoly voice service to the dynamic mobile sector defies logic.

⁴⁴ 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 at 650; *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.

⁴⁵ *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).

⁴⁶ 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, CTIA – The Wireless Association, to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 & 10-127, at 3-5 (Feb. 10, 2015) (CTIA Feb. 10, 2015 Ex Parte Letter).

⁴⁷ 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>.

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.⁴⁸ 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.⁴⁹ In addition, there has been no meaningful opportunity for public comment on this change of definition.⁵⁰ This action is nothing less than an attempt to improperly capture mobile broadband under Title II, in direct contravention of congressional intent,⁵¹ and it is not likely to survive judicial scrutiny.

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.*”⁵² 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 to make my point:

⁴⁸ 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, CTIA – The Wireless Association, to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 & 10-127 (Oct. 6, 2014).

⁴⁹ 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.

⁵⁰ See, e.g., Letter from Gary L. Phillips, AT&T, to Marlene H. Dortch, FCC, 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, Verizon, to Marlene H. Dortch, FCC, at 5-6 (Verizon Dec. 24, 2014 Ex Parte Letter).

⁵¹ 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.

⁵² *Supra* para. 446 (emphasis added).

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.”⁵³ This is backdoor rate-setting authority.

Fauxbearance from Information Collection and Reporting (sections 211, 213, 215, 218-20): “[S]ection 706 of the 1996 Act, along with other statutory provisions, give the Commission authority to collect necessary information.” (Citing as one example the Special Access Data Collection, which relied on sections 201 and 202 of the Act and section 706 of the 1996 Act).⁵⁴

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.”⁵⁵

Fauxbearance from Duty to Maintain Adequate Facilities (section 214(d)): “In practice, we expect that the exercise of this duty here would overlap significantly with the sorts of behaviors we would expect providers to have marketplace incentives to engage in voluntarily as part of the ‘virtuous cycle.’ Beyond that...it is our predictive judgment that other protections will be sufficient to ensure just, reasonable, and nondiscriminatory conduct by providers of broadband Internet access service and to protect consumers....”⁵⁶

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.”⁵⁷

Section 201 is apparently so broad that it is even a backstop for section 202. Several commenters had pointed out that the Commission has interpreted Title II—specifically, section 202(a)—to allow carriers to engage in reasonable discrimination, including by charging certain customers more for better or faster service.⁵⁸ But we are told that is longer an obstacle because the Commission can simply ban service differentiation as an unjust and unreasonable practice under section 201(b).⁵⁹ While courts have

⁵³ *Supra* para. 499.

⁵⁴ *Supra* para. 509.

⁵⁵ *Supra* para. 510.

⁵⁶ *Supra* para. 513 (internal citation omitted).

⁵⁷ *Supra* para. 514.

⁵⁸ *See, e.g.*, NCTA Comments 27-29; TWC Comments 14-16; Letter from William L. Kovacks, Chamber of Commerce to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 & 10-127, at 3, n.13 (filed July 15, 2014); ITIF Comments at 9.

⁵⁹ *Supra* para. 292 (“In light of our discretion in interpreting and applying sections 201 and 202 and insofar as section 706(a) is ‘a ‘fail-safe’ that ‘ensures’ the Commission’s ability to promote advanced services,’ we decline to

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determined that sections 201 and 202 afford the Commission with substantial discretion, it is not unbounded. This statutory shell game seems to be height of arbitrary and capricious rulemaking.

Yet even if one were to buy the story that the Commission is granting broad forbearance, that only serves to undercut the argument for Title II in the first place. Broad forbearance would prove that Title II is ill-suited for the dynamic broadband market. As one provider stated, “The very fact that the Commission feels the need to re-work so many provisions of Title II is proof that Congress never intended for Title II to apply to broadband providers.”⁶⁰ It would be evident that the Commission is merely engaging in an end-run around the statute in order to advance its own vision.

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

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.”⁶¹ 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.”⁶² 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.”⁶³ It is the unified theory of communications law.

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? The fact that Congress added more specific provisions is, by itself, evidence that the Commission does not have sufficient authority to do what the item envisions with the “core” Title II provisions. Indeed, “such an argument implies that the provision being forborne is redundant or surplus.”⁶⁴ And it is axiomatic that statutes should be construed “so as to avoid rendering superfluous” any statutory language.⁶⁵

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

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interpret section 202(a) as preventing the Commission from exercising its authority under sections 201(b) and 706 to ban paid prioritization practices that harm Internet openness and deployment.”) (internal citation omitted).

⁶⁰ Verizon Feb, 19, 2015 Title II Ex Parte Letter at 7.

⁶¹ *Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2444, 2445 (2014).

⁶² *Ragsdale v Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002) (internal quotation marks omitted).

⁶³ *Verizon v. FCC*, 740 F.3d at 662 (Silberman, J., concurring in part and dissenting in part).

⁶⁴ Letter from Earl W. Comstock, Counsel to Full Service Network and TruConnect, to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 & 10-127 at 4 (filed Feb. 20, 2015), <http://apps.fcc.gov/ecfs/document/view?id=60001031994>.

⁶⁵ *Astoria Federal Savings & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991).

forbear from enforcing provisions of the Act as well as its own regulations.”⁶⁶ 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 deregulatory objective is reinforced by other provisions enacted at the same time. For example, in the same Title of the 1996 Act, Congress directed the Commission to engage in a biennial review of regulations adopted under the Act and remove regulations that were no longer justified.⁶⁷ Therefore, increasing regulation would run counter to this plain intent.

Congress was even clearer with respect to the minimal regulatory treatment it expected for the Internet and Internet access services. In section 230(b)(2), Congress stated that it is the policy of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation”.⁶⁸ Congress defined an “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”⁶⁹ Accordingly, applying new rules to broadband would be contrary to the Act, even if one was to accept the misguided premise that this hortatory language provides any authority.

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, charges, practices, 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 207⁷⁰—will rule

⁶⁶ *Verizon and AT&T Inc. v. FCC*, 770 F.3d 961, 964 (D.C. Cir. 2014).

⁶⁷ 47 U.S.C. § 161.

⁶⁸ 47 U.S.C. § 230(b)(2).

⁶⁹ 47 U.S.C. § 230(f)(2).

⁷⁰ 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 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

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on a particular matter. There will be no certainty. Indeed, one public interest group called the catch-all a “recipe for overreach and confusion”.⁷¹

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.)

Those that haven’t monitored enforcement actions should take heed: the Commission has enforced statutory provisions even where it has not “give[n] fair notice of conduct that is forbidden or required.”⁷² This happened in the *TerraCom Notice of Apparent Liability for Forfeiture* where the Commission determined, for the first time—during an enforcement action—that sections 201 and 222 cover data protection.⁷³ As I explained at length in my dissent, the Commission had never adopted any rules to that effect. To the contrary, prior orders had made clear that the Commission viewed section 222 as being limited to CPNI.⁷⁴ Moreover, if data protection falls within the ambit of 201(b), then I can only imagine what else might be a practice “in connection with” a communications service. There is no limiting principle. I would also note that this was a situation where the provider voluntarily disclosed the data breach to the Enforcement Bureau and Wireline Competition Bureau.

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. Additionally, the Commission fully intends to review rates after the fact. As one group noted, “[A]llowing post hoc scrutiny of broadband rates through the filing of complaints (either before the Commission or in federal court) is “rate regulation” in the purest sense—no less so than *ex ante* requirements to file tariffs or to seek Commission approval for rate changes.”⁷⁵ The Commission expressly contemplates examining, on a case-by-case basis, whether interconnection agreements are just and reasonable under sections 201 and

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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).

⁷¹ 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>.

⁷² *FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2317 (2012) (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

⁷³ *TerraCom, Inc. and YourTel America, Inc.*, Apparent Liability for Forfeiture, File No.: EB-TCD-13-00009175, 29 FCC Rcd 13325 (2014), https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-173A1_Rcd.pdf. The NAL also wrongly suggested that section 201(b) covers cybersecurity.

⁷⁴ *Id.* at 13351 (dissenting Statement of Commissioner Michael O’Rielly), https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-173A5.pdf.

⁷⁵ Letter from Matthew A. Brill, Counsel to National Cable & Telecommunications Association, to Marlene H. Dortch, FCC, GN Docket Nos. 14-28, 10-127 at 2 (Feb.11, 2015) (NCTA Feb. 11, 2015 Ex Parte Letter), <http://apps.fcc.gov/ecfs/document/view?id=60001028642>.

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. As one association observed, “the Commission should not and cannot legally or logically distinguish between kinds of broadband transmission (e.g., last-mile, middle-mile, etc.) in classifying broadband as a telecommunications service. If data are conveyed from points A to Z or exchanged between networks of any kind, those functions are broadband transmission – and the mere location of that transmission at a given point in the network ecosystem is irrelevant by itself to regulatory classification.”⁷⁶ In other words, the decisions made today will necessarily impact future decisions. The fact that certain decisions will happen later does nothing to diminish the culpability of the current majority.

For all of these reasons, I dissent.

⁷⁶ Letter from Michael R. Romano, NTCA to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 & 10-127, at 1 (filed Feb. 19, 2015) (NTCA Feb. 19, 2015 Ex Parte Letter), <http://apps.fcc.gov/ecfs/document/view?id=60001031424>.