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MOBILE INTERNET ACCESS: TECHNOLOGY, COMPETITION, AND JURISDICTION

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I. INTRODUCTION

In 2007, the Federal Communications Commission ("FCC" or "Commission") exempted mobile on-ramps to the "information superhighway" from common carrier treatment.[1] The agency reversed its decision just eight years later, establishing a modified common carrier regulatory regime for broadband Internet access services.[2] In order to preserve the ability of consumers to send and receive legal information of their choosing over the "open Internet," the Commission reclassified fixed broadband services under Title II of the Communications Act of 1934 (the "Act"),[3] the statutory provisions traditionally applied to telecommunications common carriers. The Commission also reclassified mobile broadband services as "commercial mobile service" or its functional equivalent, also subject to Title II. Finally, it forbore from applying the full extent of Title II to broadband services. This decision was upheld in 2016 by a three-judge panel of the Court of Appeals for the D.C. Circuit in *United States Telecom*

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[1] Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd. 5901, 5903 (2007) [hereinafter *Wireless Broadband Order*].

[2] *See* Protecting and Promoting the Open Internet, *Declaratory Ruling and Order,* FCC 15-24, GN Docket No. 14-28, 30 FCC Rcd. 5601, 5609-10 (2015) [hereinafter *2015 Open Internet Order*].

[3] Communications Act of 1934, 47 U.S.C. § 51 *et seq., as amended by* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) [hereinafter *1996 Act*].

Ass'n. v. FCC,[4] petitions for rehearing en banc pending.[5]

How did the search for the open Internet lead to more regulation for mobile broadband services?[6] In answering this question, this article reviews the background of common carriage, traces its application to mobile services, and examines the history of network neutrality[7] policies in the United States.

II. COMMON CARRIAGE, MOBILE SERVICES AND THE INTERNET: A BRIEF HISTORY

The concept of "common carriage" arose out of English common law expectations that those who served the public, such as innkeepers, blacksmiths, ferries and railroads, were responsible for reasonable treatment of those who requested or purchased their services.[8] The quasi public character of certain services, "coupled with the lack of control exercised by shippers or travellers over the safety

[4] U.S. Telecom Ass'n. v. FCC, 825 F.3d 674 (D.C. Cir. 2016) [hereinafter *US Telecom*]. AT&T rapidly indicated it expected the case to reach the Supreme Court. *See* AT&T Blog Team, *AT&T Statement on U.S. Court of Appeals Net Neutrality Decision,* AT&T PUBLIC POLICY BLOG (June 14, 2016, 11:04 AM), https://www.attpublicpolicy.com/broadband-classification/att-statement-on-u-s-court-of-appeals-net-neutrality-decision **[**https://perma.cc/BJ6Q-8U7F**]** **(**"*The following may be attributed to David McAtee, AT&T Senior Executive Vice President and General Counsel:* 'We have always expected this issue to be decided by the Supreme Court, and we look forward to participating in that appeal.'").

[5] *See* Petition for Rehearing En Banc, *US Telecom*, 825 F.3d 674 (D.C. Cir. 2016); Petitioner CTIA's Petition for Rehearing En Banc, *US Telecom*, 825 F.3d 674 (D.C. Cir. 2016) [hereinafter CTIA En Banc Petition]; Joint Petition for Rehearing En Banc of Petitioners Nat'l. Cable and Telecomm. Ass'n. (NCTA) and Am. Cable Ass'n. (ACA), *US Telecom*, 825 F.3d 674 (D.C. Cir. 2016).

[6] *See generally 2015 Open Internet Order,* 30 FCC Rcd. at 5609-10. The FCC has defined "broadband Internet access service" as a "mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service" and "any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part." This article uses the term "broadband" or "broadband service" at times as shorthand for "broadband Internet access service," and the phrase "broadband providers" as a substitute for the "broadband Internet access service providers;" the terms should be considered interchangeable.

[7] *See* Tim Wu, *Network Neutrality, Broadband Discrimination,* 2 J. ON TELECOMM. & HIGH TECH. L. 141 (2003) (describing the term "network neutrality" as a lack of discrimination by Internet access providers against competing content and applications).

[8] *See, e.g.*, JOSEPH H. BEALE, THE LAW OF INNKEEPERS AND HOTELS: INCLUDING OTHER PUBLIC HOUSES, THEATRES, SLEEPING CARS 8 (1906) ("[H]aving undertaken such a public business, and the public need being concerned, the innkeeper must supply his service to all."); Nat'l. Ass'n. of Regulatory Utility Comm'rs. v. FCC, 525 F.2d 630, 640 (D.C. Cir. 1976)

of their carriage, was seen as justifying imposing upon the carrier the status of an insurer," aside from events in the nature of *force majeure.*[9] Common carrier regulation restricts those regulated, but also may result in benefits or loss offsets, such as access to public markets, public rights of way, construction or operation subsidies, control of facilities, services or routes also needed by other service providers, and limited liability for the content of traffic transported for customers.[10]

By applying the "stricter duty of care"[11] of common carriers, as implemented in Title II of the Communications Act, the FCC has, to an extent instructed carriers to insure the safe transmission of information to or from members of the public. Exercising authority granted by Congress in connection with newer technologies, the Commission has used its Section 230(b) authority to "promote the continued development of the Internet," and as authorized by Section 706 of the Act, has encouraged the deployment of broadband to all Americans. At the same time, an absolute ideal of indifferent carriage may not be attainable in a landscape of complex marketplace dynamics, economic realities and technical network operations aspects.

The central conflict leading to the initial appeal of the 2015 open Internet rules arose from the Commission's increasing desire to require a "neutral" provision of broadband Internet access services while decreasing its authority over broadband services. Although the agency initially classified certain mobile services as "commercial mobile services" subject to portions of Title II, and broadband Internet access services as "telecommunications services" also subject to Title II,[12] it later reclassified broadband services as "information services" which were not subject to Title II common carrier requirements.

[hereinafter *NARUC I*] (citing Munn v. People of State of Illinois, 94 U.S. 113, 130 (1876)) (early common carrier regulations on rail carriers in the U.S., for example, "were upheld on the basis of the near monopoly power exercised by the railroads, coupled with the fact that they 'exercise a sort of public office' in the duties which they perform."), *cert. denied*, 425 U.S. 992 (1976); *see also* Cellco P'ship v. FCC, 700 F.3d 534, 545 (D.C. Cir. 2012) [hereinafter *Cellco P'ship*].

[9] *See NARUC I*, 525 F.2d at 640 n.53 (citing Propeller Niagara v. Cordes, 62 U.S. 7, 23 (1858)).

[10] *See, e.g.*, *NARUC I*, 525 F.2d at 641-42 ("The common carrier concept appears to have developed as a sort of quid pro quo whereby a carrier was made to bear a special burden of care, in exchange for the privilege of soliciting the public's business."); *see also* Rob Frieden, *Schizophrenia Among Carriers: How Common and Private Carriers Trade Places*, 3 MICH. TELECOMM. TECH. L. REV. 19 (1997) ("Historically, the rights and responsibilities vested in common carriers tempered their market power in exchange for reduced liability or insulation from commercial and personal damages caused by the content carried.").

[11] *NARUC I*, 525 F.2d at 641.

[12] *See* Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 FCC Rcd. 24012, 24014 & 24029-30 (1998) [hereinafter *Advanced Services Order*].

Commencing in 2005, however, the agency adopted network neutrality principles setting forth market competition as a policy goal and opposing the blocking by broadband service providers of consumers' access to lawful Internet content, applications and services, or connection "of legal devices that do not harm the network . . . ."[13] In other words, shortly after it started reclassifying broadband services as not common carriage, the Commission began establishing principles that Internet content and applications must receive indifferent carriage, a hallmark of common carriage.

In 2010, the agency codified its network neutrality principles,[14] requiring that broadband providers make detailed disclosures; not limit consumers' access to lawful content, applications, services, non-harmful devices, lawful websites, or competing applications; and, for fixed services, not unreasonably discriminate in transmitting lawful network traffic. The anti-discrimination and no-blocking rule was moderated by providers' ability to exercise "reasonable network management. . . ."[15]

Rapid appeal by Verizon resulted in the D.C. Court of Appeals vacating the no-blocking and anti-discrimination rules in 2014.[16] The court found that although the agency had "chosen to classify broadband providers in a manner that exempts them from treatment as common carriers,[17] the rules imposed common carrier requirements, contravening the Act's prohibition against applying common carrier treatment to providers not regulated as common carriers.

The Commission returned to square one. It sought public input on new proposals, and 3.7 million commenters responded. Internet content and application providers and advocates, from small startups to large companies such as eBay, Netflix, Microsoft and Mozilla, largely filed "support for the reclassification of broadband Internet access under Title II, opposition to fast lanes and paid prioritization, and unease regarding the market power of broadband Internet access service providers."[18] In contrast, many broadband providers and commentators, ranging from small wireless Internet service providers (WISPs), competitive mobile service providers and cable companies to titans with multiple lines of business such as AT&T, Verizon, CenturyLink, Cox and Comcast, observed that

[13] *See* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33, 20 FCC Rcd. 14986, 14988 (2005) [hereinafter *Policy Statement*].

[14] Preserving the Open Internet, Report and Order, GN Docket No. 09-191, WC Docket No. 07-52, 25 FCC Rcd. 17905, 17958 (2010) [hereinafter *2010 Open Internet Order*].

[15] *See id.* at 17928.

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

[17] *See id.* at 628.

[18] *2015 Open Internet Order*, 30 FCC Rcd. at 5625 n.110 (citing Knight Foundation, *Decoding the Net Neutrality Debate* (2014), http://www.knightfoundation.org/features/netneutrality/).

overbroad regulation could impair the broadband marketplace.[19] The White House released a video of President Obama strongly supporting Title II reclassification,[20] while members of Congress voiced both approval and opposition.

Ultimately, the agency took the *Verizon* court's hint and reclassified broadband under Title II, excluding CDNs.[21] While it preempted numerous Title II obligations, those chosen – and not – were the subject of concern for broadband providers, as were less flexible mobile provider open Internet obligations and spinoff proceedings such as an information privacy docket inviting comment on expanded data security obligations.[22] Some members of Congress alleged the FCC had failed to act independently,[23] and industry representatives and companies again appealed the rules to the D.C. Circuit Court of Appeals.

Nevertheless, a three-judge panel of the court upheld the Commission's 2015 order and rules.[24] The Cellular Telecommunications Industry Association (CTIA)'s petition for en banc review focuses on whether Congress intended to

[19] *See, e.g.*, Bryan Tramont & J. Wade Lindsay, *The Dangers of Mandating Network Neutrality,* 7 ENGAGE 145, 146 (2006), *available at* FEDERALIST SOC'Y FOR L. & PUB. STUD., WASHINGTON, D.C. (Mar. 04, 2016), http://www.fed-soc.org/publications/detail/the-dangers-of-mandating-network-neutrality [https://perma.cc/SYD8-46HY] ("Those who favor a vast new regulatory regime based on Net Neutrality principles place at risk the core, long term strength of the broadband marketplace in the United States. . . . [P]ublic policy should instead be focused on maintaining economic incentives for new broadband platforms to emerge, increasing competition, and eliminating whatever marketplace incentives there are for the dominant carriers to engage in the anticompetitive misconduct Net Neutrality is intended to thwart."). An overview of arguments for and against network neutrality regulation is available in Tim Wu & Christopher S. Yoo, *Keeping the Internet Neutral?: Tim Wu and Christopher Yoo Debate*, 59 FED. COMM. L. J. 575 (2007).

[20] *See* Ezra Mechaber, *President Obama Urges FCC to Implement Stronger Net Neutrality Rules,* WHITE HOUSE: BLOG (Nov. 10, 2014, 9:15AM), https://www.whitehouse.gov/blog/2014/11/10/president-obama-urges-fcc-implement-stronger-net-neutrality-rules [https://perma.cc/3M3Q-3DYM].

[21] Maintaining the information service classification for CDNs was viewed as a "curious" decision by some, "despite the fact that these ventures, operating upstream from last mile ISPs, work on an integrated basis with last mile ISPs to achieve a complete and seamless link from content source to content consumer." Rob Frieden, *Déjà Vu All Over Again: Questions and a Few Suggestions on How the FCC Can Lawfully Regulate Internet Access*, 67 FED. COMM. L.J. 325, 375 (2015), http://www.fclj.org/wp-content/uploads/2016/01/67.3.1-Frieden.pdf [https://perma.cc/8FL4-MXBC].

[22] *See* Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, 81 FED. REG. 23, 360 (April 20, 2016).

[23] *See generally FCC: Process and Transparency: Hearing Before the H. R. Comm. On Oversight and Gov't Reform,* 114th Cong. (2015) (statement of Congressmen who think FCC failed to act independently), https://oversight.house.gov/hearing/fcc-process-transparency [https://perma.cc/BS6A-4FLU].

[24] *See* Petition for Rehearing En Banc, *US Telecom*, *supra* note 5.

provide the Commission with flexibility to regulate as common carriers networks that include Internet Protocol (IP) enabled endpoints, rather than encompassing only the telephone voice services traditionally regulated under Title II.[25] This article examines the history of common carriage, traces its application to mobile services during the emergence of the open Internet principles, and discusses the recent court proceedings.

III. COMMON CARRIAGE BEFORE 1996

A. Common Carrier Regulation Under the Communications Act of 1934

Title III of the Communications Act, 47 U.S.C. § 301 *et seq.,* gives the agency authority over radio stations.[26] Before 1993, Title III primarily authorized FCC regulation and licensing of radio transmissions, including mobile telephony. Early public mobile services and subsequent licensed cellular services were also regulated under the legal construct of "common carriage" applied to public telephone utilities,[27] with one cellular license in each market made available for the incumbent local exchange carrier (ILEC) affiliate. Radio services with more

[25] CTIA's Petition for Rehearing En Banc states, e.g.,

> Congress well understood that the Internet and the telephone network are different systems, and made clear its intent that the Internet be free from old-fashioned regulation . . . . In the *Order* on review, a bare majority of the FCC cast aside this longstanding and correct interpretation of Section 332, claiming vast authority to regulate every wireless device with an Internet Protocol ("IP") address . . . . The *Order* did multiple interpretive backflips to reach this unreasonable conclusion.

CTIA En Banc Petition, supra note 5, at 7.

[26] *See* 47 U.S.C. § 301 (1982).

[27] *See, e.g.*, G. Hamilton Loeb, *The Communications Act Policy Toward Competition: A Failure to Communicate,* 1978 DUKE L.J. 1, 1-20 (In many respects, "Title II of the Act incorporated the provisions of the Interstate Commerce Act that had governed telephone and telegraph since 1910," and when that Act was amended to include "'telegraph and telephone companies' within the definition of the common carriers . . . [i]ts [House] sponsor argued . . . that 'these necessary instrumentalities which the citizens have to use, which are monopolies in their particular lines of business [should] be required to make reasonable charges,'" and its Senate sponsor stated that "the interstate telegraph and telephone companies are about the only remaining public service corporations engaged in interstate commerce that are not under the control of the Interstate Commerce Commission."). Nevertheless, when Title II was later imported into the Communications Act of 1934 that created the FCC, new provisions such as §§ 201(a) and (b), 204, 211 and 214 were added, significantly increasing regulatory authority over communications common carriers. *See id.* at 20-21.

limited customer bases were regulated as "private" land mobile services not subject to common carriage requirements.[28]

The Commission derives its common carrier regulatory authority from Title II of the Communications Act, 47 U.S.C. § 201 *et seq.* Title II sets forth obligations traditionally applied to landline telephone exchange services, which generally held local monopolies over access to unique communications facilities and services. The statute requires common carriers to "furnish . . . service upon reasonable request," "establish physical connections with other carriers" where found necessary or desirable in the public interest, establish "just and reasonable" rates and practices, and refrain from "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services," among other obligations.[29]

The Act provides a notoriously circular definition of a "common carrier" or "carrier":

> any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.[30]

The D.C. Circuit Court of Appeals long interpreted this opaque definition by reference to common law and Commission interpretations. In *Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC ("NARUC I")*, upholding the FCC's non-common carrier treatment of specialized mobile radio ("SMRS") carriers, the court drew from precedent in describing when communications offerings constitute common carriage.

Judge Wilkey reconciled the English common law standard with common carrier regulation of railroads, whose monopoly power, "coupled with the fact that they 'exercise a sort of public office" in the duties which they perform[,]" had led to price and access controls; and with common carrier regulation of competitive service providers such as truckers.[31] Citing FCC precedent, he stated that a common carrier "makes a public offering to provide, for hire, facilities by wire or radio whereby all members of the public who choose to employ such

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[28] *See, e.g.*, Peter K. Pitsch & Arthur W. Bresnahan, *Common Carrier Regulation of Telecommunications Contracts and the Private Carrier Alternative*, 48 FED. COMM. L.J. 447, 454 n.42 (1996) ("Because user-owned radio communications systems did not afford the same economies of scale as wire-based telephony, the FCC licensed first private licensees and then competing common carrier licensees.").

[29] 47 U.S.C. § 201(a), (b); *id* at § 202(a).

[30] 47 U.S.C. § 153 (11) (originally enacted as § 3 of the Communications Act of 1934).

[31] *See* Nat'l. Ass'n. of Regulatory Utility Comm'rs. v. FCC, 525 F.2d 630, 641 n. 56 (D.C. Cir. 1976) [NARUC I] (citing American Trucking Ass'ns, Inc. v. United States, 101 F. Supp. 710 (N.D. Ala. 1951)).

facilities may communicate or transmit intelligence of their own design and choosing . . .”[32] He determined that “[w]hat appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier ‘undertakes to carry for all people indifferently . . .’”[33] whether this undertaking was implicit in the nature of the service or legally compelled.[34]

Applying this test, the Judge upheld the Commission’s determination that SMRS was not a common carrier service because the agency’s rules and requirements did not compel indiscriminate service, the nature of the contemplated services appeared to indicate little holding out to the public except upon individually negotiated contracts, and the intended regulatory scheme did not violate the Act.[35] In contrast, he stated, “public services are operated by common carrier licensees and made available to members of the public. . . . The cellular system is clearly a public, common carrier system, and will serve primarily to expand the capacity of radio telephone service. . . .”[36] Accordingly, a material determinant of common carriage was the indifferent offering of services to the public.

Subsequently, in *NARUC II,* the full court confirmed that the “primary sine qua non of common carrier status” was its “quasi public character.”[37] The court stated that the appropriate test for “common carriage” involved inquiry into whether the provider held itself out to serve indifferently all potential users, combined with traditional FCC inquiry into whether the system permits customer transmission of “intelligence of their own design and choosing.”[38] This case was decided after the Commission’s early inquiries into the effects on regulatory status of the combination of computer processing services with communications services.

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[32] *Id.* at 641 n.58 (citing Report and Order, Industrial Radiolocation Service, Docket No. 16106, 5 F.C.C.2d 197, 202 (1966)). Judge Wilkey noted nevertheless that a carrier could be a common carrier even if its services were not available to the entire public, as a result of specialized services not of use to the entire population, or insufficient capacity. “But a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal.” *Id.* at 641 (citing Semon v. Royal Indemnity Co., 279 F.2d 737, 739-40 (5th Cir. 1960)).

[33] *Id.* at 641.

[34] *Id.* at 642-43.

[35] *Id.* at 642-46.

[36] *Id.* at 634.

[37] *NARUC v. FCC II,* 533 F.2d 601, 608 (D.C. Cir. 1976) [hereinafter *NARUC II*] (citing Semon v. Royal Indemnity Co., 279 F.2d at 739; cases referred to in *NARUC I,* 525 F.2d at 641 n.58).

[38] *See NARUC I,* 525 F.2d at 641; *NARUC II,* 533 F.2d at 608 n.32 (describing FCC precedent as the basis for this judicial inquiry); *see id.* at 609 n.36 (citing In the Matter of Amendment of Part 2, 91, & 99 of the Commission’s Rules Insofar as they Relate to the Indus. Radiolocation Serv., 5 FCC 2d 197, 202 (1968); Frontier Broadcasting Co. v. FCC, 24 F.C.C. 251, 254 (1958)); *see also* FCC v. Midwest Video II, 440 U.S. 689, 701 (1979).

B. The Computer Inquiries and the Roots of the Open Internet Debate

The Commission traces the "roots of the [open Internet] debate" to its *Computer Inquiry* proceedings.[39] In the 1960s and early 1970s, as network and computer processing capabilities evolved, communications offerings could be accompanied by information processing and the production of stored information. The FCC decided to examine whether, "without appropriate regulatory safeguards," common carriers' provision of data processing services could adversely impact their provision of "adequate communications services under reasonable terms and conditions and impair effective competition in the sale of data processing services."[40]

Initially, the FCC declined to apply its full regulatory authority to data processing services[41] and required carriers to separate their regulated telephone activities from "non-regulated activities involving data processing"[42] – in other words, based upon the "upon the markets within which the technology existed."[43] The agency nevertheless forbore from regulation of "hybrid" services where message switching was "offered as an integral part of and as an incidental feature of a package offering that is primarily data processing . . . ."[44] Between 1971 and 1980, however, the agency was inundated with requests for classification of services in this "gray area" where "[c]omputer processing was involved in both 'pure communications' and 'data processing.'"[45]

This deluge, combined with additional policy issues and technological developments, spurred additional examination of these issues. Advances in distributed

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[39] *See* Reply Brief for Respondents at 10, U.S. Telecom Assn. v. Fed. Commc'ns Comm'n, No. 15-1063 (D.C. Cir. Oct. 13, 2015) (citing JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 188 (2d ed. 2013)).

[40] *In re* Regulatory & Policy Problems Presented by the Interdependence of Comput & Commc'n Servs. & Facilities, 28 F.C.C.2d 267, 269 (1971) [hereinafter *Computer I*], *aff'd in part sub. nom.* GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973), *decision on remand*, 40 F.C.C.2d 293 (1973). The first *Computer Inquiry* "recognized the dependency of the computer networks on the underlying communications facility . . . a crucial resource upon which they depended, supplied by a single provider who also had the potential to be a competitor." *See* Robert Cannon, *The Legacy of the Federal Communications Commission's Computer Inquiries,* 55 FED. COMM. L.J 167, 177 (2003) [hereinafter Cannon].

[41] *Computer I*, 28 F.C.C.2d at 269.

[42] *Id.*

[43] *See* Cannon, *supra* note 40, at 174.

[44] *Computer I*, 28 F.C.C.2d at 277.

[45] *See* Cannon, *supra* note 40, at 181 (citing Computer II Tentative Decision, 72 F.C.C. 2d 358, para., 86 (1979); Computer III Report and Order, 104 F.C.C. 2d 958, 10 (1986); *In re* Amendments of Section 54.702 of the Comm'n's Rules and Regs (Computer Inquiry), 64 F.C.C.2d 771 (1977)).

computing, such as increasing use of digital network technologies, modems and personal computers, enabled the use of data processing and communications control applications not only within networks but also at customer premises.[46] In addition, the regulatory burdens imposed on small businesses by the "maximum separation" regime were called into question. "Was it really necessary for a small incumbent telephone company in the foothills of the Appalachian Mountains, with less than 1000 subscribers, to set up a separate corporation simply to offer data processing services?"[47]

In its *Computer II* decision,[48] seeking to settle these issues, the agency decided to maintain "basic" transmission services[49] and provide certainty and efficiency, while "remov[ing] the threat of regulation from markets which were unheard of in 1934 and bear none of the important characteristics justifying the imposition of economic regulation by an administrative agency."[50] It reclassified "enhanced" services, which it defined as including computer processing applications or customer interaction with different or stored information, as non-common carrier services, saying that this would "remove the threat of regulation" from developing markets that lacked characteristics that would justify economic regulation.[51] *Computer II* also classified as "enhanced" those services that combined the transmissions element of basic services with computer processing applications.[52] In other words, adding a computer processing element removed a service from common carrier treatment, although the underlying "basic" transmission services remained subject to common carrier regulation.[53]

The Commission also eliminated the maximum separation regime for telephone common carriers not controlled by AT&T and GTE, surmising that most

[46] *See In re* Amendments of Section 64.702 of the Comm'n's Rules and Regs. (Second Computer Inquiry), 77 F.C.C.2d 385, 391 (1980) [hereinafter *Computer II*].

[47] *See* Cannon, *supra* note 40, at 182-83.

[48] *See Computer II*, 77 F.C.C.2d at 385.

[49] The Commission distinguished between "basic transmission services," which it defined as "the common carrier offering of transmission capacity for the movement of information," and "enhanced" computer-related services, defined as "basic service [combined] with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information." *Id.* at 387.

[50] *Id.* at 423.

[51] *Id.*

[52] *Id.* at 387.

[53] *Id.* at 435.

of these small, rural carriers lacked significant ability to engage in anticompetitive conduct favoring their own enhanced services over those of competitors,[54] and for smaller carriers, the costs of regulatory compliance could reduce access to capital markets and "foreclose entry into the enhanced services and CPE markets."[55]

The Commission supported its deregulation of enhanced services by stating that, like cable and SMRS, these services were not contemplated in the Act and need not be routinely regulated under either Title II or Title III.[56] Enhanced service providers could make individualized decisions whether and on what terms to deal. Moreover, the burdens of common carriage would "substantially affect not only the manner in which enhanced services are offered but also the ability of a vendor to more fully tailor the service to a given consumer's information processing needs."[57] Common carrier regulation "would limit the kinds of services an unregulated vendor could offer, restricting this fast-moving, competitive market . . . ."[58] The FCC therefore concluded that its goals under Section 1 of assuring a ". . . [n]ationwide . . . wire and radio communications service with adequate facilities at reasonable charges . . ." would be effectively promoted by asserting only ancillary authority with respect to enhanced services.[59]

After *Computer II*, accordingly, "enhanced services" were in most respects unregulated. When offered by common carriers, they were carried over networks subject to common carrier regulation, while content and applications remained outside of that regime.

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[54] *Computer II*, 77 F.C.C.2d at 388-89. The agency replaced these requirements with nonstructural safeguards in Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry) and Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations, 104 F.C.C.2d 958 (1986) [hereinafter *Computer III*]. The agency noted that "the rural telephone companies would be hard pressed to attempt to bankrupt competitors in their local areas where such competitors may flourish in the major metropolitan areas, or throughout the nation generally." *Id.* at 468.

[55] *Id.* at 466.

[56] *Id.* at 430.

[57] *Id.* at 432.

[58] *Id.* at 434.

[59] *Id.* at 435. The Commission asserted subject matter jurisdiction over enhanced services pursuant to its §§ 151, 152(a) and 153(a)-(b) authority over ". . . all interstate and foreign communication by wire or radio . . .". The agency added that it held "regulatory power over all forms of electrical communication . . . ." *Id.* at 432 (citing United States v. Southwestern Cable Co., 392 U.S. 157, 172 (1968)). *See also* General Telephone Company of the Southwest et al. v. United States, 449 F.2d 846 (5th Cir. 1971); General Telephone Company of California v. FCC, 413 F.2d 390 (D.C. Cir.), *cert. denied,* 396 U.S. 385 (1969).

C. Commercial Mobile Services: Moving to "Light Touch" Title II

Alluding to litigation between public and private land mobile licensees, Congress in 1982 authorized the FCC to classify land mobile services as "private" or "public" services, adopting new definitions intended to override the common law-based classifications of *NARUC I* and provide regulatory parity for functionally similar services.[60] In 1993, through the Omnibus Budget Reconciliation Act of 1993 ("OBRA"),[61] Congress both facilitated the authorization of more competitors[62] and reinforced its instructions to the Commission to level the playing field with consistent regulation of similar services.[63]

Through OBRA, Congress established a "light" version of Title II for mobile services. The legislation contemplated that the FCC would not apply certain Title II obligations to an expanded common carrier class of providers, when consistent with the public interest. In combination, these changes enabled the

[60] *See* H.R. REP. NO. 97-765 at 55, 1982 U.S. Code Cong. and Ad. News 2237, 2300, ftp://ftp.fcc.gov/pub/Bureaus/OSEC/library/legislative_histories/1189.pdf:

> The basic distinction set out in this legislation is a functional one, i.e., whether or not a particular entity is engaged functionally in the provision of telephone service or facilities of a common carrier as part of the entity's service offering. If so, the entity is deemed to be a common carrier. If not, it clarifies that private systems may be interconnected with the public switched telephone network under the tests in subsections 331(c)(l) (A) and (B), and the entity providing the base station facility or service is nonetheless providing private land mobile service. With respect to the land mobile services, this test supersedes the traditional common law test of indifferent service to the public established in National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (1976), cert. denied, 425 U.S. 992 (1976).

[61] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993) [hereinafter OBRA].

[62] The Commission had recently permitted PSTN interconnection and broad service offerings by "private" specialized mobile radio (SMR) licensees, thereby also facilitating competition to public service licensees. Implementation of Sections 3(n) and 332 of the Communications Act and Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd. 1411 ¶¶ 6, 7 (1994) [hereinafter *CMRS Second Report and Order*]. OBRA now vested the FCC with authority to distribute new licenses by auction. *See* Communications Act of 1934, 47 U.S.C. 309(j) (1934). This would add new competition for the two public cellular providers per market.

[63] The Conference Report stated that "the intent of Congress is that . . . consistent with the public interest, similar services are accorded similar regulatory treatment." H.R. Rep. 103-213, 103rd Cong., 1st Sess. 494 (1993) (Conference Report); *see also* H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 259-60 (House Report) (1993); OBRA, *supra* note 61, at § 6002(d)(3). These modifications did not address certain asymmetries resulting from facilities control and tariffing decisions; for brief observations on economic imbalances between providers at that time, *see* Gregory L. Rosston & Bradley S. Wimmer, *Reflecting on the 1996 Act,* 68 FED. COMM. L. J. 55 (2016).

agency to recalibrate the regulatory balance.

The new law barred common carrier treatment of private mobile service providers. Section 332(c) of the Act, as amended, stated that a private mobile service provider "shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this Act."[64] "Private mobile services" were defined as services that were not "commercial mobile services."[65]

"Commercial mobile services," a new classification under the statute,[66] were defined as "any mobile service . . .that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission".[67] Congress required common carrier treatment of commercial mobile services,[68] including broadband commercial mobile services,[69] except to the extent the Commission chose not to apply provisions of Title II.

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[64] 47 U.S.C. § 332(c)(2) (1993).

[65] A "private mobile service" was defined as "any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission." *Id.* at § 332(d)(3).

[66] *Id.* at § 332(d)(1).

[67] *Id.* As revised by Congress, a "mobile service" was defined as follows:

> a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (1) both one-way and two-way radio communication services, (2) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation, and (3) any service for which a license is required in a personal communications service established pursuant to the proceeding entitled "Amendment to the Commission's Rules to Establish New Personal Communications Services" (GEN Docket No. 90–314; ET Docket No. 92–100), or any successor proceeding.

Id. at § 153(33). OBRA moved traditional land mobile services into this general category of "mobile services" and added personal communications services; the Commission tentatively concluded these changes were "intended to bring all existing mobile services within the ambit of Section 332." *CMRS Second Report and Order, supra* note 61, at 1423.

[68] Section 332(c), as amended, stated that a commercial mobile service provider "shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person . . . ." 47 U.S.C. § 332(c) (1993).

[69] Personal Communications Services [hereinafter PCS] and certain Specialized Mobile Radio [hereinafter SMR] services were called "broadband" at the time in contrast to services licensed for narrower bandwidths. *See, e.g.*, FIRST REPORT, IN THE MATTER OF IMPLEMENTATION OF SECTION 6002(B) OF THE OMNIBUS BUDGET RECONCILIATION ACT OF 1993 ANNUAL REPORT & ANALYSIS OF COMPETITIVE MARKET CONDITIONS WITH RESPECT TO

The definition of "commercial mobile services" incorporated the term "interconnected service," which was defined as "service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B) of this section."[70]

The Commission was authorized to forbear from applying any sections of Title II to commercial mobile services[71] except Sections 201, 202, and 208, if the Commission determined under a three-part test[72] that such provisions were "not needed to prevent unreasonably discriminatory rates or practices, or to protect consumers, and if such forbearance is consistent with the public interest (*e.g.,* the Commission action, by augmenting competition, promotes better services for consumers at reasonable prices)."[73]

The Commission implemented the legislation by (1) interpreting the statutory definitions; (2) classifying services including cellular, PCS, and interconnected specialized mobile radio (SMR) as commercial mobile services;[74] (3) requiring

COMMERCIAL MOBILE SERVICES, FCC 95-317, 10 FCC Rcd. 8844 (1995) ("The Commission has allocated 153 MHz of spectrum for PCS, which is divided into three broad categories, broadband, narrowband, and unlicensed."). This definitional system was distinct from later definitions of "broadband" in terms of speed as well as capacity (at times called "throughput" in casual parlance). *See, e.g.*, *Report,* FCC 99-5, 14 FCC Rcd. 2398, at n.4 (1999) ("The term 'broadband' is generally used to convey sufficient capacity – or 'bandwidth' – to transport large amounts of information.").

[70] 47 U.S.C. § 332(d)(2) (1993).

[71] Congress recognized this forbearance authority even before codification in Title III. In connection with its 1982 amendment of Section 332, the House Conference Report stated: "[n]othing in this subsection shall be construed as prohibiting the Commission from forbearing from regulating common carrier land mobile services . . . ". H.R. REP. NO. 97-765 at 56 (1982) (Conf. Rep.).

[72] The statute permitted forbearance from applying any Title II provision, except sections 201, 202, or 208, to CMRS if the Commission determined:

> (i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (ii) enforcement of such provision is not necessary for the protection of consumers; and
>
> (iii) specifying such provision is consistent with the public interest.

47 U.S.C. § 332(c)(1)(A) (1993).

[73] *CMRS Second Report and Order*, 9 FCC Rcd. at 1418.

[74] *See* 47 C.F.R. § 20.3 (2014).

these services to comply with certain Title II obligations including interconnection;[75] and, citing the early developmental stages and competitive potential of wireless markets, (4) forbearing from applying to these services "the most burdensome" provisions of Title II, such as mandatory tariff requirements and market entry and exit regulation.

The agency defined the term "commercial mobile service" as "any mobile service that is interconnected with the public switched network, or service for which a request for interconnection is pending, that allows subscribers to send or receive messages to or from anywhere on the public switched network," except interconnection for a licensee's internal control purposes.[76] The agency included "mobile service providers using store and forward technology" as "commercial mobile service" providers, analogizing to an international satellite proceeding where it determined that interconnection to public message networks could occur "through a data circuit 'terminat[ing] in a computer that can store and process the data and subsequently retransmit it over that network.'"[77]

Addressing the meaning of the "public switched network," the Commission noted that the Senate text in OBRA required broad availability of an interconnected service, and concluded that "mobile services should be classified as commercial services if they make interconnected service broadly available through their use of the public switched network."[78] After considering whether this phrase meant only "local exchange and interexchange common carrier switched networks," including wire and radio,[79] the agency agreed with commenters that it should interpret the "public switched network" as an evolving term, consistent with the legislative choice not to employ "the more technologically based term 'public switched telephone network.'"[80] Because "[t]he purpose of the public switched network is to allow the public to send or receive messages to or from anywhere in the nation," the Commission would view "any switched common carrier service that is interconnected with the traditional local exchange or

[75] The Commission applied these Title II obligations in order to avoid "unreasonably discriminatory practices" against other carriers. The agency stated that the interconnection obligations would "ensure that competing mobile services providers all will have a fair opportunity to obtain access to the public switched network." *CMRS Second Report and Order*, 9 FCC Rcd. at 1420.

[76] *Id*. at 1434.

[77] *Id.* at 1435-36 (citing Establishment of Satellite Systems Providing International Communications, CC Docket No. 84-1299, Report and Order, 101 F.C.C.2d 1046, 1101 (1985) [hereinafter *International Satellite Systems*], *recon*., Memorandum Opinion and Order, 61 Rad. Reg. 2d (P&F) 649 (1986), *further recon.*, Memorandum Opinion and Order, 1 FCC Rcd. 439 (1986)).

[78] *Id.* at 1434 (citing H.R. REP. NO. 103-213, at 496 (1993) (Conf. Rep.)).

[79] *Id.* at 1431, 1436.

[80] *Id.* at 1436.

interexchange switched network . . . as part of [the public switched] network . . . [,]" for purposes of the definition of "commercial mobile radio services,"[81] including even indirectly interconnected mobile services, because messages could be sent to or received from the public switched network by way of the carrier through which they interconnected.[82]

Nevertheless, the Commission agreed with commenters that the North American Numbering Plan (NANP) was a key element in the definition of the "public switched network," because carriers participating in the Plan gained "ubiquitous access to all other participants in the Plan."[83] Congress had not mentioned the NANP, but it gave the Commission definitional authority. The agency added that another important element was switching capability, implied by the term "public *switched* network."[84] Therefore, it decided, "the network includes the facilities of common carriers that participate in the North American Numbering Plan and have switching capability."[85]

The Commission would view a service as available "to the public" if it was offered to the public without restriction on who may receive it,[86] and it would view a service as available "to such classes of eligible users as to be effectively available to a substantial portion of the public" if the licensee's "system [was] not dedicated exclusively to internal use," or served only "a significantly restricted class of eligible users," such as special emergency, industrial, or maritime services.[87]

Applying these definitions, the FCC determined that public mobile (cellular) services were "commercial mobile services," described in its orders as "commercial mobile radio services," or "CMRS," and would remain under Title II, albeit with forbearance from application of certain provisions.[88] The Commis-

[81] *Id.*

[82] *Id.* at 1437.

[83] *Id.*

[84] *Id.* at 1509.

[85] *Id.*

[86] *Id.* at 1440.

[87] *Id.* at 1439-41. In contrast, consistent with *NARUC I,* low system capacity or limited geographic range would not affect whether a service was deemed to be available or effectively available to the public. *See* National Assn. of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 639-40 (D.C. Cir. 1976) (Indifferent service was the question, rather than limited utility to certain consumers.). This concept was reiterated in United States Telecom Assn. v. FCC, 295 F.3d 1326, 1332-33 (D.C. Cir. 2002) (A service provider may be a common carrier even though its user base is legally restricted, if it offers service to all users it is authorized by law to serve.), *aff'g* Iowa v. FCC, 218 F.3d 756, 757 (D.C. Cir. 2000).

[88] Congress also restricted states from regulating market entry and rates charged for mobile services. *See* 47 U.S.C. §§ 332(c)(3)(A), (B) (1994); *CMRS Second Report and Order,* 9 FCC

sion found that wide-area SMR services were CMRS if they offered interconnected service,[89] and classified personal communications services (PCS) as presumptively CMRS,[90] stating that applying aspects of Title II to PCS would "advance the public interest and the underlying purpose of the Budget Act" and contribute to universal availability and consumer protections, by placing "an obligation on PCS licensees to make their service available to the public at fair prices . . . ."[91] The agency reflected that this decision best suited its goals of "service of large percentages of population," "diversity of services," and "competitive delivery," permitting the Commission to assure "competitive conditions," "regulatory symmetry among mobile service providers," and "enhance[d] efficiency and public value of PCS spectrum, advancing the nation's network infrastructure into the forefront of state-of-the-art wireless telecommunications technologies . . . ."[92]

In conducting the three-prong analysis, the agency determined forbearance was "appropriate where filing and other regulatory requirements would be imposed on CMRS providers without yielding significant consumer benefits" and where application of the regulations could impede competition.[93] It concluded that for "commercial mobile services," forbearance from numerous sections of Title II was in the public interest and met the test provided in Section 332(c)(1)(A) of the statute, which incorporated the Section 332(c)(1)(C) analysis of whether a provision will promote competitive market conditions.[94]

While providing an objective of similar regulatory treatment for similar services, Congress had permitted different degrees of forbearance for different commercial mobile service providers, *see* 47 U.S.C. 332(c)(1)(A), in recognition "that market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services."[95] The agency accordingly conducted its forbearance analysis separately for separate categories of mobile services, examining: "the possibility that one carrier or class of carriers has market power that requires continued Title II regulation to protect consumers or the public interest.[96] It found that all CMRS providers except cellular providers

Rec. at 1421, 1504; 47 C.F.R. § 20.13 (2015); *see also, e.g.*, Report and Order, Petition on Behalf of the Louisiana Public Service Commission for Authority to Retain Existing Jurisdiction over Commercial Mobile Radio Services, PR Docket No. 94-107 (1995).

[89] *CMRS Second Report and Order*, 9 FCC Rcd. at 1450-51.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.* at 1475.

[94] *Id.* at 1463-64.

[95] *Id*. at 1462, n.23.

[96] *Id.* at 1474-75 ("[I]n a competitive market, market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by

lacked such market power.[97] Nevertheless, although the record did "not support a conclusion that cellular services are fully competitive," the agency concluded it could exercise forbearance with regard to cellular services[98] as well as other commercial mobile services. It found that existing competition, combined with the "impending advent of additional competitors"[99] and the consumer protections afforded by Sections 201, 202 and 208, supported forbearance from numerous provisions of Title II, primarily related to tariffing, filings, and market entry and exit.[100]

The Commission stated that the Title II obligations from which it had not forborne would not unduly burden non-dominant mobile carriers because it often refrained from applying such sections to carriers lacking market power; it reserved them for potential use in case "some market failure occurs."[101] In other words, the agency assured non-dominant carriers that it was unlikely they would be subjected to the burdens of certain Title II provisions drafted to regulate dominant utilities.

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carriers who lack market power. Removing or reducing regulatory requirements also tends to encourage market entry and lower costs. The Commission determined in *Competitive Carrier* that non-dominant carriers are unlikely to behave anti-competitively, in violation of Sections 201(b) and 202(a) of the Act, because they recognize that such behavior would result in the loss of customers.").

[97] *Id.* at 1467.

[98] *Id.* at 1467-68. Certain structural safeguards still applied to cellular affiliates of Bell Operating Companies, as well as non-structural safeguards for the CMRS affiliates of dominant landline carriers. *See id.* at 1474-75.

[99] *Id.* at 1478.

[100] *See generally id.*; *see also* 47 C.F.R. § 20.15 (1998) (Requirements under Title II of the Communications Act). In sum, as amended over the years, the Commission forbore from applying to CMRS requirements associated with certain regulatory reports, FCC Rule Sections 42.10 and 42.11 (for certain carriers), and Sections 203 (Schedules of Charges), 204 (Hearings on New Charges . . .), 205 (Commission authorized to prescribe just and reasonable charges; penalties . . .), 211 (Contracts of carriers; filing with Commission), 212 (Interlocking directorates; officials dealing in securities), and 214 (Extension of lines or discontinuance of service; certificate of public convenience and necessity) of the Communications Act. The agency did apply to CMRS providers, to a certain extent, Sections 201 (Service and Charges), 202 (Discrimination and Preferences), 206 (Carrier's Liability for Damages), 207 (Recovery of Damages), 208 (Complaints . . .), 209 (Orders for Payment of Money), 216 (Receivers and Trustees . . .), 217 (Agents' Acts and Omissions . . .), 223 (Obscene or Harassing Telephone Calls in the District of Columbia or in Interstate or Foreign Communications), 225 (Telecommunications Services for Hearing-Impaired and Speech-Impaired Individuals), 226 (Telephone Operator Consumer Services Improvement Act), 227 (Restrictions on the Use of Telephone Equipment), and 228 (Regulation of Carrier Offering of Pay-Per-Call Services) of the Communications Act, as well as regulations including part 63 and Section 52.1 of the Commission's Rules.

[101] *CMRS Second Report and Order,* 9 FCC Rcd. at 1483-84.

IV. THE TELECOMMUNICATIONS ACT OF 1996, BROADBAND CLASSIFICATION AND RECLASSIFICATION

A. The 1996 Act

The Commission's distinctions between basic and enhanced services were largely codified in the Telecommunications Act of 1996, sweeping legislation intended to open local telephone markets to competition.[102] The 1996 Act introduced new statutory classifications for "telecommunications services" and "information services,"[103] which were essentially legislative versions of the Commission's "basic" and "enhanced" distinctions.[104] "Information service" providers were exempt from mandatory common carrier regulation, while "telecommunications service" providers were not.[105] As described by the Supreme Court:

> The Act regulates telecommunications carriers, but not information service providers, as common carriers. Telecommunications carriers, for example, must charge just and reasonable, nondiscriminatory rates to their customers, 47 U. S. C. §§ 201-209, design their systems so that other carriers can

[102] *See, e.g.*, James B. Speta, *Handicapping the Race for the Last Mile? A Critique of Open Access Rules for Broadband Platforms,* 17 YALE J. ON REG. 39, 63 nn. 142-43 (2000) ("Congress's principal goal in the 1996 Act was to open the local telephone market to effective competition"; the authors of the House Report on the 1996 Act, H.R. REP. No. 104-204, at 47-48 (1996), reprinted in 1996 U.S.C.C.A.N. 10, 11, "grandly, albeit without reference to any economic literature, stat[ed] that '[t]echnological advances would be more rapid and services would be more widely available and at lower prices if telecommunications markets were competitive rather than regulated monopolies'"; and added that "'[i]ndeed, the enormous benefits to American businesses and consumers from lifting the shackles of monopoly regulation will almost certainly earn the Communications Act of 1995 the distinction of being the most deregulatory bill in history.'").

[103] The 1996 Act defined these terms, and included the term "telecommunications," as follows: "The term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's own choosing, without change in the form or content of the information as sent and received." Communications Act § 3(43), 47 U.S.C. § 153(43) (1996). "The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." Communications Act § 3(46), 47 U.S.C. § 153(46) (1996). "The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . . " 47 U.S.C. § 153 (2010).

[104] *See* Kevin Werbach, *How Chevron Step One Limits Permissible Agency Interpretations: Brand X and the FCC's Broadband Reclassification,* 124 HARVARD L. REV. 1017, 1018-19 (Feb. 2011).

[105] *See* 1996 Act, *supra* note 3.

> interconnect with their communications networks, § 251(a)(1), and contribute to the federal "universal service" fund, § 254(d). These provisions are mandatory, but the Commission must forbear from applying them if it determines that the public interest requires it. §§ 160(a), (b). Information-service providers, by contrast, are not subject to mandatory common-carrier regulation under Title II, though the Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications, see §§ 151-161.[106]

The 1996 Act also added several provisions that appeared relevant to Internet access services. Section 706(a) of the Act charged the Commission with:

> encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability[107] to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[108]

In addition, Section 230(b) of the 1996 Act provided that the policy of the United States was preservation of "the vibrant and competitive free market that presently exists for the Internet" and promotion of "the continued development of the Internet . . . ."[109]

B. Broadband Services xDSL and Packet Switching Classified as "Telecommunications Services" Under Title II in 1998

After Congress implemented the *Computer II* service distinctions through the 1996 Act, the FCC commenced a series of actions revisiting its treatment of broadband communications services. In 1998, it classified carriage of broadband Internet access services over telephone lines as "telecommunications services" subject to Title II, carrying forward the common carrier status previously applied to "basic" services.[110] It also classified xDSL and packet switching as

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[106] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 975-76 (2005) *(Brand X)*.

[107] Section 706(d), codified as 47 U.S.C. § 1302(d) (2015), defined "advanced telecommunications capability" as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."

[108] 47 U.S.C. § 1302 (2015).

[109] *Id.* at § 230(b).

[110] Verizon v. F.C.C., 740 F.3d 623, 631 (D.C. Cir. 2014) (citing Opinion and Order, and

telecommunications, citing its previous holdings that specific packet-switched services were "basic services" and xDSL and packet switching were, similarly, transmission technologies.[111] To the extent an advanced service simply transported information of the user's choosing between or among user-specified points, the Commission viewed it as "telecommunications," and to the extent offered for a fee directly to the public, it was a "telecommunications service."[112] In the "gray area" that had proven the downfall of *Computer I,* where an end-user used "a telecommunications service together with an information service, as in the case of Internet access," the agency would approach each separately: "the first service is a telecommunication service (e.g., the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access."[113]

The Commission then applied the 1996 Act's interconnection, unbundling and resale obligations to the provision of advanced services by ILECs, in order to advance the legislative intent of competitive markets: "Congress . . . made clear that the 1996 Act [was] technologically neutral and . . . designed to ensure competition in all telecommunications markets. We therefore conclude that incumbent LECs are subject to section 251(c) in their provision of advanced services."[114] The agency concluded Congress had not authorized forbearance from "these critical market-opening provisions of the Act until their requirements have been fully implemented."[115] It applied the interconnection obligations of sections 251(a) and 251(c)(2) to ILECs' packet-switched as well as circuit-switched networks, and stated that their advanced services facilities and equipment were network elements subject to the obligations in section 251(c)(3).[116] Several years later, however, the Commission changed course.

C. 2002-2007: Fixed Broadband Services Reclassified as "Information Services" and Mobile Broadband Classified as "Private Mobile

Notice of Proposed Rulemaking Regarding Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 FCC Rcd. at 24014, 24029-30.).

[111] *Advanced Services Order,* 13 FCC Rcd. at 24029 n. 56, 24030 & 24071 n. 247.

[112] *Id.* at 24030.

[113] *Id.*

[114] *Id.* at 24017.

[115] *Id.* at 24018.

[116] *Id.* at 24034-35. Thus, for example, the Commission required ILECs, although not their separate affiliates, to provide requesting carriers with unbundled loops and equipment for providing advanced services, to the extent technically feasible and subject to the provisions of section 251(d)(2), *id.* at 24036-39; offer advanced services for resale at wholesale rates, *id*. at 24028; and "offer collocation arrangements that reduce unnecessary costs and delays for competitors and that optimize the amount of space available for collocation".

Services"

Commencing with cable broadband, the FCC classified broadband services provided over cable, landline, power lines, and wireless infrastructure as outside the realm of common carriage.[117] The agency characterized cable modem service as a "single, integrated service that enables the subscriber to utilize Internet access service through a cable provider's facilities and to realize the benefits of a comprehensive service offering."[118] Although the offering was provided "via telecommunications," the Commission said these services were not separable from the service's data processing capabilities:[119] it was not aware of any cable operators offering a separate "telecommunications service," consisting of "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public."[120] In the agency's view at that time, "[A]s provided to the end user the telecommunications is part and parcel of cable modem service and is integral to its other capabilities."[121] Accordingly, the entire cable broadband offering was deemed "information services," to which Title II regulation did not apply.[122] The Supreme Court upheld this decision, applying *Chevron* deference[123] and describing the Commission's reasoning as a "permissible reading of the Communications Act. . . ."[124]

Despite much language in the *Cable Modem Order* distinguishing cable broadband from broadband telephone services,[125] the Commission subsequently

[117] See Declaratory Ruling and Notice of Proposed Rulemaking Regarding Internet Over Cable Facilities, 17 FCC Rcd. 4798 (2002) [hereinafter *Cable Modem Order*], *aff'd*, Nat'l Cable & Telecomms. Assn. v. Brand X Internet Servs., 545 U.S. 967 (2005) [hereinafter *Brand X*]; Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 20 FCC Rcd. 14853, 14862 (2005) [hereinafter *Wireline Broadband Order*], *pet.s for review denied*, Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007); United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband as an Information Service, 21 FCC Rcd. 13281 (2006) [hereinafter *Power Line Broadband Order*]; *Wireless Broadband Order,* 22 FCC Rcd. 5901. Non-broadband telephone and mobile voice services remained subject to common carrier and "light touch" common carrier regulation, respectively.

[118] *See Cable Modem Order*, 17 FCC Rcd. at 1482-83 (the "information service" consisted of elements such as "[e]-mail, newsgroups, the ability for the user to create a web page . . . and the DNS.").

[119] *Id*. at 4823.

[120] *Id.*

[121] *Id.*

[122] *Id.* at 4802.

[123] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).

[124] *See* Nat'l Cable & Telecomms. Assn. v. Brand X Internet Servs., 545 U.S. 967, 986-1000 (2005).

[125] *See, e.g.*, *Cable Modem Order*, 17 FCC Rcd. at 4825 (*"*In the cases relied upon by

classified DSL also as an information service,[126] finding that wireline broadband internet access service also was a "functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such that the consumer always uses them as a unitary service."[127]

In 2007, the Commission applied the same reasoning to mobile broadband.[128] It found that terrestrial wireless broadband Internet access service was an "information service" under the Act; its transmission component was "telecommunications;" the transmission component offering was part of a functionally integrated Internet access service offering and not "telecommunications service" under Section 3 of the Act; and if provided as a wholesale input was not required to be a "telecommunications service," although "the provider may choose to offer it as such."[129] In other words, terrestrial wireless broadband Internet access service was entirely classified as an "information service" at the retail level, and its transmission component if made available at wholesale was classified similarly unless otherwise designated by the service provider.

In addition, the Commission classified mobile wireless broadband Internet access services as "private mobile services" under Title III of the Act, not as "commercial mobile services."[130] In other words, the agency went beyond its *Cable Broadband Order* analysis and doubled up on wireless, stating that it was also exempt from Title II in light of the mobile services provisions of Title III. The agency stated that mobile wireless broadband Internet access service was not "commercial mobile service" under Section 332 of the Act because it was not interconnected to the "public switched network," defined at that time as "any common carrier switched network[s] . . . that use the [NANP] in connection with

EarthLink and others, the providers of the information services in question were traditional wireline common carriers providing telecommunications services (*e.g.*, telephony) separate from their provision of information services. *Computer II* required those common carriers also to offer on a stand-alone basis the transport underlying that information service. The Commission has never before applied *Computer II* to information services provided over cable facilities"); *see also id.* at 4826 ("If we were to require cable operators to unbundle cable modem service merely because they also provide cable telephony service, . . . we believe that many, if not most, such cable operators would stop offering telephony if such an offering triggered a multiple ISP access obligation for the cable modem service . . . undermin[ing] the long-delayed hope of creating facilities based competition in the telephony marketplace and thereby seriously undermin[ing] the goal of the 1996 Act to open all telecommunications markets to competition.").

[126] *Wireline Broadband Order*, 20 FCC Rcd. at 14862; *see also Power Line Broadband Order*, 21 FCC Rcd. at 13281.

[127] *Wireline Broadband Order*, 20 FCC Rcd. at 14860-61.

[128] *See generally id.*

[129] *Id.* at 5901-02, 5908-09.

[130] *Id.* at 5915.

the provision of switched services."[131] Instead of using the NANP, the agency said the users of mobile wireless broadband Internet access services needed to use other services, such as voice over Internet Protocol (VoIP) services that relied on Internet access services, in order to call, and receive calls from, "'all other users on the public switched network.'"[132] Thus, subscribers could not use solely the mobile service to call and receive calls from "all other users on the public switched network," and accordingly mobile broadband Internet access was not an "interconnected service" within the Commission's rules promulgated under Section 332.[133] Consequently, the agency found the service mobile wireless broadband Internet access services were largely exempt from Title II regulation, except to the extent of interconnection, zoning and pole attachment facilities also used for telecommunications or personal wireless services.[134]

D. Cellco Partnership: Confirming the Wireless Broadband Order

This central reclassification of wireless broadband was affirmed not only on appeal[135] but also in 2012, when the D.C. Circuit Court of Appeals, addressing a challenge to an FCC data roaming rule, stated that in light of the 2007 FCC determination, mobile data providers were not common carriers:

> The Commission has previously determined and here concedes that wireless internet service both *is* an "information service" and is not a "commercial mobile service." Accordingly, mobile-data providers are statutorily immune, perhaps twice over, from treatment as common carriers.[136]

The *Cellco Partnership* court stated that Title III vested the Commission with authority to "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class."[137] Even though the Commission had classified the voice roaming rule as a common carrier obligation,

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[131] *Id.* at 5916-17 (citing 47 C.F.R. § 20.3).

[132] *Id.* at 5917-18.

[133] *Id.* (citing 47 C.F.R. § 20.3).

[134] *Wireless Broadband Order*, 20 FCC Rcd. at 5901-02. Despite reclassification, the FCC determined that certain Title II provisions would continue to apply or could apply in the future. The agency would continue monitoring the potential need to apply Section 255 (access by persons with disabilities). It continued the application of Sections 224 (pole attachments), 332(c)(7) (local authority over zoning), and 251 (interconnection obligations) to mobile broadband, to the extent a provider used wireless broadband Internet access service facilities to also carry telecommunications services or personal wireless services. *Id.* at ¶ 69. Finally, the agency suggested it might separately adopt consumer protections under its Title I ancillary jurisdiction. *Id.*

[135] *See* Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007).

[136] Cellco P'ship v. FCC, 700 F.3d 534, 538 (D.C. Cir. 2012) (citing *Wireless Broadband Order,* 22 FCC Rcd. at ¶¶ 37-56).

[137] *Id.* at 542 (citing 47 U.S.C. § 303(b) (2010)) (The court stated that the agency had

this did not necessarily mean the data roaming rule entailed common carriage or impermissibly applied common carrier regulation to providers that were not common carriers.

Considering the data roaming rule in the context of the term "common carrier," the court accorded *Chevron* deference to the Commission's regulation because it was in a "gray area": the rule was consistent with common carrier status, but not "so fundamentally common carriage as to render it inconsistent with private carrier status." In other words, "the obligations imposed are not common carriage *per se*."[138] Although providers were required to "offer data roaming arrangements on commercially reasonable terms and conditions," they could negotiate terms tailored to "individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms."[139] Accordingly, the data roaming rule "did not amount to a duty to hold out facilities *indifferently* for public use [emphasis added].'"[140] Moreover, the rule imposed no presumption of reasonableness, and listed sixteen factors in addition to "other special or extenuating circumstances" that the Commission must consider in evaluating the commercial reasonableness of an agreement.[141] Thus, the terms of the data roaming arrangements between providers were largely negotiable. For these reasons, while leaving open the door to "as-applied" challenges, the court upheld the data roaming rule as not contrary to "the statutory exclusion of mobile-internet providers from common carrier status."[142]

V. THE OPEN INTERNET, MOBILE BIAS AND *VERIZON V. FCC*

While the Commission was busily reclassifying broadband Internet access services as "information services" and "private radio services" exempt from Title II regulation, it was also strengthening the open Internet requirements that would later move these services back under Title II regulation. This impending

jurisdiction under Title III "to manage spectrum . . . in the public interest," to "'[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class,'" and, subject to the public interest, to "'[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter.'").

[138] *Id.* at 547 (citing U.S. Telecom Assoc'n v. FCC, 295 F.3d 1326, 1331–32 (D.C. Cir. 2002)).

[139] *Id.* at 540 (citing *Wireless Broadband Order,* 22 FCC Rcd. at 548). The court distinguished *Midwest Video II,* 440 U.S. at 700–01, because unlike the public access rules set aside in that case, the "data roaming rule leaves substantial room for individualized bargaining and discrimination in terms." *Id.* at 548.

[140] *Id.* (citing FCC v. Midwest Video Corp. II, 440 U.S. 689, 706 n.16 (1979)).

[141] *Id.* (citing *Data Roaming Order*, 26 FCC Rcd. at 5452-53).

[142] *Id.* at 548-49.

conflict was set up when, commencing in 2005,[143] the Commission adopted policies and rules establishing principles of "network neutrality" to preserve the "open Internet."[144]

A. The 2005 Open Internet Policy

On September 23, 2005, following the *Brand X* decision affirming the reclassification of broadband cable as an "information service," the Commission shed light on its approach to the Internet and broadband,[145] releasing principles it intended to incorporate into its policymaking activities. Alluding to its duties under Sections 230(b) and 706(a), the agency stated that in order "to foster creation, adoption and use of Internet broadband content, applications, services and attachments, and to ensure consumers benefit from the innovation that comes from competition," as well as "[t]o encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet," it was adopting four principles. Consumers were entitled to: (1) "access the lawful Internet content of their choice," (2) "run applications and use services of their choice, subject to the needs of law enforcement," (3) "connect their choice of legal devices that do not harm the network,"[146] and (4) "competition among network providers, application and service providers, and content providers."[147]

The Commission acknowledged that information service providers ("ISPs") were "not subject to mandatory common-carrier regulation under Title II," citing the *Brand X* case sustaining the agency's classification of cable modem services as information services.[148] Nevertheless, the Commission believed it could reg-

[143] Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd. 14986, 14988 (2005) [hereinafter Policy Statement].

[144] *Id.* (The Policy Statement restricted carriers from violating consumers' ability to "access the lawful Internet content of their choice," "run applications and use services of their choice, subject to the needs of law enforcement," and "connect their choice of legal devices that do not harm the network", providing for "competition among network providers, application and service providers, and content providers.").

[145] *Id.*

[146] *Id.* at 14988 n.13 (citing *Hush-A-Phone Corp. v. United States,* 238 F.2d 266, 269 (D.C. Cir. 1956); *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420 (1968)).

[147] *Id.* at 14988 n.14 (citing Preamble, Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56 (1996)) (Congress enacted the 1996 Act in order "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.").

[148] *Id.* at 14988 & n.11 (citing *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 974 (2005)).

ulate ISPs "under its Title I ancillary jurisdiction to regulate interstate and foreign communications."[149] The agency said it was authorized to ensure that "providers of telecommunications for Internet access or Internet Protocol-enabled (IP-enabled) services are operated in a neutral manner."[150]

Subsequently, certain Tier 1 companies agreed to comply with these new Internet access principles, at least temporarily, as conditions on their mergers with competitors and auction requirements.[151] After the *Madison River* case, however, the agency viewed Internet-related incidents and allegations with increasing concern. It found Comcast had disrupted peer-to-peer uploads without disclosure of its practices (although the D.C. Circuit overturned the Commission's attempted restriction of Comcast's "reasonable network management" for failure to cite applicable jurisdiction); a mobile wireless provider allegedly blocked customers' attempts to use a non-preferred mobile payments company; and a mobile broadband provider apparently restricted or delayed access to certain types of lawful applications such as DISH's SlingBox offerings and Skype.[152] If it wanted to clarify and apply its open Internet principles across the board, the agency would need to conduct a general rulemaking in accordance with the Administrative Procedure Act.

B. The 2009 Open Internet Proceeding

In September 2009, FCC Chairman Julius Genachowski delivered a speech at the Brookings Institution in which he proposed adopting open Internet rules, supplemented with prohibitions against blocking or degrading lawful Internet

[149] *Id.* at 14988 n.12. The agency added that its Enforcement Bureau had recently resolved an investigation into the blocking of Internet ports for voice over Internet Protocol (VoIP) services by the broadband subsidiary of a telephone company. *Id.* (citing Order, Madison River LLC and Affiliated Companies, File No. EB-05-IH-0110, Order, 20 FCC Rcd. 4295 (Enf. Bur. 2005)).

[150] *Id.* at 14988.

[151] *See, e.g.*, Applications of Comcast Corp., Gen. Elec. Co., and NBC Universal, Inc., 26 FCC Rcd. 4238, 4275 (2011); SBC Commc'ns Inc. and AT&T Corp. Applications for Approval of Transfer of Control, 20 FCC Rcd. 18290, 18368 (2005); Verizon Commc'ns Inc. and MCI, Inc. Applications for Approval of Transfer of Control, 20 FCC Rcd. 18433, 18509 (2005); *see also* Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, 22 FCC Rcd. 15289, 15364 (2007).

[152] *See 2010 Open Internet Order*, 25 FCC Rcd. at 17925 nn. 104-107 (citing, *inter alia*, Madison River Consent Decree, Comcast Network Management Practices Order, 23 FCC Rcd. 13028, 13055–56 (2008) [hereinafter *Comcast Order*]; WCB Letter 12/13/10, Attach. at 1–15, Comcast Corporation, Description of Current Network Management Practices, downloads.comcast.net/docs/Attachment_A_Current_Practices.pdf [https://perma.cc/25KN-2G4H]; ACLU PN Comments at 8; Letter from James W. Cicconi, AT&T Services, Inc., to Ruth Milkman, Chief, Wireless Telecommunications Bureau, FCC, RM-11361, RM-11497 at 6–9 (filed Aug. 21, 2009); Sling Comments at 4–11; DISH PN Reply at 7).

traffic, excluding reasonable network management, and required disclosure of network management policies.[153] The Chairman sent draft proposals to his colleagues, and in October the agency requested public comment on protections for an open Internet.[154] Commenters favoring codification of the agency's open Internet principles included Google, Netflix, Skype, Vonage, and the Institute for Policy Integrity ("IPI").[155] Commenters opposing codification included Comcast, Time Warner Cable, AT&T, and Verizon.[156]

During the rulemaking, on April 6, 2010, the D.C. Circuit Court of Appeals decided *Comcast v. FCC*, finding that the Commission had failed to show that it possessed ancillary authority to regulate an Internet service provider's network management practices. The court rejected the Commission's assertions that Section 4(i) of the Communications Act[157] endowed it with ancillary authority under Title I to bar Comcast from interfering with its customers' use of peer-to-peer networking applications.[158] Although Section 4(i) authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions," this authority requires a demonstration that the agency's action is "reasonably ancillary to the . . . effective performance of its *statutorily mandated responsibilities*."[159]

The court did not find that any of the statutory provisions the Commission cited were "statutorily mandated responsibilities" justifying its rejection of Comcast's practices.[160] Notably, the court disagreed with the Commission's assertion that it found authority to regulate network management in Section 706

[153] *See* Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission, *Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity*, (Sept. 21, 2009), https://apps.fcc.gov/edocs_public/attachmatch/DOC-293568A1.pdf [https://perma.cc/5V52-N46K] ("This principle will not prevent broadband providers from reasonably managing their networks. During periods of network congestion, for example, it may be appropriate for providers to ensure that very heavy users do not crowd out everyone else. And this principle will not constrain efforts to ensure a safe, secure, and spam-free Internet experience, or to enforce the law.").

[154] Notice of Proposed Rulemaking, Preserving the Open Internet et al., FCC 09-93, GN Docket No. 09-191, WC Docket No. 07-52, 24 FCC Rcd. 13064 (2009).

[155] *2010 Open Internet Order,* 25 FCC Rcd. at 17909 n.10.

[156] *Id*. at 17909 n.11.

[157] 47 U.S.C. § 154(i) (1996).

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

[159] *Id.* at 644 (emphasis added) (citing Am. Library Assn. v. FCC, 406 F.3d 689, 692 (D.C. Cir. 2005)).

[160] *Id.* at 642, 644, 661. The Commission had found that Comcast's network management practices frustrated Congressional purposes set forth in 47 U.S.C. § 230(b) and 47 U.S.C. § 151. *Id*. at 651-52 (citing *Order*, 23 FCC Rcd. at 13,052-53, 13,036-37). The court held, how-

of the Telecommunications Act of 1996.[161] Section 706 requires the Commission to "encourage the deployment . . . of advanced telecommunications capability to all Americans . . . by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[162] The appeals court found this mandate lacking because, in its view, the Commission had earlier "ruled that section 706 'does not constitute an independent grant of authority.'"[163]

Accordingly, *Comcast* appeared to leave open a door to future reliance on Section 706 for regulation of network management practices, provided the agency first clarified its prior ruling. The Commission did exactly that.

C. The 2010 Open Internet Order

The agency completed its rulemaking on December 23, 2010, adopting rules barring broadband providers from limiting consumers' access to lawful content, applications, services, non-harmful devices, lawful websites, or competing applications ("no blocking"), subject to "reasonable network management," defined as practices "appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service."[164] Providers were required to disclose their network management practices, performance characteristics, and terms and conditions of service (collectively, "transparency" requirements), and fixed broadband providers could not "unreasonably discriminate" in the transmission of lawful network traffic, except to exercise reasonable

ever, that Congressional "policy statements alone cannot provide the basis for the Commission's exercise of ancillary authority," in light of "the 'axiomatic' principle that 'administrative agencies may [act] only pursuant to authority delegated to them by Congress.'" *Id.* at 654 (citing *Am. Library Assn.*, 406 F.3d at 691).

[161] Telecommunications Act of 1996 § 706, 47 U.S.C. § 1302(a) (2012).

[162] *Id.*

[163] *Comcast Corp.*, 600 F.3d at 658 (citing *In re* Deployment of Wireline Servs. Offering Advanced Telecomms. Capability, 13 FCC Rcd. 24,012, 24,047 (1998) (*Wireline Deployment Order*)). The court noted that the Supreme Court has held "agencies 'may not . . . depart from a prior policy *sub silentio*." *Id.* at 659 (citing FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1811 (2009)).

[164] *2010 Open Internet Order*, 25 FCC Rcd. at 17952. Examples of legitimate "network management" purposes included the following: ensuring network security and integrity, including by addressing traffic that is harmful to the network; addressing traffic that is unwanted by end users (including by premise operators), such as by providing services or capabilities consistent with an end user's choices regarding parental controls or security capabilities; and reducing or mitigating the effects of congestion on the network.

network management.[165] The new rules exempted commercial mobile broadband from certain blocking obligations and all of the nondiscrimination requirements, in light of the developing mobile services marketplace and "operational constraints that fixed broadband networks do not typically encounter."[166] All of this was authorized, the Commission said, by the mandate of Section 706.[167]

The agency's stated purpose in codifying network neutrality principles was "to ensure the Internet remains an open platform — one characterized by free markets and free speech — that enables consumer choice, end-user control, competition through low barriers to entry, and the freedom to innovate without permission."[168] An "open" Internet, meaning an Internet with "no gatekeepers limiting innovation and communication through the network," was required for:

> a virtuous circle of innovation in which new uses of the network—including new content, applications, services, and devices—lead to increased end-user demand for broadband, which drives network improvements, which in turn lead to further innovative network uses."[169]

The agency perceived an open Internet as essential to continue not only this cycle of infrastructure development and innovation but also "the Internet's role as a platform for speech and civic engagement."[170] It held "strategic value for broadcasters" for its online distribution capabilities, allowed the creation of video content without early distribution payments, and was expected to "help close the digital divide by maintaining relatively low barriers to entry for underrepresented groups."[171]

While acknowledging that a broadband Internet access provider also could be an edge provider and an end user, the Commission expressed concern that broadband providers had motive and opportunity to reduce Internet openness.[172] For example, they could interfere with transmissions or raise costs in order to disadvantage competitors, raise revenues, or degrade service quality.[173] The Commission found that market power could exacerbate these threats, and noted that the wireline telephone broadband marketplace was characterized by only one or two providers per area with then-current broadband transmission capacity.[174]

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[165] *Id.* at 17928.

[166] *Id.* at 17957-58.

[167] *Id.* at 17968.

[168] *Id.* at 17908.

[169] *Id.* 17909-11.

[170] *Id.* at 17912.

[171] *Id.* at 17912-15.

[172] *Id.* at 17915-16.

[173] *Id.* at 17918 n.57, 17919 & 17922.

[174] *Id.* at 17923, 17931 n.143 (citing Department of Justice marketplace observations). The

The agency cited the previously noted observed and alleged instances of disruption to Internet transmission.[175] Although the order did not address whether interference with peer-to-peer traffic (such as BitTorrent file sharing) violated open Internet principles, the agency stated that such practices had "raised concerns among edge providers and end users, particularly regarding lack of transparency."[176] The FCC added that it expected the costs of compliance with its new rules would be modest.[177]

For all of these reasons, the Commission adopted its 2010 open Internet rules.[178] These rules did provide some business flexibility. The "high-level" transparency requirements were intended to preserve the ability of providers and the Commission to adapt to changing market conditions and technologies.[179] The restrictions on blocking and unreasonable discrimination permitted reasonable network management, recognizing "that a flourishing and open Internet requires robust, well-functioning broadband networks,"[180] which could even, in some cases, include "block[ing] traffic and devices, engage[ing] in reasonable discrimination, and prioritize[ing] traffic at subscribers' request."[181]

The rules for mobile broadband differed in notable respects from those for fixed broadband. For example, mobile broadband providers could prevent third-party devices from connecting to their networks and could block applications that did not compete with their voice or video telephony services.[182] In addition, mobile providers were exempted from the rule against unreasonable discrimination.[183] The Commission observed that mobile broadband services were at an early stage of development, evolving rapidly, helping drive broadband adoption,

Commission did not include cable companies in its brief analysis of the broadband marketplace. As for mobile broadband competition, the agency stated that the technology was at an early stage and it was not yet clear whether end users would prefer mobile to high-speed landline broadband. *Id.* at 17924 n.98.

[175] *Id. at* 17915-24.

[176] *Id.* at 17926.

[177] *Id.* at 17928 (noting that the no-blocking and antidiscrimination rules were subject to reasonable network management and that the rules would not bar specialized service offerings such as facilities-based VoIP).

[178] *Id*. at 17931.

[179] *Id.*

[180] *Id.* at 17951.

[181] *Id.* at 17950, 17951 n. 251.

[182] *Id.* at 17959 (Mobile broadband providers were not permitted to "block consumers from accessing lawful websites, subject to reasonable network management; nor shall such person block applications that compete with the provider's voice or video telephony services, subject to reasonable network management.").

[183] *Id.* at 17962.

and experiencing rapid growth in data usage.[184] It added that, at least in highly populated areas, consumers had more mobile than fixed broadband choices. Moreover, mobile broadband "speeds, capacity, and penetration [were] typically much lower than for fixed broadband," and mobile networks had "more operational constraints" than most fixed broadband networks.[185] For all of these reasons, mobile broadband providers received greater network management flexibility.

As for its authority to take these actions, Commission pointed to *Comcast* for the proposition that "[b]roadband Internet access services are clearly within the Commission's subject matter jurisdiction."[186] After invoking its general Section 2 jurisdiction and the Congressional policies set forth in Sections 230 and 254 of the Act, the agency said Section 706 gave it "both 'authority' and 'discretion' 'to settle on the best regulatory or deregulatory approach to broadband.'"[187] Addressing the court's statement that the agency had said Section 706 "does not constitute an independent grant of authority,"[188] the Commission explained that it had not concluded that Section 706 was not a basis for jurisdiction, but rather that the provision's "broad terms" regarding forbearance did not "trump [the] specific requirements" for forbearance set forth in Section 10 of the Communications Act;[189] Section 706(a) "did not give it . . .authority over and above what it otherwise possessed—to forbear from applying other provisions of the Act."[190]

The agency concluded that Section 706(a) authorized actions by the FCC and state commissions encouraging the deployment of advanced telecommunications capability.[191] It noted that this authority was limited by its subject matter

[184] *Id.* at 17956.

[185] *Id.* at 17957.

[186] *Id*. at 17966-67 (citing Comcast Corp. v. FCC, 600 F.3d 642, 646-47 (D.C. Cir. 2010)).

[187] *Id.* (citing Ad Hoc Telecomms. Users Comm. v. FCC, 572 F.3d 903, 906–07 (D.C. Cir. 2009)).

[188] Comcast Corp. v. FCC, 600 F.3d 642, 658 (D.C. Cir. 2010) (noting that "[i]n an earlier, still binding order, however, the Commission ruled that section 706 'does not constitute an independent grant of authority'") (quoting *In re* Deployment of Wireline Servs. Offering Advanced Telecomms. Capability, 13 FCC Rcd. 24,012, 24,047 (1988)).

[189] *2010 Open Internet Order*, 25 FCC Rcd. at 17968.

[190] *Id.* at 17969.

[191] *Id.*; *see also id.* at 17972 (The Commission also found jurisdiction for its actions in § 706(b) of the 1996 Act, codified at 47 U.S.C. § 1302(b), and § 201 of the Communications Act., codified at 47 U.S.C. § 201(b).) (citing Computer & Communications Industry Assc. v. FCC, 693 F.2d 198, 212 (D.C. Cir. 1982); Orloff v. FCC, 352 F.3d 415, 418-19 (D.C. Cir. 2003)); *see generally id.* (Although the agency did not determine whether VoIP providers were telecommunications carriers, it essentially asserted that any interference by a broadband provider with the traffic that VoIP providers or customers exchanged with other telecommunications carriers or customers would violate Section 251(a)(1).).

jurisdiction under the Act,[192] as well as the Section 706(a) requirements that its actions must "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all American"[193] and "utilize[e], in a manner consistent with the public interest, convenience, and necessity," one or more specific methods including "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[194]

The Commission said Title III of the Act further supported its open Internet rules with regard to mobile broadband, authorizing it to impose license conditions and terms in the public interest, and determine license auction safeguards and goals for the protection of the public interest and the promotion of "the development and rapid deployment of new technologies, products, and services."[195] The agency said it could impose new license conditions even after the licenses were granted, despite APA considerations and licensees' reliance interests, "if in the judgment of the Commission such action will promote the public interest, convenience, and necessity."[196]

D. Verizon v. F.C.C.: Temporary Hold on The No-Blocking and Antidiscrimination Rules

In 2014, the D.C. Circuit Court of Appeals struck down key portions of these open Internet rules, because, "[g]iven that the Commission has chosen to classify broadband providers in a manner that exempts them from treatment as common carriers, the Communications Act expressly prohibits the Commission from nonetheless regulating them as such."[197]

The court found reasonable the FCC's goal of "preserving unhindered the

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[192] *Id*. at 17970 n.374 and accompanying text (citing §§ 1 and 2 of the Act, 47 U.S.C. §§ 151 and 152, which set forth the Commission's subject matter jurisdiction over "interstate and foreign commerce in communication by wire and radio" and noting that it had historically "recognized that services carrying Internet traffic are jurisdictionally mixed, but generally subject to federal regulation") (citing Nat'l Assn. of Regulatory Util. Comm'rs Petition for Clarification or Declaratory Ruling that No FCC Order or Rule Limits State Authority to Collect Broadband Data, Memorandum Opinion and Order, 25 FCC Rcd. 5051, 5054 n.24 (2010)).

[193] *Id.* at 17969-70.

[194] *Id*. at 17969.

[195] *Id.* at 17978-79, 17979 nn.425-432 (citing 47 U.S.C. §§ 301, 304, 307(a), 309(a), 309(j)(3), 309(j)(6), 316, 316(a)(1) & 427 (2015)).

[196] *Id*. at 17979-80 (citing 47 U.S.C. § 316(a)(1) (1983); Celtronix Telemetry v. FCC., 272 F.3d 585, 589 (D.C. Cir. 2001)); Comm. for Effective Cellular Rules v. FCC., 53 F.3d 1309, 1319-20 (D.C. Cir. 1995)).

[197] Verizon v. F.C.C., 740 F.3d 623, 628 (D.C. Cir. 2014).

'virtuous circle of innovation' that had long driven the growth of the Internet."[198] The court also agreed that "broadband providers' position in the market gives them the economic power to restrict edge-provider traffic and charge for the services they furnish edge providers," acting as a "terminating monopolist," with power to act as a "gatekeeper" with respect to edge providers[199] and with incentives to restrict Internet openness when consumers patronize companies like Netflix and Hulu that 'compete directly with their own 'core video subscription services. . . .'"[200] The court even agreed that the agency had properly laid the groundwork for Section 706 jurisdiction this time, by establishing that Section 706 "vest[ed] it with affirmative authority to enact measures encouraging the deployment of broadband infrastructure," and that the agency had "reasonably interpreted section 706 to empower it to promulgate rules governing broadband providers' treatment of Internet traffic. . . ."[201] The court indicated, however, that the Commission went about regulating the wrong way.[202]

The court determined that the "no-blocking" requirements and prohibitions on unreasonable discrimination were *per se* common carrier regulation, and therefore "necessarily confe[rred] common carrier status" on providers.[203] The court essentially stated that because these rules were common carrier obligations, and because the FCC had determined in previous orders that it would classify broadband internet access services as "information services" and "private mobile services" exempt from common carriage regulation under the Communications Act, these rules could not be sustained.[204]

A regulatory regime can be "*consistent* with common carrier or private carrier status" without "*necessarily confer[ring]* common carrier status."[205] In the "gray area" in which "the obligations imposed are not common carriage *per se*" nor *per se* private carriage, the court would ordinarily defer to "the Commission's determination that a regulation does or does not confer common carrier status."[206] In this case, however, the rules were "per se" common carrier obligations, in the court's view, as it noted in *Cellco Partnership:* "[i]f a carrier is

[198] *Id.*

[199] *Id.* at 646 (citing *2010 Open Internet Order*, 25 FCC Rcd. at 17923 n.66).

[200] *Id.* at 645.

[201] *Id.* at 628.

[202] *Id.*

[203] *Id.* at 652.

[204] *Id.* at 650.

[205] *Id.* at 652.

[206] 47 U.S.C. § 153(51) (2010) ("A telecommunications carrier shall be treated as a common carrier under this [Act] only to the extent that it is engaged in providing telecommunications services."); *Verizon,* 740 F.3d at 634 (citing *Cellco P'ship*, 700 F.3d at 548) (discussing "the *Midwest Video II* question whether [a regulatory] regime *necessarily confers* common carrier status" and thus, if applied to non-common carriers, would be impermissibly regulating

forced to offer service indiscriminately and on general terms, then that carrier is being relegated to common carrier status."[207]

The court did not find compelling the agency's assertion that the 2010 rules were not common carrier obligations because broadband providers were not "carriers" with respect to edge providers.[208] The Commission started from the principle that an entity was not a common carrier if it may decide on an individualized basis "'whether and on what terms to deal' with potential customers,"[209] then asserted that "[t]he customers at issue here are the *end users* who subscribe to broadband Internet access services," and found that it was permitting the providers the "flexibility to customize service arrangements for a particular customer [that] is the hallmark of private carriage."[210] Accordingly, the Commission concluded that because it did not require broadband providers to serve end users indiscriminately, the Open Internet Rules were not per se common carriage.[211]

The D.C. Circuit did not agree with this analysis. It found that broadband providers in fact functioned as carriers with respect to *edge providers*, because they "furnish a service to edge providers," and, "given the rules imposed by the *Open Internet Order*, broadband providers are *now* obligated to act as common carriers."[212] The 2010 no-blocking and anti-discrimination rules imposed upon broadband providers the duty of Section 201(a) of the Act: "*if* Amazon were now to make a request for service, Comcast *must* comply. That is, Comcast must now 'furnish . . . communication service upon reasonable request therefor.'"[213]

Even though the Communications Act defines a "common carrier" as a "common carrier *for hire*," 47 U.S.C. § 153(11) (emphasis added), and broadband services were generally provided to edge providers free of charge, broadband providers could not under the new rules choose to start imposing conditions at will upon the nature and quality of the service they furnish edge providers, "potentially turning certain edge providers—currently able to 'hire' their service for free—into paying customers . . . ."[214] The court reasoned: "The Commission may not claim that the *Open Internet Order* imposes no common carrier obligations simply because it *compels* an entity to continue furnishing service at no

them as common carriers). *See also* 47 U.S.C. § 332(c)(2) (1993) ("A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this [Act].").

[207] *Verizon,* 740 F.3d at 652 (citing *Cellco P'ship*, 700 F.3d at 547**)**.

[208] *Id.* at 650.

[209] *Id.* at 653 (citing *2010 Open Internet Order*, 25 FCC Rcd. at 17950-51).

[210] *Id.* (citing *2010 Open Internet Order*, 25 FCC Rcd. at 17951).

[211] *Id.*

[212] *Id.* (emphasis in original) (citing FCC v. Midwest Video, 440 U.S. 689, 701-02 (1979)).

[213] *Id.* (citing 47 U.S.C. § 201(a) (1938)).

[214] *Id.* at 654.

cost."[215]

The Commission had contended that its 2010 Open Internet Rules did not, merely by imposing non-discrimination requirements, "transform providers into common carriers," noting that the Act "imposes non-discrimination requirements on many entities that are not common carriers."[216] The court first responded that the FCC could not equate itself to Congress: "Congress has no statutory obligation to avoid imposing common carrier obligations on those who might not otherwise operate as common carriers," whereas the Commission "has such an obligation with respect to entities it has classified as statutorily exempt from common carrier treatment, and the issue here is whether it has nonetheless 'relegated [those entities], *pro tanto*, to common-carrier status.'"[217]

The court observed that Sections 153(51) and 332(c)(2) of the Act prohibited common carrier treatment of "information service" and "commercial mobile service" providers.[218] As with regulations found to be common carrier obligations in *Midwest Video II*, the Network Neutrality Rules created common carrier obligations by removing broadband providers' control over the content they transmitted.[219] This eliminated the ability to block or discriminate against the content of certain edge providers; "they must now carry the content those edge providers desire to transmit."[220] The non-discrimination rules limited broadband providers' content control to such an extent as to constitute common carriage *per se*. "In requiring broadband providers to serve all edge providers without 'unreasonable discrimination,' this rule by its very terms compels those providers to hold themselves out 'to serve the public indiscriminately.'"[221] The court simi-

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[215] *Id.* (emphasis added).

[216] *Id.* (citing Brief for Respondent at 66–67).

[217] *Id.* (citing FCC v. Midwest Video, 440 U.S. 689, 700–01 (1979)). In these respects, the court found this case "indistinguishable" from *Midwest Video II,* which held that FCC rules compelling cable operators to carry third party content at no cost to subscribers were common carrier obligations. The Supreme Court had said that:

> [I]n determining . . . whether the Commission's assertion of jurisdiction is 'reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting,' United States v. Southwestern Cable Co., 392 U.S. at 178, we are unable to ignore Congress' stern disapproval – evidenced in § 3(h) – of negation of the editorial discretion otherwise enjoyed by broadcasters and cable operators alike.

Midwest Video, 440 U.S. at 708.

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

[219] *Id.* at 656.

[220] *Id.* at 655.

[221] *Id.* at 655-56 (citing National Ass'n of Regulatory Utility Com'rs v. FCC, 525 F.2d 630, 642 (D.C. Cir. 1976)). The court said the Commission forfeited, by failing to raise in its

larly found that the anti-blocking rules established *per se* common carrier obligations. By requiring that broadband providers give all edge providers, without charge, a minimum level of service, the no-blocking rules imposed *per se* common carrier obligations with respect to that minimum level of service.[222]

VI. THE 2015 OPEN INTERNET ORDER AND *UNITED STATES TELECOM*

A. The Notice and Proceeding

The *Verizon* court remanded the case to the Commission, and the agency went back to the drawing board.[223] The majority of Commissioners still sought to establish strong network neutrality rules, so the Commission issued a Notice of

briefs, any argument that the *Open Internet Order*'s "no unreasonable discrimination" standard differed from the nondiscrimination standard applied to common carriers generally. *Id.* at 656. The court nevertheless addressed the hypothetical in dicta, finding it without merit. *Id.* It stated that "reasonable network management," as defined in the *Order,* did not conflict with *per se* common carriage. "[P]ermitting *end users* to direct broadband providers to block certain traffic by no means detracts from the common carrier nature of the obligations imposed on broadband providers." *Id*. The rule "merely preserve[d] a common carrier's traditional right to "turn away [business] either because it is not of the type normally accepted or because the carrier's capacity has been exhausted." *Id.* at 657 (citing Verizon's Br., *Verizon,* 740 F.3d, at 20). In addition:

> Railroads have no obligation to allow passengers to carry bombs on board, nor need they permit passengers to stand in the aisles if all seats are taken. It is for this reason that the Communications Act bars common carriers from engaging in "*unjust or unreasonable* discrimination," not *all* discrimination. 47 U.S.C. § 202 (emphasis added).

Id. Further, unlike the multi-factored "commercially reasonable" data roaming standard upheld in *Cellco P'ship,* the open Internet anti-discrimination rule essentially mirrored the language of 47 U.S.C. § 202 and was not flexible; the Commission had strongly implied it would not permit broadband providers to charge edge providers for the use of the broadband service, thus providing no room for "individualized bargaining." *Id.*

[222] *Verizon,* 740 F.3d at 633 ("[C]ontent, applications [and] services" must be "effectively [] usable.") (citing *Open Internet Order*, 25 FCC Rcd. at 17943); *Midwest Video II*, 440 U.S. at 701 n.9 (A carrier may "operate as a common carrier with respect to a portion of its service only."). While Commission counsel asserted at oral argument that different levels could be negotiated if, for example, the minimum speeds provided to all edge providers exceeded the level required to provide "effectively [] usable" service, that argument had not been raised in the *Order* or the briefs and was forfeited. *Verizon,* 740 F.3d at 647. The transparency obligations were not struck down. Verizon had not contended on appeal that they were *per se* common carrier obligations, and the court found they were severable and could stand on their own. *Id.* at 659.

[223] *Id.* at 658.

Proposed Rulemaking on May 15, 2014, seeking public comment on its jurisdiction and rules.[224]

Although the court had accepted Section 706 as a source of jurisdiction, it had said that because the Commission had classified broadband providers as non-common carriers, it could not then apply to them *per se* common carrier obligations such as the 2010 rules.[225] Thus, it appeared the Commission would need to either reverse its decisions classifying broadband services outside the realm of common carriage or revise its open Internet rules to remove the indicia of *per se* common carriage.

More than 3.7 million commenters filed their thoughts on the matter, including pioneering Internet architects, members of Congress, states, service providers, and public interest groups.[226] Public interest organizations advocated for Title II reclassification, while most industry players were opposed, advocating for another bite at the Section 706 apple.[227] In other words, their greater concern was not network neutrality but the imposition of Title II regulation. Numerous bills were introduced on Capitol Hill, indicating intent to either prohibit or invite open Internet regulation, depending on the author.[228] On November 10, 2014, even President Obama expressed an opinion, calling on the FCC to "implement the strongest possible rules," while recognizing that this decision was the agency's alone to make.[229] The President said companies that connect consumers to the world "have special obligations not to exploit the monopoly they enjoy over access in and out of your home or business."[230] He urged the FCC to reclassify consumer broadband services under Title II while forbearing from rate regulation and other provisions.[231]

Support for reclassification was building among companies, academics and organizations. On December, 5, 2014, Netflix filed a letter urging the FCC to

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[224] *2015 Open Internet Order*, 30 FCC Rcd. at 5623.

[225] *Verizon,* 740 F.3d at 657.

[226] *2015 Open Internet Order*, 30 FCC Rcd. at 5624.

[227] *See* Lee Drutman and Alexander Furnas, *How telecoms and cable have dominated net neutrality lobbying,* THE SUNLIGHT FOUNDATION (May 16, 2014), https://sunlightfoundation.com/2014/05/16/how-telecoms-and-cable-have-dominated-net-neutrality-lobbying/ [https://perma.cc/VX6B-YYZ9].

[228] *Network (Net) Neutrality Legislative History*, AMERICAN LIBRARY ASSOCIATION, http://www.ala.org/advocacy/telecom/netneutrality/legislativeactivity [https://perma.cc/V42B-D8EV] (last visited, Jan. 9, 2017).

[229] Press Release, The White House, Office of the Press Secretary, *Statement by the President on Net Neutrality,* (Nov. 10, 2014), https://www.whitehouse.gov/the-press-office/2014/11/10/statement-president-net-neutrality [https://perma.cc/L9T5-9SN6].

[230] *Id.*

[231] *Id.*

proceed with strong open Internet rules, including reclassifying broadband Internet access as a telecommunications service, while applying only Sections 201, 202 and 208 of the Act to such services.[232] On December 30, 2014, organizations COMPTEL, Engine, CCIA and IFBA filed a similar letter, asking the Commission to proceed with reclassification, while applying only Sections 201, 202 and 208 of the Act to broadband services.[233] On January 15, 2015, Sprint's chief technical officer filed a letter emphasizing that although the rules must give mobile carriers the ability to manage their networks, Sprint did "not believe a light touch application of Title II, including appropriate forbearance, would harm the continued investment in, and deployment of, mobile broadband services."[234]

On February 4, 2015, the Chairman announced that although he had originally believed Section 706 "commercial reasonableness" was the right approach, he "became concerned that this relatively new concept might, down the road, be interpreted to mean what is reasonable for commercial interests, not consumers."[235] He said that for that reason, he was proposing that the Commission use Title II authority to protect the open Internet.[236] Nevertheless, he proposed forbearance from certain obligations, including "no rate regulation, no tariffs, no last-mile unbundling," and cited the mobile industry as an example of how investment could continue under "modernized Title II regulation."[237]

B. The 2015 Open Internet Decision: Light Touch Title II?

On March 12, 2015, the FCC accepted "the *Verizon* decision's implicit invitation"[238] and reclassified retail broadband Internet access services as common carrier services. In its *2015 Open Internet Order,* the agency revised and augmented the open Internet rules[239] and applied some, but not all, sections of Title

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[232] Letter from Markham C. Erickson, Counsel, Netflix, to Marlene H. Dortch, Secretary, FCC (Dec. 5, 2014), https://www.fcc.gov/ecfs/filing/60000996513/document/60001000524 [https://perma.cc/J6KL-35AM].

[233] Letter from COMPTEL, Engine, CCIA and IFBA to Chairman Tom Wheeler, FCC (Dec. 30, 2014), https://ecfsapi.fcc.gov/file/60001011438.pdf [https://perma.cc/EBP9-4KAX].

[234] Letter from Stephen Bye, CTO, Sprint, to Chairman Tom Wheeler, FCC (Jan. 16, 2015) (on file with author).

[235] Tom Wheeler, *FCC Chairman Tom Wheeler: This Is How We Will Ensure Net Neutrality,* WIRED MAG. (Feb. 4, 2015), http://www.wired.com/2015/02/fcc-chairman-wheeler-net-neutrality [https://perma.cc/D8XP-BJLZ].

[236] *Id.*

[237] *Id.*

[238] *2015 Open Internet Order*, 30 FCC Rcd. at 5614.

[239] The new open Internet rules applied to broadband Internet access services with exclusions for enterprise services, virtual private network services, hosting, or data storage services,

II and associated regulations to broadband Internet access services.[240]

Chairman Wheeler stated that under the "light-touch Title II" applied to mobile voice companies, "there has never been concern about the ability of wireless companies to price competitively, flexibly, or quickly, or their ability to achieve a return on their investment."[241] The new item nevertheless appeared to impose additional burdens on broadband providers. It appeared the Commission had opened the door to new obligations through expanded network neutrality obligations, and with regard to Title II did not merely provide the limited application of Sections 201, 202 and 208 requested by Internet interest groups such as EFF and the IFBA, but also added Title II obligations not previously applied to mobile voice services, while forbearing from applying 1996 Act provisions that had helped balance telecommunications markets in light of differing levels of provider control of essential service inputs.

1. The Network Neutrality Rules

In summary, the regulatory structure adopted in early 2015 was less flexible for mobile providers and more rigorous for all broadband providers than previous regulatory structures. Unlike the *Computer II* order, the 1994 *Second CMRS Order* imposing "Light Touch" Title II regulation on commercial mobile services, and the 2010 open Internet rules, this time the agency provided little relief for classes of providers - neither for mobile providers with limited capacity, nor for non-dominant providers lacking market power or any content, services or applications that competed with edge content or applications so as to incentivize discrimination.

The new rules again prohibited blocking,[242] subject to reasonable network management, and required transparent public disclosures about a broadband provider's open Internet practices.[243] The rules also prohibited impairment (or "throttling") and "unreasonable interference with or unreasonably disadvantaging" lawful Internet traffic, subject to reasonable network management, and barred paid prioritization, with limited exceptions.[244] Paid prioritization was

or broadband service offerings by premises operators, such as bookstore or café owners. *2015 Open Internet Order*, 30 FCC Rcd. at 5609.

[240] *See id.*

[241] Statement, Tom Wheeler, Chairman, FCC, *In The Matter of Protecting and Promoting the Open Internet,* GN Docket No. 14-28, https://apps.fcc.gov/edocs_public/attachmatch/DOC-332260A2.pdf [https://perma.cc/E7CE-3VJG].

[242] The new "no-blocking" rule required that "[a] person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management." *2015 Open Internet Order*, 30 FCC Rcd.

[243] 47 C.F.R. § 8.3 (2015).

[244] The "no-throttling" rule provided as follows: "A person engaged in the provision of

also banned, as was "unreasonabl[e] interfere[nce] with or unreasonably disadvantage[ing]" the use or provision of lawful Internet content, applications, services, or devices, excepting to the extent of reasonable network management.[245]

Providers could nevertheless exercise reasonable network management,[246] block unlawful content, refuse to allow attachment of devices that harmed the network or did not "conform to widely accepted and publicly-available standards," and block traffic that could pose a security or reliability risk, threaten public safety or injure the consumer experience, such as unwanted spam or malware.[247]

One question relating to network management was the extent of flexibility for management of third party applications that can result in impaired network functionality or an impaired experience for other customers. Crowdsourced torrents, for example, can overwhelm limited capacity on a mobile network, interrupting a seamless experience for the larger number of consumers not using them.[248] The Order stated that the agency would be more likely to accept network management practices "that alleviate congestion without regard to the source, destination, content, application, or service," and would "also consider whether the practice is triggered only during times of congestion and whether it is based on

broadband Internet access service, insofar as such person is so engaged, shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management." 47 C.F.R. § 8.7 (2015); *see also* Wheeler, *supra* note 233.

[245] 47 C.F.R. § 8.7 (2015).

[246] "Reasonable network management" was redefined as "a practice that has a primarily technical network management justification, but does not include other business practices . . . [.] [I]f . . . primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service." 47 C.F.R. §8.2(f) (2015). This exception permitted management practices "primarily used for, and tailored to, ensuring network security and integrity, including by addressing traffic that is harmful to the network, such as traffic that constitutes a denial-of-service attack on specific network infrastructure elements," or "addressing traffic that is unwanted by end users." *Id*.; *see also* FCC SMALL ENTITY COMPLIANCE GUIDE GN Docket No. 14-28 (2016).

[247] 47 C.F.R. § 8.5 (2015).

[248] *See, e.g.*, "AT&T/FaceTime Case Study," Mobile Broadband Working Group, FCC Open Internet Advisory Committee (rel. Aug. 20, 2013), https://transition.fcc.gov/cgb/oiac/Mobile-Broadband-FaceTime.pdf [https://perma.cc/L5VM-F9LZ] (examining AT&T's restriction of the use of Apple's FaceTime application to cellular customers subscribed to a particular pricing plan). All participants in the Working Group agreed that cellular data networks have limited capacity, and "carriers also need effective ways to manage the limited resources in cellular networks." *Id.* at 4. Carrier participants stated that application-agnostic approaches could be difficult or impossible to implement in practice; for example, dynamic rate limiting was not yet supported by industry standards or vendor equipment. *Id.* at 6.

a user's demand during the period of congestion."[249] The agency did not clarify whether it was "reasonable" discrimination for a provider with no competing business[250] to manage torrent applications as a class, instead of purchasing potentially costly infrastructure or programming required to block applications only at times and places they caused network congestion. Nor did the rule provide a clear exception for blocking or moderating throughput where discrimination was *not* an issue because the broadband provider's content, services and applications did not compete with the content, service or application in question.[251] For example, small wireless Internet service providers (WISPs) often have no content production businesses.[252]

Modifications to the transparency disclosure requirements also appeared to newly burden certain providers. Each broadband provider was required to transparently disclose to the public numerous details about network management practices, performance and commercial terms, and make disclosures sufficient for content, application, service, and device providers to develop, market and maintain Internet offerings.[253] Additional "enhanced" requirements, with a temporary exception for small providers, required disclosure of promotional rates, fees and surcharges, data caps, data allowances, and packet loss as a measure of network performance, as well as notice to consumers when a "network practice" was likely to significantly affect their use of the service.[254] Certain of these requirements, such as the packet loss disclosure, could require providers to purchase substantial additional equipment or software.[255]

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[249] *2015 Open Internet Order*, 30 FCC Rcd. at 5702.

[250] Professor Barbara van Schewick and others had filed comments stating that absent rules against unreasonable discrimination among classes of applications, providers could have motives to reduce the performance of competing applications in order to protect their own service revenues. *See* Letter from Barbara van Schewick to Marlene H. Dortch, Secretary, FCC Proceeding, Docket Nos. 09-191 (submitted Feb. 20, 2015), https://ecfsapi.fcc.gov/file/60001032177.pdf [https://perma.cc/B3M6-Q2AQ]; Letter from Barbara van Schewick, Professor of Law and (by courtesy) Electrical Engineering, Stanford Law School, *et al*., to Marlene Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 Attach. at 4-5 (filed Feb. 18, 2015).

[251] *See generally* 47 C.F.R. § 8 (2015).

[252] *See* Mark Huffman, *Congress to hold hearings on AT&T-Time Warner merger*, CONSUMERAFFAIRS, (Dec. 06 2016) https://www.consumeraffairs.com/news/congress-to-hold-hearings-on-att-time-warner-merger-120616.html [https://perma.cc/XW3Z-EXKR] (The Chairman of the Wireless Service Providers Association (WISPA) stated, "'thousands of small, competitive ISPs that do not own content . . . .").

[253] *See 2015 Open Internet Order*, 30 FCC Rcd. at 5608.

[254] *Id.*

[255] Although the Commission established a "safe harbor" from enforcement for providers making disclosures in format and content later recommended by the agency's Consumer Advisory Committee, this "consumer label" format did not permit providers to omit packet loss

In order to discourage the creation of paid Internet "fast lanes," the Commission banned paid prioritization,[256] meaning "accept[ing] payment (monetary or otherwise) to manage [the broadband provider's] network in a way that benefits particular content, applications, services, or devices."[257] Exceptions could include FCC waivers in exceptional cases where paid prioritization "would provide some significant public interest benefit and would not harm the open nature of the Internet" and commercial arrangements for traffic exchange between edge providers, or with intermediaries such as content delivery networks (CDNs) or transit providers.[258]

Finally, the new order set forth a "conduct standard" barring broadband providers from "unreasonably interfer[ing] with or unreasonably disadvantag[ing]" lawful Internet content, applications, services, or devices, except to the extent of reasonable network management.[259] The agency said this would deter gatekeeper abuses and protect free expression, "thus fulfilling the congressional policy that 'the Internet offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.'"[260]

2. Application of Title II Common Carrier Obligations

a. All Broadband Internet Access Services

The 2015 order reclassified broadband Internet access services as common carrier services, subjecting them to Title II of the Act.[261] In addition to extensively linking these changes to the evolution of modern consumers' views, the Commission stated that reclassification under Title II: "addresses any limitations

or otherwise shed the labor and potential infrastructure burdens added by the rule, and the rule appeared to be based upon service areas that did not apply to many providers. *Id.* at 5674.

[256] "A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not engage in paid prioritization." *2015 Open Internet Order*, 30 FCC Rcd. at 5607.

[257] *Id.* "Paid prioritization" was defined as "the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity." *Id*.

[258] *2015 Open Internet Order*, 30 FCC Rcd. at 5658. No network management exception was applied to this rule. *See id.* at 5700.

[259] *Id.* at 5608; *see also* 47 C.F.R. §§ 8.5, 8.7 (2015).

[260] *Id.* at 5609.

[261] *Id.* at 5618.

that past classification decisions placed on the ability to adopt strong open Internet rules, as interpreted by the D.C. Circuit in the *Verizon* case."[262] Indeed, it appears unlikely that common carrier regulation would have been applied to broadband services but for the court's decision combined with the agency's desire to adopt strong open Internet rules.

The Commission dutifully walked through statutory analysis, tying its definitional changes to changes in the marketplace and customer perceptions.[263] It stated that broadband providers had moved from offering integrated "information services" toward "separately identifiable offers of (1) a broadband Internet access service that is a telecommunications service (including assorted functions and capabilities used for the management and control of that telecommunication service) and (2) various 'add-on' applications, content, and services that generally are information services."[264] In the agency's view, modern customers now understood broadband Internet access service "as a transmission platform through which consumers can access third-party content, applications, and services of their choosing."[265] Accordingly, the order subjected broadband to central Title II obligations, while forbearing from others.[266] The extensive nature of this forbearance, while welcome to providers in most regards, included forbearance from interconnection and market-opening provisions as between providers, potentially inviting reduced access to the essential competitive inputs and services that were protected under the "light touch" Title II structure that facilitated decades of mobile expansion.

b. Mobile Services

The Commission also changed its classification of mobile broadband Internet access services, moving them into the common carrier category "commercial

[262] *Id.* at 5615.

[263] *Id.* at 5616.

[264] *Id.* at 5615.

[265] *Id.*

[266] Specifically, the FCC forbore from applying to broadband providers, merely by virtue of their broadband offerings, sections of the Act that provide for tariffing, last-mile unbundling and other rate regulation (Sections 203, 204), enforcement-related provisions (Sections 205, 212), information collection and reporting (Sections 211, 213, 215 & 218-20), discontinuance, transfer of control, and network reliability approval (Section 214), interconnection and market-opening provisions (Sections 251, 252 & 256), provisions regarding subscriber changes (Section 258), provisions concerning former Bell Operating Companies (Sections 271-276) to the extent newly arising from the classification of broadband (except 276 and its accompanying rules, to the extent applicable to inmate calling services), and truth-in-billing rules. *Id*. at 5842, 5844,5846-8, 5849-50, and 5852-3. The agency also forbore from applying its CMRS roaming rule, section 20.12(d), to mobile broadband providers subject to its data roaming rule, section 20.12(e). *Id.* at 5858.

mobile services" from the "private mobile services" category it had assigned them to in the 2007 *Mobile Broadband Order*.[267] This reclassification was accomplished by expanding the definition of the "public switched network," a component of the Communications Act's definition of "commercial mobile services," to include "services that use public IP addresses."[268] The order explained that mobile broadband Internet access service was now interconnected with the public switched network, and, consistent with the definitions in Section 332(d) of the Act, was now "the functional equivalent of commercial mobile service because, like commercial mobile service, it is a widely available, for profit mobile service that offers mobile subscribers the capability to send and receive communications, including voice, on their mobile device."[269]

3. Dissenting Views on Whether the Order Applied "Light Touch" Title II

Writing in dissent, Commissioner Ajit Pai said the Internet conduct standard gave the Commission "almost unfettered discretion to decide what business practices clear the bureaucratic bar."[270] He noted that just that week, the Electronic Frontier Foundation had written that an open ended rule of this sort would be "anything but clear."[271] EFF had indeed written that the rule could be a disaster:

> There are several problems with this approach. First, it suggests that the FCC believes it has broad authority to pursue any number of practices—hardly the narrow, light-touch approach we need to protect the open Internet. Second, we worry that this rule will be extremely expensive in practice, because anyone wanting to bring a complaint will be hard-pressed to predict whether they will succeed. For example, how will the Commission determine "industry best standards and practices"? As a practical matter, it is likely that only companies that can afford years of litigation to answer these questions will be able to rely on the rule at all. Third, a multi-factor test gives the FCC an awful lot of discretion, potentially giving an unfair advantage to parties with insider influence.[272]

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[267] *Id.* at 5778.

[268] *Id*.

[269] *Id.*

[270] *Id.* at 5923-24 (2015) (Pai, Comm'r, dissenting) (citing Corynne McSherry, Electronic Frontier Foundation, Dear FCC: Rethink The Vague "General Conduct" Rule (Feb. 24, 2015), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A5.pdf).

[271] *Id.*

[272] Corynna McSherry, Dear FCC: Rethink The Vague "General Conduct" Rule, Electronic Frontier Foundation (February 24, 2015), https://www.eff.org/deeplinks/2015/02/dear-fcc-rethink-those-vague-general-conduct-rules [https://perma.cc/QL8R-UXVA].

Commissioner Pai added that the Commission's approach was hardly "light-touch," for reasons including the order's launch of new rulemakings concerning customer information privacy and data roaming, as well as the temporary nature of certain forbearance decisions.[273]

C. United States Telecom v. F.C.C.

Landline interests such as price cap association United States Telecom ("US Telecom"), cable organizations such as the American Cable Association, and wireless industry participants promptly petitioned the D.C. Circuit Court of Appeals for review of the Commission's 2015 decision.[274] The Wireless Association ("CTIA") and AT&T (collectively, the "mobile petitioners") contended that mobile broadband Internet access was "statutorily immune 'twice over' from common-carrier regulation"[275] pursuant to Sections 153(24), 230(f)(2), and 332(c)(2) of the Act, as "information services" under Title I of the Act and also "private mobile services" under Title III of the Act.[276] The mobile petitioners also argued that customers still perceive broadband as "a 'single, integrated service' in which transmission and enhanced, information-processing functions are inextricably intertwined."[277] Finally, the mobile petitioners contended that the Commission did not provide appropriate notice to change the definition of "commercial mobile service," providing such services with different regulatory treatment than they received under the 2010 Open Internet Rules.[278]

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[273] *2015 Open Internet Order*, 30 FCC Rcd. at 5924.

[274] Petitions for review were also filed by Alamo Broadband Inc., Daniel Berninger, and Full Service Network. U.S. Telecom Ass'n v. F.C.C. 825 F.3d 674, 696 (D.C. Cir. 2016). TECHFREEDOM intervened in support of the petitioners, and numerous amici piled into the case, including Members of Congress (Democrats supporting the FCC; Republicans supporting the petitioners), former FCC Chairman Reed Hundt and former Commissioners Michael Copps and Harold Furchtgott-Roth, economics and free enterprise think tanks and scholars, network neutrality scholars including professors Tim Wu and Christopher Yoo, Internet advocacy groups, content interests and Internet companies (such as the American Library Association, WordPress maker Auttomatic Inc., FourSquare, Imgur, Mozilla, Reddit, Twitter, the Writers Guild of America and Yelp), trade associations, a group of First Amendment scholars, Administrative Law professors, among others. *Id.* at 688-9.

[275] Joint Brief for Petitioners US Telecom, NCTA, CTIA, ACA, WISPA, AT&T, and CenturyLink at 3; *see* US Telecom Assoc'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016) [hereinafter *Jt. Br.*] (quoting *Cellco P'ship*, 700 F.3d at 538).

[276] *Id.* at 2-3.

[277] *Id.* at 48 (citing *Brand X*, 545 U.S. at 977-78); In the Matter of Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling and Order, FCC 15-24, GN Docket No. 14-28 (Feb. 26, 2015), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf [https://perma.cc/7GXH-PV98] [hereinafter *2015 Open Internet Order*].

[278] *Jt. Br.* at 84.

1. Arguments: Mobile Broadband Is Doubly Immune From Common Carrier Regulation

The mobile petitioners asserted that mobile broadband services were exempt from common carrier regulation as "information services" under Title I and as "private mobile services" under Title III.[279] Therefore, mobile broadband services were immune from common carrier regulation under Sections 153(24), 230(f)(2), and 332(c)(2) of the Act.[280]

The mobile petitioners also stated that mobile broadband possessed all eight characteristics of an "information service" as defined by the Communications Act.[281] Additionally, "[t]he mobile environment is in constant flux: users move around, buildings obstruct wireless signals, and multiple signals cause interference."[282] In order to "address these distinct operational challenges," the technology used must be capable of "generating and making available multiple IP addresses for devices . . . and processing data in encrypting IP packets for security."[283] The mobile petitioners contended that "[m]obile broadband interconnects with the *Internet*, not 'the public switched network' as required by the statutory definition of 'commercial mobile service'"[284] and, accordingly, the service met the definition of a "private mobile service."

The mobile petitioners argued that Section 230 of the Act established Congress's intent for the "Internet and other interactive computer services" to remain "unfettered by Federal or State regulation."[285] Section 230 also indicated Congress intended to include Internet access services as "information services."[286] The mobile petitioners stated that the Commission implemented Congress's intent in 2007 when it moved mobile broadband Internet access into the "information service" classification.[287] The agency reasoned that mobile broadband Internet access, like landline broadband, offered "a single, integrated service to end users, . . . that inextricably combines the transmission of data with computer processing, information provision, and computer interactivity. . ."[288]

The mobile petitioners argued that Internet access functions, such as DNS and caching, permit or enhance the use of the world wide web; "they do not manage

[279] *Id.* at 2-3.

[280] *Id.* at 3 (citing *Cellco P'ship*, 700 F.3d at 538).

[281] *Id.* at 25.

[282] *Id.* at 32.

[283] *Id.* at 32-33 (citing JEFFREY H. REED & NISHITH D. TRIPATHI, NET NEUTRALITY AND TECHNICAL CHALLENGES OF MOBILE BROADBAND NETWORKS 31-33 (2014)) (emphasis omitted).

[284] *Id.* at 26.

[285] *Id.* at 12 (citing 47 U.S.C. § 230(b)(2) (1998)).

[286] *Id.* at 12 (citing 47 U.S.C. § 230(f)(2) (1998)) (emphasis in original).

[287] *Id.* at 69.

[288] *Wireless Broadband Order,* 22 FCC Rcd. at 11.

a telecommunications system or service" and, therefore, DNS and caching should not be viewed as telecommunications "management" functions under 47 U.S.C. § 153(24).[289] As for email, online storage, and content from third parties, the mobile petitioners stated that customers have always been able to obtain such elements from third parties.[290] In other words, technology and the marketplace had not changed since the earlier FCC analysis. The mobile petitioners also contended that consumer perceptions had not changed as customers still perceived broadband as a "single, integrated service."[291]

2. Insufficient Notice

Finally, the mobile petitioners asserted that the Order differed significantly from the proposals in the *NPRM,* in violation of the Administrative Procedure Act (APA). Although "[a] few paragraphs of the *NPRM* sought comment on whether the FCC should reclassify broadband under Title II," in the petitioners' view this was raised "*solely* to provide additional legal authority for the new Open Internet rules, not to subject broadband Internet access service to Title II requirements unrelated to the FCC's 'goal' of 'protecting and promoting Internet openness.'"[292] In addition, the FCC stated it was not proposing to address Internet interconnection.[293] The FCC "devoted only three sentences to the possible reclassification of mobile broadband," apparently "propos[ing] the same approach" for mobile broadband that the agency took in the *2010 Order,* without ever "suggest[ing] that the agency was considering *changing* [the] definition" of commercial mobile service.[294] The petitioners also argued that the *Notice* did not propose a new "Internet Conduct Standard." Accordingly, the Commission had no authority under the APA to adopt that standard.

3. The D.C. Circuit Opinion

The court rejected all of the petitioner's arguments. Judges Tatel and Srinivasan were joined in certain portions of the majority opinion by Judge Williams, who separately concurred in part and dissented in part.

The court found that in light of *Brand X,* the FCC reasonably took into account "the end user's perspective" when classifying a service as "information" or "telecommunications."[295] The record supported the Commission's conclusion

[289] *Jt. Br.*, *supra* note 275, at 38-39.

[290] *Id.* at 49.

[291] *Id.* at 47-48.

[292] *Id.* at 18.

[293] *Id.*

[294] *Jt. Br.*, *supra* note 275, at 19 (citing *2014 Open Internet NPRM,* 30 FCC Rcd. at 5765).

[295] *US Telecom*, 825 F.3d at 697 (citing *Brand X*, 545 U.S. at 993).

that consumers perceived broadband as a standalone offering providing telecommunications service.[296]

Although broadband often relies on information services such as DNS and caching to transmit content, the court agreed with the FCC that such services "fall within the telecommunications system management exception" because both are "simply used to facilitate the transmission of information so that users can access other services."[297] The court found that the determination that "DNS and caching—are used for telecommunications management when offered as part of Internet access, but are an *information service* when third-party content providers similarly offer them" was reasonable.[298] The court also found no basis to question the agency's conclusion that the telecommunications management exception encompassed "adjunct-to-basic" qualifying services under the Computer II regime.[299] Accordingly, the court determined, once a carrier uses an information service to manage a telecommunications service, "that service no longer qualifies as an information service under the Communications Act."[300] The panel added that the Commission had provided adequate notice that it might consider Title II reclassification, because it had requested comment on whether to revisit its broadband services classification.[301] In addition, somewhat ironically in light of the strong precedent *Computer II* could have brought to the table for size-based differentiation of rules, a challenge to the Commission's analysis of the Order's effects on small entities was dismissed for failure to first file a petition for reconsideration of that analysis.

Turning to substantive arguments, the court agreed with the FCC that *Brand X* found the Act was ambiguous with respect to the term "offering" (an element of the classification analysis).[302] The court disagreed with petitioners' contention that *Brand X* permitted the agency to classify only the "last mile" of transmission as a telecommunications service. The panel said *Brand X* was "focused on the nature of the functions broadband providers offered to end users, not the

[296] *Id.* at 697-98.

[297] *Id.* at 705 (quoting *2015 Open Internet Order*, 30 FCC Rcd. at 5765).

[298] *Id.* (citing *Jt. Br.*, *supra* note 275, at 40) (emphasis in original).

[299] *Id.* (citing *2015 Open Internet Order*, 30 FCC Rcd. at 5766–67). Under that regime, when such information services were "provided on a stand-alone basis by entities other than the provider of Internet access service [,] . . . there would be no telecommunications service to which [the services are] adjunct." *Id.* (quoting *2015 Open Internet Order*, 30 FCC Rcd. at 5769 n.1046).

[300] *Id.* at 706.

[301] *US Telecom*, 825 F.3d at 747.

[302] *Id.* at 701 (citing *Brand X*, 545 U.S. at 989; 47 U.S.C. § 153(53) (2010)) ("The term 'telecommunications service' means the *offering* of telecommunications for a fee directly to the public . . . [.]") (emphasis added).

length of the transmission pathway . . . ."[303] Petitioners argued that broadband service met the statutory definition of an "information service," but the court responded that this overlooked the statute's statement that "such services are provided 'via telecommunications.'"[304] Arguments based upon Section 230 were dismissed as "oblique and indirect," apparently in light of that Section's codification within the Communications Decency Act.[305]

In response to US Telecom's contention that the agency "could have adopted appropriate Open Internet rules based upon § 706 *without* reclassifying broadband,"[306] the court stated that the Commission was justified in not doing so, because it believed that in order to establish the anti-blocking, anti-throttling, and anti-paid-prioritization rules, which it viewed as necessary, and which imposed *per se* common carrier obligations on broadband carriers, it would need to classify broadband providers as providing a "telecommunications service."[307]

"This, in our view," the court added, "represents a perfectly 'good reason' for the Commission's change in position."[308] This assertion was perhaps unsurprising from a panel of the same court that had all but advised the Commission to reclassify broadband if it wanted to apply its network neutrality rules to broadband service providers without violating the Act, in light of the statutory prohibitions against applying common carrier regulation outside the context of common carrier services.[309]

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[303] *Id.* at 703.

[304] *Id.* (citing 47 U.S.C. § 153(24) (2010)).

[305] *Id.* The court also found unpersuasive an assertion that the 1996 Act was intended to codify the Commission's previous classification of "gateway services allowing access to information stored by third parties" as "enhanced services," responding that "nothing in the Telecommunications Act suggests that Congress intended to freeze in place the Commission's existing classifications of various services." *Id.* (citing US Telecom Pet'rs' Br., at 33–35). The court also did not agree with assertions submitted by amici Members of Congress and interveners Full Service Network and TechFreedom. *Id.*

[306] *Id.* at 707 (citing Verizon v. F.C.C., 740 F.3d 623, 651–52 (D.C. Cir. 2014); *2015 Open Internet Order*, 30 FCC Rcd. at 5614).

[307] *Id.*

[308] *Id.*

[309] 47 U.S.C. § 153(44) (2015) ("A telecommunications carrier shall be treated as a common carrier under this [Act] only to the extent that it is engaged in providing telecommunications services."); 47 U.S.C. § 332(c)(2) (1993) ("A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this [Act]."); *see Verizon*, 740 F.3d at 652; *see also id.* at 628 ("Given that the Commission has chosen to classify broadband providers in a manner that exempts them from treatment as common carriers, the Communications Act expressly prohibits the Commission from nonetheless regulating them as such."). The court had determined that the network neutrality rules were *per se* common carrier regulation, and therefore "necessarily confe[rred] common carrier status" on providers; the partial dissent thought

The majority also found the Commission gave a sufficient "reasoned explanation" for changing its factual assessment and finding that consumers now perceived transmission as a standalone offering rather than integrated with information services, because it described record evidence supporting its current view. The majority said it need not "examine whether there is really anything new,"[310] as the dissent said it should, because the Commission had said the changed circumstances were not essential to its decision.[311] The court accepted the assertion that even if the underlying facts had not changed, in applying the definition to those facts the agency now found that it "best understood [broadband] as a telecommunications service, as discussed [herein] . . . and disavow our prior interpretations to the extent they held otherwise."[312] In addition, the FCC accounted for reliance interests by finding that the effect of regulatory classification on investment was at most indirect and combined with other factors such as demand and competition[313] and noting that "the regulatory status of broadband service was settled for only a short period of time."[314]

The court did not agree that reclassification required a threshold determination that broadband providers were common carriers under the *NARUC* test.[315] Instead, the agency could determine classification through application of the definitions in the Communications Act.[316]

The court also found permissible the agency's regulation of broadband interconnection arrangements, even though it rejected a challenge to the Commission's forbearance from the interconnection and unbundling requirements of sections 251 and 252.[317] The Commission had concluded it could regulate interconnection arrangements under Title II as a component of broadband service

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the Commission had not shown "good reasons" to reclassify broadband because the agency had failed to make "a finding of market power or at least a consideration of competitive conditions." *US Telecom*, 825 F.3d at 708. In the majority's view, however, the statute did not require the Commission to conduct any market power finding or competitive consideration. The agency need only find that a service met the definition of a "telecommunications service," as it had done. *Id.* (citing 47 U.S.C. § 153(53) (2010)).

[310] *US Telecom,* 825 F.3d at 709.

[311] *Id.*

[312] *Id.* (citing *2015 Open Internet Order*, 30 FCC Rcd. at 5792).

[313] *Id.* The court also deferred to the agency's prediction of the effects of reclassification on broadband investment. *Id.* at 693.

[314] *Id.* at 709.

[315] *Id.* at 711 (citing Virgin Islands Telephone Corp. v. FCC, 198 F.3d 921, 924 (D.C. Cir. 1999)) (internal quotation marks omitted); *NARUC I*; *NARUC II*; Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601 (D.C. Cir. 1976); and Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630 (D.C. Cir. 1976)).

[316] *Id.*

[317] *Id.* at 728. The court defined broadband interconnection arrangements as "arrangements that broadband providers make with other networks to exchange traffic in order to ensure that

because the "end user necessarily experiences any discriminatory treatment" applied to traffic exchange.[318] The court noted that "the Commission found that regulation of interconnection arrangements was necessary to ensure broadband providers do not 'use terms of interconnection to disadvantage edge providers' or 'prevent[] consumers from reaching the services and applications of their choosing.'"[319] The court stated that notice of the regulation was adequate, because the NPRM "expressly asked whether the Commission should apply its new rules—rules which it had signaled might depend upon Title II reclassification . . . to interconnection arrangements."[320]

US Telecom had argued that *Verizon* disallowed Title II regulation of interconnection arrangements not first classified as an offering of telecommunications to edge providers and backbone networks. The court responded that *Verizon* did not hold that the Commission must classify broadband "as a telecommunications service in both directions" before it could regulate interconnection arrangements under Title II. It said *Verizon* held that the Commission should have classified broadband service as a Title II service before applying common carrier regulation. The court found that by reclassifying broadband service as a telecommunications service, the Commission "therefore" also reclassified "the interconnection arrangements necessary to provide it—as a telecommunications service . . . ."[321]

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their end users can access edge provider content anywhere on the internet." *Id.*at 711. The agency had decided it would be premature to apply the General Conduct Rule or any of the bright-line rules to interconnection arrangements, but explained interconnection disputes would be evaluated on a case-by-case basis under sections 201, 202, and 208 of the Communications Act. *Id.* at 712 (citing *2015 Open Internet Order,* 30 FCC Rcd. at 5686–87).

[318] *2015 Open Internet Order,* 30 FCC Rcd. at 5687.

[319] *US Telecom*, 825 F.3d at 711 (citing *2015 Open Internet Order*, 30 FCC Rcd. at 5694). Several commenters had emphasized "the potential for anticompetitive behavior on the part of broadband Internet access service providers that serve as gatekeepers to the edge providers . . . seeking to deliver Internet traffic to the broadband providers' end users." *Id.*

[320] *Id.* at 712 The court also noted COMPTEL's assertion that because "[t]he interconnection point is simply a literal extension of the [broadband provider's network], . . . applying the same open Internet rules to the point of interconnection is a logical extension of the *2010 Open Internet Order* and clearly in line with the Commission's . . . proposal [in the NPRM]." *Id.* at 53-54 (citing Letter from Markham C. Erickson, Counsel to COMPTEL, to Marlene H. Dortch, FCC, GN Dkt. Nos. 14-28 & 10-127, at 10 (Feb. 19, 2015)).

[321] *Id.* at 713. Relatedly, in addressing the challenge of Full Service Networks and upholding the Commission's authority to ensure broadband interconnection under Section 201 in light of its forbearance under Sections 251 and 252, the court noted among other provisions that under Section 201, "every common carrier engaged in interstate or foreign communication by wire or radio [must] furnish such communication service upon reasonable request therefor," and upon an order of the Commission, "establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such

The court next addressed the specific contentions of the mobile petitioners, CTIA and AT&T. The panel confirmed that by upholding the agency's classification of broadband services as subject to Title II common carrier regulation, it was affirming common carrier treatment of mobile broadband as well.[322] It then upheld the agency's decisions with regard to Title III.

CTIA and AT&T had argued mobile broadband was a "private mobile service" and therefore could not be subjected to common carrier regulation. The court did not agree. In its 2015 Open Internet Order, the Commission had amended certain key mobile services definitions,[323] most notably its definition

charges, and to establish and provide facilities and regulations for operating such through routes." 47 U.S.C. § 201(a) (1938). Section 251 also included a savings clause that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201." *US Telecom*, 825 F.3d at 729. Although not mentioned by the court in the context of a petitioner (Full Service Networks) providing fixed services rather than mobile services, Section 332(c)(1)(B) similarly requires the Commission, "[u]pon reasonable request of any person providing commercial mobile service," to "order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title." 47 U.S.C. § 332(c)(1)(B) (1993).

[322] *US Telecom*, 825 F.3d at 714.

[323] Prior to modification in the *2015 Open Internet Order,* FCC Rule Section 20.3 set forth the following definitions relevant to the mobile petitioners' claims:

> *Commercial mobile radio service.* A mobile service that is:
>
> (a) (1) provided for profit, *i.e.*, with the intent of receiving compensation or monetary gain; (2) An interconnected service; and
>
> (3) Available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or
>
> (b) The functional equivalent of such a mobile service described in paragraph (a) of this section.
>
> *Interconnection or Interconnected.* Direct or indirect connection through automatic or manual means (by wire, microwave, or other technologies such as store and forward) to permit the transmission or reception of messages or signals to or from points in the public switched network.
>
> *Interconnected Service.* A service:
>
> (a) That is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network; or
>
> (b) For which a request for such interconnection is pending pursuant to section 332(c)(1)(B) of the Communications Act, 47 U.S.C. 332(c)(1)(B). A mobile service offers interconnected service even if the service allows subscribers to access the public switched network only during specified hours of the day, or if the service provides general access to points on the public switched network but also restricts access in certain limited ways. Interconnected service does not include any interface between a licensee's facilities and the public switched

of "public switched network." As noted, the Act defines "interconnected service," a required element of the "commercial mobile services" definition, as "service that is interconnected with the *public switched network* (as such terms are defined by regulation by the Commission) . . ."[324] In 2015, the Commission had changed its definition of the term "public switched network" to include any common carrier switched network that uses "public IP addresses," in addition to

> network exclusively for a licensee's internal control purposes.
>
> *Mobile Service.* A radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes:
>
> (a) Both one-way and two-way radio communications services;
>
> (b) A mobile service which provides a regularly interacting group of . . . control and relay stations . . . for private . . . land mobile radio communications by eligible users over designated areas of operation; and
>
> (c) Any service for which a license is required in a personal communications service under part 24 of this chapter.
>
> *Private Mobile Radio Service.* A mobile service that is neither a commercial mobile radio service nor the functional equivalent of a service that meets the definition of commercial mobile radio service. Private mobile radio service includes the following:
>
> (a) Not-for-profit land mobile radio and paging services that serve the licensee's internal communications needs as defined in part 90 of this chapter. Shared-use, cost-sharing, or cooperative arrangements, multiple licensed systems that use third party managers or users combining resources to meet compatible needs for specialized internal communications facilities in compliance with the safeguards of § 90.179 of this chapter are presumptively private mobile radio services;
>
> (b) Mobile radio service offered to restricted classes of eligible users. This includes entities eligible in the Public Safety Radio Pool and Radiolocation service.
>
> (c) 220-222 MHz land mobile service and Automatic Vehicle Monitoring systems (part 90 of this chapter) that do not offer interconnected service or that are not-for-profit; and
>
> (d) Personal Radio Services under part 95 of this chapter (General Mobile Services, Radio Control Radio Services, and Citizens Band Radio Services); Maritime Service Stations (excluding Public Coast stations) (part 80 of this chapter); and Aviation Service Stations (part 87 of this chapter).
>
> *Public Switched Network.* Any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use the North American Numbering Plan in connection with the provision of switched services.

47 C.F.R. § 20.3 (2015).

[324] 47 U.S.C. § 332(d)(2) (1993) (emphasis supplied); *see also id.* at. § 332(d)(1) (definition of "commercial mobile service").

those using the North American Numbering Plan.[325] This change, bringing IP-based communications networks – that is, broadband networks – within the definition of commercial mobile service, was a central point of contention.

The court first summarized the Commission's discussion of changes in mobile services markets. Eight years after classifying the "nascent" mobile broadband service as a "private mobile service" in 2007,[326] the agency found the "mobile broadband marketplace ha[d] evolved such that hundreds of millions of consumers now use mobile broadband to access the Internet."[327] The agency concluded that mobile broadband was no longer a "private" mobile service "that offer[s] users access to a discrete and limited set of endpoints,"[328] but instead should be classified as a commercial mobile service subject to common carrier regulation.[329]

The mobile petitioners did not agree.[330] They argued that the term "public switched network" is a term of art meaning the public switched *telephone* network.[331] They added that even if the public switched network included IP networks, mobile broadband still was not an "interconnected service," because people with telephone numbers cannot call mobile broadband customers, who have IP addresses instead of telephone numbers.[332]

The court responded that in 1994, when the Commission had defined the term

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[325] In the *2015 Open Internet Order,* the Commission amended its definition of "public switched network" to "[t]he network that includes any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that uses the North American Numbering Plan, or public IP addresses, in connection with the provision of switched services." 47 C.F.R. § 20.3 (2015). The agency also amended its definition of "commercial mobile radio service" to include, as a "functional equivalent," any "mobile broadband Internet access service," defined in Section 8.2 of the FCC Rules as:

> A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this part.

47 C.F.R. § 8.2 (2015).

[326] *US Telecom*, 825 F.3d at 713 (citing *Wireless Broadband Order,* 22 FCC Rcd. at 5785).

[327] *Id.* (citing *2015 Open Internet Order,* 30 FCC Rcd. at 5788-89).

[328] *Id.* (citing *2015 Open Internet Order,* 30 FCC Rcd. at 5778-88).

[329] *Id.*

[330] *Id.* at 716.

[331] *Id.*

[332] *Id.* at 713.

"public switched network,"[333] it had concluded, after reviewing comments, that the NANP fulfilled what the Commission saw as the purpose of the network: "allow[ing] the public to send or receive messages to or from anywhere in the nation" by giving users "ubiquitous access" to all other users.[334] Because mobile voice satisfied the definition thus developed, the Commission classified it as a "commercial mobile service,"[335] subjecting it to common carrier treatment.[336] Because mobile broadband did not yet exist, the Commission did not address IP-based networks at that time.[337]

In 2007, the court continued, the Commission had classified mobile broadband service as a "private radio service" because broadband users, who had IP addresses, not telephone numbers, could not interconnect with the public switched network as then defined – i.e., the telephone network.[338] Eight years later, the Commission changed its definition of the "public switched network" to also include IP-based networks, as a result of "evidence of the extensive changes that have occurred in the mobile marketplace."[339] Mobile broadband had "come to provide the same sort of ubiquitous access" to other users that mobile voice provided in 1994, in contrast to the "private mobile" networks used by taxis, public safety and other networks with limited endpoints.[340] After revising its "public switched network" definition to include IP addresses, the FCC found mobile broadband met the definitions of an "interconnected service"[341] and "commercial mobile service," and was subject to common carrier regulation.

The court found this reclassification reasonable and supported by record evidence.[342] Congress had expressly delegated authority to the FCC to define the

[333] *Id.* at 714; 47 C.F.R. § 20.3 (2015). Because it referenced the U.S. telephone numbering system, this definition indicated that the term "public switched network" meant mobile and fixed telephone networks. *US Telecom,* 825 F.3d at 714.

[334] *US Telecom,* 825 F.3d at 714. (citing *CMRS Second Report & Order,* 9 FCC Rcd. at 1454-55); *2015 Open Internet Order*, 30 FCC Rcd. at 5779.

[335] *CMRS Second Report & Order,* 9 FCC Rcd. at 1437 n.115.

[336] The Commission found that "defining a carrier as part of the PSN for purposes of our definition of 'commercial mobile radio service' is not intended to alter or modify the extent to which any such carrier may be subject to any obligations or requirements (e.g., network reliability reporting, open network architecture) other than those contained in Section 332 of the Act or in regulations promulgated by the Commission pursuant to Section 332." *Id.*

[337] *US Telecom,* 825 F.3d at 714.

[338] *Id.* (citing *2015 Open Internet Order*, 30 FCC Rcd. at 5784; Wireless Order, 22 FCC Rcd. at 17-18).

[339] *Id.* at 715 (citing *2015 Open Internet Order,* at 5785-86).

[340] *Id.* (citing *2015 Open Internet Order* at 5779-80).

[341] *Id.* at 716 (citing 47 U.S.C. § 332(d)(2) (1993)); *2015 Open Internet Order*, 30 FCC Rcd. 5779, 5785.

[342] *Id.* at 715 (citing *2015 Open Internet Order*, 30 FCC Rcd. at 5786).

"public switched network" and "interconnected service". The court stated that non-telephone services need not always remain "private mobile services";[343] it agreed with the agency that Congress granted it definitional authority because it "expected the notion [of the public switched network] to evolve . . . ."[344] If Congress had intended the "mobile switched network" to mean the "mobile switched *telephone* network," it "could (and presumably would) have used the more limited—and more precise—term", as it had later when enacting 18 U.S.C. § 1039(h)(4).[345]

The mobile petitioners also challenged the agency's definition of "interconnected service" for purposes of Section 332(d)(2) as a service "that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network."[346]

The question was whether mobile broadband "gives subscribers the capability to communicate to or receive communication from all other users on the public switched network," as redefined to encompass users with IP addresses as well as those with telephone numbers.[347] The court found that the Commission had reasonably determined that mobile broadband gives users that capability[348] through the use of VoIP applications,[349] which enable a mobile broadband user, to send a voice call from an IP address to a telephone number, even without cellular voice service and a telephone number.

In 2007, "the Commission considered VoIP applications to be a separate, non-integrated service, such that VoIP's ability to connect internet and telephone users was not thought to render mobile broadband an interconnected service."[350]

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[343] *US Telecom*, 825 F.3d at 716–17 (citing 47 U.S.C. § 332(d)) (1993); *2015 Open Internet Order,* 30 FCC Rcd. 5782-3.

[344] *Id.* at 718 (citing *2015 Open Internet Order*, 30 FCC Rcd. at 5783).

[345] *Id.* at 717.

[346] 47 C.F.R. § 20.3 (2015); *2015 Open Internet Order*, 30 FCC Rcd. at 5784.

[347] *US Telecom,* 825 F.3d at 719 (citing 47 C.F.R. § 20.3 (prior version effective through June 11, 2015)). The Commission had also excised the word "all" from its definition of an "interconnected service", describing this change as having no substantive effect. *Id*. The court found that regardless of the change, mobile broadband would nevertheless qualify as interconnected service. *Id.* Because it agreed that mobile broadband—through VoIP — "gives subscribers the capability to communicate with *all* NANP endpoints as well as with *all* users of the Internet," it said it need not consider the challenge to the removal of the word "all." *Id.* at 722 (emphasis added) (quoting *2015 Open Internet Order*, 30 FCC Rcd. at 5787). The court noted that the agency justified removal of the word "all" as recognizing its determination that a service is "interconnected," even if it "restricts access in certain limited ways," such as blocking access to 900 numbers. *Id*. at 723.

[348] *Id*. at 719.

[349] *Id.*

[350] *Id.*

By 2015, however, it found that the "technological landscape" had changed,[351] and VoIP applications had become "an integrated aspect of mobile broadband, rather than as a functionally distinct, separate service."[352] VoIP applications were routinely bundled with smartphone operating systems; they were no longer as "rare and clearly functionally distinct" as they were in 2007.[353] Mobile broadband, in 2015, "'gives subscribers the capability to communicate to . . . all other users on the public switched network,' whether the recipient has an IP address, telephone number, or both."[354] Accordingly, the court concluded, the Commission reasonably determined that mobile broadband today is interconnected with the public switched network as newly defined.[355]

CTIA and AT&T argued that mobile broadband subscribers could not interconnect with telephone users without taking the separate step of using a VoIP application. The court stated that the Act does not "compel[] the Commission to draw a talismanic (and elusive) distinction" between interconnection by the service itself and interconnection in combination with an application.[356]

The mobile petitioners also contended that because telephone users cannot establish a connection to IP users, mobile voice service would no longer qualify as an "interconnected service" if the public switched network could include services using IP addresses as well as telephone numbers. The court did not agree. First, it said, the 2015 Open Internet Order addressed the classification of mobile broadband, not mobile voice services.[357] Even so, it added, mobile voice users can "receive communication from" mobile broadband users through VoIP, and that capability alone was sufficient to render mobile voice an "interconnected service."[358]

In addition, were the Commission to formally address in the future whether mobile voice is an interconnected service, the Commission could assess at that time whether mobile voice users could "communicate to" IP users from their telephones. The court noted that Public Knowledge had described services that enable users of mobile broadband (or other computer technologies) to receive

[351] *Id.* at 720 (quoting *2015 Open Internet Order*, 30 FCC Rcd. at 5787).

[352] *Id.*

[353] *Id.* (quoting Letter from Michael Calabrese, Open Technology Institute, et al., to Marlene H. Dortch, FCC, at 6, GN Dkt. Nos. 14-28 & 10-127 [70] (Dec. 11, 2014) ("OTI 12/11 Letter")); *2015 Open Internet Order,* 30 FCC Rcd. at 5774-5.

[354] *US Telecom*, 825 F.3d at 719 (quoting 47 C.F.R. § 20.3 (2015)).

[355] *Id.* at 719-20.

[356] *Id.* at 721 (the court added that even for communications with other broadband users, mobile broadband users generally need to use a native or third-party application such as Gmail or WhatsApp.).

[357] *Id.* at 722.

[358] *Id.* at 719.

telephone calls to their IP addresses.[359]

Finally, the court accepted the agency's view that reclassification of mobile broadband as a "commercial mobile service" was necessary in order to avoid contradictions in treatment of providers. Classifying mobile broadband providers as common carriers under Title II yet immune from common carrier treatment under Title III would have been contradictory, in the agency's view.[360] Although the Commission welcomed the "tremendous investment and innovation in the mobile marketplace"[361] that had occurred with little Title II regulation (and, since 2007, without any such regulation), it was concerned about the potential for open Internet abuses. Moreover, content providers had advocated for consistent regulation,[362] and achieving consistency with regulation of fixed broadband would mean application of Title II. The court described the example of a consumer whose single connection could take place over Wi-Fi (which originates from a landline broadband connection) and then transfer to mobile broadband.[363] The court stated that the agency's decision would avoid changes in regulatory treatment as the consumer's connection changed.[364]

AT&T and CTIA also asserted that the Commission provided insufficient notice of these changes. The court responded that because the petitioners had actual notice of the final rule and could not show prejudice in arguments they would have presented if they had the chance, the lack of notice was harmless.[365] Although the concept of redefining the public switched network was raised in comments by Vonage rather than in the Notice, commenters had addressed it before the agency. Accordingly, the court concluded that any lack of notice was not prejudicial.[366]

Multiple parties requested rehearing of *US Telecom*. CTIA's petition contested the Commission's decision "to regulate every wireless device with an Internet Protocol ('IP') address," asserting that the "whole point of Section 332 is

[359] *Id.* at 722 (quoting *Public Knowledge 12/19 Letter*, at 11 n.50) (describing Apple's Continuity service, which enables an iPhone 6 user with mobile voice service to call an iPad user with mobile broadband service, and "Google Voice" and "Hangouts" services and Skype Numbers, which allow mobile broadband users to receive calls from telephone users.).

[360] *Id.* at 724.

[361] *2015 Open Internet Order,* 30 FCC Rcd. at 5603.

[362] *Id.* (citing comments from Cox, NCTA, and Time Warner Cable, as well as Mozilla, Microsoft, public interest groups including CDT and Public Knowledge, and landline broadband provider Frontier Communications).

[363] *US Telecom,* 825 F.3d at 724.

[364] *Id.*

[365] *Id.* at 725 (citing *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983)); *see* Owner-Operator Independent Drivers Assn. v. Federal Motor Carrier Safety Administration, 494 F.3d 188, 202 (D.C. Cir. 2007).

[366] *US Telecom*, 825 F.3d at 726.

to provide extra protection for mobile services in order to foster innovation," and adding that although the ability to reach *all* other users is the very definition of "*the* public switched network," a customer with only telephone service cannot contact billions of IP-enabled devices.[367]

As a practical matter of physics, wireless customers are not static. Their locations cannot be permanently assigned to estimated usage categories such as "residential home" or "office building" or "steel plant." They move. Congestion can occur unexpectedly at different places and times. A street festival, protest march, highway pileup, mobile game popularity surge or natural disaster can wreak havoc on traffic planning. Carriers with congested mobile networks need the ability to dynamically adjust how, where, and how fast they channel traffic.

Ultimately, the case may end at the Supreme Court, as AT&T's General Counsel predicted. The new administration or Congress, however, may work to change the federal approach to open Internet regulation or Title II reclassification. Under FCC Chairman Pai, the next chapter remains to be written.

[367] *See* CTIA En Banc Petition, *supra* note 5.