

TELECOMMUNICATIONS LAW AND POLICY

FOURTH EDITION

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Chapter 4

Zoning the Spectrum

Insert on page 90 after note 11:

12. Frequencies Above 24 GHz. In 2016 the Commission issued rules for wireless broadband services above 24 GHz. Use of Spectrum Bands Above 24 GHz for Mobile Radio Services, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd. 8014 (2016). Specifically, the order covered bands at 28 GHz, 37–39 GHz, and 64–71 GHz. Such frequencies, often called millimeter wave (mmW) bands, are much higher than those that historically have been used for cellular services. The idea is that the next generation of wireless services might be transmitted on these frequencies. At such high frequencies, signals do not travel very far and require a line of sight, but they can contain a lot of data.

The order continues to follow the now-dominant approach of flexible licensing, allowing a wide range of services on these frequencies. As for the licensing regime, the order provides for licensed spectrum in the 28 GHz and 37–39 GHz and unlicensed spectrum in the 64–71 GHz band. Many bands above 24 GHz, including the 37–39 GHz bands, have allocations to the federal government (usually for military purposes). The order concludes that sharing between government and private operations are possible in these bands and it mandates such sharing. The 28 GHz and 39 GHz bands also had allocations, and licenses, for non-federal commercial services. These were fixed, not mobile, services, called Local Multipoint Distribution Service (LMDS). One question for the Commission was how it wanted to handle those existing services. Would LMDS licenses be allowed to offer mobile services (which would make their licenses much more valuable)? Would the Commission instead separately license mobile rights on these frequencies? The following excerpt of the order addresses this issue.

USE OF SPECTRUM BANDS ABOVE 24 GHz FOR MOBILE RADIO SERVICES
Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd. 8014 (2016)

37. *Background.* In Rulemaking To Amend Parts 1, 2, 21, and 25 of the Commission’s Rules To Redesignate the 27.5–29.5 GHz Frequency Band, To Reallocate the 29.5–30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, First Report and Order and Fourth Notice of Proposed Rulemaking, 11 FCC Rcd. 19,005, 19,025, ¶ 45 (1996), the Commission designated the 27.5–28.35 GHz band for LMDS on a primary basis and determined that satellite services would be permitted in that band on a non-interference basis to LMDS systems, and only for the purpose of providing limited gateway-type services. The following year, in Rulemaking To Amend Parts 1, 2, 21, and 25 of the Commission’s Rules To Redesignate the 27.5–29.5 GHz Frequency Band, To Reallocate the 29.5–30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Second Report and Order and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd. 12,545 (1997) (Second LMDS Report and Order), the Commission expressed an expectation that it would expand the LMDS authorization for Fixed Service to include Mobile Service if proposed and supported by the resulting record. In the Second LMDS Report and Order, the Commission stated:

Although LMDS is allocated as a fixed service, we know of no reason why we would not allow mobile operations if they are proposed and we obtain a record in support of such an allocation. We believe this would be consistent with our goal of providing LMDS licensees with maximum flexibility in designing their systems.

Id. at 12,637, ¶ 207. The technology of the time did not enable the use of these frequencies for advanced mobile services and, therefore, the Commission did not authorize mobile service in the band. However, the band retained its mobile allocation and, in the intervening period, the Commission has authorized some satellite services in the band for the purpose of providing limited gateway-type services.

38. Recently, technological advances have enabled the development of viable mobile networks in the mmW bands. Accordingly, in Use of Spectrum Bands Above 24 GHz for Mobile Radio Services, Notice of Proposed Rulemaking, 30 FCC Rcd. 11,878 (2015) (NPRM), we proposed to permit existing LMDS and 39 GHz licensees to exercise the full extent of their rights—including mobile rights—for geographic areas and bands in which they currently hold licenses. We noted three likely advantages to this proposal. First, this approach would minimize transaction costs and provide the fastest transition to expanded use of the band, which would benefit consumers. We opined that it would be particularly important to take actions that expedite service because of the great benefits these new technologies could bring to consumers and because of the technical and logistical challenges licensees will face. Second, we noted that

given the technical characteristics of this band and the nature of the services that may be developed for it, the differences between fixed and mobile operation are increasingly blurred. We therefore suggested that attempting to define separate bundles of “fixed” and “mobile” rights might create unnecessary complexity and be inconsistent with the underlying technologies, in which case it would be more efficient to have both the fixed and mobile usage rights contained within the same license. Third, the existence of separate licenses for fixed and mobile operation might create unusually large challenges related to interference. For example, one point-to-point link could preclude mobile use of the spectrum in a downtown region. We noted that a single license that combines both fixed and mobile rights avoids this issue and provides the licensee with the appropriate incentives to evaluate the tradeoffs between different uses.

39. As an alternative, however, we also sought comment in the NPRM on the costs and benefits of using an overlay auction that would separately license the mobile rights associated with certain accompanying fixed rights on the same frequency—as long as the overlay licensee obtaining the mobile rights did not interfere with the incumbent’s fixed use. We noted several possible advantages to overlay licenses. First, an overlay auction would assign these rights to the user that values the set of rights most highly, whether it be an incumbent licensee or a new potential user. Second, the use of an auction, rather than a direct grant of additional rights to existing licensees, would ensure that a portion of the value associated with these additional rights will accrue to the United States Treasury. Third, we noted that the Commission has relevant experience in the application of overlay rights in other bands.

40. Most commenters support granting mobile rights to incumbent LMDS licensees and oppose the grant of overlay licenses. AT&T, on the other hand, suggests that incumbent licenses be modified to limit their authorizations to protecting existing operations, both by frequency and by area of operations, and that overlay licenses be issued for the remaining rights.

41. *Discussion.* We adopt our proposal to grant mobile operating rights to existing active LMDS licensees. This grant is in fulfillment of the Commission’s original mobile allocation for 28 GHz and its stated expectation of allowing mobile use in the band in “providing LMDS licensees with maximum flexibility in designing their systems.” Second LMDS Report and Order, 12 FCC Rcd. at 12,637, ¶ 207. Once the rules we adopt today take effect, existing licensees will be able to provide mobile services consistent with Part 30 licensing and technical rules. Granting mobile operating rights to existing licensees will expedite the deployment of service, minimize the difficulties involved in coordinating fixed and mobile deployments, and provide a uniform licensing scheme throughout the United States. We remain concerned that awarding fixed and mobile rights separately would lead to disputes between fixed and mobile licensees that could make it more difficult for both licensees to provide service.

42. We recognize that awarding mobile rights to incumbent licensees could be viewed as a windfall to those licensees, although the Commission contemplated granting mobile rights when it first created LMDS. Here, the benefits of expediting service and ease of coordinating fixed and mobile service outweigh any foreseeable disadvantages of granting mobile rights to incumbents. In this instance, we find that expedition is particularly important because of the need to make mmW spectrum available for innovative and novel issues.

Notes and Questions

1. Windfalls. As with the NPRM on page 81 of the casebook (see footnote 8 on page 85), the FCC confronted the question of how to deal with a potential windfall. The excerpt above is the entirety of the order’s discussion of the issue. Should it have said more? If so, what other considerations or facts should it have discussed?

2. Avoiding Windfalls. What is the best argument for an overlay auction, or some other method for assignment of mobile licenses that would avoid a windfall for LMDS licensees? Is it the importance of avoiding a windfall? If so, how strong an argument is that?

Insert on page 117 after note 5:

6. Adopting License-by-Rule. In 2015 the Commission issued a report and order that largely followed the notice of proposed rulemaking excerpted on page 111 of the casebook. Amendment of the Commission’s Rules with Regard to Commercial Operations in the 3550–3650 MHz Band, Report and Order and Second Further Notice of Proposed Rule-making, 30 FCC Rcd. 3959 (2015). The order adopted rules not only for the 3550–3650 MHz band but also for the 3650–3700 MHz band (the order refers to these 150 MHz as the 3.5 GHz Band). It adopted the three-tiered model from the

NPRM in the casebook and declined to delay its implementation: “While we appreciate the creative ‘transition plans’ put forth by various commenters, we are not convinced that this approach is necessary or desirable.” *Id.* ¶ 56. The order also specified that Priority Access Licenses will be assigned by competitive bidding. *Id.* ¶ 122. Particularly relevant for purposes of this chapter was its discussion of the licensing of the General Authorized Access tier, which is excerpted below.

**AMENDMENT OF THE COMMISSION’S RULES WITH REGARD TO
COMMERCIAL OPERATIONS IN THE 3550–3650 MHZ BAND**

Report and Order and Second Further Notice of Proposed Rulemaking, 30 FCC Rcd. 3959 (2015)

III. Discussion

D. General Authorized Access (GAA)

155. The GAA-tier is intended to provide a low-cost entry point into the Citizens Broadband Radio Service for a wide array of users. GAA users will have no expectation of interference protection from Incumbent Users and other Citizens Broadband Radio Service users. Further, GAA users must comply with the instructions of the [Spectrum Access System (SAS)] and avoid causing harmful interference to Priority Access Licensees and Incumbent Access tier users. We believe that GAA availability will promote competition, encourage flexible network deployments, and facilitate the efficient use of available spectrum. The same technical rules will apply to devices operated in both the Priority Access and GAA tiers of service to maximize flexible and efficient use of the band. Therefore, as discussed below and consistent with the proposals set forth in Amendment of the Commission’s Rules with Regard to Commercial Operations in the 3550–3650 MHz Band, Notice of Proposed Rulemaking, 27 FCC Rcd. 15,594 (2012) (NPRM) [page 111 of the casebook], we adopt a license-by-rule authorization framework under Section 307 of the Communications Act for GAA users.

1. Authorization Methodology

156. *Background.* [In the NPRM] [w]e proposed to establish the Citizen’s Broadband Radio Service (including the GAA tier) by rule under Section 307(e) of the Communications Act, 47 U.S.C. § 307(e). We reasoned that a license-by-rule licensing framework would allow for rapid deployment of small cells by a wide range of users, including consumers, enterprises, and service providers, at low cost and with minimal barriers to entry. As we explained, much wireless broadband use occurs indoors or in other enclosed facilities. Typically, the owners or users of such facilities already have access to the siting permissions, backhaul facilities, electrical power, and other key non-spectrum inputs for the provision of service. Moreover, small cell operation in the 3.5 GHz Band would generally tend to contain service within such facilities, allowing for a high degree of spectrum reuse. Therefore, authorizing these end users to have direct access to the 3.5 GHz Band in the physical locations that they otherwise are able to access would seem to facilitate expeditious and low-cost provision of service. Accordingly, we concluded that a license-by-rule framework was very compatible with and conducive toward these aims.

157. A number of commenters endorsed the license-by-rule approach. The Utility Groups, for example, agree that the Citizens Broadband Radio Service should be licensed by rule. Utilities Telecom Council notes that the license-by-rule model promotes economies of scale, minimizes administrative burdens, and provides a unified licensing model in the band. The WiMAX Forum states that a license-by-rule approach “would streamline deployment as compared to the ‘light licensing’ scenario of the current 3650–3700 MHz band.” WiMAX Forum Comments at 7.

158. Other commenting parties express a preference for an unlicensed (Part 15) framework, rather than [a] license-by-rule framework. AT&T specifically opposes license-by-rule authorizations and asserts that the Commission’s statutory authority under Section 307(e) is narrower than the Commission claims. AT&T argues that the Commission should authorize GAA users under Part 15 instead. Microsoft likewise argues that an unlicensed regime would facilitate the rapid deployment of new technologies in the band “because of the relatively low regulatory barriers to entry and because the technical rules governing Part 2 and 15 devices have proven effective in protecting incumbent users from interference.” Microsoft Comments at 10. Telecommunications Industry Association, by contrast, argues that license-by-rule and unlicensed approaches are too unpredictable to support the Commission’s service expectations, as envisioned by the National Broadband Plan.

159. *Discussion.* After careful consideration of the record in this proceeding, we adopt a licensed-by-rule framework for the GAA tier of the new Citizens Broadband Radio Service, pursuant to Section 307(e) of the Communications Act, as amended, and subject to applicable technical rules. Section 307(e) states in part that,

“[n]otwithstanding any license requirement established in this Act, if the Commission determines that such authorization serves the public interest, convenience, and necessity, the Commission may by rule authorize the operation of radio stations without individual licenses in the following radio services: (A) citizens band radio service;” Section 307(e) further states that, “[f]or purposes of this subsection, the terms ‘citizens band radio service’ . . . shall have the meanings given them by the Commission by rule.”

160. We conclude that a license-by-rule framework is the appropriate methodology for authorizing users in the 3.5 GHz Band consistent with the tiers of service proposed herein. This proposed framework will facilitate the rapid deployment of compliant small cell devices while minimizing administrative costs and burdens on the public, licensees, and the Commission.

161. We disagree with AT&T’s assertion that the Commission does not have authority to license GAA users by rule under Section 307(e) of the Communications Act. [T]he Act expressly delegates to the Commission the discretion to define the scope of the term “citizens band radio service.” The Commission has repeatedly exercised that authority to license new services by rule under Section 307. Accordingly, we establish a new Citizen’s Broadband Radio Service under Part 96 of the Commission’s Rules, and define the GAA tier as a Citizens Band Radio Service pursuant to the Commission’s authority under Sections 307(e)(1) and (e)(3) of the Act. We find that the creation of a wireless Citizens Broadband Radio Service under the license-by-rule framework of Section 307 will serve the public interest, convenience, and necessity and is consistent with Commission precedents creating new services with flexible assignments for any number of users.

162. Under the license-by-rule framework we adopt today, GAA users may use only certified, Commission-approved Citizens Broadband Radio Service Devices (CBSDs) and must register with the SAS. Consistent with our new rules governing CBSDs, devices operating on a GAA basis must provide the SAS with all information required by the rules—including operator identification, device identification, and geo-location information—upon initial registration and as required by the SAS. GAA users must also comply with the instructions of the SAS and must avoid causing harmful interference to Priority Access Licensees and Incumbent Access tier users. Similar to unlicensed operations, GAA users have no expectation of interference protection from Incumbent Users and other Citizens Broadband Radio Service users.

163. We decline to adopt an unlicensed regime for this band as suggested by certain commenters in the proceeding. Instead, we adopt a primary fixed and land mobile allocation across the entire band. A co-primary allocation for the entire 3.5 GHz Band will ensure that GAA operations are prioritized over existing secondary users in the band. Moreover, this authorization framework will serve the public interest, aiding enforcement and promoting a more stable and predictable spectral environment through affirmative authorization of CBSDs by the SAS. Further, authorizing GAA as a licensed radio service will simplify administration and oversight of the Citizens Broadband Radio Service.

Notes and Questions

1. Statutory Interpretation. How should a court evaluate the Commission’s interpretation of § 307(e)? Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), a reviewing court determines “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. . . . [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 842–43. Does § 307(e) speak to the precise question whether the FCC can license by rule? If not, is the Commission’s interpretation permissible? Is it significant that “[T]he Act expressly delegates to the Commission the discretion to define the scope of the term ‘citizens band radio service’”? Order ¶ 161.

2. Interference Protection. As the excerpts above and in the casebook highlight, license-by-rule is more restrictive than an unlicensed regime, but of course less restrictive than many other licensing regimes. One of the tradeoffs involves the relationship among the General Authorized Access, the Priority Access, and the Incumbent Access tiers. Has the Commission given the appropriate level of interference protection to each tier? How would you argue for different levels of interference protection?

3. How To Evaluate Success? On what basis should the Commission determine whether its license-by-rule regime is working well? Should it focus on interference? Should it focus on the services offered and used by GAA users? Should it value some kinds of uses more highly than others (e.g., uses that allow ordinary people to communicate on matters of importance to them)? How should it define, and how would it defend, such metrics?

Chapter 5

Structuring and Assigning Licenses

Insert on page 164 after note 4:

5. *Prometheus III*. In 2014, the Commission issued an order and further notice of proposed rulemaking that did not reach any conclusion on the definition of eligible entities. 2014 Quadrennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd. 4371 (2014). The Commission “tentatively concluded” that it should reinstate a revenue-based definition of eligible entities that *Prometheus II* had rejected as arbitrary and capricious. *Id.* ¶ 7. The Commission also “tentatively conclude[d] that the record from the 2010 Quadrennial Review proceeding does not satisfy the demanding legal standards the courts have said must be met before the Government may implement preferences based on . . . race- or gender-conscious definitions.” *Id.* It sought additional comment on these issues before it would promulgate a final order. In *Prometheus Radio Project v. FCC*, 824 F.3d 33 (3d Cir. 2016), the Third Circuit rejected the Commission’s arguments in defense of its failure to adopt a definition of eligible entities, and ordered the Commission “to act promptly to bring the eligible entity definition to a close.” *Id.* at 33.

In 2016, the Commission issued an order responding to this remand (and bringing to a conclusion its 2010 and 2014 quadrennial reviews). *See* 2014 Quadrennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Second Report and Order, 31 FCC Rcd. 9864 (2016). The order reinstated the revenue-based definition of eligible entities that *Prometheus II* had vacated. *Id.* ¶¶ 279–286. The Commission also “[found] that the demanding legal standards the courts have said must be met before the Government may implement preferences based on such race- or gender-conscious definitions have not been satisfied.” *Id.* ¶ 4.

Insert on page 182 at the end of note 6:

In 2015 the Commission completed an auction for flexible licenses it calls “Advance Wireless Service” (AWS) licenses (see page 88 of the casebook). The spectrum involved (the 1695–1710 MHz, 1755–1780 MHz and 2155–2180 MHz bands) were collectively known as the AWS-3 bands. This auction is discussed in the excerpt on pages 454–455 of the casebook. These are not particularly large bands, and the two lower bands were offered on a shared basis with incumbent federal government users for an indefinite period of time, so analysts did not expect huge revenues: the high end of analysts’ estimates of auction revenues was \$18 billion. Amendment of the Commission’s Rules with Regard to Commercial Operations in the 1695–1710 MHz, 1755–1780 MHz, and 2155–2180 MHz Bands, 29 FCC Rcd. 4610, ¶ 2; John Eggerton, Washington Hails Success of AWS-3 Auction, *Broadcasting & Cable* (Jan. 29, 2015), available at <http://www.broadcastingcable.com/news/washington/washington-hails-success-aws-3-auction/137541>. The auction actually yielded \$44.89 billion, making it the highest revenue generating auction in FCC history. *Id.*

Insert on page 182 at the end of note 8:

In 2017 bidding closed and the Commission completed the incentive auction. In the reverse auction, 175 winning broadcasters received more than \$10 billion. Of the winners, 30 stations opted for payments to move to a lower channel, and 133 relinquished their licenses and indicated their intent to remain on air through channel-sharing agreements with non-winning stations. In the forward auction, wireless carriers bid \$19.8 billion on mobile broadband spectrum. 84 MHz were repurposed as a result of the auction. Fifty winning bidders won 70 MHz of licensed spectrum nationwide, and another 14 MHz of spectrum were designated for unlicensed use and wireless microphones. *See* FCC Announces Results of World’s First Broadcast Incentive Auction (April 13, 2017), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-344397A1.pdf.

Chapter 6

Early Telephone Regulation through Divestiture

Insert on page 201 after note 3:

4. Set Top Boxes. Although telephone CPE can be purchased by consumers and connected to the network through standard interfaces, most cable and satellite companies provide (rent) “boxes” to consumers that are necessary to access the service. In 2016 the FCC proposed to also require the unbundling of those boxes, to allow them to be independently supplied, together with their navigation functionality. As with telephone CPE, the FCC then said that it would “allow consumer electronics manufacturers, innovators, and other developers to build devices or software solutions that can navigate the universe of multichannel video programming with a competitive user interface.” Expanding Consumers’ Video Navigation Choices, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 31 FCC Rcd. 1544, 1545, ¶ 1 (2016). In 2017, the FCC removed this item from its rulemaking agenda (meaning that it did not propose to move forward with the proposal). Do you think that telephone CPE and set top boxes are equivalent cases?

Chapter 7

Control of Telephone Monopolies

Insert on page 235 after note 2:

3. State Control of Municipal Telecommunications and Broadband Providers. In *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), the Supreme Court held that 47 U.S.C. § 253(a) did not require states to allow municipalities or municipally-owned utilities to enter telecommunications markets. In 2015, the FCC was faced with state laws that permitted municipalities and municipally-owned utilities to provide broadband, but restricted their provision to their utility service areas and imposed certain other conditions on their ability to offer broadband services. The FCC preempted the territorial restriction and most of the other conditions as creating barriers to broadband deployment, but the United States Court of Appeals for the Sixth Circuit held that the FCC lacked the clear grant of statutory authority necessary for it to preempt the state laws. *See City of Wilson, North Carolina, Petition for Preemption, Memorandum Opinion and Order*, 30 FCC Rcd. 2408 (2015), *rev'd*, *Tennessee v. FCC*, 832 F.3d 597 (6th Cir. 2016). An excerpt from the Sixth Circuit's decision is in the supplementary materials for Chapter 14.

Chapter 10

Structural Regulation of Media

Insert on page 405 after note 6:

7. Quadrennial? As was noted on page 385 of the casebook, § 202(h) of the Telecommunications Act of 1996 requires the FCC to review its media ownership rules (first biennially, later changed to quadrennially). Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111–12 (1996); Pub. L. No. 108-199, § 629, 118 Stat. 3, 99–100 (2004) (making review quadrennial instead of biennial). The 2014 order noted above that failed to define eligible entities also failed to come to any resolution on the Commission’s media ownership regulations. 2014 Quadrennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd. 4371 (2014). The order sought additional comment on those regulations without completing its 2010 quadrennial review of them. Thus the 2010 quadrennial review of the FCC’s media ownership regulations was rolled into the succeeding (2014) quadrennial review.

Broadcasters who were frustrated by this extended timeline sought an order vacating all five of the FCC’s broadcast ownership rules subject to quadrennial review under § 202(h). In the *Prometheus III* case noted above, the Third Circuit rejected this argument for vacatur, but did order the Commission to bring the 2010 and 2014 quadrennial reviews to a close. *Prometheus Radio Project v. FCC*, 824 F.3d 33 (3d Cir. 2016). And the Commission did so in 2016. See 2014 Quadrennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Second Report and Order, 31 FCC Rcd. 9864 (2016). This order maintained the media ownership rules, but a reconsideration order after the election eliminated the Newspaper/Broadcast Cross-Ownership Rule and the Radio/Television Cross Ownership Rule and modified the Local Television and Local Radio Ownership Rules. 2014 Quadrennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd. 9802 (2017).

Insert on page 468 after note 4:

5. Foreclosing the Possibility of Foreclosure. In the 600 MHz incentive auction completed in 2017, Verizon and AT&T ultimately either did not bid (Verizon) or bid relatively little (AT&T). Does this mean that the spectrum limits had no impact or were otherwise useless? Not necessarily. The spectrum limits eliminated the possibility of foreclosure on the part of Verizon and AT&T, so it is impossible to know whether foreclosure would have been attractive to those companies had it been available.

Chapter 13

Universal Service: From Telephony to Broadband

Insert on page 565 at the end of note 3:

The FCC has, in fact, continued and is upgrading the E-rate program. In *Modernizing the E-rate Program for Schools and Libraries, Order and Further Notice of Proposed Rulemaking*, 29 FCC Rcd. 8870 (2014), the FCC adopted enhanced performance standards for high-speed connectivity to and within schools and libraries. And, in *Modernizing the E-rate Program for Schools and Libraries, Second Report and Order and Order on Reconsideration*, 29 FCC Rcd. 15,538 (2014), the FCC expanded the federal support available to schools and libraries. This 3–2 decision brought strong dissents from Commissioners Pai and O’Rielly who argued that the FCC had done little to ensure that waste would not continue and that the decision would increase the federal “tax” on telecommunications to almost 20% to fund these and other universal service programs.

Insert on page 578 after the notes:

[Please note that the Notes for this section, starting on page 577, are mis-numbered, the second note number 3 (Why Not a Broad-Based Tax) should be note number 5.]

6. Further Expansion of Broadband Universal Service. The FCC made good on its promises to transition traditional universal service programs to support broadband access. *Lifeline and Link Up Reform and Modernization, Third Report and Order, Further Report and Order, and Order on Reconsideration*, 31 FCC Rcd. 3962 (2016). In this order, the FCC makes Lifeline funding available for standalone broadband services and mixed voice and broadband services, while setting minimum standards for such services and attempting to streamline processes by which carriers can qualify as eligible providers. Indeed, the FCC held that, following a transition period, funding would not be allowed for standalone voice services.

In a companion order, the FCC also set specific broadband buildout requirements for rate-of-return carriers still receiving high-cost support. *Connect America Fund*, 31 FCC Rcd. 3087 (2016). The Commission allowed rate-of-return carriers to select into quicker targets in exchange for greater funding, but it made clear that it would “adopt specific broadband deployment obligations for all rate-of-return carriers, and not just for those that elect the voluntary path to the [increased funding] model.” *Id.* at 3092, ¶ 7. To respond to competitive concerns, the FCC also adopted what it called a “robust challenge process” to ensure that subsidized carriers would buildout only to those areas not currently being served by “a qualifying unsubsidized competitor.” *Id.* at 3092, ¶ 8.

7. Wireless Broadband Support. In an order issued in March 2017, the FCC adopted a framework to ensure broadband wireless coverage throughout the United States. *Connect America Fund: Universal Service Reform—Mobility Framework, Report and Order and Further Notice of Proposed Rulemaking*, 32 FCC Rcd. 2152 (2017). Shifting more than \$4.5 billion from existing programs, the new framework has three key elements. First, the FCC commits to subsidize the deployment of 4G LTE service, the most current deployed technology for wireless broadband, to ensure equivalent coverage of uncovered areas. Second, the FCC establishes a process to ensure that funds would only be used to subsidized buildouts in uncovered areas. If an area has an unsubsidized commercial provider, the FCC states that buildout subsidies in that area constitute unfair competition. And, third, the FCC provides that it will adopt a “reverse auction” framework for new buildouts, to ensure than new construction occurs at the lowest cost. Estimating that uncovered areas include 3 million Americans, the FCC reaffirms its commitment to wireless broadband universal service.

Chapter 14

Broadband Jurisdiction and Structural Regulation

Insert on page 614 after note 6:

7. **Reclassification.** The FCC issued an order reclassifying broadband Internet access service as a Title II telecommunications service. Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015). The order is excerpted later in this supplement.

Insert on page 619:

§14.C.2. Net Neutrality Policy (and Jurisdiction, Again)

[Usage note by the Editors: We believe that the material in this subsection, 14.C.2., could usefully be taught in two different ways. A class may wish to review each of the orders and court decisions in the progress of net neutrality policy. This issue has, in many ways, been the defining work of the FCC for more than the past 10 years and has been at the center of many broadband policy debates. Reviewing each decision allows the various legal and policy issues to be discussed in the context in which the Commission and the courts grappled with them most deeply. Alternatively, a class might simply read the D.C. Circuit’s most recent decision (from 2016, excerpted just below in this supplement) and the FCC’s 2018 Restoring Internet Freedom Order. That decision provides, in its first part, a summary of the history. We have retained in this supplement the FCC’s 2015 Open Internet Order, which one would read under the first approach and might read in all events under the second. What follows here is a few paragraphs to introduce the subject of net neutrality regulation for classes that adopt the second approach.]

For more than a decade, net neutrality has been one of the most significant and contentious issues on the FCC’s agenda. In 2005, the FCC took its first action, issuing a Policy Statement, stating that “consumers are entitled to access the lawful Internet content of their choice [and] to run applications and use services of their choice.” *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Policy Statement*, 20 FCC Rcd. 14,986 (2005). But policy statements, while important because in that they announce how the FCC intends to proceed, are not legally binding. Over the ensuing years, the FCC increasingly formalized its approach, as the 2016 decision of the D.C. Circuit explains. The FCC first adopted the position that it would and could use its Title I authority to prevent ISPs’ blocking or discriminating against content and applications. The D.C. Circuit questioned its authority to do this in *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010), and remanded the matter to the FCC. The Commission then relied on both Title I and on § 706 of the Telecommunications Act of 1996 to adopt net neutrality rules. On appeal, the D.C. Circuit agreed that the FCC had authority to regulate broadband, but it held that it could not use Title I and § 706 to adopt a policy that contravened a specific provision of the Communications Act. The FCC’s net neutrality rules, it further held, were a version of common carrier regulation, and the Communications Act only permits common carrier regulation to be imposed on common carriers. *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014); *see* 47 U.S.C. §§ 153(51), 332(c)(2).

After *Verizon*, therefore, the FCC was basically left with the choice of reclassifying broadband service as a common carrier service, adopting much weaker net neutrality rules, or abandoning net neutrality regulation altogether. In 2015, the Commission chose the first option and reclassified broadband Internet access service as a common carrier service, and it imposed net neutrality regulations while also forbearing from applying other aspects of traditional common carrier regulation. In 2016, the D.C. Circuit upheld the FCC’s 2015 order against multiple attacks, attacks that included challenges to the FCC’s statutory authority, its fact finding, and its policy judgments, as well as to the constitutionality of its decision. Then, in 2017, the FCC’s new majority adopted an order (released 2018) that repealed the 2015 common carrier classification and almost all of the substantive requirements. Excerpts follow.

Insert on page 653 after note 7:

8. Net Neutrality Order. The FCC moved quickly on its 2014 Notice of Proposed Rulemaking to readopt Open Internet Rules. It chose to reclassify broadband Internet access service as a Title II common carrier service, but to forbear from the application of the rules. The FCC’s order and accompanying statements are more than 400 pages; we cover the main issues in the excerpt below.

PROTECTING AND PROMOTING THE OPEN INTERNET

Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015)

I. INTRODUCTION

5. Carefully-tailored rules need a strong legal foundation to survive and thrive. Today, we provide that foundation by grounding our open Internet rules in multiple sources of legal authority—including both section 706 of the Telecommunications Act and Title II of the Communications Act. Moreover, we concurrently exercise the Commission’s forbearance authority to forbear from application of 27 provisions of Title II of the Communications Act, and over 700 Commission rules and regulations. This is a Title II tailored for the 21st century, and consistent with the “light-touch” regulatory framework that has facilitated the tremendous investment and innovation on the Internet. We expressly eschew the future use of prescriptive, industry-wide rate regulation. Under this approach, consumers can continue to enjoy unfettered access to the Internet over their fixed and mobile broadband connections, innovators can continue to enjoy the benefits of a platform that affords them unprecedented access to hundreds of millions of consumers across the country and around the world, and network operators can continue to reap the benefits of their investments.

II. EXECUTIVE SUMMARY

7. Just over a year ago, the D.C. Circuit in *Verizon v. FCC* struck down the Commission’s 2010 conduct rules against blocking and unreasonable discrimination. *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014). But the *Verizon* court upheld the Commission’s finding that Internet openness drives a “virtuous cycle” in which innovations at the edges of the network enhance consumer demand, leading to expanded investments in broadband infrastructure that, in turn, spark new innovations at the edge. The *Verizon* court further affirmed the Commission’s conclusion that “broadband providers represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment.” *Id.* at 645.

8. Threats to Internet openness remain today. The record reflects that broadband providers hold all the tools necessary to deceive consumers, degrade content, or disfavor the content that they don’t like. The 2010 rules helped to deter such conduct while they were in effect. But, as *Verizon* frankly told the court at oral argument, but for the 2010 rules, it would be exploring agreements to charge certain content providers for priority service. Indeed, the wireless industry had a well-established record of trying to keep applications within a carrier-controlled “walled garden” in the early days of mobile applications. That specific practice ended when Internet Protocol (IP) created the opportunity to leap the wall. But the Commission has continued to hear concerns about other broadband provider practices involving blocking or degrading third-party applications.

9. Emerging Internet trends since 2010 give us more, not less, cause for concern about such threats. First, mobile broadband networks have massively expanded since 2010. They are faster, more broadly deployed, more widely used, and more technologically advanced. At the end of 2010, there were about 70,000 devices in the U.S. that had LTE wireless connections. Today, there are more than 127 million. Second, and critically, the growth of online streaming video services has spurred further evolution of the Internet. Currently, video is the dominant form of traffic on the Internet. These video services directly confront the video businesses of the very companies that supply them broadband access to their customers.

A. Strong Rules That Protect Consumers from Past and Future Tactics that Threaten the Open Internet

1. Clear, Bright-Line Rules

14. Because the record overwhelmingly supports adopting rules and demonstrates that three specific practices invariably harm the open Internet—Blocking, Throttling, and Paid Prioritization—this Order bans each of them, applying the same rules to both fixed and mobile broadband Internet access service.

15. *No Blocking.* Consumers who subscribe to a retail broadband Internet access service must get what they have

paid for—access to all (lawful) destinations on the Internet. This essential and well-accepted principle has long been a tenet of Commission policy, stretching back to its landmark decision in *Carterfone*, which protected a customer’s right to connect a telephone to the monopoly telephone network. Use of the Carterfone Device in Message Toll Telephone Service, 13 F.C.C. 2d 420 (1968), *recon. denied*, 14 F.C.C. 2d 571 (1968). Thus, this Order adopts a straightforward ban:

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.

16. *No Throttling.* The 2010 open Internet rule against blocking contained an ancillary prohibition against the degradation of lawful content, applications, services, and devices, on the ground that such degradation would be tantamount to blocking. This Order creates a separate rule to guard against degradation targeted at specific uses of a customer’s broadband connection:

A person engaged in the provision of 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.

17. The ban on throttling is necessary both to fulfill the reasonable expectations of a customer who signs up for a broadband service that promises access to all of the lawful Internet, and to avoid gamesmanship designed to avoid the no-blocking rule by, for example, rendering an application effectively, but not technically, unusable. It prohibits the degrading of Internet traffic based on source, destination, or content. It also specifically prohibits conduct that singles out content competing with a broadband provider’s business model.

18. *No Paid Prioritization.* Paid prioritization occurs when a broadband provider accepts payment (monetary or otherwise) to manage its network in a way that benefits particular content, applications, services, or devices. To protect against “fast lanes,” this Order adopts a rule that establishes that:

A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not engage in paid prioritization.

“Paid prioritization” refers to 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.

19. The record demonstrates the need for strong action. The *Verizon* court itself noted that broadband networks have “powerful incentives to accept fees from edge providers, either in return for excluding their competitors or for granting them prioritized access to end users.” 740 F.3d at 645–46. Although there are arguments that some forms of paid prioritization could be beneficial, the practical difficulty is this: the threat of harm is overwhelming, case-by-case enforcement can be cumbersome for individual consumers or edge providers, and there is no practical means to measure the extent to which edge innovation and investment would be chilled. And, given the dangers, there is no room for a blanket exception for instances where consumer permission is buried in a service plan—the threats of consumer deception and confusion are simply too great.

2. No Unreasonable Interference or Unreasonable Disadvantage to Consumers or Edge Providers

20. The key insight of the virtuous cycle is that broadband providers have both the incentive and the ability to act as gatekeepers standing between edge providers and consumers. As gatekeepers, they can block access altogether; they can target competitors, including competitors to their own video services; and they can extract unfair tolls. Such conduct would, as the Commission concluded in 2010, “reduce the rate of innovation at the edge and, in turn, the likely rate of improvements to network infrastructure.” Preserving the Open Internet, Report and Order, 25 FCC Rcd. 17,905, 17,911, ¶ 14 (2010) (2010 Open Internet Order), *aff’d in part, vacated and remanded in part sub nom.* Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014). In other words, when a broadband provider acts as a gatekeeper, it actually chokes consumer demand for the very broadband product it can supply.

21. The bright-line bans on blocking, throttling, and paid prioritization will go a long way to preserve the virtuous cycle. But not all the way. Gatekeeper power can be exercised through a variety of technical and economic means, and without a catch-all standard, it would be that, as Benjamin Franklin said, “a little neglect may breed great

mischievous.” Benjamin Franklin, *Poor Richard’s Almanac* (1757). Thus, the Order adopts the following standard:

Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users’ ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers’ ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.

22. This “no unreasonable interference/disadvantage” standard protects 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.” 47 U.S.C. § 230(a)(3). And the standard will permit considerations of asserted benefits of innovation as well as threatened harm to end users and edge providers.

3. Enhanced Transparency

23. The Commission’s 2010 transparency rule, upheld by the *Verizon* court, remains in full effect:

A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.

4. Scope of the Rules

25. The open Internet rules described above apply to both fixed and mobile broadband Internet access service. Consistent with the 2010 Order, today’s Order applies its rules to the consumer-facing service that broadband networks provide, which is known as “broadband Internet access service” (BIAS) and is defined to be:

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.

26. As in 2010, BIAS does not include enterprise services, virtual private network services, hosting, or data storage services. Further, we decline to apply the open Internet rules to premises operators to the extent they may be offering broadband Internet access service as we define it today.

27. In defining this service we make clear that we are responding to the *Verizon* court’s conclusion that broadband providers “furnish a service to edge providers” (and that this service was being treated as common carriage *per se*). As discussed further below, we make clear that broadband Internet access service encompasses this service to edge providers. Broadband providers sell retail customers the ability to go anywhere (lawful) on the Internet. Their representation that they will transport and deliver traffic to and from all or substantially all Internet endpoints includes the promise to transmit traffic to and from those Internet endpoints back to the user.

28. *Interconnection*. BIAS involves the exchange of traffic between a broadband Internet access provider and connecting networks. The representation to retail customers that they will be able to reach “all or substantially all Internet endpoints” necessarily includes the promise to make the interconnection arrangements necessary to allow that access.

29. As discussed below, we find that broadband Internet access service is a “telecommunications service” and subject to sections 201, 202, and 208 (along with key enforcement provisions). As a result, commercial arrangements for the exchange of traffic with a broadband Internet access provider are within the scope of Title II, and the Commission will be available to hear disputes raised under sections 201 and 202 on a case-by-case basis: an appropriate vehicle for enforcement where disputes are primarily over commercial terms and that involve some very large corporations, including companies like transit providers and Content Delivery Networks (CDNs), that act on behalf of smaller edge providers.

30. But this Order does not apply the open Internet rules to interconnection. Three factors are critical in informing this approach to interconnection. First, the nature of Internet traffic, driven by massive consumption of video, has

challenged traditional arrangements—placing more emphasis on the use of CDNs or even direct connections between content providers (like Netflix or Google) and last-mile broadband providers. Second, it is clear that consumers have been subject to degradation resulting from commercial disagreements, perhaps most notably in a series of disputes between Netflix and large last-mile broadband providers. But, third, the causes of past disruption and—just as importantly—the potential for future degradation through interconnection disputes—are reflected in very different narratives in the record.

31. While we have more than a decade’s worth of experience with last-mile practices, we lack a similar depth of background in the Internet traffic exchange context. Thus, we find that the best approach is to watch, learn, and act as required, but not intervene now, especially not with prescriptive rules. This Order—for the first time—provides authority to consider claims involving interconnection, a process that is sure to bring greater understanding to the Commission.

32. *Reasonable Network Management.* As with the 2010 rules, this Order contains an exception for reasonable network management, which applies to all but the paid prioritization rule (which, by definition, is not a means of managing a network):

A network management practice is a practice that has a primarily technical network management justification, but does not include other business practices. A network management practice is reasonable if it is 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.

33. Recently, significant concern has arisen when mobile providers have attempted to justify certain practices as reasonable network management practices, such as applying speed reductions to customers using “unlimited data plans” in ways that effectively force them to switch to price plans with less generous data allowances.

34. With mobile broadband service now subject to the same rules as fixed broadband service, the Order expressly recognizes that evaluation of network management practices will take into account the additional challenges involved in the management of mobile networks, including the dynamic conditions under which they operate. It also recognizes the specific network management needs of other technologies, such as unlicensed Wi-Fi networks.

35. *Non-Broadband Internet Access Service Data Services.* The 2010 rules included an exception for “specialized services.” This Order likewise recognizes that some data services—like facilities-based VoIP offerings, heart monitors, or energy consumption sensors—may be offered by a broadband provider but do not provide access to the Internet generally. The term “specialized services” can be confusing because the critical point is not whether the services are “specialized;” it is that they are not broadband Internet access service. IP-services that do not travel over broadband Internet access service, like the facilities-based VoIP services used by many cable customers, are not within the scope of the open Internet rules, which protect access or use of broadband Internet access service. Nonetheless, these other non-broadband Internet access service data services could be provided in a manner that undermines the purpose of the open Internet rules and that will not be permitted. The Commission expressly reserves the authority to take action if a service is, in fact, providing the functional equivalent of broadband Internet access service or is being used to evade the open Internet rules. The Commission will vigilantly watch for such abuse, and its actions will be aided by the existing transparency requirement that non-broadband Internet access service data services be disclosed.

5. Enforcement

36. The Commission may enforce the open Internet rules through investigation and the processing of complaints (both formal and informal). In addition, the Commission may provide guidance through the use of enforcement advisories and advisory opinions, and it will appoint an ombudsperson. In order to provide the Commission with additional understanding, particularly of technical issues, the Order delegates to the Enforcement Bureau the authority to request a written opinion from an outside technical organization or otherwise to obtain objective advice from industry standard-setting bodies or similar organizations.

B. Promoting Investment with a Modern Title II

37. Today, our forbearance approach results in over 700 codified rules being inapplicable, a “light-touch” approach for the use of Title II. This includes no unbundling of last-mile facilities, no tariffing, no rate regulation, and no cost accounting rules, which results in a carefully tailored application of only those Title II provisions found to directly further the public interest in an open Internet and more, better, and open broadband. Nor will our actions result in the imposition of any new federal taxes or fees; the ability of states to impose fees on broadband is already limited

by the congressional Internet tax moratorium.

38. This is Title II tailored for the 21st Century. Unlike the application of Title II to incumbent wireline companies in the 20th Century, a swath of utility-style provisions (including tariffing) will *not* be applied. Indeed, there will be fewer sections of Title II applied than have been applied to Commercial Mobile Radio Service (CMRS), where Congress expressly required the application of Sections 201, 202, and 208, and permitted the Commission to forbear from others. In fact, Title II has never been applied in such a focused way.

39. History demonstrates that this careful approach to the use of Title II will not impede investment. First, mobile voice services have been regulated under a similar light-touch Title II approach since 1994—and investment and usage boomed. For example, between 1993 and 2009 (while voice was the primary driver of mobile revenues), the mobile industry invested more than \$271 billion in building out networks, during a time in which industry revenues increased by 1300 percent and subscribership grew over 1600 percent. Moreover, more recently, Verizon Wireless has invested tens of billions of dollars in deploying mobile wireless services since being subject to the 700 MHz C Block open access rules, which overlap in significant parts with the open Internet rules we adopt today. But that is not all. Today, key provisions of Title II apply to certain enterprise broadband services that AT&T has described as “the epicenter of the broadband investment” the Commission seeks to promote. Comments of AT&T, Inc., WC Docket No. 05-25, at 2–3 (filed Apr. 16, 2013). Title II has been maintained by more than 1000 rural local exchange carriers that have chosen to offer their DSL and fiber broadband services as common carrier offerings. And, of course, wireline DSL was regulated as a common-carrier service until 2005—including a period in the late ‘90s and the first five years of this century that saw the highest levels of wireline broadband infrastructure investment to date.

40. In any event, recent events have demonstrated that our rules will not disrupt capital markets or investment. Following recent discussions of the potential application of Title II to consumer broadband, investment analysts have issued reports concluding that Title II with appropriate forbearance is unlikely to alter broadband provider conduct or have any negative effect on their value or future profitability. Executives from large broadband providers have also repeatedly represented to investors that the prospect of regulatory action will not influence their investment strategies or long-term profitability; indeed, Sprint has gone so far [as] to say that it “does not believe that a light touch application of Title II, including appropriate forbearance, would harm the continued investment in, and deployment of, mobile broadband services.” Letter from Stephen Bye, Chief Tech. Officer, Sprint, to Chairman Wheeler, FCC, GN Docket No. 14-28, at 1 (filed Jan. 16, 2015). Finally, the recent AWS auction, conducted under the prospect of Title II regulation, generated bids (net of bidding credits) of more than \$41 billion—further demonstrating that robust investment is not inconsistent with a light-touch Title II regime.

C. Sustainable Open Internet Rules

41. We ground our open Internet rules in multiple sources of legal authority—including both section 706 and Title II of the Communications Act. The *Verizon* court upheld the Commission’s use of section 706 as a substantive source of legal authority to adopt open Internet protections. But it held that, “[g]iven the Commission’s still-binding decision to classify broadband providers . . . as providers of ‘information services,’” open Internet protections that regulated broadband providers as common carriers would violate the Act. *Verizon*, 740 F.3d at 650. Rejecting the Commission’s argument that broadband providers only served retail consumers, the *Verizon* court went on to explain that “broadband providers furnish a service to edge providers, thus undoubtedly functioning as edge providers’ ‘carriers,’” and held that the 2010 no blocking and no unreasonable discrimination rules impermissibly “obligated [broadband providers] to act as common carriers.” *Id.* at 653.

42. The *Verizon* decision thus made clear that section 706 affords the Commission substantive authority, and that open Internet protections are within the scope of that authority. And this Order relies on section 706 for the open Internet rules. But, in light of *Verizon*, absent a classification of broadband providers as providing a “telecommunications service,” the Commission could only rely on section 706 to put in place open Internet protections that steered clear of regulating broadband providers as common carriers *per se*. Thus, in order to bring a decade of debate to a certain conclusion, we conclude that the best path is to rely on all available sources of legal authority—while applying them with a light touch consistent with further investment and broadband deployment. Taking the *Verizon* decision’s implicit invitation, we revisit the Commission’s classification of the retail broadband Internet access service as an information service and clarify that this service encompasses the so-called “edge service.”

43. Exercising our delegated authority to interpret ambiguous terms in the Communications Act, as confirmed by the Supreme Court in *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980–81 (2005), today’s Order concludes that the facts in the market today are very different from the facts that supported the

Commission’s 2002 decision to treat cable broadband as an information service and its subsequent application to fixed and mobile broadband services.

44. The *Brand X* decision made famous the metaphor of pizza delivery. Justice Scalia, in dissent, concluded that the Commission had exceeded its legal authority by classifying cable-modem service as an “information service.” *Id.* at 1005 (Scalia, J., dissenting). To make his point, Justice Scalia described a pizzeria offering delivery services as well as selling pizzas and concluded that, similarly—broadband providers were offering “telecommunications services” even if that service was not offered on a “stand-alone basis.” *Id.* at 1007–09.

45. To take Justice Scalia’s metaphor a step further, suppose that in 2014, the pizzeria owners discovered that other nearby restaurants did not deliver their food and thus concluded that the pizza-delivery drivers could generate more revenue by delivering from any neighborhood restaurant (including their own pizza some of the time). Consumers would clearly understand that they are being offered a delivery service.

46. Today, broadband providers are offering stand-alone transmission capacity and that conclusion is not changed even if, as Justice Scalia recognized, other products may be offered at the same time. The trajectory of technology in the decade since the *Brand X* decision has been towards greater and greater modularity. For example, consumers have considerable power to combine their mobile broadband connections with the device, operating systems, applications, Internet services, and content of their choice. Today, broadband Internet access service is fundamentally understood by customers as a transmission platform through which consumers can access third-party content, applications, and services of their choosing.

47. Based on this updated record, this Order concludes that the retail broadband Internet access service available today is best viewed as 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. This finding more than reasonably interprets the ambiguous terms in the Communications Act, best reflects the factual record in this proceeding, and will most effectively permit the implementation of sound policy consistent with statutory objectives, including the adoption of effective open Internet protections.

48. This Order also revisits the Commission’s prior classification of mobile broadband Internet access service as a private mobile service, which cannot be subject to common carrier regulation, and finds that it is best viewed as a commercial mobile service or, in the alternative, the functional equivalent of commercial mobile service. Under the statutory definition, commercial mobile services must be “interconnected with the public switched network (as such terms are defined by regulation by the Commission).” 47 U.S.C. § 332(d)(2). Consistent with that delegation of authority to define these terms, and with the Commission’s previous recognition that the public switched network will grow and change over time, this Order updates the definition of public switched network to reflect current technology, by including services that use public IP addresses. Under this revised definition, the Order concludes that mobile broadband Internet access service is interconnected with the public switched network. In the alternative, the Order concludes that mobile broadband Internet access service is 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.

49. By classifying broadband Internet access service under Title II of the Act, in our view the Commission addresses any limitations 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.

50. Having classified broadband Internet access service as a telecommunications service, we respond to the *Verizon* court’s holding, supporting our open Internet rules under the Commission’s Title II authority and removing any common carriage limitation on the exercise of our section 706 authority. For mobile broadband services, we also ground the open Internet rules in our Title III authority to protect the public interest through the management of spectrum licensing.

D. Broad Forbearance

51. In finding that broadband Internet access service is subject to Title II, we simultaneously exercise the Commission’s forbearance authority to forbear from 30 statutory provisions and render over 700 codified rules inapplicable, to establish a light-touch regulatory framework tailored to preserving those provisions that advance our goals of more, better, and open broadband. We thus forbear from the vast majority of rules adopted under Title II. We do not, however, forbear from sections 201, 202, and 208 (or from related enforcement provisions), which are

necessary to support adoption of our open Internet rules. We also grant extensive forbearance, minimizing the burdens on broadband providers while still adequately protecting the public.

52. In addition, we do not forbear from a limited number of sections necessary to ensure consumers are protected, promote competition, and advance universal access, all of which will foster network investment, thereby helping to promote broadband deployment.

53. *Section 222: Protecting Consumer Privacy.* Ensuring the privacy of customer information both directly protects consumers from harm and eliminates consumer concerns about using the Internet that could deter broadband deployment. Among other things, section 222 imposes a duty on every telecommunications carrier to take reasonable precautions to protect the confidentiality of its customers' proprietary information. 47 U.S.C. § 222(a).

54. As the Commission has recognized, “[c]onsumers’ privacy needs are no less important when consumers communicate over and use broadband Internet access than when they rely on [telephone] services.” Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14,853, 14,930, ¶ 148 (2005) (Wireline Broadband Classification Order). Thus, this Order finds that consumers concerned about the privacy of their personal information will be more reluctant to use the Internet, stifling Internet service competition and growth. Application of section 222’s protections will help spur consumer demand for those Internet access services.

55. *Sections 225/255/251(a)(2): Ensuring Disabilities Access.* We do not forbear from those provisions of Title II that ensure access to broadband Internet access service by individuals with disabilities. All Americans, including those with disabilities, must be able to reap the benefits of an open Internet.

56. *Section 224: Ensuring Infrastructure Access.* For broadband Internet access service, we do not forbear from section 224 and the Commission’s associated procedural rules. Section 224 of the Act governs the Commission’s regulation of pole attachments. In particular, section 224(f)(1) requires utilities to provide cable system operators and telecommunications carriers the right of “nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled” by a utility. 47 U.S.C. § 224(f)(1). Access to poles and other infrastructure is crucial to the efficient deployment of communications networks including, and perhaps especially, new entrants.

57. *Section 254: Promoting Universal Broadband.* Section 254 promotes the deployment and availability of communications networks to all Americans, including rural and low-income Americans—furthering our goals of more and better broadband. With the exception of 254(d), (g), and (k) as discussed below, we therefore do not find the statutory test for forbearance from section 254 (and the related provision in section 214(e)) is met. We recognize that supporting broadband-capable networks is already a key component of [the] Commission’s current universal service policies. The Order concludes, however, that directly applying section 254 provides both more legal certainty for the Commission’s prior decisions to offer universal service subsidies for deployment of broadband networks and adoption of broadband services and more flexibility going forward.

58. We partially forbear from section 254(d) and associated rules insofar as they would immediately require mandatory universal service contributions associated with broadband Internet access service.

III. REPORT AND ORDER ON REMAND: PROTECTING AND PROMOTING THE OPEN INTERNET

E. Enforcement of the Open Internet Rules

1. Background

225. Timely and effective enforcement of the rules we adopt in this Order is crucial to preserving an open Internet, enhancing competition and innovation, and providing clear guidance to consumers and other stakeholders. As has been the case since we adopted our original open Internet rules in 2010, we anticipate that many disputes that will arise can and should be resolved by the parties without Commission involvement. We encourage parties to resolve disputes through informal discussions and private negotiations whenever possible. To the extent disputes are not resolved, the Commission will continue to provide backstop mechanisms to address them. We also will proactively monitor compliance and take strong enforcement action against parties who violate the open Internet rules.

F. Legal Authority

273. We ground the open Internet rules we adopt today in multiple sources of legal authority—section 706, Title II, and Title III of the Communications Act. We marshal all of these sources of authority toward a common statutorily-

supported goal: to protect and promote Internet openness as [a] platform for competition, free expression and innovation; a driver of economic growth; and an engine of the virtuous cycle of broadband deployment.

1. Section 706 Provides Affirmative Legal Authority for Our Open Internet Rules.

276. *Section 706(a) and (b) Are Express Grants of Authority.* In *Verizon*, the D.C. Circuit squarely upheld as reasonable the Commission’s reading of section 706(a) as an affirmative grant of authority. Finding that provision ambiguous, the court upheld the Commission’s interpretation as consistent with the statutory text, legislative history, and the Commission’s lengthy history of regulating Internet access.

277. Separately addressing section 706(b), the D.C. Circuit held, citing similar reasons, that the “Commission has reasonably interpreted section 706(b) to empower it to take steps to accelerate broadband deployment” if and when it determines that such deployment is not “reasonable and timely.” *Verizon*, 740 F.3d at 640–43. The 10th Circuit, in upholding the Commission’s reform of our universal service and inter-carrier compensation regulatory regime, likewise concluded that the Commission reasonably construed section 706(b) as an additional source of authority for those regulations. In re FCC 11-161, 753 F.3d 1015, 1053 (10th Cir. 2014).

278. In January, the Commission adopted the 2015 Broadband Progress Report, 30 FCC Rcd. 1375 (2015), which determined that advanced telecommunications capability is not being deployed in a reasonable and timely manner to all Americans. That determination triggered our authority under section 706(b) to take immediate action, including the adoption of today’s open Internet rules, to accelerate broadband deployment to all Americans.

2. Authority for the Open Internet Rules Under Title II with Forbearance

283. In light of our Declaratory Ruling below, the rules we adopt today are also supported by our legal authority under Title II to regulate telecommunications services. For the reasons set forth below, we have found that BIAS is a telecommunications service and, for mobile broadband, commercial mobile services or its functional equivalent. While we forbear from applying many of the Title II regulations to this service, we have applied sections 201, 202, and 208 (along with related enforcement authorities). These provisions provide an alternative source of legal authority for today’s rules.

284. Section 201(a) places a duty on common carriers to furnish communications services subject to Title II “upon reasonable request” and “establish physical connections with other carriers” where the Commission finds it to be in the public interest. 47 U.S.C. § 201(a). Section 201(b) provides that “[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful.” 47 U.S.C. § 201(b). It also gives the Commission the authority to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.” *Id.* Section 202(a) makes it “unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.” 47 U.S.C. § 202(a).

3. Title III Provides Additional Authority for Mobile Broadband Services

285. With respect to mobile broadband Internet access services, today’s open Internet rules are further supported by our authority under Title III of the Act to protect the public interest through spectrum licensing. While this authority is not unbounded, we exercise it here in reliance upon particular Title III delegations of authority.

286. Section 303(b) directs the Commission, consistent with 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.” 47 U.S.C. § 303(b). Today’s conduct regulations do precisely this. They lay down rules about “the nature of the service to be rendered” by licensed entities providing mobile broadband Internet access service, making clear that this service may not be offered in ways that harm the virtuous cycle. Today’s rules specify the form this service must take for those who seek licenses to offer it. In providing such licensed service, broadband providers must adhere to the rules we adopt today.

287. This authority is bolstered by at least two additional provisions. First, as the D.C. Circuit has explained, section 303(r) supplements the Commission’s ability to carry out its mandates via rulemaking. *Cellco Partnership v. FCC*, 700 F.3d 534, 543 (2012). Second, section 316 authorizes the Commission to adopt new conditions on existing licenses if it determines that such action “will promote the public interest, convenience, and necessity.” 47 U.S.C. § 315.

Nor do today's rules work any fundamental change to those licenses. Rather we understand our rules to be largely consistent with the current operation of the Internet and the current practices of mobile broadband service providers.

4. Applying these Legal Authorities to Our Open Internet Rules

288. *Bright line rules.* Applying these statutory sources of authority, we have ample legal bases on which to adopt the three bright-line rules against blocking, throttling, and paid prioritization. To begin, we have found that broadband providers have the incentive and ability to engage in such practices—which disrupt the unity of interests between end users and edge providers and thus threaten the virtuous cycle of broadband deployment. As the D.C. Circuit found with respect to the 2010 conduct rules, such broadband provider practices fall squarely within our section 706 authority. The court struck down the 2010 conduct rules after finding that the Commission failed to provide a legal justification that would take the rules out of the realm of impermissibly mandating common carriage, but did not find anything impermissible about the need for such rules to protect the virtuous cycle. Given our classification of broadband Internet access service as a telecommunications service, the court's rationale for vacating our 2010 conduct rules no longer applies and, for the reasons discussed above, we have legal justification to support our bright-line rules under section 706.

289. Our bright-line rules are also well grounded in our Title II authority. In Title II contexts, the Commission has made clear that blocking traffic generally is unjust and unreasonable under section 201. The Commission has likewise found it unjust and unreasonable for a carrier to refuse to allow non-harmful devices to attach to the network. And with respect to throttling, Commission precedent has likewise held that “no carriers . . . may block, choke, reduce or restrict traffic in any way.” *Connect America Fund, Report and Order and Further Notice of Proposed Rulemaking*, 26 FCC Rcd. 17,663, 17,903, ¶ 734 (2011), *aff'd sub nom.* In re FCC 11-161, 753 F.3d 1015 (10th Cir. 2014). We see no basis for departing from such precedents in the case of broadband Internet access services. As discussed above, the record here demonstrates that blocking and throttling broadband Internet access services harm consumers and edge providers, threaten the virtuous cycle, and deter broadband deployment. Consistent with our prior Title II precedents, we conclude that blocking and throttling of broadband Internet access services is an unjust and unreasonable practice under section 201(b).

290. Some parties have suggested that the Commission cannot adopt a rule banning paid prioritization under Title II. We disagree and conclude that paid prioritization is an unjust and unreasonable practice under section 201(b). The unjust and unreasonable standards in sections 201 and 202 afford the Commission significant discretion to distinguish acceptable behavior from behavior that violates the Act. Indeed, the very terms “unjust” and “unreasonable” are broad, inviting the Commission to undertake the kind of line-drawing that is necessary to differentiate just and reasonable behavior on the one hand from unjust and unreasonable behavior on the other.

291. Acting within this discretion, the Commission has exercised its authority, both through adjudication and rulemaking, under section 201(b) to ban unjust and unreasonable carrier practices as unlawful under the Act. Although the particular circumstances have varied, in reviewing these precedents, we find that the Commission generally takes this step where necessary to protect competition and consumers against carrier practices for which there was either no cognizable justification for the action or where the public interest in banning the practice outweighed any countervailing policy concerns. Based on the record here, we find that paid prioritization presents just such a case, threatening harms to consumers, competition, innovation, and deployment that outweigh any possible countervailing justification of public interest benefit. Our interpretation and application of section 201(b) in this case to ban paid prioritization is further bolstered by the directive in section 706 to take actions that will further broadband deployment.

292. Several commenters argue that we cannot ban paid prioritization under section 202(a), pointing to Commission precedents allowing carriers to engage in discrimination so long as it is reasonable. As discussed above, however, we adopt this rule pursuant to sections 201(b) and 706, not 202(a). And nothing about section 202(a) prevents us from doing so. We recognize that the Commission has historically interpreted section 202(a) to allow carriers to engage in reasonable discrimination, including by charging some customers more for better, faster, or more service. But those precedents stand for the proposition that such discrimination is *permitted*, not that it must be allowed in all cases. None of those cases of discrimination presented the kinds of harms demonstrated in the record here—harms that form the basis of our decision to ban the practice as unjust and unreasonable under section 201(b), not 202(a). Furthermore, none of those precedents involved practices that the Commission has twice found threaten to create barriers to broadband deployment that should be removed under section 706. In light of our discretion in interpreting and applying sections 201 and 202 and insofar as section 706(a) is “a ‘fail-safe’ that ‘ensures’ the Commission’s ability to promote advanced services,” *Verizon*, 740 F.3d at 639 (quoting 2010 Open Internet Order, 25 FCC Rcd. at 17,969, ¶ 120), we decline to interpret section 202(a) as preventing the Commission from exercising its authority under sections 201(b) and 706 to ban paid prioritization practices that harm Internet openness and deployment.

293. With respect to mobile broadband Internet access services, our bright-line rules are also grounded in the Commission’s Title III authority to ensure that spectrum licensees are providing service in a manner consistent with the public interest.

294. *No-Unreasonable Interference/Disadvantage Standard.* As with our bright-line rules, the no-unreasonable interference/disadvantage standard we adopt today is supported by our section 706 authority. Beyond the practices addressed by our bright-line rules, we recognize that broadband providers may implement unknown practices or engage in new types of practices in the future that could threaten harm by unreasonably interfering with the ability of end users and edge providers to use broadband Internet access services to reach one another. Such unreasonable interference creates a barrier that impedes the virtuous cycle, threatening the open nature of the Internet to the detriment of consumers, competition, and deployment. For conduct outside the three bright-line rules, we adopt the no-unreasonable interference/disadvantage standard to ensure that broadband providers do not engage in practices that threaten the open nature of the Internet in other or novel ways. This standard is tailored to the open Internet harms we wish to prevent, including harms to consumers, competition, innovation, and free expression—all of which could impair the virtuous cycle and thus deter broadband deployment, undermining the goals of section 706.

295. The no-unreasonable interference/disadvantage standard is also supported by section 201 and 202 of the Act, which require broadband providers to engage in practices that are just and reasonable, and not unreasonably discriminatory. The prohibition on no-unreasonable interference/disadvantage represents our interpretation of these 201 and 202 obligations in the open Internet context—an interpretation that is informed by section 706’s goals of promoting broadband deployment. In other words, we will evaluate whether a practice is unjust, unreasonable, or unreasonably discriminatory using this no-unreasonable interference/disadvantage standard. We note, however, that this rule—on its own—does not constitute common carriage *per se*. The no-unreasonable interference/disadvantage standard, *standing alone*, contains no obligation to provide broadband service to any consumer or edge provider and would not, in its isolated application, necessarily preclude individualized negotiations so long as they do not otherwise unreasonably interfere with the ability of end users and edge providers to use broadband Internet access services to reach one another. Rather, particular practices or arrangements that are not barred by our rules against blocking, throttling, and paid prioritization will be evaluated based on the facts and circumstances they present using a series of factors specifically designed to protect the virtuous cycle of innovation and deployment. Thus, this is a rule tied to particular harms. Broadband providers, having chosen to provide BIAS, may not do so in a way that harms the virtuous cycle.

296. For mobile broadband providers, the no-unreasonable interference/disadvantage standard finds additional support in the Commission’s Title III authority as discussed above. The Commission has authority to ensure that broadband providers, having obtained a spectrum license to provide mobile broadband service, must provide that service in a manner consistent with the public interest. This standard provides guidance on how the Commission will evaluate particular broadband practices, not otherwise barred by our bright-line rules, to ensure that they are consistent with the public interest.

297. *Transparency Rule.* The D.C. Circuit severed and upheld the Commission’s 2010 transparency rule in *Verizon*. While the majority did not expressly opine on the legal authority for the Commission’s prior transparency rule, we feel confident that like the 2010 transparency rule, the enhanced transparency rule we adopt today falls well within multiple, independent sources of the Commission’s authority. Beginning with section 706, the transparency rule ensures that consumers have sufficient information to make informed choices thereby facilitating competition in the local telecommunications market (to the extent competitive choices are available). Furthermore, these disclosures remove potential information barriers by ensuring that edge providers have the necessary information to develop innovative products and services that rely on the broadband networks to reach consumers, a crucial arc of the virtuous cycle of broadband deployment. Our transparency rule is also supported by Title II. The Commission has relied on section 201(b) in related billing contexts to ensure that carriers convey accurate and sufficient information about the services they provide to consumers. We do so here as well.

IV. DECLARATORY RULING: CLASSIFICATION OF BROADBAND INTERNET ACCESS SERVICES

306. The *Verizon* court upheld the Commission’s use of section 706 as a substantive source of legal authority to adopt open Internet protections. But it held that, “[g]iven the Commission’s still-binding decision to classify broadband providers . . . as providers of ‘information services,’” open Internet protections that regulated broadband providers as common carriers would violate the Act. 740 F.3d at 650. Rejecting the Commission’s argument that broadband providers only served retail consumers, the *Verizon* court went on to explain that “broadband providers

furnish a service to edge providers, thus undoubtedly functioning as edge providers’ ‘carriers,’” and held that the 2010 no-blocking and no-unreasonable discrimination rules impermissibly “obligated [broadband providers] to act as common carriers.” *Id.* at 653.

307. The *Verizon* decision thus made clear that section 706 affords the Commission with substantive authority and that open Internet protections are within the scope of that authority. And this Order relies on section 706 for the open Internet rules. But, in light of *Verizon*, absent a classification of broadband providers as providing a “telecommunications service,” the Commission may only rely on section 706 to put in place open Internet protections that steer clear of what the court described as common carriage *per se* regulation.

308. Taking the *Verizon* decision’s implicit invitation, we revisit the Commission’s classification of the retail broadband Internet access service as an information service and clarify that this service encompasses the so-called “edge service.” Based on the updated record, we conclude that retail broadband Internet access service is best understood today as an offering of a “telecommunications service.”

B. Rationale for Revisiting the Commission’s Classification of Broadband Internet Access Services

328. We now find it appropriate to revisit the classification of broadband Internet access service as an information service. The Commission has steadily and consistently worked to protect the open Internet for the last decade, starting with the adoption of the Internet Policy Statement, 20 FCC Rcd. 14,986 (2005) up through its recent Protecting and Promoting the Open Internet, Notice of Proposed Rulemaking, 29 FCC Rcd. 5561 (2014) (2014 Open Internet NPRM) following the D.C. Circuit’s *Verizon* decision. Although the *Verizon* court accepted the Commission’s interpretation of section 706 as an independent grant of authority over broadband services, it nonetheless vacated the no-blocking and antidiscrimination provisions of the Open Internet Order. As the *Verizon* decision explained, to the extent that conduct-based rules remove broadband service providers’ ability to enter into individualized negotiations with edge providers, they impose *per se* common carrier status on broadband Internet access service providers, and therefore conflict with the Commission’s prior designation of broadband Internet access services as information services. Thus, absent a finding that broadband providers were providing a “telecommunications service,” the D.C. Circuit’s *Verizon* decision defined the bounds of the Commission’s authority to adopt open Internet protections to those that do not amount to common carriage.

329. The *Brand X* Court emphasized that the Commission has an obligation to consider the wisdom of its classification decision on a continuing basis. 545 U.S. at 981–82. An agency’s evaluation of its prior determinations naturally includes consideration of the law affecting its ability to carry out statutory policy objectives. As discussed above, the record in the Open Internet proceeding demonstrates that broadband providers continue to have the incentives and ability to engage in practices that pose a threat to Internet openness, and as such, rules to protect the open nature of the Internet remain necessary. To protect the open Internet, and to end legal uncertainty, we must use multiple sources of legal authority to protect and promote Internet openness, to ensure that the Internet continues to grow as a platform for competition, free expression, and innovation; a driver of economic growth; and an engine of the virtuous cycle of broadband deployment, innovation, and consumer demand. Thus, we now find it appropriate to examine how broadband Internet access services are provided today.

330. Changed factual circumstances cause us to revise our earlier classification of broadband Internet access service based on the voluminous record developed in response to the 2014 Open Internet NPRM. In the 2002 Cable Modem Declaratory Ruling, the Commission observed that “the cable modem service business is still nascent, and the shape of broadband deployment is not yet clear. Business relationships among cable operators and their service offerings are evolving.” Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, 4843–44, ¶ 83 (2002) (Cable Modem Declaratory Ruling), *aff’d sub nom.* Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 978 (2005). However, despite the rapidly changing market for broadband Internet access services, the Commission’s decisions classifying broadband Internet access service are based largely on a factual record compiled over a decade ago, during this early evolutionary period. The premises underlying that decision have changed. As the record demonstrates and we discuss in more detail below, we are unable to maintain our prior finding that broadband providers are offering a service in which transmission capabilities are “inextricably intertwined” with various proprietary applications and services. Rather, it is more reasonable to assert that the “indispensable function” of broadband Internet access service is “the connection link that in turn enables access to the essentially unlimited range of Internet-based services.” Center for Democracy and Technology (CDT) Comments at 11. This is evident, as discussed below, from: (1) consumer conduct, which shows that subscribers today rely heavily on third-party services, such as email and social networking sites, even when such services are included as add-ons in the broadband Internet access provider’s service; (2) broadband providers’ marketing

and pricing strategies, which emphasize speed and reliability of transmission separately from and over the extra features of the service packages they offer; and (3) the technical characteristics of broadband Internet access service. We also note that the predictive judgments on which the Commission relied in the Cable Modem Declaratory Ruling anticipating vibrant intermodal competition for fixed broadband cannot be reconciled with current marketplace realities.

C. Classification of Broadband Internet Access Service

331. In this section, we reconsider the Commission’s prior decisions that classified wired and wireless broadband Internet access service as information services, and conclude that broadband Internet access service is a telecommunications service subject to our regulatory authority under Title II of the Communications Act regardless of the technological platform over which the service is offered. We both revise our prior classifications of wired broadband Internet access service and wireless broadband Internet access service, and classify broadband Internet access service provided over other technology platforms. In doing so, we exercise the well-established power of federal agencies to interpret ambiguous provisions in the statutes they administer.

332. The Court’s [decision] in *Brand X* makes clear our delegated authority to revisit our prior interpretation of ambiguous statutory terms and reclassify broadband Internet access service as a telecommunications service.

335. More recently, in *FCC v. Fox Television Stations, Inc.*, the Supreme Court emphasized that, although an agency must acknowledge that it is changing course when it adopts a new construction of an ambiguous statutory provision, “it need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one” *FCC v. Fox Televisions Stations, Inc.*, 556 U.S. 502, 515 (2009).

1. Scope

336. As discussed below, we conclude that broadband Internet access service is a telecommunications service. We define “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. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence.

337. The term “broadband Internet access service” includes services provided over any technology platform, including but not limited to wire, terrestrial wireless (including fixed and mobile wireless services using licensed or unlicensed spectrum), and satellite. For purposes of our discussion, we divide the various forms of broadband Internet access service into the two categories of “fixed” and “mobile,” rather than between “wired” and “wireless” service. With these two categories of services—fixed and mobile—we intend to cover the entire universe of Internet access services at issue in the Commission’s prior broadband classification decisions as well as all other broadband Internet access services offered over other technology platforms that were not addressed by prior classification orders. We also make clear that our classification finding applies to all providers of broadband Internet access service, as we delineate them here, regardless of whether they lease or own the facilities used to provide the service. “Fixed” broadband Internet access service refers to a broadband Internet access service that serves end users primarily at fixed endpoints using stationary equipment, such as the modem that connects an end user’s home router, computer, or other Internet access device to the network. The term encompasses the delivery of fixed broadband over any medium, including various forms of wired broadband services (e.g., cable, DSL, fiber), fixed wireless broadband services (including fixed services using unlicensed spectrum), and fixed satellite broadband services. “Mobile” broadband Internet access service refers to a broadband Internet access service that serves end users primarily using mobile stations. Mobile broadband Internet access includes, among other things, services that use smartphones or mobile-network-enabled tablets as the primary endpoints for connection to the Internet. The term also encompasses mobile satellite broadband services.

338. In the *Verizon* opinion, the D.C. Circuit concluded that, in addition to the retail service provided to consumers, “broadband providers furnish a service to edge providers, thus undoubtedly functioning as edge providers ‘carriers.’” 740 F.3d at 653. It was because the court concluded that the Commission had treated this distinct service as common carriage, that it “remand[ed] the case to the Commission for further proceedings consistent with this opinion.” *Id.* at 659. We conclude now that the failure of the Commission’s analysis was a failure to explain that the “service to edge providers” is subsumed within the promise made to the retail customer of the BIAS service. For the reasons we review herein, the reclassification of BIAS necessarily resolves the edge-provider question as well. In other words, the Commission agrees that a two-sided market exists and that the beneficiaries of the non-consumer side either are or potentially could be all edge providers. Because our reclassification decision treats BIAS as a Title II service, Title II applies, as well, to the second side of the market, which is always a part of, and subsidiary to, the

BIAS service. The *Verizon* court implicitly followed that analysis when it treated the classification of the retail end user service as controlling with respect to its analysis of the edge service; its conclusion that an edge service could be not be treated as common carriage turned entirely on its understanding that the provision of retail broadband Internet access services had been classified as “information services.” The reclassification of BIAS as a Title II service thus addresses the court’s conclusion that “the Commission would violate the Communications Act were it to regulate broadband providers as common carriers.” *Id.* at 650.

340. Broadband Internet access service does not include virtual private network (VPN) services, content delivery networks (CDNs), hosting or data storage services, or Internet backbone services. The Commission has historically distinguished these services from “mass market” services and, as explained in the 2014 Open Internet NPRM, they “do not provide the capability to transmit data to and receive data from all or substantially all Internet endpoints.” Protecting and Promoting the Open Internet, Notice of Proposed Rulemaking, 29 FCC Rcd. 5561, 5581–82, ¶ 58 (2014). We do not disturb that finding here. Finally, we observe that to the extent that coffee shops, bookstores, airlines, private end-user networks such as libraries and universities, and other businesses acquire broadband Internet access service from a broadband provider to enable patrons to access the Internet from their respective establishments, provision of such service by the premise operator would not itself be considered a broadband Internet access service unless it was offered to patrons as a retail mass market service, as we define it here. Likewise, when a user employs, for example, a wireless router or a Wi-Fi hotspot to create a personal Wi-Fi network that is not intentionally offered for the benefit of others, he or she is not offering a broadband Internet access service, under our definition, because the user is not marketing and selling such service to residential customers, small business, and other end-user customers such as schools and libraries.

2. The Market Today: Current Offerings of Broadband Internet Access Service

341. We begin our analysis by examining how broadband Internet access service was and currently is offered. In the 2002 Cable Modem Declaratory Ruling, the Commission observed that “the cable modem service business is still nascent, and the shape of broadband deployment is not yet clear. Business relationships among cable operators and their service offerings are evolving.” 17 FCC Rcd. at 4843–44, ¶ 83. Despite the rapidly changing market for broadband Internet access services, the Commission’s decisions classifying broadband Internet access service are based largely on a factual record compiled over a decade ago, during this early evolutionary period. The record in this proceeding leads us to the conclusion that providers today market and offer consumers separate services that are best characterized as (1) a broadband Internet access service that is a telecommunications service; and (2) “add-on” applications, content, and services that are generally information services.

342. In the past, the Commission has identified a number of ways to determine what broadband providers “offer” consumers. In the Cable Modem Declaratory Ruling, for example, the Commission concluded that “the classification of cable modem service turns on the *nature of the functions* that the end user is offered.” *Id.* at 4822, ¶ 38 (emphasis added). In the Wireline Broadband Classification Order, the Commission noted that “whether a telecommunications service is being provided turns on *what* the entity is ‘offering . . . to the public,’ and *customers’ understanding* of that service.” Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14,853, 14,910, ¶ 104 (2005), *aff’d sub nom.* Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007). In Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks, Declaratory Ruling, 22 FCC Rcd. 5901, 5909, ¶ 21 (2007) (Wireless Broadband Classification Order), the Commission stated that “[a]s with both cable and wireline Internet access, [the] definition appropriately focuses on the end user’s experience, factoring in both the functional characteristics and speed of transmission associated with the service.” *Id.* Similarly, in *Brand X*, both the majority and dissenting opinions examined how consumers perceive and use cable modem service, technical characteristics of the services and how it is provided, and analogies to other services. 545 U.S. at 989–90.

a. Broadband Internet Access Services at Time of Classification

343. “*Wired*” Broadband Services. The Commission’s Cable Modem Declaratory Ruling described cable modem service as “typically includ[ing] many and sometimes all of the functions made available through dial-up Internet access service, including content, e-mail accounts, access to news groups, the ability to create a personal web page, and the ability to retrieve information from the Internet, including access to the World Wide Web.” Cable Modem Declaratory Ruling, 17 FCC Rcd. at 4804, ¶ 10. The Commission also identified functions provided with cable modem service that it called “Internet connectivity functions.” These included establishing a physical connection to the Internet and interconnecting with the Internet backbone, protocol conversion, Internet Protocol address number assignment, domain name resolution through DNS, network security, caching, network monitoring, capacity engineering and management, fault management, and troubleshooting. In addition, the Commission noted that

“[n]etwork monitoring, capacity engineering and management, fault management, and troubleshooting are Internet access service functions that . . . serve to provide a steady and accurate flow of information between the cable system to which the subscriber is connected and the Internet.” *Id.* at 4810–11, ¶ 17. The Cable Modem Declaratory Ruling noted that “[c]omplementing the Internet access functions are *Internet applications* provided *through* cable modem service. These applications include traditional ISP services such as e-mail, access to online newsgroups, and creating or obtaining and aggregating content. The cable modem service provider will also typically offer subscribers a ‘first screen’ or ‘home page’ and the ability to create a personal web page.” *Id.* at 4811, ¶ 18. The Commission explained that “[e]-mail, newsgroups, the ability for the user to create a web page that is accessible by other Internet users, and DNS are *applications* that are commonly associated with Internet access service,” and that “[t]aken together, they constitute an information service.” *Id.* at 4822, ¶ 38. In the Wireline Broadband Classification Order, the Commission found that end users subscribing to wireline broadband Internet access service “*expect to receive* (and pay for) a finished, functionally integrated service that provides access to the Internet.” 20 FCC Rcd. at 14,910, ¶ 104.

345. *Wireless Broadband Services.* In 2007, the Commission described wireless broadband Internet access service as a service “that uses spectrum, wireless facilities and wireless technologies to provide subscribers with high-speed (broadband) Internet access capabilities.” Wireless Broadband Classification Order, 22 FCC Rcd., at 5909, ¶ 21. The Commission noted that “many of the mobile telephone carriers that provide mobile wireless broadband service for mobile handsets offer a range of IP-based multimedia content and services—including ring tones, music, games, video clips and video streaming—that are specially designed to work with the small screens and limited keypads of mobile handsets. This content is typically sold through a carrier-branded, carrier-controlled portal.” *Id.* at 5908, ¶ 16.

b. The Growth of Consumer Demand and Market Supply

346. The record in this proceeding reveals that, since we collected information to address the classification of cable modem service over a decade ago, the market for both fixed and mobile broadband Internet access service has changed dramatically.

347. This widespread penetration of broadband Internet access service has led to the development of third-party services and devices and has increased the modular way consumers have come to use them. As more American households have gained access to broadband Internet access service, the market for Internet-based services provided by parties other than broadband Internet access providers has flourished. Consumers’ appetite for third-party services has also received a boost from the shift from dial-up to broadband, as a high-speed connection makes the Internet much more useful to consumers. The impact of broadband on consumers’ demand for third-party services is evident in the explosive growth of online content and application providers. In early 2003, a year after the Cable Modem Declaratory Ruling, there were approximately 36 million websites. Today there are an estimated 900 million. When the Commission assessed the cable modem service market in the Cable Modem Declaratory Ruling, the service at issue was offered with various online applications, including e-mail, newsgroups, and the ability to create a web page. The Commission observed that subscribers to cable modem services “usually d[id] not need to contract separately” for “discrete services or applications” such as e-mail. 17 FCC Rcd. at 4806, ¶ 11. Today, broadband service providers still provide various Internet applications, including e-mail, online storage, and customized homepages, in addition to newer services such as music streaming and instant messaging. But consumers are very likely to use their high-speed Internet connections to take advantage of competing services offered by third parties.

349. More generally, both fixed and mobile consumers today largely use their broadband Internet access connections to access content and services that are unaffiliated with their broadband Internet access service provider. In this regard, perhaps the most significant trend is the growing popularity of third-party video streaming services. By one estimate, Netflix and YouTube alone account for 50 percent of peak Internet download traffic in North America. Other sites among the most popular in the United States include the search engines Google and Yahoo!; social networking sites Facebook and LinkedIn; e-commerce sites Amazon, eBay and Craigslist; the user-generated reference site Wikipedia; a diverse array of user-generated media sites including Reddit, Twitter, and Pinterest; and news sources such as nytimes.com and CNN.com. Overall, broadband providers themselves operate very few of the websites that broadband Internet access services are most commonly used to access.

350. Thus, as a practical matter, broadband Internet access service is useful to consumers today primarily as a conduit for reaching modular content, applications, and services that are provided by unaffiliated third parties.

3. Broadband Internet Access Service Is a Telecommunications Service

355. We now turn to applying the statutory terms at issue in light of our updated understanding of how both fixed and mobile broadband Internet access services are offered. Three definitional terms are critical to a determination of

the appropriate classification of broadband Internet access service. First, the Act defines “telecommunications” as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(50). Second, the Act defines “telecommunications service” as “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.” 47 U.S.C. § 153(53). Finally, “information service” is defined in the Act as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . , but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(24). We observe that the critical distinction between a telecommunications and an information service turns on what the provider is “offering.” If the offering meets the statutory definition of telecommunications service, then the service is also necessarily a common carrier service.

356. In reconsidering our prior decisions and reaching a different conclusion, we find that this result best reflects the factual record in this proceeding, and will most effectively permit the implementation of sound policy consistent with statutory objectives. For the reasons discussed above, we find that broadband Internet access service, as offered by both fixed and mobile providers, is best seen, and is in fact most commonly seen, as an offering (in the words of Justice Scalia, dissenting in *Brand X*) “consisting of two separate things”: “both ‘high-speed access to the Internet’ and other ‘applications and functions.’” 545 U.S. at 1008 (Scalia, J., dissenting). Although broadband providers in many cases provide broadband Internet access service along with information services, such as email and online storage, we find that broadband Internet access service is today sufficiently independent of these information services that it is a separate “offering.” We also find that domain name service (DNS) and caching, when provided with broadband Internet access services, fit squarely within the telecommunications systems management exception to the definition of “information service.” Thus, when provided with broadband Internet access services, these integrated services do not convert broadband Internet access service into an information service.

a. Broadband Internet Access Service Involves Telecommunications

361. *Broadband Internet Access Service Transmits Information of the User’s Choosing Between Points Specified by the User.* As discussed above, the Act defines “telecommunications” as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(50). It is clear that broadband Internet access service is providing “telecommunications.” Users rely on broadband Internet access service to transmit “information of the user’s choosing,” “between or among points specified by the user.”

362. *Information is Transmitted Without Change in Form or Content.* Broadband Internet access service may use a variety of protocols to deliver content from one point to another. However, the packet payload (i.e., the content requested or sent by the user) is not altered by the variety of headers that a provider may use to route a given packet. The information that a broadband provider places into a packet header as part of the broadband Internet access service is for the management of the broadband Internet access service and it is removed before the packet is handed over to the application at the destination. Broadband providers thus move packets from sender to recipient without any change in format or content.

b. Broadband Internet Access Service is a “Telecommunications Service”

363. Having affirmatively determined that broadband Internet access service involves “telecommunications,” we also find that broadband Internet access service is a “telecommunications service.” A “telecommunications service” is the “offering of telecommunications for a fee directly to the public, . . . regardless of the facilities used.” 47 U.S.C. § 153(53). We find that broadband Internet access service providers offer broadband Internet access service “directly to the public.” [T]he record indicates that broadband providers routinely market broadband Internet access services widely and to the general public. Because a provider is a common carrier “by virtue of its functions,” we find that such offerings are made directly to the public within the Act’s definition of telecommunications service.

c. Broadband Internet Access Service is Not an “Information Service”

365. We further find that broadband Internet access service is not an information service. The Act defines “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(24). To the extent that broadband Internet access service is offered along with some capabilities that would otherwise fall within the information service definition, they do not turn

broadband Internet access service into a functionally integrated information service. To the contrary, we find these capabilities either fall within the telecommunications systems management exception or are separate offerings that are not inextricably integrated with broadband Internet access service, or both.

366. *DNS Falls Within the Telecommunications Systems Management Exception to the Definition of Information Services.* As the Supreme Court spotlighted in *Brand X*, the Commission predicated its prior conclusion that cable modem service was an integrated information service at least in part on the view that it “transmits data *only* in connection with the further processing of information.” That was so, under the theory of the Cable Modem Declaratory Ruling, because “[a] user cannot reach a third-party’s Web site without DNS, which (among other things) matches the Web site address the end user types into his browser (or ‘clicks’ on with his mouse) with the IP address of the Web page’s host server.” *Brand X*, 545 U.S. at 998. The Commission had assumed without analysis that DNS, when provided with Internet access service, is an information service.

367. Although the Commission assumed in the Cable Modem Declaratory Ruling—*sub silentio*—that DNS fell outside the telecommunications systems management exception, Justice Scalia’s assessment finds support both in the language of section 3(24), and in the Commission’s consistently held view that “adjunct-to-basic” functions fall within the telecommunications systems management exception to the “information service” definition. Such functions, the Commission has held: (1) must be “incidental” to an underlying telecommunications service—i.e., “‘basic’ in purpose and use” in the sense that they facilitate use of the network; and (2) must “not alter the fundamental character of [the telecommunications service].” See North American Telecommunications Ass’n, Memorandum Opinion and Order, 101 F.C.C. 2d 349, 359-61, ¶¶ 24, 27, 28 (1985). By established Commission precedent, they include “speed dialing, call forwarding, [and] computer-provided directory assistance.” Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905, 21958, ¶ 107 n.245, each of which shares with DNS the essential characteristic of using computer processing to convert the number or keystroke that the end user enters into another number capable of routing the communication to the intended recipient. Similarly, traditional voice telephone calls to toll free numbers, pay-per-call numbers, and ported telephone numbers require a database query to translate the dialed telephone number into a different telephone number and/or to otherwise determine how to route the call properly, and there is no doubt that the inclusion of that functionality does not somehow convert the basic telecommunications service offering into an information service.

368. Citing language from a staff decision to the effect that adjunct-to-basic functions do not include functions that are “useful to end users, rather than carriers,” Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, As Amended, to Certain Activities, Bell Operating Companies, Memorandum Opinion and Order, 13 FCC Rcd. 2627, 2639, ¶ 18 (1998), AT&T argues that DNS must fall outside of the telecommunications systems management exception because “Internet access providers use DNS functionality not merely (or even primarily) to ‘manage’ their networks more efficiently, but to make the Internet as a whole easily accessible and convenient *for their subscribers.*” AT&T Reply at 39-40 (emphasis in original). We disagree. The particular function at issue in the cited staff decision—the “storage and retrieval of information that emergency service personnel use to respond to E911 calls”—was not instrumental in placing calls or managing the communications network, but simply allowed certain telecommunications consumers (E911 answering centers and first responders) to identify the *physical location* of the distressed caller in order to render assistance, a benefit to be sure, but one unrelated to telecommunications. By contrast, DNS—like the speed dialing, call forwarding, and computer-provided directory assistance functions that already have been definitively classified as falling within the telecommunications systems management exception to section 3(24)—allows more efficient use of the telecommunications network by facilitating accurate and efficient routing from the end user to the receiving party.¹⁰³⁷

¹⁰³⁷ Notwithstanding the close resemblance between DNS and these features that the Commission previously has found to be within the telecommunications systems management exception, USTelecom contends that “DNS does not manage or control a telecommunications system or a telecommunications service.” USTelecom Reply at 32. As with call forwarding, speed dialing, and computer-provided directory assistance, however, DNS manages the network in the sense of facilitating efficient routing and call completion. In any event, even if DNS were not viewed as facilitating network management, it clearly would fall within the exception as a capability used for the “operation of a telecommunications system.” 47 U.S.C. § 153(24). [W]e expressly find this rationale applies equally to other services that arguably serve the interests of subscribers, such as, for example, caching. While these services do provide a benefit to subscribers in the form of faster, more efficient service, they also serve to manage the network by facilitating

370. Although we find that DNS falls within the telecommunications systems management exception, even if did not, DNS functionality is not so inextricably intertwined with broadband Internet access service so as to convert the entire service offering into an information service. While most users rely on their broadband providers to provide DNS lookup, the record indicates that third-party-provided-DNS is now widely available, and the availability of the service from third parties cuts against a finding that Internet transmission and DNS are inextricably intertwined, whether or not they were at the time of the Commission’s earlier classification decisions. In any event, the fact that DNS may be offered by a provider of broadband Internet access service does not affect our conclusion that the telecommunications is offered directly to the public.

372. *Caching Falls Within the Telecommunications Systems Management Exception.* Opponents of revisiting the Commission’s earlier classification decisions also point to caching as another feature of broadband Internet access service packages that the Commission relied upon to find such packages to be information services. When offered as part of a broadband Internet access service, caching, like DNS, is simply used to facilitate the transmission of information so that users can access other services, in this case by enabling the user to obtain “more rapid retrieval of information” through the network. Cable Modem Declaratory Ruling, 17 FCC Rcd. at 4810 n.76. Thus, it falls easily within the telecommunications systems management exception to the information service definition.

4. *Mobile Broadband Internet Access Service is Commercial Mobile Service*

388. As outlined above, we conclude that broadband Internet access service, whether provided by fixed or mobile providers, is a telecommunications service. We also find that mobile broadband Internet access service is a commercial mobile service. In any event, however, even if that service falls outside the definition of “commercial mobile service,” we find that it is the functional equivalent of a commercial mobile service and, thus, not a private mobile service.

389. Congress adopted the commercial mobile service provisions in the Act with the goal of creating regulatory symmetry among similar mobile services. Section 332(d)(1) of the Communications Act defines “commercial mobile service” 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.” 47 U.S.C. § 332(d)(1). We find that mobile broadband Internet access service meets this definition. First, we find that mobile broadband Internet access service is a “mobile service” because subscribers access the service through their mobile devices. Next, we find that mobile broadband Internet access service is provided “for profit” because service providers offer it to subscribers with the intent of receiving compensation. We also conclude the mobile broadband Internet access services are widely available to the public, without restriction on who may receive them.

390. Finally, we conclude that mobile broadband Internet access service is an interconnected service. Section 332(d)(2) states that the term “interconnected service” means “service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) . . .” 47 U.S.C. § 332(d)(2). The Commission has defined “interconnected service” as a service “that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network.” 47 C.F.R. § 20.3. The Commission has defined the term “public switched network” to mean “[a]ny common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use[s] the North American Numbering Plan in connection with the provision of switched services.” *Id.*

5. *The Reclassification of Broadband Internet Access Service Will Preserve Investment Incentives*

409. In this section, we address potential effects of our classification decision on investment and innovation in the Internet ecosystem. Our classification of broadband Internet access service flows from the marketplace realities in how this service is offered. In reaching these conclusions, we also consider whether the resulting regulatory environment produces beneficial conditions for investment and innovation while also ensuring that we are able to protect consumers and foster competition. We find that classifying broadband Internet access service as a telecommunications service—but forbearing from applying all but a few core provisions of Title II—strikes an appropriate balance by combining minimal regulation with meaningful Commission oversight. This approach is based on the proven model Congress and the Commission have applied to CMRS, under which investment has flourished.

410. Based on our review of the record, the proven application of the CMRS model, and our predictive judgment

efficient retrieval of requested information, reducing a broadband provider’s costs in the provision of the service. In addition, caching and other services which provide a benefit to subscribers, like DNS, also serve as a capability used for the operation of a telecommunications system by enabling the efficient retrieval of information.

about the future of the ecosystem under our new legal framework, we conclude that the new framework will not have a negative impact on investment and innovation in the Internet marketplace as a whole. As is often the case when we confront questions about the long-term effects of our regulatory choices, the record in this proceeding presents conflicting viewpoints regarding the likely impact of our decisions on investment. We cannot be certain which viewpoint will prove more accurate, and no party can quantify with any reasonable degree of accuracy how either a Title I or a Title II approach may affect future investment. Moreover, regulation is just one of many factors affecting investment decisions. Although we appreciate carriers' concerns that our reclassification decision could create investment-chilling regulatory burdens and uncertainty, we believe that any effects are likely to be short term and will dissipate over time as the marketplace internalizes our Title II approach, as the record reflects and we discuss further, below. More significantly, to the extent that our decision might in some cases reduce providers' investment incentives, we believe any such effects are far outweighed by positive effects on innovation and investment in other areas of the ecosystem that our core broadband policies will promote. Industry representatives support this judgment, stating that combined reclassification and forbearance decisions will provide the regulatory predictability needed to spur continued investment and innovation not only in infrastructure but also in content and applications.

E. State and Local Regulation of Broadband Services

431. Today, we reaffirm the Commission's longstanding conclusion that broadband Internet access service is jurisdictionally interstate for regulatory purposes. As a general matter, mixed-jurisdiction services are typically subject to dual federal/state jurisdiction, except where it is impossible or impractical to separate the service's intrastate from interstate components and the state regulation of the intrastate component interferes with valid federal rules or policies. With respect to broadband Internet access services, the Commission has previously found that, "[a]lthough . . . broadband Internet access service traffic may include an intrastate component, . . . broadband Internet access service is properly considered jurisdictionally interstate for regulatory purposes." National Association of Regulatory Utility Commissioners Petition for Clarification or Declaratory Ruling that No FCC Order or Rule Limits State Authority to Collect Broadband Data, 25 FCC Rcd. 5051, 5054, ¶ 8 n.24 (2010). The Commission thus has evaluated possible state regulations of broadband Internet access service to guard against any conflict with federal law. Though we adopt some changes to the legal framework regulating broadband, the Commission has consistently applied this jurisdictional conclusion to broadband Internet access services, and we see no basis in the record to deviate from this established precedent. The "Internet's inherently global and open architecture" enables edge providers to serve content through a multitude of distributed origination points, making end-to-end jurisdictional analysis extremely difficult—if not impossible—when the services at issue involve the Internet. *See, e.g.*, Cable Modem Declaratory Ruling, 17 FCC Rcd. at 4832, ¶ 59.

432. We also make clear that the states are bound by our forbearance decisions today. Under section 10(e), "[a] State commission may not continue to apply or enforce any provision" from which the Commission has granted forbearance. 47 U.S.C. § 160(e). With respect to universal service, we conclude that the imposition of state-level contributions on broadband providers that do not presently contribute would be inconsistent with our decision at the present time to forbear from mandatory federal USF contributions, and therefore we preempt any state from imposing any new state USF contributions on broadband—at least until the Commission rules on whether to provide for such contributions. We recognize that section 254 expressly contemplates that states will take action to preserve and advance universal service, but as discussed below, our actions in this regard will benefit from further deliberation.

433. Finally, we announce our firm intention to exercise our preemption authority to preclude states from imposing obligations on broadband service that are inconsistent with the carefully tailored regulatory scheme we adopt in this Order. While we establish a comprehensive regulatory framework governing broadband Internet access services nationwide today, situations may nonetheless arise where federal and state actions regarding broadband conflict. The Commission has used preemption to protect federal interests when a state regulation conflicts with federal rules or policies, and we intend to exercise this authority to preempt any state regulations which conflict with this comprehensive regulatory scheme or other federal law. For example, should a state elect to restrict entry into the broadband market through certification requirements or regulate the rates of broadband Internet access service through tariffs or otherwise, we expect that we would preempt such state regulations as in conflict with our regulations. While we necessarily proceed on a case-by-case basis in light of the fact specific nature of particular preemption inquiries, we will act promptly, whenever necessary, to prevent state regulations that would conflict with the federal regulatory framework or otherwise frustrate federal broadband policies.

V. ORDER: FORBEARANCE FOR BROADBAND INTERNET ACCESS SERVICES

434. Having classified broadband Internet access service as a telecommunications service, we now consider whether the Commission should grant forbearance as to any of the resulting requirements of the Act or Commission rules. As proposed in the 2014 Open Internet NPRM, we do not forbear from sections 201, 202, and 208, along with key enforcement authority under the Act, both as a basis of authority for adopting open Internet rules as well as for the additional protections those provisions directly provide. As discussed below, we also do not forbear from certain provisions in the context of broadband Internet access service to protect customer privacy, advance access for persons with disabilities, and foster network deployment. Because we believe that those protections and our open Internet rules collectively will strike the right balance at this time of minimizing the burdens on broadband providers while still adequately protecting the public, particularly given the objectives of section 706 of the 1996 Act, we otherwise grant substantial forbearance.

439. We reject arguments suggesting that persuasive evidence of competition is a necessary prerequisite to granting forbearance under section 10 even if the section 10 criteria otherwise are met. For example, the Commission has in the past granted forbearance from particular provisions of the Act or regulations where it found the application of other requirements (rather than marketplace competition) adequate to satisfy the section 10(a) criteria, and nothing in the language of section 10 precludes the Commission from proceeding on that basis where warranted. Thus, although, in appropriate circumstances, persuasive evidence of competition can be a sufficient basis to grant forbearance, it is not inherently necessary to a grant of forbearance under section 10.

B. Maintaining the Customer Safeguards Critical to Protecting and Preserving the Open Internet

440. As discussed below, we find sections 201 and 202 of the Act, along with section 208 and certain fundamental Title II enforcement authority, necessary to ensure just and reasonable conduct by broadband providers and necessary to protect consumers under sections 10(a)(1) and (a)(2). We also find that forbearance from these provisions would not be in the public interest under section 10(a)(3), and therefore do not grant forbearance from those provisions and associated enforcement procedural rules with respect to the broadband Internet access service at issue here.

451. Although we conclude that the section 10 criteria are not met with respect to the full scope of forbearance that these commenters seek, because we do not and cannot envision adopting new *ex ante* rate regulation of broadband Internet access service in the future, we forbear from applying sections 201 and 202 to broadband services to that extent. As described above, our approach here is informed by the success of the CMRS framework, which has not, in practice, involved *ex ante* rate regulation. In addition, as courts have recognized, when exercising its section 10 forbearance authority “[g]uided by section 706,” the Commission permissibly may “decide[] to balance the future benefits” of encouraging broadband deployment “against [the] short term impact” from a grant of forbearance. *EarthLink*, 462 F.3d 1, 9 (D.C. Cir. 2006). Under the totality of the circumstances here, including the protections of our open Internet rules—which focus on what we identify and the most significant problems likely to arise regarding these broadband services—and our ability to address issues *ex post* under sections 201 and 202 we do not find *ex ante* rate regulations necessary for purposes of section 10(a)(1) and (a)(2). Further, guided by section 706, and reflecting the tailored regulatory approach we adopt in this item, we find it in the public interest to forbear from applying sections 201 and 202 insofar as they would support the adoption of *ex ante* rate regulations for broadband Internet access service in the future.

452. To the extent some commenters express concern about future rules that the Commission might adopt based on this section 201 and 202 authority, we cannot, and do not, envision going beyond our open Internet rules to adopt *ex ante* rate regulations based on that section 201 and 202 authority in this context. Consequently, we forbear from sections 201 and 202 in that respect. In this Order, we decide only that forbearance from sections 201 and 202 of the Act to broadband Internet access service is not warranted under section 10 to the extent described above. Indeed, we find here that the application of sections 201 and 202 of the Act enable us to forbear from other requirements, including pre-existing tariffing requirements and Commission rules governing rate regulation, which we find are not warranted here. Thus, any pre-existing rate regulations adopted by the Commission under its Title II authority—including any regulations adopted under sections 201 and 202—will not be imposed on broadband Internet access service as a result of this Order. Finally, while other types of rules also potentially could be adopted based on section 201 and 202 authority, any Commission rules adopted in the future would remain subject to judicial review under the APA.

C. Forbearance Analysis Specific to Broadband Internet Access Service

456. As discussed elsewhere, with respect to broadband Internet access service we find that the standard for

forbearance is not met with respect to the following limited provisions:

- a) sections 201, 202, and 208, along with the related enforcement provisions of sections 206, 207, 209, 216, and 217, and the associated complaint procedures; and the Commission’s implementing regulations (but, to be clear, the Commission forbears from all ratemaking regulations adopted under sections 201 and 202);
- b) section 222, which establishes core customer privacy protections;
- c) section 224 and the Commission’s implementing regulations, which grant certain benefits that will foster network deployment by providing telecommunications carriers with regulated access to poles, ducts, conduits, and rights-of-way;
- d) sections 225, 255, and 251(a)(2), and the Commission’s implementing regulations, which collectively advance access for persons with disabilities; except that the Commission forbears from the requirement that providers of broadband Internet access service contribute to the Telecommunications Relay Service (TRS) Fund at this time. These provisions and regulations support the provision of TRS and require providers of broadband Internet access service, as telecommunications carriers, to ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable; and
- e) section 254, the interrelated requirements of section 214(e), and the Commission’s implementing regulations to strengthen the Commission’s ability to support broadband, supporting the Commission’s ongoing efforts to support broadband deployment and adoption; the Commission forbears from immediate contributions requirements, however, in light of the ongoing Commission proceeding.

457. We naturally also do not forbear from applying open Internet rules and section 706 of the 1996 Act itself. For convenience, we collectively refer to these provisions and regulations for purposes of this Order as the “core broadband Internet access service requirements.”

458. Beyond those core broadband Internet access service requirements we grant extensive forbearance as permitted by our authority under section 10 of the Act. [I]t is our predictive judgment that the statutory and regulatory requirements that remain are sufficient to ensure just, reasonable, and not unjustly or unreasonably discriminatory conduct by providers of broadband Internet access service and to protect consumers with respect to broadband Internet access service. Those same considerations, plus the overlay of section 706 of the 1996 Act and our desire to proceed incrementally when considering what new requirements that should apply here, likewise persuade us that this forbearance is in the public interest.

VI. CONSTITUTIONAL CONSIDERATIONS

A. First Amendment

1. Free Speech Rights

544. The rules we adopt today do not curtail broadband providers’ free speech rights. When engaged in broadband Internet access services, broadband providers are not speakers, but rather serve as conduits for the speech of others. The manner in which broadband providers operate their networks does not rise to the level of speech protected by the First Amendment. As telecommunications services, broadband Internet access services, by definition, involve transmission of network users’ speech without change in form or content, so open Internet rules do not implicate providers’ free speech rights. And even if broadband providers were considered speakers with respect to these services, the rules we adopt today are tailored to an important government interest—protecting and promoting the open Internet and the virtuous cycle of broadband deployment—so as to ensure they would survive intermediate scrutiny.

545. This is not to say that we are indifferent to matters of free speech on the Internet. To the contrary, our rules serve First Amendment interests of the highest order, promoting “the widest possible dissemination of information from diverse and antagonistic sources” and “assuring that the public has access to a multiplicity of information sources” by preserving an open Internet. *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994). We merely acknowledge that the free speech interests we advance today do not inhere in broadband providers with respect to their provision of broadband Internet access services.

550. Moreover, broadband is not subject to the same limited carriage decisions that characterize cable systems—the Internet was designed as a decentralized “network of networks” which is capable of delivering an unlimited variety of content, as chosen by the end user. In contrast, the *Turner I* court emphasized that the rules under consideration in that case regulated cable speech by “reduc[ing] the number of channels over which cable operators exercise unfettered

control” and “render[ing] it more difficult for cable programmers to compete for carriage on the limited channels remaining.” *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994). Neither of these deprivations of editorial discretion translates to the Internet as a content platform. The arrival of one speaker to the network does not reduce access to competing speakers; nor are broadband providers limited by our rules in the direct exercise of their free speech rights. Lacking the exercise of editorial control and an intent to convey a particularized message, we find that our rules regulate the unexpressive transmission of others’ speech over broadband Internet access services, not the speech of broadband providers. As our rules merely affect what broadband providers “must *do* . . . not what they may or may not *say*,” the provision of broadband Internet access services falls outside the protections of the First Amendment outlined by the court in *Turner I*. 512 U.S. at 637.

2. *Compelled Disclosure*

559. The disclosure requirements adopted as a part of our transparency rule also fall well within the confines of the First Amendment. As explained above, these required disclosures serve important government purposes, ensuring that end users and edge providers have accurate and accessible information about broadband providers’ services. This information is central both to preventing consumer deception and to the operation of the virtuous cycle of innovation, consumer demand, and broadband deployment.

B. *Fifth Amendment Takings*

564. The open Internet rules also present no cognizable claims under the Fifth Amendment’s Takings Clause. Today’s decision simply identifies as common carriage the services that broadband Internet access service providers already offer in a manner that carries with it certain statutory duties. Regulatory enforcement of those duties has never been held to raise takings concerns. Correspondingly, our rules do not rise to the level of a *per se* taking because they do not grant third parties a right to physical occupation of the broadband providers’ property. Finally, they do not constitute a regulatory taking because they actually enhance the value of broadband networks by protecting the virtuous cycle that drives innovation, user adoption, and infrastructure investment.

DISSENTING STATEMENT OF COMMISSIONER AJIT PAI

Americans love the free and open Internet. We relish our freedom to speak, to post, to rally, to learn, to listen, to watch, and to connect online. The Internet has become a powerful force for freedom, both at home and abroad. So it is sad to witness the FCC’s unprecedented attempt to replace that freedom with government control.

It shouldn’t be this way. For twenty years, there’s been a bipartisan consensus in favor of a free and open Internet. A Republican Congress and a Democratic President enshrined in the Telecommunications Act of 1996 the principle that the Internet should be a “vibrant and competitive free market . . . unfettered by Federal or State regulation.” 47 U.S.C. § 230(b)(2). And dating back to the Clinton Administration, every FCC Chairman—Republican and Democrat—has let the Internet grow free from utility-style regulation. The result? The Internet has been an amazing success story, changing our lives and the world in ways that would have been unimaginable when the 1996 Act was passed.

But today, the FCC abandons those policies. It reclassifies broadband Internet access service as a Title II telecommunications service. It seizes unilateral authority to regulate Internet conduct, to direct where Internet service providers put their investments, and to determine what service plans will be available to the American public. This is not only a radical departure from the bipartisan, market-oriented policies that have served us so well for the last two decades. It is also an about-face from the proposals the FCC made just last May.

So why is the FCC changing course? Why is the FCC turning its back on Internet freedom? Is it because we now have evidence that the Internet is not open? No. Is it because we have discovered some problem with our prior interpretation of the law? No. We are flip-flopping for one reason and one reason alone. President Obama told us to do so.

On November 10, President Obama asked the FCC to implement his plan for regulating the Internet, one that favors government regulation over marketplace competition. As has been widely reported in the press, the FCC has been scrambling ever since to figure out a way to do just that.

The courts will ultimately decide this Order’s fate. And I doubt they will countenance this unlawful power grab. Litigants are already lawyering up to seek judicial review of these new rules. Given the Order’s many glaring legal flaws, they will have plenty of fodder.

But if this Order manages to survive judicial review, these will be the consequences: higher broadband prices, slower speeds, less broadband deployment, less innovation, and fewer options for American consumers. To paraphrase Ronald Reagan, President Obama’s plan to regulate the Internet isn’t the solution to a problem. His plan is the problem.

In short, because this Order imposes intrusive government regulations that won’t work to solve a problem that doesn’t exist using legal authority the FCC doesn’t have, I dissent.

I.

The Commission’s decision to adopt President Obama’s plan marks a monumental shift toward government control of the Internet. It gives the FCC the power to micromanage virtually every aspect of how the Internet works. It’s an overreach that will let a Washington bureaucracy, and not the American people, decide the future of the online world.

One facet of that control is rate regulation. For the first time, the FCC will regulate the rates that Internet service providers may charge and will set a price of zero for certain commercial agreements. And the Order goes out of its way to reject calls to forbear from section 201’s authorization of rate regulation, thus making clear that the FCC will have the authority to determine the appropriate rates and charges for service. The Order also expressly invites parties to file such complaints with the Commission. A government agency deciding whether a rate is lawful is the very definition of rate regulation.

As a consequence, if the FCC decides that it does not like how broadband is being priced, Internet service providers may soon face admonishments, citations, notices of violation, notices of apparent liability, monetary forfeitures and refunds, cease and desist orders, revocations, and even referrals for criminal prosecution. The only limit on the FCC’s discretion to regulate rates is its own determination of whether rates are “just and reasonable,” which isn’t much of a restriction at all.

Although the Order plainly regulates rates, the plan takes pains to claim that it is not imposing further “*ex ante* rate regulation.” Order ¶¶ 441, 443, 447, 451, 452. Of course, that concedes that the new regulatory regime will involve *ex post* rate regulation. But even the agency’s suggestion that it today “cannot . . . envision” *ex ante* rate regulations “in this context” says nothing of what a future Commission—perhaps this very Commission in a few months or years—could envision. Order ¶¶ 451, 452. Indeed, the FCC grants forbearance against *ex ante* rate regulation but then turns around and says there’s no apparent “incremental benefit” to doing so since the Commission could just reverse that decision in any future rulemaking. Order ¶ 452 n.1352.

Indeed, it’s actually quite easy to envision this same Commission deciding to discard the predictive judgment that *ex ante* rate regulation is unnecessary. After all, the Commission in this very Order and without explanation junks the agency’s 2002 predictive judgment that intermodal broadband competition would develop. The short shrift the Order gives to our past bodes poorly for our future—for why should anyone trust these latest promises at all?

Just as pernicious is the FCC’s new “Internet conduct” standard, a standard that gives the FCC a roving mandate to review business models and upend pricing plans that benefit consumers. Usage-based pricing plans and sponsored data plans are the current targets. So if a company doesn’t want to offer an expensive, unlimited data plan, it could find itself in the FCC’s cross hairs.

Consider that activists promoting this rule had previously targeted neither AT&T nor Verizon with their first net-neutrality complaint but MetroPCS—an upstart competitor with a single-digit market share and not an ounce of market power. Its crime? Unlimited YouTube. MetroPCS offered a \$40-per-month plan with unlimited talk, text, Web browsing and YouTube streaming. The company’s strategy was to entice customers to switch from the four national carriers or to upgrade to its newly built 4G Long Term Evolution network. Whatever the benefits of MetroPCS’s approach, activists have said “there can be no compromise.” *See, e.g.,* Susan Crawford, Zero for Conduct, *Medium* (Jan. 7, 2015).

Or take T-Mobile’s Music Freedom program, which the Internet conduct rule puts on the chopping block. The “Un-carrier” lets consumers stream as much online music as they want without charging it against their monthly data allowance. Consumers love it, judging by T-Mobile’s rapid subscriber growth. Yet Music Freedom too stands on the brink of a ban—with the FCC “mindful of the concerns raised in the record that sponsored data plans have the potential to distort competition by allowing service providers to pick and choose among content and application providers to feature on different service plans.” Order ¶ 152.

Affordable, prepaid plans are now also suspect. These plans have enabled millions of low-income households to have mobile service. And yet the Order plays up the “concern that such practices can potentially be used by

broadband providers to disadvantage over-the-top providers.” Order ¶ 153. In other words, these plans aren’t the all-you-can-eat plans endorsed by the FCC, and so they, too, may violate the Internet conduct standard.

Our standard should be simple: If you like your current service plan, you should be able to keep your current service plan. The FCC shouldn’t take it away from you. Indeed, economists have long understood innovative business models like these are good for consumers because they give them more choices and lower prices. To apply outmoded economic thinking to the Internet marketplace would just hurt consumers, especially the middle-class and low-income Americans who are the biggest beneficiaries of these plans.

In all, the FCC will have almost unfettered discretion to decide what business practices clear the bureaucratic bar, so these won’t be the last business models targeted by the agency. And though the FCC spends several paragraphs describing seven vaguely worded factors that it will consider when applying the Internet conduct standard—end-user control; competitive effects; consumer protection; effect on innovation, investment, or broadband deployment; free expression; application agnostic; and standard practices—these factors lead to more questions than they answer. As the Electronic Frontier Foundation wrote just this week: This open-ended rule will be “anything but clear” and “suggests that the FCC believes it has broad authority to pursue any number of practices.” And “multi-factor test gives the FCC an awful lot of discretion, potentially giving an unfair advantage to parties with insider influence.” Or as they put it more bluntly, this rule is “hardly the narrow, light-touch approach we need to protect the open Internet.” Corynne McSherry, Electronic Frontier Foundation, Dear FCC: Rethink The Vague “General Conduct” Rule (Feb. 24, 2015), available at <http://bit.ly/1AIJrKU>. Even FCC leadership conceded that, with respect to the sorts of activities the Internet conduct standard could regulate, “we don’t really know” and that “we don’t know where things go next,” other than that the “FCC will sit there as a referee and be able to throw the flag.” February 2015 Open Meeting Press Conference of Chairman Tom Wheeler (Feb. 26, 2015), available at <http://www.fcc.gov/events/open-commission-meeting-february-2015> (165:30–166:51).

And because this list is “non-exhaustive,” with “other considerations relevant to determining whether a particular practice violates” the standard, Internet service providers are left to guess. Order ¶ 138. Will the rate of return on investment be a factor? How about an operator’s margins? What if the Internet service provider separately offers an interconnected VoIP service?

Net neutrality proponents are already bragging that it will turn the FCC into the “Department of the Internet”—and it’s no wonder. The FCC’s newfound control extends to the design of the Internet itself, from the last mile through the backbone. Section 201(a) of the Communications Act gives the FCC authority to order “physical connections” and “through routes,” meaning the FCC can decide where the Internet should be built and how it should be interconnected. And with the broad Internet conduct standard, decisions about network architecture and design will no longer be in the hands of engineers but bureaucrats and lawyers.

So if one Internet service provider wants to follow in the footsteps of Google Fiber and enter the market incrementally, the FCC may say no. If another wants to upgrade the bandwidth of its routers at the cost of some latency, the FCC may block it. Every decision to invest in ports for interconnection may be second-guessed; every use of priority coding to enable latency-sensitive applications like Voice over LTE may be reviewed with a microscope. How will this all be resolved? No one knows. 81-year-old laws like this don’t self-execute, and even in 317 pages, there’s not enough room for the FCC to describe how it would decide whether this or that broadband business practice is just and reasonable. So businesses will have to decide for themselves—with newly-necessary counsel from high-priced attorneys and accountants—whether to take a risk.

That’s just from some of the rules that the FCC is deciding to apply now. Yet *more* rules are on the horizon. The Commission commits “to commence in the near term a separate proceeding to revisit the data roaming obligations of [mobile broadband] providers in light of our reclassification decisions” and to determine whether full-fledged common-carriage wholesale obligations should apply. Order ¶ 526. And it promises a new rulemaking to apply section 222’s customer-proprietary network information provisions to Internet service providers. Still more are sure to come.

And then there is the temporary forbearance. Did I forget to mention that? Although the Order crows that its forbearance from Title II’s provisions and rules yields a “‘light-touch’ regulatory framework,” in reality it isn’t light at all, coming as it does with the provisos, limitations, and qualifications that the public has come to expect from Washington, DC. The plan is quite clear about the limited duration of its forbearance decisions, stating that the FCC will revisit them in the future and proceed in an incremental manner with respect to additional regulation. In discussing additional rate regulation, tariffs, last-mile unbundling, burdensome administrative filing requirements, accounting

standards, and entry and exit regulation, the plan repeatedly states that it is only forbearing “at this time.” Order ¶ 497. For others, the FCC will not impose rules “for now.” Order ¶¶ 470, 488.

To be sure, with respect to some rules, the agency says that it “cannot envision” going further. Order ¶¶ 451, 452, 508. But as the history of this proceeding makes clear, temporal statements like these don’t tend to last very long. Ask people who have followed this proceeding closely, and they could tell you that as late as November 2014, reclassification was not under serious consideration by the FCC “at this time,” Title II was not going to be imposed “for now,” and the agency “could not envision” going further than either a 706-based approach or the Mozilla-inspired hybrid proposal. In other words, expect the forbearance to fade and the regulations to ratchet up as time marches on.

Notes and Questions

1. Statutory Interpretation. The FCC’s decision is premised on the argument (for which it claims support from *Brand X*) that the statutory scheme is ambiguous and that classifying BIAS as either a telecommunications service or as an information service would be equally possible (and should be equally affirmed by a court). In so doing, what is the FCC’s methodology? Is it principally trying to reach the best interpretation of the statute in this particular case? Or is it reaching the interpretation that it thinks has the best policy outcomes, so long as the interpretation is not foreclosed? What do you think is the proper role of an expert agency in these circumstances?

2. Changed Facts? The Commission says that changed factual circumstances led it to reclassify BIAS (¶ 330). As a legal matter, the Commission needed to justify its decision to reclassify, so its assertion of changed facts is not surprising. But how difficult would it be to argue that changed factual circumstances after its earlier classification decision reinforced, rather than undermined, the Title I classification of BIAS? What is the best argument that changed circumstances compelled a decision not to reclassify?

3. Competition and Forbearance. The FCC’s decision to forbear is central to the balance that it struck in this order. (Do you think the FCC would have engaged in reclassification if it weren’t able to forbear?) One of the more interesting parts of the order is the FCC’s insistence that it need not find the BIAS market to be competitive in order to justify forbearance. In the deregulatory environment of the 1996 Act (from which the forbearance provision comes), forbearance was thought to flow from increasingly competitive markets (that is, competition justified a finding that regulation was no longer necessary). Do you think market competition should be necessary before the FCC forbears from regulating?

More broadly, to what extent does the FCC’s order rely on there being insufficient competition in BIAS markets? Look again at the sections on wireless broadband access, in which four nationwide carriers operate. Does the order justify regulation even if the market is workably competitive? Do you think that it should?

4. “Innovation by Permission.” One of the criticisms of the FCC order is that it replaces the open Internet ecosystem with one where a significant number of innovations can be effected only with advance permission. This is most telling in the FCC’s prohibition on paid prioritization and its suggestion that requests for waivers, while possible, will be disfavored. What innovations might be affected by the FCC’s rules? What metric enables the striking of a balance between the innovations the FCC argues will be helped by the order and those that might be hindered?

5. Affirmed. In the opinion excerpted below, a D.C. Circuit panel upheld the FCC’s 2015 Open Internet Order against all the challenges presented.

UNITED STATES TELECOM ASS’N v. FCC* 825 F.3d 674 (D.C. Cir. 2016)

Opinion for the Court filed by Circuit Judges TATEL and SRINIVASAN. Opinion concurring in part and dissenting in part filed by Senior Circuit Judge WILLIAMS.

* [The following excerpt includes Part I of the court’s opinion, which details the background of the prior FCC and court decisions. Thus, the excerpt can be read on its own, without those precedents. Readers who have reviewed the earlier decisions can skip or skim Part I of the court’s opinion. Eds.]

TATEL and SRINIVASAN, Circuit Judges:

For the third time in seven years, we confront an effort by the Federal Communications Commission to compel internet openness—commonly known as net neutrality—the principle that broadband providers must treat all internet traffic the same regardless of source. In our first decision, *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010), we held that the Commission had failed to cite any statutory authority that would justify its order compelling a broadband provider to adhere to certain open internet practices. In response, relying on section 706 of the Telecommunications Act of 1996, the Commission issued an order imposing transparency, anti-blocking, and anti-discrimination requirements on broadband providers. In our second opinion, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), we held that section 706 gives the Commission authority to enact open internet rules. We nonetheless vacated the anti-blocking and anti-discrimination provisions because the Commission had chosen to classify broadband service as an information service under the Communications Act of 1934, which expressly prohibits the Commission from applying common carrier regulations to such services. The Commission then promulgated the order at issue in this case—the 2015 Open Internet Order—in which it reclassified broadband service as a telecommunications service, subject to common carrier regulation under Title II of the Communications Act. The Commission also exercised its statutory authority to forbear from applying many of Title II’s provisions to broadband service and promulgated five rules to promote internet openness. Three separate groups of petitioners, consisting primarily of broadband providers and their associations, challenge the Order, arguing that the Commission lacks statutory authority to reclassify broadband as a telecommunications service, that even if the Commission has such authority its decision was arbitrary and capricious, that the Commission impermissibly classified mobile broadband as a commercial mobile service, that the Commission impermissibly forbore from certain provisions of Title II, and that some of the rules violate the First Amendment. For the reasons set forth in this opinion, we deny the petitions for review.

I.

Called “one of the most significant technological advancements of the 20th century,” Senate Committee on Commerce, Science and Transportation, Report on Online Personal Privacy Act, Sen. Rep. No. 107-240, at 7 (2002), the internet has four major participants: end users, broadband providers, backbone networks, and edge providers. Most end users connect to the internet through a broadband provider, which delivers high-speed internet access using technologies such as cable modem service, digital subscriber line (DSL) service, and fiber optics. *See* Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, 5682–83, ¶ 188, 5751, ¶ 346 (2015) (2015 Open Internet Order or the Order). Broadband providers interconnect with backbone networks—“long-haul fiber-optic links and high-speed routers capable of transmitting vast amounts of data.” *Verizon*, 740 F.3d at 628 (citing *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18,433, 18,493, ¶ 110 (2005)). Edge providers, like Netflix, Google, and Amazon, “provide content, services, and applications over the Internet.” *Id.* at 629 (citing Preserving the Open Internet, Report and Order, 25 FCC Rcd. 17,905, 17,910, ¶ 13 (2010) (2010 Open Internet Order)). To bring this all together, when an end user wishes to check last night’s baseball scores on ESPN.com, his computer sends a signal to his broadband provider, which in turn transmits it across the backbone to ESPN’s broadband provider, which transmits the signal to ESPN’s computer. Having received the signal, ESPN’s computer breaks the scores into packets of information which travel back across ESPN’s broadband provider network to the backbone and then across the end user’s broadband provider network to the end user, who will then know that the Nats won 5 to 3. In recent years, some edge providers, such as Netflix and Google, have begun connecting directly to broadband providers’ networks, thus avoiding the need to interconnect with the backbone, 2015 Open Internet Order, 30 FCC Rcd. at 5610, ¶ 30, and some broadband providers, such as Comcast and AT&T, have begun developing their own backbone networks, *id.* at 5688, ¶ 198.

Proponents of internet openness “worry about the relationship between broadband providers and edge providers.” *Verizon*, 740 F.3d at 629. “They fear that broadband providers might prevent their end-user subscribers from accessing certain edge providers altogether, or might degrade the quality of their end-user subscribers’ access to certain edge providers, either as a means of favoring their own competing content or services or to enable them to collect fees from certain edge providers.” *Id.* Thus, for example, “a broadband provider like Comcast might limit its end-user subscribers’ ability to access the *New York Times* website if it wanted to spike traffic to its own news website, or it might degrade the quality of the connection to a search website like Bing if a competitor like Google paid for prioritized access.” *Id.*

Understanding the issues raised by the Commission’s current attempt to achieve internet openness requires

familiarity with its past efforts to do so, as well as with the history of broadband regulation more generally.

A.

Much of the structure of the current regulatory scheme derives from rules the Commission established in its 1980 Computer II Order. The Computer II rules distinguished between “basic services” and “enhanced services.” Basic services, such as telephone service, offered “pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information.” Amendment of Section 64.702 of the Commission’s Rules and Regulations, 77 F.C.C. 2d 384, 420, ¶ 96 (1980) (Computer II). Enhanced services consisted of “any offering over the telecommunications network which is more than a basic transmission service,” for example, one in which “computer processing applications are used to act on the content, code, protocol, and other aspects of the subscriber’s information,” such as voicemail. *Id.* at 420 ¶ 97. The rules subjected basic services, but not enhanced services, to common carrier treatment under Title II of the Communications Act. *Id.* at 387, ¶¶ 5–7. Among other things, Title II requires that carriers “furnish . . . communication service upon reasonable request,” 47 U.S.C. § 201(a), engage in no “unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services,” *id.* § 202(a), and charge “just and reasonable” rates, *id.* § 201(b).

The Computer II rules also recognized a third category of services, “adjunct-to-basic” services: enhanced services, such as “speed dialing, call forwarding, [and] computer-provided directory assistance,” that facilitated use of a basic service. *See* Implementation of the Non-Accounting Safeguards, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21,905, 21,958, ¶ 107 n.245 (1996). Although adjunct-to-basic services fell within the definition of enhanced services, the Commission nonetheless treated them as basic because of their role in facilitating basic services.

Fifteen years later, Congress, borrowing heavily from the Computer II framework, enacted the Telecommunications Act of 1996, which amended the Communications Act. The Telecommunications Act subjects a “telecommunications service,” the successor to basic service, to common carrier regulation under Title II. 47 U.S.C. § 153(51) (“A telecommunications carrier shall be treated as a common carrier under [the Communications Act] only to the extent that it is engaged in providing telecommunications services.”). By contrast, an “information service,” the successor to an enhanced service, is not subject to Title II. The Telecommunications Act defines a “telecommunications service” as “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.” *Id.* § 153(53). It defines telecommunications as “the transmission, between or among points specified by the user, of information of the user’s choosing without change in the form or content of the information as sent and received.” *Id.* § 153(50). An information service is an “offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” *Id.* § 153(24). The appropriate regulatory treatment therefore turns on what services a provider offers to the public: if it offers telecommunications, that service is subject to Title II regulation.

Tracking the Commission’s approach to adjunct-to-basic services, Congress also effectively created a third category for information services that facilitate use of a telecommunications service. The “telecommunications management exception” exempts from information service treatment—and thus treats as a telecommunications service—“any use [of an information service] for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” *Id.*

The Commission first applied this statutory framework to broadband in 1998 when it classified a portion of DSL service—broadband internet service furnished over telephone lines—as a telecommunications service. *See* Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 24,012, 24,014, ¶ 3, 24,029–30, ¶¶ 35–36 (1998). According to the Commission, the transmission component of DSL—the phone lines that carried the information—was a telecommunications service. The Commission classified the internet access delivered via the phone lines, however, as a separate offering of an information service. DSL providers that supplied the phone lines and the internet access therefore offered both a telecommunications service and an information service.

Four years later, the Commission took a different approach when it classified cable modem service—broadband service provided over cable lines—as solely an information service. Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, 4823, ¶¶ 39–40 (2002) (Cable Broadband Order). In its 2002 Cable Broadband Order, the Commission acknowledged that when providing the information service component of broadband—which, according to the Commission, consisted of several distinct applications, including email and online newsgroups—cable

broadband providers transmit information and thus use telecommunications. In the Commission’s view, however, the transmission functioned as a component of a “single, integrated information service,” rather than as a standalone offering. *Id.* at 4823, ¶ 38. The Commission therefore classified them together as an information service.

The Supreme Court upheld the Commission’s classification of cable modem service in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 986 (2005). Applying the principles of statutory interpretation established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court explained that the key statutory term “offering” in the definition of “telecommunications service” is ambiguous. *Brand X*, 545 U.S. at 989. What a company offers, the Court reasoned, can refer to either the “single, finished product” or the product’s individual components. *Id.* at 991. According to the Court, resolving that question in the context of broadband service requires the Commission to determine whether the information service and the telecommunications components “are functionally integrated . . . or functionally separate.” *Id.* That question “turns not on the language of [the Communications Act], but on the factual particulars of how Internet technology works and how it is provided, questions *Chevron* leaves to the Commission to resolve in the first instance.” *Id.* Examining the classification at *Chevron*’s second step—reasonableness—the Court deferred to the Commission’s finding that “the high-speed transmission used to provide [the information service] is a functionally integrated component of that service,” *id.* at 998, and upheld the order. Three Justices dissented, arguing that cable broadband providers offered telecommunications in the form of the “physical connection” between their computers and end users’ computers. *See id.* at 1009 (Scalia, J., dissenting).

Following *Brand X*, the Commission classified other types of broadband service, such as DSL and mobile broadband service, as integrated offerings of information services without a standalone offering of telecommunications. *See, e.g.*, *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd. 5901, 5901–02, ¶ 1 (2007) (mobile broadband) (2007 Wireless Order); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14,853, 14,863–64, ¶ 14 (2005) (DSL) (2005 Wireline Broadband Order).

B.

Although the Commission’s classification decisions spared broadband providers from Title II common carrier obligations, the Commission made clear that it would nonetheless seek to preserve principles of internet openness. In the 2005 Wireline Broadband Order, which classified DSL as an integrated information service, the Commission announced that should it “see evidence that providers of telecommunications for Internet access or IP-enabled services are violating these principles,” it would “not hesitate to take action to address that conduct.” 2005 Wireline Broadband Order, 20 FCC Rcd. at 14,904, ¶ 96. Simultaneously, the Commission issued a policy statement signaling its intention to “preserve and promote the open and interconnected nature of the public Internet.” *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd. 14,986, 14,988, ¶ 4 (2005).

In 2007, the Commission found reason to act when Comcast customers accused the company of interfering with their ability to access certain applications. *Comcast*, 600 F.3d at 644. Because Comcast voluntarily adopted new practices to address the customers’ concerns, the Commission “simply ordered [Comcast] to make a set of disclosures describing the details of its new approach and the company’s progress toward implementing it.” *Id.* at 645. As authority for that order, the Commission cited its section 4(i) “ancillary jurisdiction.” 47 U.S.C. § 154(i) (“The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”); *Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, Memorandum Opinion and Order, 23 FCC Rcd. 13,028, 13,034–41, ¶¶ 14–22 (2008). In *Comcast*, we vacated that order because the Commission had failed to identify any grant of statutory authority to which the order was reasonably ancillary.

C.

Following *Comcast*, the Commission issued a notice of inquiry, seeking comment on whether it should reclassify broadband as a telecommunications service. *See Framework for Broadband Internet Service*, Notice of Inquiry, 25 FCC Rcd. 7866, 7867, ¶ 2 (2010). Rather than reclassify broadband, however, the Commission adopted the 2010 Open Internet Order. *See* 25 FCC Rcd. 17,905. In that order, the Commission promulgated three rules: (1) a transparency rule, which required broadband providers to “disclose the network management practices, performance characteristics, and terms and conditions of their broadband services”; (2) an anti-blocking rule, which prohibited broadband providers from “block[ing] lawful content, applications, services, or non-harmful devices”; and (3) an anti-discrimination rule, which established that broadband providers “may not unreasonably discriminate in transmitting

lawful network traffic.” *Id.* at 17,906, ¶ 1. The transparency rule applied to both “fixed” broadband, the service a consumer uses on her laptop when she is at home, and “mobile” broadband, the service a consumer uses on her iPhone when she is riding the bus to work. *Id.* The anti-blocking rule applied in full only to fixed broadband, but the order prohibited mobile broadband providers from “block[ing] lawful websites, or block[ing] applications that compete with their voice or video telephony services.” *Id.* The anti-discrimination rule applied only to fixed broadband. According to the Commission, mobile broadband warranted different treatment because, among other things, “the mobile ecosystem is experiencing very rapid innovation and change,” *id.* at 17,956, ¶ 94, and “most consumers have more choices for mobile broadband than for fixed,” *id.* at 17,957, ¶ 95. In support of its rules, the Commission relied primarily on section 706 of the Telecommunications Act, which requires that the Commission “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,” 47 U.S.C. § 1302(a).

In *Verizon*, we upheld the Commission’s conclusion that section 706 provides it authority to promulgate open internet rules. According to the Commission, such rules encourage broadband deployment because they “preserve and facilitate the ‘virtuous circle’ of innovation that has driven the explosive growth of the Internet.” *Verizon*, 740 F.3d at 628. Under the Commission’s “virtuous circle” theory, “Internet openness . . . spurs investment and development by edge providers, which leads to increased end-user demand for broadband access, which leads to increased investment in broadband network infrastructure and technologies, which in turns leads to further innovation and development by edge providers.” *Id.* at 634. Reviewing the record, we concluded that the Commission’s “finding that Internet openness fosters . . . edge-provider innovation . . . was . . . reasonable and grounded in substantial evidence” and that the Commission had “more than adequately supported and explained its conclusion that edge-provider innovation leads to the expansion and improvement of broadband infrastructure.” *Id.* at 644.

We also determined that the Commission had “adequately supported and explained its conclusion that, absent rules such as those set forth in the [2010 Open Internet Order], broadband providers represent[ed] a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment.” *Id.* at 645. For example, the Commission noted that “broadband providers like AT&T and Time Warner have acknowledged that online video aggregators such as Netflix and Hulu compete directly with their own core video subscription service,” *id.* (internal quotation marks omitted), and that, even absent direct competition, “[b]roadband providers . . . have powerful incentives to accept fees from edge providers, either in return for excluding their competitors or for granting them prioritized access to end users,” *id.* at 645–46. Importantly, moreover, the Commission found that “broadband providers have the technical . . . ability to impose such restrictions,” noting that there was “little dispute that broadband providers have the technological ability to distinguish between and discriminate against certain types of Internet traffic.” *Id.* at 646. The Commission also “convincingly detailed how broadband providers’ [gatekeeper] position in the market gives them the economic power to restrict edge-provider traffic and charge for the services they furnish edge providers.” *Id.* Although the providers’ gatekeeper position would have brought them little benefit if end users could have easily switched providers, “we [saw] no basis for questioning the Commission’s conclusion that end users [were] unlikely to react in this fashion.” *Id.* The Commission “detailed . . . thoroughly . . . the costs of switching,” and found that “many end users may have no option to switch, or at least face very limited options.” *Id.* at 647.

Finally, we explained that although some record evidence supported Verizon’s insistence that the order would have a detrimental effect on broadband deployment, other record evidence suggested the opposite. The case was thus one where “‘the available data do[] not settle a regulatory issue and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion.’” *Id.* (quoting *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 52 (1983)). The Commission, we concluded, had “offered ‘a rational connection between the facts found and the choice made.’” *Id.* (quoting *State Farm*, 463 U.S. at 52).

We nonetheless vacated the anti-blocking and anti-discrimination rules because they unlawfully subjected broadband providers to per se common carrier treatment. As we explained, the Communications Act provides that “[a] telecommunications carrier shall be treated as a common carrier . . . only to the extent that it is engaged in providing telecommunications services.” *Id.* at 650 (quoting 47 U.S.C. § 153(51)). The Commission, however, had classified broadband not as a telecommunications service, but rather as an information service, exempt from common carrier regulation. *Id.* Because the anti-blocking and anti-discrimination rules required broadband providers to offer service indiscriminately—the common law test for a per se common carrier obligation—they ran afoul of the Communications Act. We upheld the transparency rule, however, because it imposed no per se common carrier obligations on broadband providers.

D.

A few months after our decision in *Verizon*, the Commission issued a notice of proposed rulemaking to “find the best approach to protecting and promoting Internet openness.” Protecting and Promoting the Open Internet, Notice of Proposed Rulemaking, 29 FCC Rcd. 5561, 5563, ¶ 4 (2014). After receiving nearly four million comments, the Commission promulgated the order at issue in this case, the 2015 Open Internet Order.

The Order consists of three components. First, the Commission reclassified both fixed and mobile “broadband Internet access service” as telecommunications services. 2015 Open Internet Order, 30 FCC Rcd. at 5743–44, ¶ 331. For purposes of the Order, the Commission 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.” *Id.* at 5745–46, ¶ 336 (footnote omitted). Because the Commission concluded that the telecommunications service offered to end users necessarily includes the arrangements that broadband providers make with other networks to exchange traffic—commonly referred to as “interconnection arrangements”—the Commission determined that Title II would apply to those arrangements as well. The Commission also reclassified mobile broadband service, which it had previously deemed a “private mobile service,” exempt from common carrier regulation, as a “commercial mobile service,” subject to such regulation.

In the Order’s second component, the Commission carried out its statutory mandate to forbear “from applying any regulation or any provision” of the Communications Act if it determines that the provision is unnecessary to ensure just and reasonable service or protect consumers and determines that forbearance is “consistent with the public interest.” 47 U.S.C. § 160(a). Specifically, the Commission forbore from applying certain Title II provisions to broadband service, including section 251’s mandatory unbundling requirements.

In the third portion of the Order, the Commission promulgated five open internet rules, which it applied to both fixed and mobile broadband service. The first three of the Commission’s rules, which it called “bright-line rules,” ban blocking, throttling, and paid prioritization. The anti-blocking and anti-throttling rules prohibit broadband providers from blocking “lawful content, applications, services, or non-harmful devices” or throttling—degrading or impairing—access to the same. *Id.* at 5648, ¶ 112, 5651, ¶ 119. The anti-paid-prioritization rule bars broadband providers from “favor[ing] some traffic over other traffic . . . either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.” *Id.* at 5653, ¶ 125. The fourth rule, known as the “General Conduct Rule,” prohibits broadband providers from “unreasonably interfer[ing] with or unreasonably disadvantage[ing] (i) end users’ ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers’ ability to make lawful content, applications, services, or devices available to end users.” *Id.* at 5660, ¶ 136. The Commission set forth a nonexhaustive list of factors to guide its application of the General Conduct Rule, which we discuss at greater length below. Finally, the Commission adopted an enhanced transparency rule, which builds upon the transparency rule that it promulgated in its 2010 Open Internet Order and that we sustained in *Verizon*.

II.

In the [2015] Open Internet Order, the Commission determined that broadband service satisfies the statutory definition of a telecommunications service: “the offering of telecommunications for a fee directly to the public.” 47 U.S.C. § 153(53). In accordance with *Brand X*, the Commission arrived at this conclusion by examining consumer perception of what broadband providers offer. In *Brand X*, the Supreme Court held that it was “consistent with the statute’s terms” for the Commission to take into account “the end user’s perspective” in classifying a service as “information” or “telecommunications.” 545 U.S. at 993. Specifically, the Court held that the Commission had reasonably concluded that a provider supplies a telecommunications service when it makes a “‘stand-alone’ offering of telecommunications, i.e., an offered service that, from the user’s perspective, transmits messages unadulterated by computer processing.” *Id.* at 989. In the Order, the Commission concluded that consumers perceive broadband service both as a standalone offering and as providing telecommunications. These conclusions about consumer perception find extensive support in the record and together justify the Commission’s decision to reclassify broadband as a telecommunications service.

With respect to its first conclusion—that consumers perceive broadband as a standalone offering—the Commission explained that broadband providers offer two separate types of services: “a broadband Internet access service,” *id.* at 5750, ¶ 341, which provides “the ability to transmit data to and from Internet endpoints,” *id.* at 5755, ¶ 350; and “‘add-on’ applications, content, and services that are generally information services,” *id.* at 5750, ¶ 341, such

as email and cloud-based storage programs. It found that from the consumer’s perspective, “broadband Internet access service is today sufficiently independent of these information services that it is a separate offering.” *Id.* at 5757–58, ¶ 356.

In support of its conclusion, the Commission pointed to record evidence demonstrating that consumers use broadband principally to access third-party content, not email and other add-on applications. “As more American households have gained access to broadband Internet access service,” the Commission explained, “the market for Internet-based services provided by parties other than broadband Internet access providers has flourished.” *Id.* at 5753, ¶ 347. Indeed, from 2003 to 2015, the number of websites increased from “approximately 36 million” to “an estimated 900 million.” *Id.* By one estimate, two edge providers, Netflix and YouTube, “account for 50 percent of peak Internet download traffic in North America.” *Id.* at 5754, ¶ 349.

That consumers focus on transmission to the exclusion of add-on applications is hardly controversial. Even the most limited examination of contemporary broadband usage reveals that consumers rely on the service primarily to access third-party content.

The Commission found, moreover, that broadband consumers not only focus on the offering of transmission but often avoid using the broadband providers’ add-on services altogether, choosing instead “to use their high-speed Internet connections to take advantage of competing services offered by third parties.” 2015 Open Internet Order, 30 FCC Rcd. at 5753, ¶ 347. For instance, two third-party email services, Gmail and Yahoo! Mail, were “among the ten Internet sites most frequently visited during the week of January 17, 2015, with approximately 400 million and 350 million visits respectively.” *Id.* at 5753, ¶ 348. Some “even advise consumers specifically *not* to use a broadband provider-based email address[] because a consumer cannot take that email address with them if he or she switches providers.” *Id.*

In support of its second conclusion—that from the user’s point of view, the standalone offering of broadband service provides telecommunications—the Commission explained that “[u]sers rely on broadband Internet access service to transmit ‘information of the user’s choosing,’ ‘between or among points specified by the user,’” without changing the form or content of that information. 2015 Open Internet Order, 30 FCC Rcd. at 5761, ¶ 361 (quoting 47 U.S.C. § 153(50)); *see also id.* at 5762–63, ¶ 362. The Commission grounded that determination in record evidence that “broadband Internet access service is marketed today primarily as a conduit for the transmission of data across the Internet.” *Id.* at 5757, ¶ 354.

[Broadband providers’] advertisements, moreover, “link higher transmission speeds and service reliability with enhanced access to the Internet at large—to any ‘points’ a user may wish to reach.” *Id.* at 5756, ¶ 352. For example, RCN brags that its service is “ideal for watching Netflix,” and Verizon touts its service as “work[ing] well for uploading and sharing videos on YouTube.” *Id.* Based on the providers’ emphasis on how useful their services are for accessing third-party content, the Commission found that end users view broadband service as a mechanism to transmit data of their own choosing to their desired destination—i.e., as a telecommunications service.

Petitioners assert numerous challenges to the Commission’s decision to reclassify broadband. Finding that none has merit, we uphold the classification. Significantly, although our colleague believes that the Commission acted arbitrarily and capriciously when it reclassified broadband, he agrees that the Commission has statutory authority to classify broadband as a telecommunications service.

B.

This brings us to petitioners’ substantive challenges to reclassification. Specifically, they argue that the Commission lacks statutory authority to reclassify broadband as a telecommunications service. They also argue that, even if it has such authority, the Commission failed to adequately explain why it reclassified broadband from an information service to a telecommunications service. Finally, they contend that the Commission had to determine that broadband providers were common carriers under this court’s [established] test in order to reclassify.

1.

In addressing petitioners’ first argument, we follow the Supreme Court’s decision in *Brand X* and apply *Chevron*’s two-step analysis. At *Chevron* step one, we ask “whether Congress has directly spoken to the precise question at issue.” *Chevron*, 467 U.S. at 842. Where “the intent of Congress is clear, that is the end of the matter; for [we], as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842–43. But if “the statute is silent or ambiguous with respect to the specific issue,” we proceed to *Chevron* step two, where “the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843.

As part of its challenge to the Commission’s reclassification, US Telecom argues that broadband is

unambiguously an information service, which would bar the Commission from classifying it as a telecommunications service. The Commission maintains, however, that *Brand X* established that the Communications Act is ambiguous with respect to the proper classification of broadband. As the Commission points out, the Court explained that whether a carrier provides a “telecommunications service” depends on whether it makes an “offering” of telecommunications. *Brand X*, 545 U.S. at 989; *see also* 47 U.S.C. § 153(53) (“The term ‘telecommunications service’ means the *offering* of telecommunications for a fee directly to the public” (emphasis added)). The term “offering,” the Court held, is ambiguous. *Brand X*, 545 U.S. at 989.

Seeking to escape *Brand X*, US Telecom argues that the Court held only that the Commission could classify as a telecommunications service the “last mile” of transmission, which US Telecom defines as the span between the end user’s computer and the broadband provider’s computer. Here, however, the Commission classified “the *entire* broadband service from the end user all the way to edge providers” as a telecommunications service. US Telecom Pet’rs’ Br. 44. According to US Telecom, “[t]he ambiguity addressed in *Brand X* thus has no bearing here because the Order goes beyond the scope of whatever ambiguity [the statute] contains.” *Id.*

We have no need to resolve this dispute because, even if the *Brand X* decision was only about the last mile, the Court focused on the nature of the functions broadband providers offered to end users, not the length of the transmission pathway, in holding that the “offering” was ambiguous. As discussed earlier, the Commission adopted that approach in the Order in concluding that the term was ambiguous as to the classification question presented here: whether the “offering” of broadband internet access service can be considered a telecommunications service. In doing so, the Commission acted in accordance with the Court’s instruction in *Brand X* that the proper classification of broadband turns “on the factual particulars of how Internet technology works and how it is provided, questions *Chevron* leaves to the Commission to resolve in the first instance.” 545 U.S. at 991.

Amici Members of Congress in Support of Petitioners advance an additional argument that post-Telecommunications Act legislative history “demonstrates that Congress never delegated to the Commission” authority to regulate broadband service as a telecommunications service. Members of Congress for Pet’rs Amicus Br. 4. In support, they point out that Congress has repeatedly tried and failed to enact open internet legislation, confirming, in their view, that the Commission lacks authority to issue open internet rules. But as the Supreme Court has made clear, courts do not regard Congress’s “attention” to a matter subsequently resolved by an agency pursuant to statutory authority as “legislative history demonstrating a congressional construction of the meaning of the statute.” *American Trucking Ass’n v. Atchison, Topeka, & Santa Fe Railway Co.*, 387 U.S. 397, 416–17 (1967).

This brings us, then, to petitioners’ and intervenors’ *Chevron* step two challenges.

First, US Telecom argues that the Commission’s classification is unreasonable because many broadband providers offer information services, such as email, alongside internet access. According to US Telecom, because broadband providers still offer such services, consumers must perceive that those providers offer an information service. For its part, the Commission agreed that broadband providers offer email and other services, but simply concluded that “broadband Internet access service is today sufficiently independent of these information services that it is a separate offering.” 2015 Open Internet Order, 30 FCC Rcd. at 5758, ¶ 356. US Telecom nowhere challenges that conclusion, and for good reason: the record contains extensive evidence that consumers perceive a standalone offering of transmission, separate from the offering of information services like email and cloud storage.

US Telecom next contends that the Commission’s reclassification of broadband was unreasonable because DNS and caching do not fall within the Communications Act’s telecommunications management exception. As noted above, that exception excludes from the definition of an information service “any [service] for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(24). The Commission found that “[w]hen offered as part of a broadband Internet access service, caching [and] DNS [are] simply used to facilitate the transmission of information so that users can access other services.” 2015 Open Internet Order, 30 FCC Rcd. at 5770, ¶ 372. Challenging this interpretation, US Telecom argues that DNS and caching fall outside the exception because neither “manage[s] a telecommunications system or service,” US Telecom Pet’rs’ Br. 39, but are instead examples of the “many core information-service functions associated with Internet access,” *id.* at 37. US Telecom claims that the Commission’s use of the telecommunications management exception was also unreasonable because the Commission “contends that the *same functions*—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.” *Id.* at 40. We are unpersuaded.

First, the Commission explained that the Communications Act’s telecommunications management exception

encompasses those services that would have qualified as “adjunct-to-basic” under the Computer II regime. To qualify as an adjunct-to-basic service, a service had to be “‘basic in purpose and use’ in the sense that [it] facilitate[d] use of the network, and . . . [it] could ‘not alter the fundamental character of the [telecommunications service].’” *Id.* at 5767 ¶ 367 (last alteration in original) (quoting North American Telecommunications Ass’n, Memorandum Opinion and Order, 101 F.C.C. 2d 349, 359, ¶ 24, 360, ¶ 27 (1985)). The Commission concluded that DNS and caching satisfy this test because both services facilitate use of the network without altering the fundamental character of the telecommunications service. DNS does so by “allow[ing] more efficient use of the telecommunications network by facilitating accurate and efficient routing from the end user to the receiving party.” *Id.* at 5768, ¶ 368. Caching qualifies because it “enabl[es] the user to obtain more rapid retrieval of information through the network.” *Id.* at 5770, ¶ 372 (internal quotation marks omitted). US Telecom does not challenge the applicability of the adjunct-to-basic standard, nor does it give us any reason to believe that the Commission’s application of that standard was unreasonable.

As to US Telecom’s second point, the Commission justified treating third-party DNS and caching services differently on the ground that when such services are “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.” 2015 Open Internet Order, 30 FCC Rcd. at 5769, ¶ 370 n.1046. Again, US Telecom has given us no basis for questioning the reasonableness of this conclusion. Once a carrier uses a service that would ordinarily be an information service—such as DNS or caching—to manage a telecommunications service, that service no longer qualifies as an information service under the Communications Act. The same service, though, when unconnected to a telecommunications service, remains an information service.

2.

We next consider US Telecom’s argument that the Commission failed to adequately explain why, having long classified broadband as an information service, it chose to reclassify it as a telecommunications service.

As relevant here, “[t]he APA’s requirement of reasoned decision-making ordinarily demands that an agency acknowledge and explain the reasons for a changed interpretation.” *Verizon*, 740 F.3d at 636.

US Telecom contends that the Commission lacked good reasons for reclassifying broadband because “as *Verizon* made clear, and as the [Commission] originally recognized, it could have adopted appropriate Open Internet rules based upon § 706 *without* reclassifying broadband.” US Telecom Pet’rs’ Br. 54 (internal citations omitted). But the Commission did not believe it could do so. Specifically, the Commission found it necessary to establish three bright-line rules, the anti-blocking, anti-throttling, and anti-paid-prioritization rules, all of which impose per se common carrier obligations by requiring broadband providers to offer indiscriminate service to edge providers, *see Verizon*, 740 F.3d at 651–52. “[I]n light of *Verizon*,” the Commission explained, “absent a classification of broadband providers as providing a ‘telecommunications service,’ the Commission could only rely on section 706 to put in place open Internet protections that steered clear of regulating broadband providers as common carriers *per se*.” 2015 Open Internet Order, 30 FCC Rcd. at 5614, ¶ 42. This, in our view, represents a perfectly “good reason” for the Commission’s change in position.

Raising an additional argument, US Telecom asserts that reclassification “will undermine” investment in broadband. US Telecom Pet’rs’ Br. 54. The partial dissent agrees, pointing specifically to 47 U.S.C. § 207, which subjects Title II common carriers to private complaints. The Commission, however, reached a different conclusion with respect to reclassification’s impact on broadband investment. It found that “Internet traffic is expected to grow substantially in the coming years,” driving investment, 2015 Open Internet Order, 30 FCC Rcd. at 5792, ¶ 412; that Title II regulation had not stifled investment when applied in other circumstances; and that “major infrastructure providers have indicated that they will in fact continue to invest under the [Title II] framework,” *id.* at 5795, ¶ 416. In any event, the Commission found that the virtuous cycle—spurred by the open internet rules—provides an ample counterweight, in that any harmful effects on broadband investment “are far outweighed by positive effects on innovation and investment in other areas of the ecosystem that [its] core broadband policies will promote.” *Id.* at 5791, ¶ 410. In reviewing these conclusions, we ask not whether they “are correct or are the ones that we would reach on our own, but only whether they are reasonable.” *EarthLink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006).

Finally, the partial dissent disagrees with our conclusion that the Commission had “good reasons” to reclassify because, according to the partial dissent, it failed to make “a finding of market power or at least a consideration of competitive conditions.” Concurring & Dissenting Op. at 749. But nothing in the statute requires the Commission to make such a finding. Under the Act, a service qualifies as a “telecommunications service” as long as it constitutes an “offering of telecommunications for a fee directly to the public.” 47 U.S.C. § 153(53).

US Telecom next argues that the Commission “could not rationally abandon its prior policy without account[ing] for reliance interests that its prior policy engendered.” US Telecom Pet’rs’ Br. 51 (alteration in original) (internal quotation marks omitted). The Commission, however, did not fail to “account” for reliance interests. *Fox Television*, 556 U.S. at 515. Quite to the contrary, it expressly considered the claims of reliance and found that “the regulatory status of broadband Internet access service appears to have, at most, an indirect effect (along with many other factors) on investment.” 2015 Open Internet Order, 30 FCC Rcd. at 5760, ¶ 360. The Commission explained that “the key drivers of investment are demand and competition,” not the form of regulation. *Id.* at 5792, ¶ 412. Additionally, the Commission noted that its past regulatory treatment of broadband likely had a particularly small effect on investment because the regulatory status of broadband service was settled for only a short period of time. *Id.* at 5760–61, ¶ 360. As the Commission pointed out, just five years after *Brand X* upheld the Commission’s classification of broadband as an information service, the Commission asked in a notice of inquiry whether it should reclassify broadband as a telecommunications service. *Id.* at 5760, ¶ 360.

III.

Having thus rejected petitioners’ arguments against reclassification, we turn to US Telecom’s challenges to the Commission’s regulation of interconnection arrangements—arrangements that broadband providers make with other networks to exchange traffic in order to ensure that their end users can access edge provider content anywhere on the internet. Broadband providers have such arrangements with backbone networks, as well as with certain edge providers, such as Netflix, that connect directly to broadband provider networks. In the Order, 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.” 2015 Open Internet Order, 30 FCC Rcd. at 5694, ¶ 205.

As authority for regulating interconnection arrangements, the Commission relied on Title II. “Broadband Internet access service,” it explained, “involves the exchange of traffic between a . . . broadband provider and connecting networks,” since “[t]he representation to retail customers that they will be able to reach ‘all or substantially all Internet endpoints’ necessarily includes the promise to make the interconnection arrangements necessary to allow that access.” *Id.* at 5693–94, ¶ 204. Because the “same data is flowing between the end user and edge consumer,” the end user necessarily experiences any discriminatory treatment of the edge provider, the Commission reasoned, making interconnection “simply derivative of” the service offered to end users. *Id.* at 5748–49, ¶ 339.

As a result, the Commission concluded that it could regulate interconnection arrangements under Title II as a component of broadband service. It refrained, however, from applying the General Conduct Rule or any of the bright-line rules to interconnection arrangements because, given that it “lack[ed] [a] background in practices addressing Internet traffic exchange,” it would be “premature to adopt prescriptive rules to address any problems that have arisen or may arise.” *Id.* at 5692–93, ¶ 202. Rather, it explained that interconnection disputes would be evaluated on a case-by-case basis under sections 201, 202, and 208 of the Communications Act.

US Telecom argues that our decision in *Verizon* prevents the Commission from regulating interconnection arrangements under Title II without first classifying the arrangements as an offering of telecommunications to edge providers and backbone networks. As US Telecom points out, *Verizon* recognized that broadband, and thus interconnection arrangements, provides a service not only to end users but also to edge providers and backbone networks, namely, the ability to reach the broadband provider’s users. According to US Telecom, *Verizon* therefore requires the Commission to classify this service to edge providers and backbone networks as a telecommunications service before it regulates interconnection arrangements under Title II.

US Telecom misreads *Verizon*. Although *Verizon* does recognize that broadband providers’ delivery of broadband to end users also provides a service to edge providers, it does not hold that the Commission must classify broadband as a telecommunications service in both directions before it can regulate the interconnection arrangements under Title II. The problem in *Verizon* was not that the Commission had misclassified the service between carriers and edge providers but that the Commission had failed to classify broadband service as a Title II service at all. The Commission overcame this problem in the Order by reclassifying broadband service—and the interconnection arrangements necessary to provide it—as a telecommunications service.

V.

Having upheld the Commission’s reclassification of broadband services, both fixed and mobile, we consider

next Full Service Network’s challenges to the Commission’s decision to forbear from applying portions of the Communications Act to those services. Section 10 of the Communications Act provides that the Commission “shall forbear from applying any regulation or any provision” of the Communications Act to a telecommunications service or carrier if three criteria are satisfied: (1) “enforcement of such regulation or provision is not necessary to ensure that” the carrier’s practices “are just and reasonable and are not unjustly or unreasonably discriminatory,” 47 U.S.C. § 160(a)(1); (2) “enforcement of such regulation or provision is not necessary for the protection of consumers,” *id.* § 160(a)(2); and (3) “forbearance from applying such provision or regulation is consistent with the public interest,” *id.* § 160(a)(3). Under the third criterion, “the Commission shall consider whether forbearance . . . will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.” *Id.* § 160(b). Thus, section 10 imposes a mandatory obligation upon the Commission to forbear when it finds these conditions are met.

Section 10(c) gives any carrier the right to “submit a petition to the Commission requesting” forbearance. *Id.* § 160(c). In regulations issued pursuant to section 10(c), the Commission requires “petitions for forbearance” to include a “[d]escription of relief sought,” make a prima facie case that the statutory criteria for forbearance are satisfied, identify any related matters, and provide any necessary evidence. 47 C.F.R. § 1.54.

In the Order, the Commission decided to forbear from numerous provisions of the Communications Act.

B.

Full Service Network contends that the Commission acted arbitrarily and capriciously in forbearing from the mandatory network connection and facilities unbundling requirements contained in sections 251 and 252. As relevant here, section 251 requires telecommunications carriers “to interconnect directly or indirectly” with other carriers and prohibits them from “impos[ing] unreasonable or discriminatory conditions or limitations on[] the resale of . . . telecommunications services.” 47 U.S.C. § 251(a)(1), (b)(1). “Incumbent local exchange carrier[s],” meaning carriers who “provided telephone exchange service” in a particular area as of the effective date of the Telecommunications Act, must provide nondiscriminatory access to their existing networks and unbundled access to network elements in order to allow service-level competition through resale. *Id.* § 251(c), (h)(1). Section 252 sets standards for contracts that implement section 251 obligations.

Full Service Network first argues that section 10(a)(3)’s public interest determination “must be made for each regulation, provision and market . . . using the definition and context of that provision in the [Communications] Act.” Full Service Network Pet’rs’ Br. 14–15 (emphasis omitted). Because section 251 “applies to ‘local exchange carriers,’” Full Service Network contends, “the geographic market, as the name implies and the definition in the [Communications] Act confirms, is local and not national.” *Id.* at 15.

Our decision in *EarthLink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006), forecloses this argument. There, EarthLink made a similar argument—that the inclusion of the phrase “geographic markets” in section 10 meant that the Commission could not “forbear on a nationwide basis” from separate unbundling requirements in section 271 “without considering more localized regions individually.” *Id.* at 8. Rejecting this argument, we focused on the language of section 10, and held that “[o]n its face, the statute imposes no particular mode of market analysis or level of geographic rigor.” *Id.* Rather, “the language simply contemplates that the FCC might sometimes forbear in a subset of a carrier’s markets; it is silent about how to determine when such partial relief is appropriate.” *Id.* For the same reason, Full Service Network cannot rope section 251’s requirements into the Commission’s section 10 analysis.

Next, Full Service Network argues that section 152(b), which “prevent[s] the Commission from taking intrastate action solely because it further[s] an interstate goal,” *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 381 (1999), prohibits the Commission from “us[ing] its interstate authority under [section] 201 to regulate broadband Internet access service that is an intrastate ‘telephone exchange service’ under the [Communications] Act,” Full Service Network Pet’rs’ Br. 17 (quoting 47 U.S.C. § 153(54)). According to Full Service Network, the Commission erred by refusing to determine whether broadband service qualifies as a “telephone exchange service” because that definition would prevent the Commission from classifying the internet as jurisdictionally interstate.

In the Order, the Commission “reaffirm[ed] [its] longstanding conclusion” that broadband service falls within its jurisdiction as an interstate service. 2015 Open Internet Order, 30 FCC Rcd. at 5803, ¶ 431. “The Internet’s inherently global and open architecture,” the Commission reasoned, “mak[es] end-to-end jurisdictional analysis extremely difficult—if not impossible—when the services at issue involve the Internet.” 2015 Open Internet Order, 30 FCC Rcd. at 5803, ¶ 431. The Commission also determined that because it had found the section 10 criteria met as

to section 251, it had no reason to “resolve whether broadband Internet access service could constitute ‘telephone exchange service’” under section 251. *Id.* at 5851, ¶ 513 n.1575.

We approved the Commission’s jurisdictional approach in *Core Communications, Inc. v. FCC*, 592 F.3d 139, 144 (D.C. Cir. 2010). Although the petitioners in that case never challenged the general framework of the Commission’s “end-to-end analysis, . . . under which the classification of a communication as local or interstate turns on whether its origin and destination are in the same state,” *id.* at 142, we recognized that

[d]ial-up internet traffic is special because it involves interstate communications that are delivered through local calls; it thus simultaneously implicates the regimes of both § 201 and of §§ 251–252. Neither regime is a subset of the other. They intersect, and dial-up internet traffic falls within that intersection. Given this overlap, § 251(i)’s specific saving of the Commission’s authority under § 201 against any negative implications from § 251 renders the Commission’s reading of the provisions at least reasonable.

Id. To be sure, *Core Communications* concerned dial-up internet access, but because broadband involves a similar mix of local facilities and interstate information networks, we see no meaningful distinction between the interpretation approved in *Core Communications* and the one the Commission offered here. Nor do we see any reason to obligate the Commission to determine the legal status of each underlying “hypothetical regulatory obligation[]” that could result from any particular Communications Act provision prior to undertaking the section 10 forbearance analysis. *AT&T Inc. v. FCC*, 452 F.3d 830, 836–37 (D.C. Cir. 2006).

In the Order, the Commission identified two bases for forbearing from sections 251 and 252. First, it considered evidence from commenters who argued that “last-mile unbundling requirements . . . led to depressed investment in the European broadband marketplace.” 2015 Open Internet Order, 30 FCC Rcd. at 5796, ¶ 417. Those commenters identified several studies suggesting that mandatory unbundling had reduced investment in broadband infrastructure in Europe relative to the United States. The Commission reasoned that its decision to forbear from section 251’s unbundling requirement, in combination with regulation under other provisions of Title II, would avoid similar problems and encourage further deployment because the scheme “establishes the regulatory predictability needed by all sectors of the Internet industry to facilitate prudent business planning, without imposing undue burdens that might interfere with entrepreneurial opportunities.” 2015 Open Internet Order, 30 FCC Rcd. at 5796, ¶ 417.

VI.

We turn next to petitioners’ challenges to the particular rules adopted by the Commission. As noted earlier, the Commission promulgated five rules in the Order: rules banning (i) blocking, (ii) throttling, and (iii) paid prioritization; (iv) a General Conduct Rule; and (v) an enhanced transparency rule. Petitioners Alamo and Berninger (together, Alamo) challenge the anti-paid-prioritization rule as beyond the Commission’s authority. US Telecom challenges the General Conduct Rule as unconstitutionally vague. We reject both challenges.

A.

In its challenge to the anti-paid-prioritization rule, petitioner Alamo contends that, even with reclassification of broadband as a telecommunications service, the Commission lacks authority to promulgate such a rule under section 201(b) of Title II and section 303(b) of Title III. The Commission, however, grounded the rules in “multiple, complementary sources of legal authority”—not only Titles II and III, but also section 706 of the Telecommunications Act of 1996 (now codified at 47 U.S.C. § 1302). *Id.* at 5720–21, ¶¶ 273–74. As to section 706, this court concluded in *Verizon* that it grants the Commission independent rulemaking authority. Alamo nonetheless argues that the Commission lacks authority to promulgate rules under section 706.

As we held in *Verizon* and reaffirm today, the Commission’s section 706 authority extends to rules “governing broadband providers’ treatment of internet traffic”—including the anti-paid-prioritization rule—in reliance on the virtuous cycle theory. *Verizon*, 740 F.3d at 628. Even if there were any lingering uncertainty about the import of our decision in *Verizon*, we fully adopt here our findings and analysis in *Verizon* concerning the existence and permissible scope of the Commission’s section 706 authority, including our conclusion that the Commission’s virtuous cycle theory provides reasonable grounds for the exercise of that authority.

That brings us to our colleague’s suggestion that the Order embodies a “central paradox[]” in that the Commission relied on the Telecommunications Act to “increase regulation” even though the Act was “intended to

‘reduce regulation.’” Concurring & Dissenting Op. at 770. We are unmoved. The Act, by its terms, aimed to “encourage the rapid deployment of new telecommunications technologies.” Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat 56. If, as we reiterate here (and as the partial dissent agrees), section 706 grants the Commission rulemaking authority, it is unsurprising that the grant of rulemaking authority might occasion the promulgation of additional regulation. And if, as is true here (and was true in *Verizon*), the new regulation is geared to promoting the effective deployment of new telecommunications technologies such as broadband, the regulation is entirely consistent with the Act’s objectives.

B.

The Due Process Clause “requires the invalidation of laws [or regulations] that are impermissibly vague.” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). US Telecom argues that the General Conduct Rule falls within that category. We disagree.

The General Conduct Rule forbids broadband providers from engaging in conduct that “unreasonably interfere[s] with or unreasonably disadvantage[s] (i) end users’ ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers’ ability to make lawful content, applications, services, or devices available to end users.” 2015 Open Internet Order, 30 FCC Rcd. at 5660, ¶ 136. The Commission adopted the General Conduct Rule based on a determination that the three bright-line rules—barring blocking, throttling, and paid prioritization—were, on their own, insufficient “to protect the open nature of the Internet.” *Id.* at 5659–60, ¶¶ 135–36. Because “there may exist other current or future practices that cause the type of harms [the] rules are intended to address,” the Commission thought it “necessary” to establish a more general, no-unreasonable interference/disadvantage standard. *Id.* The standard is designed to be flexible so as to address unforeseen practices and prevent circumvention of the bright-line rules. The Commission will evaluate conduct under the General Conduct Rule on a case-by-case basis, taking into account a “non-exhaustive” list of seven factors. *Id.* at 5661, ¶ 138.

The degree of vagueness tolerable in a given statutory provision varies based on “the nature of the enactment.” *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). Thus, “the Constitution is most demanding of a criminal statute that limits First Amendment rights.” *DiCola v. FDA*, 77 F.3d 504, 508 (D.C. Cir. 1996). The General Conduct Rule does not implicate that form of review because it regulates business conduct and imposes civil penalties. In such circumstances, “regulations will be found to satisfy due process so long as they are sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require.” *Freeman United Coal Mining Co. v. Federal Mine Safety & Health Review Commission*, 108 F.3d 358, 362 (D.C. Cir. 1997).

That standard is met here. The Commission has articulated “the objectives the [General Conduct Rule is] meant to achieve,” *id.*: to serve as a complement to the bright-line rules and advance the central goal of protecting consumers’ ability to access internet content of their choosing. The Commission set forth seven factors that will guide the determination of what constitutes unreasonable interference with, or disadvantaging of, end-user or edge-provider access: end-user control; competitive effects; consumer protection; effect on innovation, investment, or broadband deployment; free expression; application agnosticism; and standard practices. The Commission’s articulation of the Rule’s objectives and specification of the factors that will inform its application “mark out the rough area of prohibited conduct,” which suffices to satisfy due process in this context. *DiCola*, 77 F.3d at 509.

Finally, the advisory-opinion procedure accompanying the General Conduct Rule cures it of any potential lingering constitutional deficiency. The Commission announced in the Order that it would allow companies to obtain an advisory opinion concerning any “proposed conduct that may implicate the rules,” in order to “enable companies to seek guidance on the propriety of certain open Internet practices before implementing them.” 2015 Open Internet Order, 30 FCC Rcd. at 5706, ¶¶ 229–30. The opinions will be issued by the Enforcement Bureau and “will be publicly available.” *Id.* at 5706–07, ¶¶ 229, 231. As a result, although the Commission did not reach a definitive resolution during the rulemaking process as to the permissibility under the General Conduct Rule of practices such as zero-rating and usage caps, companies that seek to pursue those sorts of practices may petition for an advisory opinion and thereby avoid an inadvertent infraction. The opportunity to obtain prospective guidance thus provides regulated entities with “relief from [remaining] uncertainty.” *DiCola*, 77 F.3d at 509.

VII.

We finally turn to Alamo and Berninger’s First Amendment challenge to the open internet rules. Having upheld the FCC’s reclassification of broadband service as common carriage, we conclude that the First Amendment poses no bar to the rules.

B.

Alamo argues that the open internet rules violate the First Amendment by forcing broadband providers to transmit speech with which they might disagree. We are unpersuaded. We have concluded that the Commission’s reclassification of broadband service as common carriage is a permissible exercise of its Title II authority, and Alamo does not challenge that determination. Common carriers have long been subject to nondiscrimination and equal access obligations akin to those imposed by the rules without raising any First Amendment question. Those obligations affect a common carrier’s neutral transmission of *others’* speech, not a carrier’s communication of its own message.

Because the constitutionality of each of the rules ultimately rests on the same analysis, we consider the rules together. The rules generally bar broadband providers from denying or downgrading end-user access to content and from favoring certain content by speeding access to it. In effect, they require broadband providers to offer a standardized service that transmits data on a nondiscriminatory basis. Such a constraint falls squarely within the bounds of traditional common carriage regulation.

The “basic characteristic” of common carriage is the “requirement [to] hold[] oneself out to serve the public indiscriminately.” *Verizon*, 740 F.3d at 651 (internal quotation marks omitted). That requirement prevents common carriers from “mak[ing] individualized decisions, in particular cases, whether and on what terms to deal.” *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979). In the communications context, common carriers “make[] a public offering to provide communications facilities whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing.” *Id.* That is precisely what the rules obligate broadband providers to do.

Equal access obligations of that kind have long been imposed on telephone companies, railroads, and postal services, without raising any First Amendment issue. *See Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 739 (1996) (plurality opinion) (noting that the “speech interests” in leased channels are “relatively weak because [the companies] act less like editors, such as newspapers or television broadcasters, than like common carriers, such as telephone companies”); *FCC v. League of Women Voters of California*, 468 U.S. 364, 378 (1984) (“Unlike common carriers, broadcasters are entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public duties.”); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 106 (1973) (noting that the Senate decided in passing the Communications Act “to eliminate the common carrier obligation” for broadcasters because “it seemed unwise to put the broadcaster under the hampering control of being a common carrier and compelled to accept anything and everything that was offered him so long as the price was paid” (quoting 67 Cong. Rec. 12,502 (1926))). The Supreme Court has explained that the First Amendment comes “into play” only where “particular conduct possesses sufficient communicative elements,” *Texas v. Johnson*, 491 U.S. 397, 404 (1989), that is, when an “intent to convey a particularized message [is] present, and in the surrounding circumstances the likelihood [is] great that the message would be understood by those who viewed it,” *Spence v. Washington*, 418 U.S. 405, 410–11 (1974). The absence of any First Amendment concern in the context of common carriers rests on the understanding that such entities, insofar as they are subject to equal access mandates, merely facilitate the transmission of the speech of others rather than engage in speech in their own right.

As the Commission found, that understanding fully applies to broadband providers. In the Order, the Commission concluded that broadband providers “exercise little control over the content which users access on the Internet” and “allow Internet end users to access all or substantially all content on the Internet, without alteration, blocking, or editorial intervention,” thus “display[ing] no such intent to convey a message in their provision of broadband Internet access services.” 2015 Open Internet Order, 30 FCC Rcd. at 5869, ¶ 549. In turn, the Commission found, end users “expect that they can obtain access to all content available on the Internet, without the editorial intervention of their broadband provider.” *Id.* Because “the accessed speech is not edited or controlled by the broadband provider but is directed by the end user,” *id.* At 5869–70, ¶ 549, the Commission concluded that broadband providers act as “mere conduits for the messages of others, not as agents exercising editorial discretion subject to First Amendment protections,” *id.* at 5870, ¶ 549. Petitioners provide us with no reason to question those findings.

Because the rules impose on broadband providers the kind of nondiscrimination and equal access obligations

that courts have never considered to raise a First Amendment concern—i.e., the rules require broadband providers to allow “all members of the public who choose to employ such facilities [to] communicate or transmit intelligence of their own design and choosing,” *Midwest Video*, 440 U.S. at 701 (internal quotation marks omitted)—they are permissible. Of course, insofar as a broadband provider might offer its own *content*—such as a news or weather site—separate from its internet access service, the provider would receive the same protection under the First Amendment as other producers of internet content. But the challenged rules apply only to the provision of internet access as common carriage, as to which equal access and nondiscrimination mandates present no First Amendment problem.

VIII.

For the foregoing reasons, we deny the petitions for review.

So ordered.

WILLIAMS, Senior Circuit Judge, concurring in part and dissenting in part:

I agree with much of the majority opinion but am constrained to dissent. In my view the Commission’s Order must be vacated for three reasons:

I. The Commission’s justification of its switch in classification of broadband from a Title I information service to a Title II telecommunications service fails for want of reasoned decisionmaking. (a) Its assessment of broadband providers’ reliance on the now-abandoned classification disregards the record. Furthermore, the Commission relied on explanations contrary to the record before it and failed to consider issues critical to its conclusion. (b) To the extent that the Commission relied on changed factual circumstances, its assertions of change are weak at best and linked to the Commission’s change of policy by only the barest of threads. (c) To the extent that the Commission justified the switch on the basis of new policy perceptions, its explanation of the policy is watery thin and self-contradictory.

II. The Commission has erected its regulatory scheme on two statutory sections that would be brought into play by reclassification (if reclassification were supported by reasoned decisionmaking), but the two statutes do not justify the rules the Commission has adopted.

Application of Title II gives the Commission authority to apply § 201(b) of the Communications Act, 47 U.S.C. § 201(b). The Commission invokes a new interpretation of § 201 to sustain its ban on paid prioritization. But it has failed to offer a reasonable basis for that interpretation. Absent such a basis, the ban is not in accordance with law.

Application of Title II also removes an obstacle to most of the Commission’s reliance on § 706 of the Telecommunications Act of 1996, 47 U.S.C. § 1302, namely any rules that have the effect of treating the subject firms as common carriers. *See Verizon Communications Inc. v. Federal Communications Commission*, 740 F.3d 623, 650 (D.C. Cir. 2014). But the limits of § 706 itself render it inadequate to justify the ban on paid prioritization and kindred rules.

I discuss § 201(b) and § 706 in subparts A and B of part II.

III. The Commission’s decision to forbear from enforcing a wide array of Title II’s provisions is based on premises inconsistent with its reclassification of broadband. Its explicit refusal to take a stand on whether broadband providers (either as a group or in particular instances) may have market power manifests not only its doubt as to whether it could sustain any such finding but also its pursuit of a “Now you see it, now you don’t” strategy. The Commission invokes something very like market power to justify its broad imposition of regulatory burdens, but then finesses the issue of market power in justifying forbearance.

* * *

I should preface the discussion by acknowledging that the Commission is under a handicap in regulating internet access under the Communications Act of 1934 as amended by the Telecommunications Act of 1996. The first was designed for regulating the AT&T monopoly, the second for guiding the telecommunications industry from that monopoly into a competitive future.

Two central paradoxes of the Commission’s position are (1) its use of an Act intended to “reduce regulation” to instead increase regulation, and (2) its coupling adoption of a dramatically new policy whose rationality seems

heavily dependent on the existing state of competition in the broadband industry, under an Act intended to “promote competition,” with a resolute refusal even to address the state of competition. In the Commission’s words, “Thus, these rules do not address, and are not designed to deal with, the acquisition or maintenance of market power or its abuse, real or potential.” Order, 30 FCC Rcd. at 5606, ¶ 11 n.12.

I.

I agree with the majority that the Commission’s reclassification of broadband internet as a telecommunications service may not run afoul of any statutory dictate in the Telecommunications Act. But in changing its interpretation, the Commission failed to meet the modest requirements of *Fox Television*.

Fox states that an agency switching policy must as always “show that there are good reasons for the new policy.” 556 U.S. at 515. But in special circumstances more is required. An “agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. [But s]ometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.” *Id.*

Here the Commission justifies its decision on two bases: changed facts and a new policy judgment. To the extent it rests on new facts, *Fox* requires us to examine whether there is really anything new. *Fox* also, of course, requires us to consider reliance interests, regardless of what the Commission has said about them. Thus novel facts and reliance interests are plainly at issue. The Commission also argues that its policy change would be reasonable even if the facts had not changed. Order, 30 FCC Rcd. 5761, ¶ 360 n.993 (“[W]e clarify that, even assuming, *arguendo*, that the facts regarding how [broadband] is offered had not changed, in now applying the Act’s definitions to these facts, we find that the provision of [broadband] is best understood as a telecommunications service, as discussed [elsewhere] . . . and disavow our prior interpretations to the extent they held otherwise.”). In sum then, at a minimum, we must inquire whether the Commission gave reasonable attention to petitioners’ claims of reliance interests, how much the asserted factual change amounts to, and finally whether the Commission has met the minimal burden of showing “that there are good reasons for the new policy.” I address them in that order.

(a) *Reliance*. The Order deals with reliance interests summarily, noting, “As a factual matter, the regulatory status of broadband internet access service appears to have, at most, an indirect effect (along with many other factors) on investment.” Order, 30 FCC Rcd. at 5759–61, ¶ 360. The Commission’s support for the conclusion is weak and its pronouncement superficial.

To the extent that the Commission’s judgment relies on the presence of “many other factors,” it relies on an irrelevance. The proposition that “many other factors” affect investment is a truism. In a complex economy there will be few phenomena that are entirely driven by a single variable. Investment in broadband obviously reflects such matters as market saturation, the cost of capital, obsolescence, technological innovation, and a host of macroeconomic variables.

For its factual support, the Commission essentially lists several anecdotes about what happened to stock prices and what corporate executives said about investment in response to Commission proposals for regulatory change. For example, the Order notes that, after the Commission proposed tougher rules, the stocks of telecommunications companies outperformed the broader market. Order, 30 FCC Rcd. at 5759–61, ¶ 360. This might be interesting if the Commission had performed a sophisticated analysis trying to hold other factors constant. In the absence of such an analysis, the evidence shows only that the threat of regulation was not so onerous as to precipitate radical stock market losses.

A more important (and logically prior) question is why this evidence matters at all. I take *Fox*’s position on reliance interests to be addressed to both fairness and efficiency. If a regulatory switch will significantly undercut the productivity and value of past investments, made in reasonable reliance on the old regime, rudimentary fairness suggests that the agency should take that into account in evaluating a possible switch. And a pattern of capricious change would undermine any agency purpose of encouraging future investment on the basis of new rules. But the effect of past policy on past investment is quite different from future levels of investment.

The Commission also argues that “the regulatory history regarding the classification of broadband Internet access service would not provide a reasonable basis for assuming that the service would receive sustained treatment as an information service in any event.” Order, 30 FCC Rcd. at 5759–61, ¶ 360. In short, the Commission says that reliance was not reasonable. The statement misreads the history of the classification of broadband. In March 2002, the Commission classified cable broadband as an information service, *see* Inquiry Concerning High-Speed Access to the

Internet over Cable and Other Facilities (the Cable Modem Declaratory Ruling), 17 FCC Rcd. 4798 (2002); soon after that Order was affirmed by the Supreme Court in *National Cable & Telecommunications Ass'n v. Brand X Internet Service*, 545 U.S. 967 (2005), the Commission reclassified the transmission component of DSL service as an information service as well. *See* *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities* (the Wireline Broadband Classification Order), 20 FCC Rcd. 14,853 (2005). The Commission continued to hold that view until 2010, when in the 2010 Notice, Framework for Broadband Internet Service, Notice of Inquiry, 25 FCC Rcd. 7866 (2010), it sought comment on reclassification (though rejecting it in the ultimate 2010 Order). I'm puzzled at the Commission's implicit claim, Order, 30 FCC Rcd. at 5759–61, ¶ 360, that *judicial* uncertainty—dating back to the 9th Circuit's 2000 decision in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), reading the statute to compel classification as a telecommunications service—made it unreasonable for firms investing in provision of internet access to think that the Commission would persist in its longheld commitment. The Commission offered fierce resistance to the 9th Circuit decision, resistance that culminated in its success in *Brand X*. It seems odd, in this context, to discount firms' reliance on the Commission's own assiduously declared views.

According to data that [the] Commission itself uses, Order, 30 FCC Rcd. at 5603, ¶ 2, broadband providers invested \$343 billion during the five years after *Brand X*, from 2006 through 2010. This amounts to about \$3,000 on average for every American household. For the Commission to ignore these sums as investment in reliance on its rules is to say it will give reliance interests zero weight.

No one supposes that firms' past investment in reliance on a set of rules should give them immunity to regulatory change. But *Fox* requires an agency at least to make a serious assessment of such reliance. The Commission has failed to do so.

(b) *Changed facts*. The Commission identifies two changes, neither of which seems very radical or logically linked to the new regime. First, it argues that consumers now use broadband “to access third party content, applications and services.” Order, 30 FCC Rcd. at 5743, ¶ 330, 5751–53, ¶¶ 346–47. But that is nothing new. In the Order from well over a decade ago that *Brand X* affirmed, the Commission said that consumers “may obtain many functions from companies with whom the cable operator has not even a contractual relationship” instead of from their cable internet service provider. Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, ¶¶ 25, 38 & n.153 (2002) (Declaratory Ruling).

Second, the Order points to the emphasis that providers put on the “speed and reliability of transmission separately from and over” other features. Order, 30 FCC Rcd. at 5743, ¶ 330, 5755, ¶ 351. Again, there is nothing new about these statements from broadband providers, who have been advertising speed for decades. As Justice Scalia put it in an undisputed segment of his *Brand X* dissent, broadband providers (like pizzerias) “advertise[] quick delivery” as an “advantage[] over competitors.” 545 U.S. at 1007 n.1 (Scalia, J., dissenting).

At no point does the Commission seriously try to quantify these alleged changes in the role or speed of internet service providers. Even if there were changes in degree in these aspects of the internet, the Commission doesn't explain why an increase in consumer access to third-party content, or an increase in competition to offer high-speed service, would make application of Title II more appropriate as a policy matter now than it was at the time of the Declaratory Ruling at issue in *Brand X*.

(c) *New reasoning*. Perhaps recognizing the frailty of its claims of changed facts, the Commission tries to cover its bases by switching to the alternative approach set forth in *Fox*, a straightforward disavowal of its prior interpretation of the 1996 Act and related policy views. *See, e.g.*, Order, 30 FCC Rcd. at 5761, ¶ 360 n.993.

The Commission justifies its reclassification almost entirely in terms of arguments that provision of such services as DNS and caching, when provided by a broadband provider, do not turn the overall service into an “information service.” Rather, those functions in its view fit within § 153(24)'s exception for telecommunications systems management. Thus, the Commission set for itself a highly technical task of classification, concluding that broadband internet access could fit within the literal terms of the pertinent statutory sections. And it accomplished the task. That it could do so is hardly surprising in view of the broad leeway provided by *Brand X*, which gave it authority to reverse the policy judgment it had made in the decision there under review, the Declaratory Ruling.

But in doing so the Commission performed *Hamlet* without the Prince—a finding of market power or at least a consideration of competitive conditions. The Declaratory Ruling sustained in *Brand X* invoked serious economic propositions as the basis for its conclusion. For example, the *Brand X* majority noted that in reaching its initial classification decision the Commission had concluded that “broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market.” Declaratory Ruling, 17 FCC Rcd. at

4802, ¶ 5, quoted by *Brand X*, 545 U.S. at 1001. But the Commission has now discovered, for reasons still obscure, that a “minimal regulatory environment,” far from promoting investment and innovation, retards them, so that the Commission must replace that environment with a regime that is far from “minimal.”

While the 1996 Act by no means conditions classification under Title II on a finding of market power, *Brand X* shows that the Court recognized the relevance of market power to the Commission’s classification decisions. *See* Declaratory Ruling, 17 FCC Rcd. at 4826, ¶ 47 (resting the classification decision in part on the desire to avoid “undermin[ing] the goal of the 1996 Act to open all telecommunications markets to competition”).

In addressing activities on the periphery of highly monopolized telephone service, the Commission has for nearly four decades made the presence or prospect of competition the touchstone for refusal to apply Title II. The Computer II decision, for example, says of the Computer I decision, “A major issue was whether communications common carriers should be permitted to market data processing services, and if so, what safeguards should be imposed to insure that the carriers would not engage in anti-competitive or discriminatory practices.” Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), 77 F.C.C. 2d 384, 389–90, ¶ 15 (1980) (Computer II). In the Computer II decision, it is hard to go more than a page or so without encountering discussion of competition. The decision concludes that, “In view of all of the foregoing evidence of an effective competitive situation, we see no need to assert regulatory authority over data processing services.” *Id.* at 433, ¶ 127. The competitiveness of the market was in large part what the inquiry was *about*.

Yet in the present Order the Commission contradicted its prior strategy and explicitly declined to offer any market power analysis: “[T]hese rules do not address, and are not designed to deal with, the acquisition or maintenance of market power or its abuse, real or potential.” Order, 30 FCC Rcd. at 5606, ¶ 11 n.12. In fact, as we’ll see, many of the Commission’s policy arguments assert what sound like claims of market power, but without going through any of the fact-gathering or analysis needed to sustain such claims.

The Order made no finding on market power; in order to do so it would have to answer a number of basic questions. Most notably, there are a fairly large number of competitors in most markets, with 74% of American households having access to at least two fixed providers giving speeds greater than 10 Mbps and 88% with at least two fixed providers giving access to service at 3 Mbps. Furthermore, 93% of Americans have access to three or more mobile broadband providers—access which at least at the margin must operate in competition with suppliers of fixed broadband.

The Commission emphasizes how few people have access to 25 Mbps, but that criterion is not grounded in any economic analysis. For example, Netflix—a service that demands high speeds—recommends only 5 Mbps for its high-definition quality service and 3 Mbps for its standard definition quality. A likely explanation for why there has not been more rollout of higher speeds is that many people are reluctant to pay the extra price for it. Indeed, fewer than 30% of customers for whom 25 Mbps broadband is available actually order it.

That many markets feature few providers offering service at 25 Mbps or above is hardly surprising. In a competitive world of rapidly improving technology, it’s unreasonable to expect that all firms will simultaneously launch the breakthrough services everywhere, especially in a context in which more than 70% of the potential customers decline to use the latest, priciest service.

My aim is simply to make two points: (1) that such a degree of market power cannot be assumed, as the Commission itself seems to acknowledge in its disclaimer of interest in market power, Order, 30 FCC Rcd. at 5606, ¶ 11 n.12; and (2) that the Commission’s reliance on consumers’ “high switching costs,” *id.* at 5631–32, ¶ 81 (discussed below in part II), which is an implicit assertion that the providers have market power, poses an empirical question that is susceptible of resolution and is in tension with the Commission’s assertion that it is not addressing “market power or its abuse, real or potential.”

In a move evidently aimed at circumventing the whole market power issue (despite Title II’s origin as a program for monopoly regulation), the Commission rests on its “virtuous cycle” theory, to wit the fact that “innovations at the edges of the network enhance consumer demand, leading to expanded investments in broadband infrastructure that, in turn, spark new innovations at the edge.” Order, 30 FCC Rcd. at 5604, ¶ 7. The Commission clearly expects the policy adopted here to cause increases in broadband investment.

I see no problem with the general idea. Indeed, it seems to me it captures an important truth about any sector of the economy. Though the subsectors may compete over rents, the prosperity of each subsector depends on the prosperity of the others—at least it does so unless some wholly disruptive technology replaces one of the subsectors. American wheat producers, American railroads, steamship lines, and wheat consumers around the globe participate

in a virtuous cycle; medical device inventors, hospitals, doctors, and patients participate in a virtuous cycle. Innovation, to be sure, is especially robust in the information technology and application sectors, but a mutual relationship between subsectors pervades the economy.

I do not understand the Commission to claim that its new rules will have a *direct positive* effect on investment in broadband. The positive effect is expected from the way in which, in the Commission's eyes, the new rules encourage demand for and supply of content, which it believes will indirectly spur demand for and investment in broadband access.

The direct effect, of which the Commission doesn't really speak, seems unequivocally negative, as petitioner United States Telecom Association (USTA) argues. Besides imposing the usual costs of regulatory compliance, the Order increases uncertainty in policy, which both reason and the most recent rigorous econometric evidence suggest reduce investment. In fact, the Order itself acknowledges that vague rules threaten to "stymie" innovation, Order, 30 FCC Rcd. at 5661, ¶ 138, but then proceeds to adopt vague rules.

Here, a major source of uncertainty is the Internet Conduct Standard, which forbids broadband providers to "unreasonably interfere with or unreasonably disadvantage" consumer access to internet content. 47 C.F.R. § 8.11. All of these terms—"unreasonably," "interfere," and "disadvantage"—are vague ones that increase uncertainty for regulated parties. Indeed, the FCC itself is uncertain what the policy means, as indicated by the FCC Chairman's admission that even he "do[esn't] really know" what conduct is proscribed. February 26, 2015 Press Conference, available at <http://goo.gl/oiPX2M> (165:30–166:54). The Commission does announce a "nonexhaustive list" of seven factors to be used in assessing providers' practices, including "end-user control," "consumer protection," "effect on innovation," and "free expression." Order, 30 FCC Rcd. at 5661–64, ¶¶ 138–45. But these factors themselves are vague and unhelpful at resolving the uncertainty.

As to the hoped-for indirect effect, the idea that it will be positive depends on the supposition that these new rules (the specific and the general) will cure some material problem, will avert some threat that either is now burdening the internet or could reasonably be expected to do so absent the Commission's intervention. Why, precisely, the observer wants to know, has the Commission repudiated the policy judgment it made in 2002, that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market"? Declaratory Ruling, 17 FCC Rcd. at 4802, ¶ 5. The answer evidently turns on the Commission's conclusion that broadband providers have indulged (or will indulge) in behavior that threatens the internet's "virtuous cycle." Indeed, the majority points to the need to reclassify broadband so that the Commission could promulgate the rules as the Commission's "'good reason' for [its] change in position," Maj. Op. 707, and indeed its only reason. But the record contains multiple reasons for thinking that the Commission's new rules will retard rather than enhance the "virtuous cycle," and the Commission's failure to answer those objections renders its decision arbitrary and capricious. I now turn to those arguments, first in the context of 47 U.S.C. §§ 201, 202 (part II.A) and then in the context of § 706 of the 1996 Act (part II.B).

II.

Having reclassified broadband service under Title II, the Commission has relied on two specific provisions to sustain its actions: § 201(b) of the Communications Act, 47 U.S.C. § 201(b), and § 706 of the Telecommunications Act of 1996, 47 U.S.C. § 1302. The petitioners contend that neither provides adequate support for the Commission's actions. Furthermore, as just mentioned, the Commission's arguments here bear directly on the reasonableness of the reclassification decision itself.

A.

Petitioners Alamo Broadband Inc. and Daniel Berninger (Alamo-Berninger) argue that even if Title II could properly be applied to broadband service, that Title gives the Commission no authority to prohibit reasonable rate distinctions. Berninger is a would-be edge provider working on new technology that he believes could provide much enhanced telephone service—but *only* if he could be assured that "latency, jitter, and packet loss in the transmission of a communication will [not] threaten voice quality and destroy the value proposition of a high-definition service." Declaration of Daniel Berninger, October 13, 2015, at 2. He is ready to pay for the assurance of high-quality service, and asserts that the Commission's ban on paid prioritization will obstruct successful commercial development of his innovation.

For our purposes, of course, the question is whether, as the Alamo-Berninger brief argues, the section of the statute invoked by the Commission under Title II, namely § 201(b), authorizes the ban, or, more precisely, whether

the Commission has offered any reasonable interpretation of § 201(b) that would encompass the ban.

A number of points by way of background: First, nothing in the Order suggests that the paid prioritization ban allows any exception for rate distinctions based on differing costs of transmission, time-sensitivity of the material transmitted, or congestion levels at the time of transmission, all variables historically understood to justify distinctions in rates. General principles of public utility rate regulation have always allowed reasonable rate distinctions, with many factors determining reasonableness. But the ban adopted by the Commission prohibits rate differentials for priority handling regardless of factors that would render them reasonable under the above understandings. Although the Order provides for the possibility of waiver, it cautions, “An applicant seeking waiver relief under this rule faces a high bar. We anticipate granting such relief only in exceptional cases.” Order, 30 FCC Rcd. at 5658, ¶ 132.

Second, in a case discussing the terms “unjust” and “unreasonable” as used in § 201(b) and in its fraternal twin § 202(a), we said that those words “open[] a rather large area for the free play of agency discretion.” *Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003).

Third, in the order under review in *Orloff* the Commission focused on § 202 but mentioned § 201. We summarized it as holding that “if a practice is just and reasonable under § 202, it must also be just and reasonable under § 201.” *Orloff*, 352 F.3d at 418.

Fourth, the Commission (at least for the moment) allows ISPs to provide *consumers* differing levels of service at differing prices. As it says in its brief, “The Order does not regulate rates—for example, broadband providers can (and some do) reasonably charge consumers more for faster service or more data.” Commission Br. 133. The statement is true (for now) vis-à-vis rates to consumers. But the ban on paid prioritization obviously regulates rates—the rates paid by edge providers; it insists that the *incremental rate* for assured or enhanced quality of service must be zero. Although I cannot claim that the parties’ exposition of the technology is clear to me, it seems evident that the factors affecting quality of delivery to a consumer include not only whatever service characteristics go into promised (and delivered) speed at the consumer end but also circumstances along the route. “Paid peering” (discussed below) would be unintelligible if it were otherwise.

With these background points in mind, I turn to the Commission’s treatments of “unjust” and “unreasonable” under §§ 201 and 202. Its principal discussions of the concept have occurred in the context of § 202(a), which bars “any unjust or unreasonable discrimination in charges, practices. . .,” etc. Section § 201(b), relied on by the Commission here, is very similar but does not include the word “discrimination.” § 201(b) (“All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful”) The Order’s language explaining its view of § 201(b) doesn’t mention this difference, so evidently the Commission’s interpretation doesn’t rely on it.

The Commission’s decisions under § 202 have plainly recognized the permissibility of reasonable rate differences. In *Dev. of Operational, Tech. & Spectrum Requirements for Meeting Fed., State & Local Pub. Safety Agency Comm’n Requirements Through the Year 2010*, Second Report and Order, 15 FCC Rcd. 16,720 (2000), for example, the Commission issued an order declaring that premium charges for prioritized emergency mobile services were not unjust and unreasonable. In full accord with the usual understanding of rate regulation, the Commission said, “Section 202 . . . does not prevent carriers from treating users differently; it bars only *unjust* or *unreasonable* discrimination. Carriers may differentiate among users so long as there is a valid reason for doing so.” *Id.* at 16,730–31 (emphasis in original).

I note that the ban here is simply on *differences* in rates, an issue normally addressed under statutory language barring discrimination. So it is at least anomalous that the Commission here relies on § 201(b), which says nothing about discrimination, rather than § 202(a), which does. The only reason I can discern is that the Commission’s interpretation of § 202 was more clearly established, and obviously didn’t ban reasonable discriminations. Accordingly, the Commission jumped over to § 201(b), about which it had said relatively little.

In the passage where the Order claims support from § 201(b), the Commission appears to acknowledge that it has never interpreted that section to support a sweeping ban on quality-of-service premiums, but, speaking of its anti-discrimination decisions (evidently under both §§ 201(b) and 202(a)), it says that “none of those precedents involved practices that the Commission has twice found threaten to create barriers to broadband development that should be removed under section 706.” Order, 30 FCC Rcd. at 5728, ¶ 292. This is an odd form of statutory interpretation. Finessing any effort to fit the agency action within the statutory *language*, it only claims that the banned practice threatens broadband deployment. Maybe the theory works, but it can do so only by a sturdy showing of how the banned conduct posed a “threat.” The Commission has made no such showing, let alone a sturdy one.

Indeed, I can find no indication—and the Commission presents none—that any of the agencies regulating natural monopolies, such as the Interstate Commerce Commission, Federal Energy Regulatory Commission, or Federal Communications Commission—has ever attempted to use its mandate to assure that rates are “just and reasonable” to invalidate a rate distinction that was not unreasonably discriminatory. To uproot over a century of interpretation—and with so little explanation—is truly extraordinary.

The short of it is that the Commission has nowhere explained why price distinctions based on quality of service would tend to impede the flourishing of the internet, or, conversely, why the status quo ante would not provide a maximum opportunity for the flourishing of edge providers as a group—or small innovative edge providers as a subgroup.

One prominent critic of the ban on paid prioritization—Timothy Brennan, the Commission’s chief economist at the time the Order was initially in production, who has called the rules “an economics-free zone”—offered an alternative that addressed these concerns. His argument goes as follows. If some potential content providers might refrain from entry for fear that poor service might stifle advantageous interactions with other sites (thus thwarting the virtuous cycle), that fear could be assuaged by requiring that ISPs meet minimum quality standards. Brennan writes that

a minimum quality standard does not preclude above-minimum quality services and pricing schemes that could improve incentives to improve broadband networks and facilitate innovation in the development and marketing of audio and video content. Moreover, a minimum quality standard should reduce the costs of and impediments to congestion management necessary under net neutrality.

Comments of International Center for Law & Economics and TechFreedom at 48. This is a proposal based on the notion that consumers value the things prevented by the Order, but it offers an alternative that solves a (perhaps hypothetical) problem at which the Order is aimed (relieving content providers of the fear discussed above and thus ensuring the virtuous cycle), without such significant costs as those the commentators discussed. The Order offers no response.

Finally, the Commission’s argument that paid prioritization would be used largely by “well-heeled incumbents,” Order, 30 FCC Rcd. at 5653–54, ¶ 126 n.286, not only is ungrounded factually (so far as appears) but contradicts the Commission’s decision (and the reasoning behind its decision) not to apply its paid prioritization ban to types of paid prioritization that use caching technology.

Caching is the storage of frequently accessed data in a location closer to some users of the data. The provider of the caching service (in some contexts called a content delivery network) thus increases the speed at which the end user can access the data. Order, 30 FCC Rcd. at 5770, ¶ 372 & n.1052. In effect, then, it prioritizes the content in question. It is provided sometimes by ISPs (sometimes at the expense of edge providers) and sometimes by third parties. *Id.*

For example, Netflix has entered agreements with several large broadband providers to obtain direct access to their content delivery networks, i.e., cached storage on their networks.

Although the Commission acknowledges that caching agreements raise many of the same issues as other types of paid prioritization, it expressly declines to adopt regulations governing them, opting instead to hear disputes related to such arrangements under §§ 201 & 202 and to “continue to monitor” the situation. Order, 30 FCC Rcd. at 5694, ¶ 205. If caching is a form of preferential traffic management—and I cannot see why it is not—then paid access to broadband providers’ caching facilities violates the paid prioritization ban, or at any rate would do so but for the Commission’s decision in ¶ 205 that it will evaluate such arrangements on a case-by-case basis rather than condemn them root-and-branch.

Another question posed by the Order but never answered is the Commission’s idea that if superior services are priced, their usage will track the size and resources of the firms using them. One would expect, instead, that firms would pay extra for extra speed and quality to the extent that those transit enhancements increased the value of goods and services to the end user. Firms do not ship medical supplies by air rather than rail or truck because the firms are rich and powerful (though doubtless some are). They use air freight where doing so enhances the effectiveness of their service enough to justify the extra cost. This obvious point explains why Berninger is a petitioner here.

The Commission’s disparate treatment of two types of prioritization that appear economically indistinguishable suggests either that it is ambivalent about the ban itself or that it has not considered the economics of the various relevant classes of transactions. Or perhaps the Commission is drawn to its present stance because it enables it to revel in populist rhetorical flourishes without a serious risk of disrupting the net.

Whatever the explanation, the Order fails to offer a reasoned basis for its view that paid prioritization is “unjust or unreasonable” within the meaning of § 201, or a reasoned explanation for why paid prioritization is

problematic, or answers to commenters' critiques and alternatives. I note that all these objections would be fully applicable even as applied to ISPs with market power.

It is true that the Commission has asserted the conclusion that the supposed beneficent effect of its new rules on edge providers as a class will (pursuant to its virtuous cycle theory) enhance demand for internet services and thus demand for broadband access services. *See* Order, 30 FCC Rcd. at 5791, ¶ 410. The Commission's predictions are due considerable deference, but when its decision shows no sign that it has examined serious countervailing contentions, that decision is arbitrary and capricious.

Accordingly, its promulgation of the rules under § 201 is, absent a better explanation, not in accordance with law.

B.

Alamo-Berninger raise two objections to the Commission's reliance on § 706 of the 1996 Act, 47 U.S.C. § 1302, as support for its new rules, especially the bans on paid prioritization, blocking and throttling (i.e., the statutory theory offered by the Commission as an alternative to its reliance on § 201). First, Alamo-Berninger develop a comprehensive claim that § 706 grants the Commission no power to issue rules. On its face the argument seems quite compelling, but I agree with the majority that the *Verizon* court's ruling on that issue was not mere dictum, but was necessary to the court's upholding of the transparency rules.

Second, Alamo-Berninger raise, albeit in rather conclusory form, the argument that "the purpose of section 706 is to move away from exactly the kind of common-carrier duties imposed by this Order. Thus . . . the rules [adopted in the Order] frustrate the purpose of the statute and are therefore unlawful." Alamo-Berninger Br. 15.

There is an irony in the Commission's coupling of its decision to subject broadband to Title II and its reliance on § 706. As the Alamo-Berninger brief argues, § 706 points away from the Commission's classification of broadband under Title II and its Order. Title II is legacy legislation from the era of monopoly telephone service. It has no inherent provision for evolution to a competitive market. It fits cases where all hope (of competitive markets) is lost. Section 706, by contrast, as part of the 1996 Act and by its terms, seeks to facilitate a shift from regulated monopoly to competition.

I believe that a threshold to application of § 706 is either (1) a finding that the regulated firms possess market power or (2) at least a regulatory history treating the firms as possessing market power (classically as natural monopolies). Under this reading of § 706, then, the Commission's refusal to take a position on market power wholly undercuts its application of § 706.

III.

Full Service Network challenges the Commission's decision to forbear from applying a host of Title II's provisions, most particularly 47 U.S.C. §§ 251–52, on the ground (among others) that forbearance, in the absence of a showing of competition between local exchange carriers (*see* 47 U.S.C. §§ 153(32), 153(54)), is arbitrary, capricious, and contrary to law. I agree to this extent: The Commission's forbearance decision highlights the dodgy character of the Commission's refusal, in choosing to reclassify broadband under Title II, to take any position on the question whether the affected firms have market power. The upshot is to leave the Commission in a state of hopeless self-contradiction.

In part II I noted that one reason for the Commission's evasion of the market-power question may well have been its intuition that the question might (unlike its handwaving about the virtuous cycle) be susceptible of a clear answer and that that answer would be fatal to its expansive mission. The issue raised by Full Service exposes another flaw in the Commission's non-decision. While a finding that the broadband market was generally competitive would, under Commission precedent, amply justify its forbearance decisions, here again the Commission refuses to take that position. Doing so would obviously undermine its decision to reclassify broadband under Title II. Strategic ambiguity best fits its policy dispositions. But strategic ambiguity on key propositions underlying its regulatory choices is just a polite name for arbitrary and capricious decisionmaking.

* * *

While the statute explicitly envisions forbearance, it does so only under enumerated conditions. To forbear, the Commission must determine that enforcement of a provision is not necessary to ensure just, reasonable, and nondiscriminatory charges and practices or to protect consumers, 47 U.S.C. § 160(a)(1)–(2), and that forbearance "is consistent with the public interest," *id.* § 160(a)(3). In making these determinations, "the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including

the extent to which such forbearance will enhance competition among providers of telecommunications services.” *Id.* § 160(b). These conditions are broadly framed, but the emphasis on consumer protection, competition, and reasonable, nondiscriminatory rates is plainly intended to implement the 1996 Act’s policy goal of promoting competition in a context that had historically been dominated by firms with market power, while assuring that consumers are protected.

The Commission relied in part on the idea that enforcement of unbundling rules would unduly deter investment, specifically that such enforcement would collide with its “duty to encourage advanced services deployment.” Order, 30 FCC Rcd. at 5851, ¶ 514. But, perhaps recognizing that this concern would apply universally to compulsory unbundling, the Commission also confronted claims that broadband providers often have local market power. But it responded to these claims not with factual refutation but with an assertion that “persuasive evidence of competition” is unnecessary as a predicate to forbearance. Order, 30 FCC Rcd. at 5807–08, ¶ 439. This assertion is in line with the Commission’s view that, “although there is some amount of competition for broadband Internet access service, it is limited in key respects.” Order, 30 FCC Rcd. at 5810, ¶ 444. The language is sufficiently vague to cover any state of competition between outright monopoly and perfect competition.

In sum, the Commission chose to regulate under a Title designed to temper the effects of market power by close agency supervision of firm conduct, but forbore from provisions aimed at constraining market power by compelling firms to share their facilities, all with no effort to perform a market power analysis. The Order’s combined reclassification-forbearance decision is arbitrary and capricious.

* * *

The ultimate irony of the Commission’s unreasoned patchwork is that, refusing to inquire into competitive conditions, it shunts broadband service onto the legal track suited to natural monopolies. Because that track provides little economic space for new firms seeking market entry or relatively small firms seeking expansion through innovations in business models or in technology, the Commission’s decision has a decent chance of bringing about the conditions under which some (but by no means all) of its actions could be grounded—the prevalence of incurable monopoly.

I would vacate the Order.

Notes and Questions

- 1. Following a Roadmap?** The D.C. Circuit majority characterizes the FCC as having followed a roadmap set out for it by the Supreme Court in *Brand X* and by the Court of Appeals itself in *Comcast* and *Verizon*. Do you think that is a fair characterization of what the FCC did?
- 2. Following the *Brand X* Dissent?** Does the FCC’s current approach vindicate the *Brand X* dissent, at least in part (in which part)? How exactly has the debate over the operational meaning of the word “offer” been resolved, both legally and factually?
- 3. Expanding the FCC’s Role Further.** The FCC’s reclassification decision had consequences beyond the issues of network neutrality and economic regulation. For example, in April 2016, the FCC initiated a proceeding to create privacy rules for broadband Internet access providers, principally under its section 222 authority. Prior to reclassification, privacy regulation of Internet providers was principally the domain of the Federal Trade Commission.

In 2016, the FCC promulgated broadband privacy regulations applicable, like the net neutrality regulations, to broadband Internet access service. *See* Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, Report and Order, 31 FCC Rcd. 13,911, 13,925, ¶ 40 (2016) (Broadband Privacy Order) (“To remove any doubt as to the scope of these rules, we define BIAS for purposes of our rules pursuant to 47 U.S.C. § 222 identically to our definition in the 2015 Open Internet Order.”). The Broadband Privacy Order was premised on the Commission’s classification of broadband Internet access service as a Title II telecommunications service. Specifically, as the parenthetical above suggests, it relied on § 222(a) for legal authority. Section 222(a) provides that “Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier.” 47 U.S.C. § 222(a).

What did the Broadband Privacy Order do? Among other things, it required BIAS providers and other telecommunications carriers to inform consumers of the providers' privacy practices and any data breaches, it prohibited these providers from offering broadband service contingent on customers' agreeing to forego privacy rights, and it prohibited them from allowing the re-identification of de-identified data (that is, data that have been altered so that they are no longer associated with individual consumers or devices). Probably its most significant provisions were those that required BIAS providers to obtain affirmative "opt-in" consent from consumers to use and share what the order identified as "sensitive information," notably including precise geo-location, financial information, health information, children's information, social security numbers, web browsing history, app usage history and the content of communications.

Why not say more about the impact of this order (and why refer to it in the past tense)? Because in the spring of 2017, Congress passed legislation pursuant to the Congressional Review Act, 5 U.S.C. §§ 801–808 (which allows Congress via simple majority vote to disapprove recently promulgated regulations) that nullified the Broadband Privacy Order. *See* Pub. L. 115-22, 131 Stat. 88 (2017). FCC Chair Ajit Pai responded by welcoming the resolution of disapproval. *See* Statement of FCC Chairman Ajit Pai on Congressional Resolution of Disapproval of FCC Broadband Privacy Regulations, 2017 WL 1165163. But even if a majority of FCC Commissioners did want to promulgate new broadband privacy regulations, the resolution of disapproval poses a major hurdle: By the terms of the Congressional Review Act, not only is the Broadband Privacy Order repealed but also it "may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule." 5 U.S.C. § 801(b)(2). So the FCC's broadband privacy regulations are not only gone but also difficult to resurrect.

4. FTC Jurisdiction. The FCC focuses on telecommunications, but it is not the only possible regulator. One obvious alternative is the Federal Trade Commission. As we noted in Chapter 2 of the casebook, the FTC can play a role in network neutrality and beyond. But FCC classification of broadband Internet access as a telecommunications service subject to regulation as common carriage entails a jurisdictional hurdle for the FTC: the statute that empowers the FTC to prevent "unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce" contains an exemption for "common carriers subject to the Acts to regulate commerce." 15 U.S.C. § 45(a)(2). So this key statutory empowerment of the FTC does not apply to common carriers. The statute does not define what a "common carrier" is. A case arose in the Ninth Circuit in which the FTC brought a complaint against AT&T Mobility alleging that its failure to disclose data-throttling (reducing speeds for some users) violated § 45, and AT&T Mobility responded that § 45(a)(2) exempted it from FTC regulation even as to activity that was not common carriage, because it had the status of a common carrier under the FCC's network neutrality regulations. The Ninth Circuit ultimately held, en banc, that the exemption for common carriers in § 45(a)(2) does not bar FTC from regulating those carriers' non-common-carriage activities. *See* Federal Trade Commission v. AT&T Mobility LLC, 883 F.3d 848 (9th Cir. 2018). But the larger issue for jurisdictional purposes is that, by statute, common carriage regulation by the FCC displaces the FTC to at least some degree. Conversely, classification of broadband Internet access (or anything else) as something other than common carriage (e.g., an information service) empowers the FTC.

5. Re-reclassifying, and Eliminating the 2015 Rules. 2017 brought a new Chair for the FCC—Commissioner (now Chair) Ajit Pai, who dissented from the FCC's 2015 Open Internet Order—and a shift in the Commission's majority. The FCC moved quickly to undo the net neutrality regulatory regime (quickly in the world of administrative law, anyway). First, in February 2017, the Wireless Telecommunications Bureau announced that it was withdrawing a previous report on so-called "zero rating" practices by several wireless companies and terminating its investigations into those practices. Wireless Telecom. Bureau Report: Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero Rated Content and Services, Order, 2017 WL 483678. Second, and more significantly, in 2018 the Commission issued the following order.

RESTORING INTERNET FREEDOM
Declaratory Ruling, Report and Order, 33 FCC Rcd. 311 (2018)

III. ENDING PUBLIC-UTILITY REGULATION OF THE INTERNET

A. Reinstating the Information Service Classification of Broadband Internet Access Service

1. Scope

21. We continue to define “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.

2. Broadband Internet Access Service Is an Information Service Under the Act

26. In deciding how to classify broadband Internet access service, we find that the best reading of the relevant definitional provisions of the Act supports classifying broadband Internet access service as an information service. Section 3 of the Act defines an “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(24). Section 3 defines a “telecommunications service,” by contrast, as “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.” 47 U.S.C. § 153(53). Finally, section 3 defines “telecommunications”—used in each of the prior two definitions—as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(50). Prior to Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015) (Title II Order), the Commission had long interpreted and applied these terms to classify various forms of Internet access service as information services—a conclusion affirmed as reasonable by the Supreme Court in *Nat’l Cable & Telecomms. Ass’n v. Brand X Servs.* 545 U.S. 967 (2005). Our action here simply returns to that prior approach.

28. We find that applying our understanding of the statutory definitions to broadband Internet access service as it is offered today most soundly leads to the conclusion that it is an information service. Although the Internet marketplace has continued to develop in the years since the earliest classification decisions, broadband Internet access service offerings still involve a number of “capabilities” within the meaning of the section 3 definition of information services, including critical capabilities that all Internet Service Provider (ISP) customers must use for the service to work as it does today. While many popular uses of the Internet have shifted over time, the record reveals that broadband Internet access service continues to offer information service capabilities that typical users both expect and rely upon. Indeed, the basic nature of Internet service—“[p]rovid[ing] consumers with a comprehensive capability for manipulating information using the Internet via high-speed telecommunications”—has remained the same since the Supreme Court upheld the Commission’s similar classification of cable modem service as an information service twelve years ago. *Brand X*, 545 U.S. at 987.

a. Broadband Internet Access Service Information Processing Capabilities

30. We begin by evaluating the “information service” definition and conclude that it encompasses broadband Internet access service. Broadband Internet access service includes “capabilit[ies]” meeting the information service definition under a range of reasonable interpretations of that term. In other contexts, the Commission has looked to dictionary definitions and found the term “capability” to be “broad and expansive,” including the concepts of “potential ability” and “the capacity to be used, treated, or developed for a particular purpose.” Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al., Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, 17020, ¶ 54 & n.194 (2003) (Triennial Review Order), *rev’d on other grounds* U.S. Telecom Ass’n v. FCC, 359 F.3d 554 (D.C. Cir. 2004). Because broadband Internet access service necessarily has the capacity or potential ability to be used to engage in the activities within the information service definition—“generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,” 47 U.S.C. § 153(24)—we conclude that it is best understood to have those “capabilit[ies].” The record reflects that fundamental purposes of broadband

Internet access service are for its use in “*generating*” and “*making available*” information to others, for example through social media and file sharing; “*acquiring*” and “*retrieving*” information from sources such as websites and online streaming and audio applications, gaming applications, and file sharing applications; “*storing*” information in the cloud and remote servers, and via file sharing applications; “*transforming*” and “*processing*” information such as by manipulating images and documents, online gaming use, and through applications that offer the ability to send and receive email, cloud computing and machine learning capabilities; and “*utilizing*” information by interacting with stored data. These are just a few examples of how broadband Internet access service enables customers to generate, acquire, store, transform, process, retrieve, utilize, and make available information. These are not merely incidental uses of broadband Internet access service—rather, because it not only has “the capacity to be used” for these “particular purpose[s]” but was designed and intended to do so, we find that broadband Internet access is best interpreted as providing customers with the “capability” for such interactions with third party providers. Triennial Review Order, 18 FCC Rcd. at 17020, ¶ 54 n.194 (discussing definition of “capability”).

31. We also find that broadband Internet access is an information service irrespective of whether it provides the *entirety* of any end user functionality or whether it provides end user functionality in tandem with edge providers. We do not believe that Congress, in focusing on the “offering of a capability,” intended the classification question to turn on an analysis of which capabilities the end user selects. Further, we are unpersuaded by commenters who assert that in order to be considered an “information service,” an ISP must not only offer customers the “capability” for interacting with information that may be offered by third parties (“click-through”), but must also provide the ultimate content and applications themselves. Although there is no dispute that many edge providers likewise perform functions to facilitate information processing capabilities, they *all* depend on the combination of information-processing and transmission that ISPs make available through broadband Internet access service. The fundamental purpose of broadband Internet access service is to “enable a constant flow of computer-mediated communications between end-user devices and various servers and routers to facilitate interaction with online content.” NCTA Reply at 7.

33. [E]ven if “capability” were understood as requiring more of the information processing to be performed by the classified service itself, we find that broadband Internet access service meets that standard. Not only do ISPs offer end users the capability to interact with information online in each and every one of the ways set forth above, they also do so through a variety of functionally integrated information processing components that are part and parcel of the broadband Internet access service offering itself. In particular, we conclude that DNS and caching functionalities, as well as certain other information processing capabilities offered by ISPs, are integrated information processing capabilities offered as part of broadband Internet access service to consumers today.

34. *DNS*. We find that DNS is an indispensable functionality of broadband Internet access service. DNS is a core function of broadband Internet access service that involves the capabilities of generating, acquiring, storing, transforming, processing, retrieving, utilizing and making available information. DNS is used to facilitate the information retrieval capabilities that are inherent in Internet access. DNS allows “‘click through’ access from one web page to another, and its computer processing functions analyze user queries to determine which website (and server) would respond best to the user’s request.” AT&T Comments at 74. And “[b]ecause it translates human language (e.g., the name of a website) into the numerical data (i.e., an IP address) that computers can process, it is indispensable to ordinary users as they navigate the Internet.” *Id.* at 73. Without DNS, a consumer would not be able to access a website by typing its advertised name (e.g., fcc.gov or cnn.com). The *Brand X* Court recognized the importance of DNS, concluding that “[f]or an Internet user, ‘DNS is a must. . . . [N]early all of the Internet’s network services use DNS. That includes the World Wide Web, electronic mail, remote terminal access, and file transfer.’” *Brand X*, 545 U.S. at 999 (quoting P. Albitz & C. Liu, *DNS and BIND 10* (4th ed. 2001)). While ISPs are not the sole providers of DNS services, the vast majority of ordinary consumers rely upon the DNS functionality provided by their ISP, and the absence of ISP-provided DNS would fundamentally change the online experience for the consumer. We also observe that DNS, as it is used today, provides more than a functionally integrated address-translation capability, but also enables other capabilities critical to providing a functional broadband Internet access service to the consumer, including for example, a variety of underlying network functionality information associated with name service, alternative routing mechanisms, and information distribution.

37. The Title II Order drew erroneous conclusions from *Computer Inquiries* precedent and too quickly rejected objections to its treatment of DNS as meeting the telecommunications management exception.¹ Under the *Computer Inquiries* framework, the Commission held that some capabilities “may properly be associated with basic [common carrier] service without changing its nature, or with an enhanced service without changing the classification of the latter as unregulated under Title II of the Act.” Communications Protocols Under Section 64.702 of the Commission’s Rules and Regulations, Memorandum Opinion, Order, and Statement of Principles, 95 FCC 2d 584, 591, ¶ 15 (1983). These commonly came to be known as “adjunct” capabilities. The Commission has held that functions it had classified as “adjunct-to-basic” under the *Computer Inquiries* framework will fall within the statutory telecommunications management exception to the information service definition. Drawing loose analogies to certain functions described as adjunct-to-basic under Commission precedent, the Title II Order held that DNS fell within the telecommunications management exception.

38. The Title II Order incorrectly assumed that so long as a functionality was, in part, used in a manner that could be viewed as adjunct-to-basic, it necessarily was adjunct-to-basic regardless of what the functionality otherwise accomplished. Although confronted with claims that DNS is, in significant part, designed to be useful to end-users rather than providers, the Title II Order nonetheless decided that it fell within the telecommunications management exception. Title II Order, 30 FCC Rcd. at 5768, ¶ 368 & n.1037. While conceding that DNS, as well as other functions like caching, “do provide a benefit to subscribers,” *id.*, the Title II Order held that they nonetheless fell within the telecommunications management exception because it found some aspect of their operation also was of use to providers in managing their networks. *Id.* This expansive view of the telecommunications management exception—and associated narrowing of the scope of information services—is a transposition of the analytical approach embodied in the MFJ and *Computer Inquiries*; under the approach in the pre-1996 Act precedent, the analysis would instead begin with the broad language of the information service or enhanced service definitions, generally excluding particular functions only if the purpose served clearly was narrowly focused on facilitating bare transmission.² The Commission and the courts made clear the narrow scope of the ‘adjunct-to-basic’ or ‘telecommunications management’ categories in numerous decisions in many different contexts.

39. The 1996 Act enunciates a policy for the Internet that distinguishes broadband Internet access from legacy services like traditional telephone service. The 1996 Act explains that it is federal policy “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.” 47 U.S.C. § 230(b)(2). The application of potentially ambiguous precedent to broadband Internet access service should be informed by how well—or how poorly—it advances that deregulatory statutory policy. We find that our approach to that precedent, which results in an information service classification of broadband Internet access service, better advances that deregulatory policy than the approach in the Title II Order, which led to the imposition of utility-style regulation under Title II.

41. *Caching.* We also conclude that caching, a functionally integrated information processing component of broadband Internet access service, provides the capability to perform functions that fall within the information service definition. As the record reflects, “[c]aching does much more than simply enable the user to obtain more rapid retrieval of information through the network; caching depends on complex algorithms to determine what information to store where and in what format.” ITIF Comments at 13. This requires “extensive information processing, storing, retrieving, and transforming for much of the most popular content on the Internet,” *id.*, and as such, caching involves storing and retrieving capabilities required by the “information service” definition. The Court affirmed this view in *Brand X*, finding “reasonable” the “Commission’s understanding” that Internet service

¹ More than fifty years ago, the Commission decided *Computer I*, the first of a series of decisions known as the *Computer Inquiries*, Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services, Notice of Inquiry, 7 FCC 2d 11 (1966), which, in combination, created a dichotomy between “basic” and “enhanced” services. Amendment of Section 64.702 of the Commission’s Rules and Regulations (*Second Computer Inquiry*), Final Decision, 77 FCC 2d 384, 420, ¶ 97 (1980). [Footnote relocated from ¶ 6 and accompanying footnotes.]

² The Modification of Final Judgment (MFJ) of 1982 distinguished between “telecommunications services,” which Bell Operating Companies could offer when “actually regulated by tariff,” *U.S. v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 228-29 (D.D.C. 1982), *aff’d sub nom. Maryland v. U.S.*, 460 U.S. 1001 (1983), and “information services,” including “data processing and other computer-related services” *id.* at 179, and “electronic publishing services,” *id.* at 180, which Bell Operating Companies (BOCs) were prohibited from offering under the terms of that court decision, *id.* at 228. [Footnote relocated from ¶ 7 and accompanying footnotes.]

“facilitates access to third-party Web pages by offering consumers the ability to store, or ‘cache,’ popular content on local computer servers,” which constitutes “the ‘capability for . . . acquiring, [storing] . . . retrieving [and] utilizing information.’” *Brand X*, 545 U.S. at 999-1000.

42. We find that ISP-provided caching does not merely “manage” an ISP’s broadband Internet access service and underlying network, it enables and enhances consumers’ access to and use of information online. The record shows that caching can be realized as part of a service, such as DNS, which is predominantly to the benefit of the user (DNS caching). Caching can also be realized in terms of content that can be accumulated by the ISP through non-confidential (i.e., non-encrypted) retrieval of information from websites (Web caching). In this case, the user benefits from a rapid retrieval of information from a local cache or repository of information while the ISP benefits from less bandwidth resources used in the retrieval of data from one or more destinations. DNS and Web caching are functions provided as part and parcel of the broadband Internet access service. When ISPs cache content from across the Internet, they are not performing functions, like switching, that are instrumental to pure transmission, but instead storing third party content they select in servers in their own networks to enhance access to information. The record reflects that without caching, broadband Internet access service would be a significantly inferior experience for the consumer, particularly for customers in remote areas, requiring additional time and network capacity for retrieval of information from the Internet. Thus, because caching is useful to the consumer, we conclude that the Title II Order erred in incorrectly categorizing caching as falling within the telecommunications system management exception to the definition of “information service.”

b. ISPs’ Service Offerings Inextricably Intertwine Information Processing Capabilities with Transmission

45. Having established that broadband Internet access service has the information processing capabilities outlined in the definition of “information service,” the relevant inquiry is whether ISPs’ broadband Internet access service offerings make available information processing technology inextricably intertwined with transmission.

46. We begin by considering the ordinary customer’s perception of the ISP’s offer of broadband Internet access service. As *Brand X* explained, “[i]t is common usage to describe what a company ‘offers’ to a consumer as what the consumer perceives to be the integrated finished product.” *Brand X*, 545 U.S. at 999-1000. ISPs generally market and provide information processing capabilities and transmission capability together as a single service. Therefore, it is not surprising that consumers perceive the offer of broadband Internet access service to include more than mere transmission, and that customers want and pay for functionalities that go beyond mere transmission.

47. This view also accords with the Commission’s historical understanding that “[e]nd users subscribing to . . . broadband Internet access service expect to receive (and pay for) a finished, functionally integrated service that provides access to the Internet. End users do not expect to receive (or pay for) two distinct services—both Internet access service and a distinct transmission service, for example.” *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al., Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd. 14853, 14910-11, ¶ 104 (2005) (Wireline Broadband Classification Order), *aff’d* *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

49. Separate and distinct from our finding that an ISP “offers” an information service from the consumer’s perspective, we find that as a factual matter, ISPs offer a single, inextricably intertwined information service. The record reflects that information processes must be combined with transmission in order for broadband Internet access service to work, and it is the combined information processing capabilities and transmission functions that an ISP offers with broadband Internet access service. Thus, even assuming that any individual consumer could perceive an ISP’s offer of broadband Internet access service as akin to a bare transmission service, the information processing capabilities that are actually offered as an integral part of the service make broadband Internet access service an information service as defined by the Act. As such, we reject commenters’ assertions that the primary function of ISPs is to simply transfer packets and not process information.

50. The inquiry called for by the relevant classification precedent focuses on the nature of the service offering the provider makes, rather than being limited to the functions within that offering that particular subscribers do, in fact, use or that third parties also provide. The Title II Order erroneously contended that, because functions like DNS and caching potentially could be provided by entities other than the ISP itself, those functions should not be understood as part of a single, integrated information service offered by ISPs. However, the fact that some consumers obtain these functionalities from third-party alternatives is not a basis for ignoring the capabilities that a broadband provider actually “offers.” The Title II Order gave no meaningful explanation why a contrary, narrower interpretation of “offer” was warranted other than, implicitly, its seemingly end-results driven effort to justify a telecommunications

service classification of broadband Internet access service.

52. We disagree with commenters who assert that ISPs necessarily offer both an information service and a telecommunications service because broadband Internet access service includes a transmission component. In providing broadband Internet access service, an ISP *makes use* of telecommunications—i.e., it provides information-processing capabilities “via telecommunications”—but does not separately *offer* telecommunications on a stand-alone basis to the public. By definition, *all* information services accomplish their functions “via telecommunications,” 47 U.S.C. § 153(50) (defining “telecommunications”), and as such, broadband Internet access service has always had a telecommunications component intrinsically intertwined with the computer processing, information provision, and computer interactivity capabilities an information service offers. Indeed, service providers, who are in the best position to understand the inputs used in broadband Internet access service, do not appear to dispute that the “via telecommunications” criteria is satisfied even if also arguing that they are *not providing* telecommunications to end-users. For example, ISPs typically transmit traffic between aggregation points on their network and the ISPs’ connections with other networks. Whether self-provided by the ISP or purchased from a third party, that readily appears to be transmission between or among points selected by the ISP of traffic that the ISP has chosen to have carried by that transmission link. Such inclusion of a transmission component does not render broadband Internet access services telecommunications services; if it did, the entire category of information services would be narrowed drastically.

53. The approach we adopt today best implements the Commission’s longstanding view that Congress intended the definitions of “telecommunications service” and “information service” to be mutually exclusive ways to classify a given service. As the *Brand X* Court found, the term “offering” in the telecommunications service definition “can reasonably be read to mean a ‘stand-alone’ offering of telecommunications.” *Brand X*, 545 U.S. at 989. Where, as in the case of broadband Internet access services, a service involving transmission inextricably intertwines that transmission with information service capabilities—in the form of an integrated information service—there cannot be “a ‘stand-alone’ offering of telecommunications” as required under that interpretation of the telecommunications service definition. *Id.* at 989. This conclusion is true even if the information service could be said to involve the provision of telecommunications as a component of the service. *Id.* at 992. The Commission’s historical approach to Internet access services carefully navigated that issue, while the Title II Order, by contrast, threatened to usher in a much more sweeping scope of “telecommunications services.”

54. The Title II Order interpretation stands in stark contrast to the Commission’s historical classification precedent and the views of all Justices in *Brand X*. Beginning with the earliest classification decisions, the Commission found that transmission provided by ISPs outside the last mile was part of an integrated information service. The DSL transmission service previously required to be unbundled by the *Computer Inquiries* rules likewise was limited to the “last mile” connection between the end-user and the ISP. Nor did any Justice in *Brand X* contest the view that, beyond the last mile, cable operators were offering an information service. Indeed, the Title II Order’s broad interpretation of “telecommunications service” stands in contrast to the views of Justice Scalia himself, on which the Title II Order purports to rely. Justice Scalia was skeptical that a telecommunications service classification of cable modem service would lead to the classification of ISPs as telecommunications carriers based on the transmission underlying their “connect[ions] to other parts of the Internet, including Internet backbone providers.” *Brand X*, 545 U.S. at 1010-11 (Scalia, J., dissenting). Yet the Title II Order reached essentially that outcome. The Title II Order’s interpretation of the statutory definitions did not merely lead it to classify “last mile” transmission as a telecommunications service. Rather, under the view of the Title II Order, even the transmissions underlying an ISP’s connections to other parts of the Internet, including Internet backbone providers, were part of the classified telecommunications service. Even if the Title II Order’s classification approach does not technically render the category of information services a nullity, the fact that its view of telecommunications services sweeps so much more broadly than previously considered possible provides significant support for our reading of the statute and the classification decision we make today.

55. In contrast, our approach leaves ample room for a meaningful range of “telecommunications services.” Historically, the Commission has distinguished service offerings that “always and necessarily combine” functions such as “computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications such as e-mail, and access web pages and newsgroups,” on the one hand, from services “that carriers and end users typically use [] for basic transmission purposes” on the other hand. Wireline Broadband Classification Order, 20 FCC Rcd. at 14860-61, ¶ 9. Thus, an offering like broadband Internet access service that “always and necessarily” includes integrated transmission and information service capabilities

would be an information service. The Commission’s historical interpretation thus gives full meaning to both “information service” and “telecommunications service” categories in the Act.

56. We reject assertions that the analysis we adopt today would necessarily mean that standard telephone service is likewise an information service. The record reflects that broadband Internet access service is categorically different from standard telephone service in that it is “*designed with* advanced features, protocols, and security measures so that it can integrate directly into electronic computer systems and enable users to electronically create, retrieve, modify and otherwise manipulate information stored on servers around the world.” Verizon Reply at 32-33. Further, “[t]he dynamic network functionality enabling the Internet connectivity provided by [broadband Internet access services] is fundamentally different from the largely static one dimensional, transmission oriented Time Division Multiplexing (TDM) voice network.” CenturyLink Comments at 26. This finding is consistent with past distinctions. Under pre-1996 Act MFJ precedent, for example, although the provision of time and weather services was an information service, when a BOC’s traditional telephone service was used to call a third party time and weather service “the Operating Company does not ‘provide information services’ within the meaning of section II(D) of the decree; it merely transmits a call under the tariff.” *U.S. v. West. Elec. Co., Inc.*, 578 F. Supp. 658, 661 (D.D.C. 1983). In other words, the fundamental nature of traditional telephone service, and the commonly-understood purpose for which traditional telephone service is designed and offered, is to provide basic transmission—a fact not changed by its incidental use, on occasion, to access information services. By contrast, the fundamental nature of broadband Internet access service, and the commonly-understood purpose for which broadband Internet access service is designed and offered, is to enable customers to generate, acquire, store, transform, process, retrieve, utilize, and make available information. In addition, broadband Internet access service includes DNS and caching functionalities, as well as certain other information processing capabilities. As such, we reject assertions that, under the approach we adopt today, any telephone service would be an information service because voice customers can get access to either automated information services or a live person who can provide information.

C. *Public Policy Supports Classifying Broadband Internet Access Service As An Information Service*

86. While our legal analysis concluding that broadband Internet access service is best classified as an information service under the Act is sufficient grounds alone on which to base our classification decision, the public policy arguments advanced in the record and economic analysis reinforce that conclusion. We find that reinstating the information service classification for broadband Internet access service is more likely to encourage broadband investment and innovation, furthering our goal of making broadband available to all Americans and benefitting the entire Internet ecosystem.

87. Based on the record in this proceeding, we conclude that economic theory, empirical studies, and observational evidence support reclassification of broadband Internet access service as an information service rather than the application of public-utility style regulation on ISPs. We find the Title II classification likely has resulted, and will result, in considerable social cost, in terms of foregone investment and innovation. At the same time, classification of broadband Internet access service under Title II has had no discernable incremental benefit relative to Title I classification. The regulations promulgated under the Title II regime appear to have been a solution in search of a problem. Close examination of the examples of harm cited by proponents of Title II to justify heavy-handed regulation reveal that they are sparse and often exaggerated. Moreover, economic incentives, including competitive pressures, support Internet openness. We find that the gatekeeper theory, the bedrock of the Title II Order’s overall argument justifying its approach, is a poor fit for the broadband Internet access service market. Further, even if there may be potential harms, we find that pre-existing legal remedies, particularly antitrust and consumer protection laws, sufficiently address such harms so that they are outweighed by the well-recognized disadvantages of public utility regulation. As such, we find that public policy considerations support our legal finding that broadband Internet access service is an information service under the Act.

2. *Utility-Style Regulation of Broadband Is a Solution in Search of a Problem*

109. *The Internet was open before Title II, and many economic factors support openness.* The Internet thrived for decades under the light-touch regulatory regime in place before the Title II Order, as ISPs built networks and edge services were born. We find that the sparse evidence of harms discussed in the Title II Order—evidence repeated by commenters in this proceeding as the basis for adopting a Title II classification—demonstrates that the incremental benefits of Title II over light-touch regulation are inconsequential, and pale in comparison to the significant costs of public-utility regulation.

110. The Internet as we know it developed and flourished under light-touch regulation. It is self-evident

that the hypothetical harms against which the Title II Order purported to protect did not thwart the development of the Internet ecosystem. Edge providers have been able to disrupt a multitude of markets—finance, transportation, education, music, video distribution, social media, health and fitness, and many more—through innovation, all without subjecting the networks that carried them to onerous utility regulation. It is telling that the Title II Order and its proponents in this proceeding can point only to a handful of incidents that purportedly affected Internet openness, while ignoring the two decades of flourishing innovation that preceded the Title II Order.

116. Because of the paucity of concrete evidence of harms to the openness of the Internet, the Title II Order and its proponents have heavily relied on purely speculative threats. We do not believe hypothetical harms, unsupported by empirical data, economic theory, or even recent anecdotes, provide a basis for public-utility regulation of ISPs. Indeed, economic theory demonstrates that many of the practices prohibited by the Title II Order can sometimes harm consumers and sometimes benefit consumers; therefore, it is not accurate to presume that all hypothetical effects are harmful. Intrusive, investment-inhibiting Title II regulation requires a showing of actual harms, and after roughly fifteen years of searching, proponents of Title II have found “astonishing[ly]” few. *See* United States Telecom Ass’n v. FCC, 825 F.3d 674, 761-62 (D.C. Cir. 2016) (Williams, J., dissenting). Further, the transparency rule we adopt today will require ISPs to clearly disclose such practices and this, coupled with existing consumer protection and antitrust laws, will significantly reduce the likelihood that ISPs will engage in actions that would harm consumers or competition. To the extent that our approach relying on transparency requirements, consumer protection laws, and antitrust laws does not address all concerns, we find that any remaining unaddressed harms are small relative to the costs of implementing more heavy-handed regulation.

117. *Incentives.* We find, based on the record before us, that ISPs have strong incentives to preserve Internet openness, and these interests typically outweigh any countervailing incentives an ISP might have. Consequently, Title II regulation is an unduly heavy-handed approach to what, at worst, are relatively minor problems. Although the Title II Order argued that ISPs were incentivized to harm edge innovation, it also conceded that ISPs benefit from the openness of the Internet. The Title II Order found that “when a broadband provider acts as a gatekeeper, it actually chokes consumer demand for the very broadband product it can supply.” *See* Title II Order, 30 FCC Rcd. at 5608, ¶ 20. We agree. The content and applications produced by edge providers often complement the broadband Internet access service sold by ISPs, and ISPs themselves recognize that their businesses depend on their customers’ demand for edge content. It is therefore no surprise that many ISPs have committed to refrain from blocking or throttling lawful Internet conduct notwithstanding any Title II regulation. Finally, to the extent these economic forces fail in any particular situation, existing consumer protection and antitrust laws additionally protect consumers. We therefore find that Title II, and the attendant utility-style regulation of ISPs, are an unnecessarily heavy-handed approach to protecting Internet openness.

118. The Open Internet and Title II Orders claimed to base their actions on a theory that broadband adoption is driven by a “virtuous cycle,” whereby edge provider development “increase[s] end-user demand for [Internet access services], which [drive] network improvements, which in turn lead to further innovative network uses.” Preserving the Open Internet; Broadband Industry Practices, Report and Order, 25 FCC Rcd. 17905, 17910-11, ¶ 14 (2010) (Open Internet Order); Title II Order, 30 FCC Rcd. at 5603, 5604, 5608-09, ¶¶ 2, 7, 20-21. The Title II Order concluded that Commission action was necessary to protect this virtuous cycle because “gatekeeper” power on the part of ISPs might otherwise thwart it, as ISPs “are unlikely to fully account for the detrimental impact on edge providers’ ability and incentive to innovate and invest.”³ However, the economic analysis in the Open Internet Order and Title II Order was at best only loosely based on the existing economics literature, in some cases contradicted peer-reviewed economics literature, and included virtually no empirical evidence.

119. We find it essential to take a holistic view of the market(s) supplied by ISPs. ISPs, as well as edge providers, are important drivers of the virtuous cycle, and regulation must be evaluated accounting for its impact on ISPs’ capacity to drive that cycle, as well as that of edge providers. The underlying economic model of the virtuous cycle is that of a two-sided market. In a two-sided market, intermediaries—ISPs in our case—act as platforms facilitating interactions between two different customer groups, or sides of the market—edge providers and end users. The Open Internet Order takes the position that edge provider innovation drives consumer adoption of Internet access and platform upgrades. The key characteristic of a two-sided market, however, is that participants on each side of the market value a platform service more as the number and/or quality of participants on the platform’s other side increases. (The benefits subscribers on one side of the market bring to the subscribers on the other, and *vice versa*, are called positive externalities.) Thus, rather than a single side driving the market, both sides generate network

³ [These quotations are from ¶¶ 23-25 of the 2010 Open Internet Order. Eds.]

externalities, and the platform provider profits by inducing both sides of the market to use its platform. In maximizing profit, a platform provider sets prices and invests in network extension and innovation, subject to costs and competitive conditions, to maximize the gain both sides of the market obtain from interacting across the platform. The more competitive the market, the larger the net gains to subscribers and edge providers. Any analysis of such a market must account for each side of the market and the platform provider.

120. Innovation by ISPs may take the form of reduced costs, network extension, increased reliability, responsiveness, throughput, ease of installation, and portability. These types of innovations are as likely to drive additional broadband adoption as are services of edge providers. In 2016, nearly 80 percent of Americans used fixed Internet access at home. There is no evidence that the remaining nearly one-fifth of the population are all waiting for the development of applications that would make Internet access useful to them. Rather, the cost of broadband Internet access service is a central reason for non-adoption. ISP innovation that lowers the relative cost of Internet access service is as likely as edge innovation, if not more so, to positively impact consumer adoption rates. Indeed, ISPs likely play a crucial role by offering, for example, low-margin or loss-leading offers designed to induce skeptical Internet users to discover the benefits of access. In response to a larger base of potential customers, the returns to innovation by edge providers would be expected to rise, thereby spurring additional innovative activity in that segment of the market.

121. Accordingly, arguments that ISPs have other incentives to take actions that might harm the virtuous cycle, and hence might require costly Title II regulation, need to be explained and evaluated empirically. In a two-sided market, three potential reasons for Title II regulation arise: the extent to which ISPs have market power in selling Internet access to end users; the extent to which ISPs have market power in selling to edge providers access to the ISP's subscribers (end users), which seems to primarily be to what the Commission and others appear to be referring when using the term "gatekeeper"; and the extent to which the positive externalities present in a two-sided market might lead to market failure even in the absence (or because of that absence) of ISP market power. In considering each of these, we find that, where there are problems, they have been overestimated, and can be substantially eliminated or reduced by the more light-handed approach this order implements.

122. Our approach recognizes our limits as regulators, and is appropriately focused on the long-lasting effects of regulatory decisions. Thus, we seek to balance the harms that arise in the absence of regulation against the harms of regulation, accounting for, in particular, the effects of our actions on investment decisions that could increase competition three to five or more years from now. We note that our reclassification of broadband Internet access service as an information service leaves the usual recourse of antitrust and consumer protection action available to all parties. That is, heavy-handed Title II regulation is unnecessary to enforce antitrust and consumer protection laws.

123. *Fixed ISPs Often Face Material Competitive Constraints.* The premise of Title II and other public utility regulation is that ISPs can exercise market power sufficient to substantially distort economic efficiency and harm end users. However, analysis of broadband deployment data, coupled with an understanding of ISPs' underlying cost structure, indicates fixed broadband Internet access providers frequently face competitive pressures that mitigate their ability to exert market power. Therefore, the primary market failure rationale for classifying broadband Internet access service under Title II is absent. Furthermore, the presence of competitive pressures in itself protects the openness of the Internet. The theory that competition is the best way to protect consumers is the "heart of our national economic policy" and the premise of the 1996 Act. Hon. Maureen K. Ohlhausen, *Antitrust Over Net Neutrality*, 15 COLO. TECH. L. J. 119, 122 (2016) (quoting *Standard Oil Co. v. FTC*, 340 U.S. 231, 249 (1951)) (Ohlhausen, *Antitrust Over Net Neutrality*). We therefore find that the competition that exists in the broadband market, combined with the protections of our consumer protection and antitrust laws against anticompetitive behaviors, will constrain the actions of an ISP that attempts to undermine the openness of the Internet in ways that harm consumers, and to the extent they do not, any resulting harms are outweighed by the harms of Title II regulation.

131. *ISP Competition in Supplying Edge Providers Access to End Users.* On the other side of the market, to the extent ISPs have market power in supplying edge providers, ISP prices to edge providers could distort economic efficiency (a potential harm that is distinct from anticompetitive behavior or because of a failure to internalize a relevant externality). Loosely speaking, such power over an edge provider can arise under one of two conditions: the ISP has conventional market power over the edge provider because it controls a substantial share of (perhaps a specific subset of) end-user subscribers that are of interest to the edge provider, or that edge provider's customers only subscribe to one ISP (a practice known as single homing).

134. [L]arger edge providers, such as Amazon, Facebook, Google and Microsoft, likely have significant advantages that would reduce the prospect of inefficient outcomes due to ISP market power. For example, the market

capitalization of the smallest of these five companies, Amazon, is more than twice that of the largest ISP, Comcast, and the market capitalization of Google alone is greater than every cable company in America combined. Action by these larger edge providers preventing or reducing the use of ISP market power could spill over to smaller edge providers, and in any case, is unlikely to anticompetitively harm them given existing antitrust protections (since arrangements between an ISP and a large established edge provider must be consistent with antitrust law). Consequently, any market power even the largest ISPs have over access to end users is limited in the extent it can distort edge provider decisions (or those of their end users).

135. Despite the preceding analysis, a second claim is made that relies solely on the second factor, single homing: “regardless of the competition in the local market for broadband Internet access, once a consumer chooses a broadband provider, that provider has a monopoly on access to the subscriber Once the broadband provider is the sole provider of access to an end user, this can influence that network’s interactions with edge providers, end users, and others.” Title II Order, 30 FCC Rcd. at 5629-30, ¶ 80. Commenters have echoed this “terminating access monopoly” concern. The Title II Order contended that these forces applied to all ISPs, whether large or small, fixed or mobile, fiber or satellite, and “therefore [it] need not consider whether market concentration gives broadband providers the ability to raise prices.” Title II Order, 30 FCC Rcd. at 5633, ¶ 84.

136. As a blanket statement, this position is not credible. It is unlikely that any ISP, except the very largest, could exercise substantial market power in negotiations with Google or Netflix, but almost certainly no small wireless ISP, or a larger but still small rural cable company or incumbent LEC, could do so. Further, from the perspective of many edge providers, end users do not single home, but subscribe to more than one platform (e.g., one fixed and one mobile) capable of granting the end user effective access to the edge provider’s content (i.e., they multi-home). As the Title II Order acknowledges, to the extent multihoming occurs in the use of an application, there is no terminating monopoly.

137. Moreover, to the extent a terminating monopoly exists for some edge providers, and it is not offset or more than offset by significant advantages, there is the question of the extent to which the resulting prices are economically inefficient. A terminating (access) monopoly arises when customers on one side of the market, roughly speaking end users in our case, single home with little prospect of switching to another platform in the short run, while customers on the other side, roughly speaking edge providers in our case, find it worthwhile to multi-home. The terminating monopoly differs from conventional market power because it can arise despite effective competition between platforms. In that case, platforms must vigorously compete for single-homing end users, but have less need to compete for edge providers, who subscribe to all platforms. This means each ISP faces strong pressures to cut prices to end users, but does not face similar pressures in pricing to edge providers. However, ISPs are unlikely to earn supranormal profits, so any markups earned from edge providers in excess of total costs are generally passed through to end users. While such an outcome generally will not be efficient, there is no general presumption about the extent of that inefficiency, or even if prices to the multi-homers ideally should be lower than would emerge in the absence of a termination monopoly. In the present case, there is no substantive evidence in the record that demonstrates how different efficient prices to edge providers would be from the prices that would emerge without rules banning paid prioritization or prohibiting ISPs from charging providers at all.

138. Lastly, we find the record presents no compelling evidence that any inefficiencies, to the extent they exist, justify Title II regulation. There is no empirical evidence that the likely effects from conventional market power or the terminating monopoly, to the extent they exist, are likely to be significant, let alone outweigh the harmful effects of Title II regulation. For all these reasons, we find no case for supporting Title II regulation of ISP prices to edge providers.

139. *Externalities Associated with General-Purpose Technologies Are Not a Convincing Rationale for Title II Regulation.* Some commenters make somewhat inchoate arguments that ISPs should not be permitted to treat different edge providers’ content differently or charge more than a zero price because the Internet is a “general purpose technology” and/or the services of some edge providers create positive externalities that the edge providers cannot appropriate. Hogendorn may propose the most coherent version of this argument: because the Internet is a general purpose technology (GPT), when an ISP sets a price to any edge provider, the ISP does not take into account the positive externalities generated by the broad (e.g., GPT) use of those edge providers’ applications (just as edge providers do not). Unfortunately, these commentators fail to define or substantiate the extent of the problem, if any; fail to demonstrate how much the situation would be improved by requiring nondiscriminatory treatment of all edge providers; do not explain why, if nondiscriminatory treatment is required, it should be at a zero price; do not assess whether the costs of such an intervention would be offset by the benefits; and do not consider whether other less

regulatory measures would be more appropriate. Instead, these commenters seek to apply Title II regulation to all ISPs, and consider the solution to their concern that certain services or the Internet itself might be inefficiently undersupplied (for reasons well beyond the control of ISPs) to be a ban on ISPs only (and not other input suppliers of edge providers) charging edge providers *any* price. We reject this approach as unreasonable and unreasoned.

3. *Pre-Existing Consumer Protection and Competition Laws Protect the Openness of the Internet*

140. In the unlikely event that ISPs engage in conduct that harms Internet openness, despite the paucity of evidence of such incidents, we find that utility-style regulation is unnecessary to address such conduct. Other legal regimes—particularly antitrust law and the FTC’s authority under Section 5 of the FTC Act to prohibit unfair and deceptive practices—provide protection for consumers. These long-established and well-understood antitrust and consumer protection laws are well-suited to addressing any openness concerns, because they apply to the whole of the Internet ecosystem, including edge providers, thereby avoiding tilting the playing field against ISPs and causing economic distortions by regulating only one side of business transactions on the Internet.

141. *Consumer Protection.* The FTC has broad authority to protect consumers from “unfair or deceptive acts or practices.” 15 U.S.C. § 45(a)(1). As the nation’s premier consumer protection agency, the FTC has exercised its authority, which arises from Section 5 of the FTC Act, to protect consumers in all sectors of the economy. The FTC has used its Section 5 authority to enjoin some of the practices at issue in this proceeding, such as throttling. The FTC is prohibited under the FTC Act from regulating common carriers. As a result, the Commission’s classification of broadband Internet access service as a common carriage telecommunications service stripped the FTC of its authority over ISPs. Therefore, as discussed in greater detail below, the return to Title I will increase the FTC’s effectiveness in protecting consumers. Today’s reclassification of broadband Internet access service restores the FTC’s authority to enforce any commitments made by ISPs regarding their network management practices that are included in their advertising or terms and conditions. The FTC’s unfair-and-deceptive-practices authority “prohibits companies from selling consumers one product or service but providing them something different,” which makes voluntary commitments enforceable. Acting Chairman Ohlhausen Comments at 10-11. The FTC also requires the “disclos[ur]e [of] material information if not disclosing it would mislead the consumer,” so if an ISP “failed to disclose blocking, throttling, or other practices that would matter to a reasonable consumer, the FTC’s deception authority would apply.” *Id.* at 11. Today’s reclassification also restores the FTC’s authority to take enforcement action against unfair acts or practices. An unfair act or practice is one that creates substantial consumer harm, is not outweighed by countervailing benefits to consumers, and that consumers could not reasonably have avoided. A unilateral change in a material term of a contract can be an unfair practice. The FTC’s 2007 Report on Broadband Industry Practices raises the possibility that an ISP that starts treating traffic from different edge providers differently without notifying consumers and obtaining their consent may be engaging in a practice that would be considered unfair under the FTC Act.

142. Many of the largest ISPs have committed in this proceeding not to block or throttle legal content. These commitments can be enforced by the FTC under Section 5, protecting consumers without imposing public-utility regulation on ISPs. As discussed below, we believe that case-by-case, *ex post* regulation better serves a dynamic industry like the Internet and reduces the risk of over-regulation. We also reject assertions that the FTC has insufficient authority, because, as Verizon argues, “[i]f broadband service providers’ conduct falls outside [the FTC’s] grant of jurisdiction—that is, if their actions cannot be described as anticompetitive, unfair, or deceptive—then the conduct should not be banned in the first place.” Verizon Reply at 27. And the transparency rule that we adopt today should allay any concerns about the ambiguity of ISP commitments, by requiring ISPs to disclose if the ISPs block or throttle legal content. Finally, we expect that any attempt by ISPs to undermine the openness of the Internet would be resisted by consumers and edge providers. We also observe that all states have laws proscribing deceptive trade practices.

143. *Antitrust.* The antitrust laws, particularly Sections 1 and 2 of the Sherman Act, as well as Section 5 of the FTC Act, protect competition in all sectors of the economy where the antitrust agencies have jurisdiction. When challenged as anticompetitive under the antitrust laws, the types of conduct and practices prohibited under the Title II Order would likely be evaluated under the “rule of reason,” which amounts to a consumer welfare test. The Communications Act includes an antitrust savings clause, so the antitrust laws apply with equal vigor to entities regulated by the Commission. Should the hypothetical anticompetitive harms that proponents of Title II imagine eventually come to pass, application of the antitrust laws would address those harms.

144. Section 1 of the Sherman Act bars contracts, combinations, or conspiracies in restraint of trade, making anticompetitive arrangements illegal. If ISPs reached horizontal agreements to unfairly block, throttle, or discriminate against Internet conduct or applications, these agreements likely would be *per se* illegal under the antitrust

laws. Section 2 of the Sherman Act, which applies if a firm possesses or has a dangerous probability of achieving monopoly power, prohibits exclusionary conduct, which can include refusals to deal and exclusive dealing, tying arrangements, and vertical restraints. Section 2 makes it unlawful for a vertically integrated ISP to anticompetitively favor its content or services over unaffiliated edge providers' content or services. Treble damages are available under both Section 1 and Section 2.

146. Among the benefits of the antitrust laws over public utility regulation are (1) the rule of reason allows a balancing of pro-competitive benefits and anti-competitive harms; (2) the case-by-case nature of antitrust allows for the regulatory humility needed when dealing with the dynamic Internet; (3) the antitrust laws focus on protecting competition; and (4) the same long-practiced and well-understood laws apply to all Internet actors.

147. *Reasonableness.* The unilateral conduct that is covered by Section 2 of the Sherman Act would be evaluated under a standard similar to the rule of reason applicable to conduct governed by Section 1, "an all-encompassing inquiry, paying close attention to the consumer benefits and downsides of the challenged practice based on the facts at hand." Ohlhausen, *Antitrust Over Net Neutrality*, 15 *Colo. Tech. L.J.* at 142. We believe that such an inquiry will strike a better balance in protecting the openness of the Internet and continuing to allow the "permissionless innovation" that made the Internet such an important part of the modern U.S. economy, as antitrust uses a welfare standard defined by economic analysis shaped by a significant body of precedent.

148. The case-by-case, content-specific analysis established by the rule of reason will allow new innovative business arrangements to emerge as part of the ever-evolving Internet ecosystem. New arrangements that harm consumers and weaken competition will run afoul of the Sherman Act, and successful plaintiffs will receive treble damages. The FTC and DOJ can also bring enforcement actions in situations where private plaintiffs are unable or unwilling to do so. New arrangements benefiting consumers, like so many Internet innovations over the last generation, will be allowed to continue, as was the case before the imposition of Title II utility-style regulation of ISPs.

149. We reject commenters' assertions that the case-by-case nature of antitrust enforcement makes it inherently flawed. A case-by-case approach minimizes the costs of overregulation, including tarring all ISPs with the same brush, and reduces the risk of false positives when regulation is necessary. We believe the Commission's bright-line and Internet conduct rules are more likely to inhibit innovation before it occurs, whereas antitrust enforcement can adequately remedy harms should they occur. As such, we reject the argument that innovation is best protected by *ex ante* rules and command-and-control government regulation. Further, while a handful of ISPs are large and vertically integrated with content producers, most ISPs are small companies that have no leverage in negotiations with large edge providers, which include some of the most valuable companies in the world. Regulating these companies is unnecessarily harmful. The antitrust laws can be tailored to the ISP's circumstances.

150. Moreover, the case-by-case analysis, coupled with the rule of reason, allows for innovative arrangements to be evaluated based on their real-world effects, rather than a regulator's *ex ante* predictions. Such an approach better fits the dynamic Internet economy than the top-down mandates imposed by Title II. Further, the antitrust laws recognize the importance of protecting innovation. Indeed, the FTC has pursued several cases in recent years where its theory of harm was decreased innovation. Accordingly, we believe that antitrust law can sufficiently protect innovation, which is a matter of particular importance for the continued development of the Internet. We also find that the combination of the transparency rule, ISP commitments, and their enforcement by the FTC sufficiently address the argument made by several commenters that antitrust moves too slowly and is too expensive for many supposed beneficiaries of regulation.

151. Additionally, the existence of antitrust law deters much potential anticompetitive conduct before it occurs, and where it occurs offers recoupment through damages to harmed competitors. Some commenters have cast doubt on the effectiveness of *ex post* enforcement, preferring *ex ante* rules. Yet as the FTC staff noted in its comments, this is a false dichotomy. "Effective rule of law requires both appropriate standards—whether established by common law court, Congress in statute, or by an agency in rules—and active enforcement of those standards." FTC Staff Comments at 21. Even the "bright line" rules in the Title II Order contain an exception for "reasonable network management." An ISP accused of violating those rules would be the subject of an *ex post* FCC enforcement action. The FCC would have to determine *ex post* whether a challenged practice constituted technical network management or not.

152. Moreover, economic research has demonstrated that the threat of antitrust enforcement deters anticompetitive actions. Block et al. find that an increase in the likelihood of antitrust enforcement in the U.S. has a

significant effect on lowering prices to consumers. Similarly it has been found that countries with vigorous antitrust statutes and enforcement, such as the United States, reduce the effects of anticompetitive behavior when it does occur. There is also evidence that firms, once they have been subject to an enforcement action, are less likely to violate the antitrust laws in the future. Overall, we have confidence that the use of antitrust enforcement to protect competition in the broadband internet service provider market will ensure that consumers continue to reap the benefits of that competition. We conclude that the light-touch approach that we adopt today, in combination with existing antitrust and consumer protection laws, more than adequately addresses concerns about Internet openness, particularly as compared to the rigidity of Title II.

153. *Focus on protecting competition.* One of the benefits of antitrust law is its strong focus on protecting competition and consumers. If a particular practice benefits consumers, antitrust law will not condemn it. The fact that antitrust law protects competition means that it also protects other qualities that consumers value. The market competition that antitrust law preserves will protect values such as free expression, to the extent that consumers value free expression as a service attribute and are aware of how their ISPs' actions affect free expression. The lack of evidence of harms to free expression on the Internet also bolsters our belief that Title II is unnecessary to protect social values that are not the focus of antitrust. The anecdotes of harms to Internet openness cited by supporters of the Title II Order almost exclusively concern business decisions regarding network management, rather than being aimed at or impacting political expression. In any case, the transparency rule and the ISP commitments backed up by FTC enforcement are targeted to preserving free expression, particularly the no-blocking commitment.

154. Finally, applying antitrust principles to ISP conduct is consistent with longstanding economic and legal principles that cover all sectors of the economy, including the entire Internet ecosystem. Applying the same body of law to ISPs, edge providers, and all Internet actors avoids the regulatory distortions of Title II, which “impos[ed] asymmetric behavioral regulations . . . on broadband ISPs under the banner of protecting Internet openness, but le[ft] Internet edge providers free to threaten or engage in the same types of behavior prohibited to ISPs free of any *ex ante* constraints.” ACA Comments at 67. Our decision today to return to light-touch Title I regulation and the backstop of generally-applicable antitrust and consumer protection law “help[s] to ensure a level, technology-neutral playing field” for the whole Internet. NCTA Comments at 56.

E. Effects on Regulatory Structures Created by the Title II Order

7. Preemption of Inconsistent State and Local Regulations

194. We conclude that regulation of broadband Internet access service should be governed principally by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements. Our order today establishes a calibrated federal regulatory regime based on the pro-competitive, deregulatory goals of the 1996 Act. Allowing state and local governments to adopt their own separate requirements, which could impose far greater burdens than the federal regulatory regime, could significantly disrupt the balance we strike here. Federal courts have uniformly held that an affirmative federal policy of *deregulation* is entitled to the same preemptive effect as a federal policy of regulation. In addition, allowing state or local regulation of broadband Internet access service could impair the provision of such service by requiring each ISP to comply with a patchwork of separate and potentially conflicting requirements across all of the different jurisdictions in which it operates. Just as the Title II Order promised to “exercise our preemption authority to preclude states from imposing regulations on broadband service that are inconsistent” with the federal regulatory scheme, we conclude that we should exercise our authority to preempt any state or local requirements that are inconsistent with the federal deregulatory approach we adopt today. See Title II Order, 30 FCC Rcd. at 5804, ¶ 433.

195. We therefore preempt any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order. Among other things, we thereby preempt any so-called “economic” or “public utility-type” regulations,⁷³⁰ including common-carriage

⁷³⁰ The terms “economic regulation” and “public utility-type regulation,” as used here, are terms of art that the Commission has used to include, among other things, requirements that all rates and practices be just and reasonable; prohibitions on unjust or unreasonable discrimination; tariffing requirements; accounting requirements; entry and exit restrictions; interconnection obligations; and unbundling or network-access requirements. See, e.g., IP-Enabled Services, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863, 4911-13, ¶¶ 73-74 (2004) (IP-Enabled Services

requirements akin to those found in Title II of the Act and its implementing rules, as well as other rules or requirements that we repeal or refrain from imposing today because they could pose an obstacle to or place an undue burden on the provision of broadband Internet access service and conflict with the deregulatory approach we adopt today.

IV. *A LIGHT-TOUCH FRAMEWORK TO RESTORE INTERNET FREEDOM*

208. [W]e next reevaluate the rules and enforcement regime adopted in the Title II Order. That reevaluation is informed—as it must be—by the return of jurisdiction to the Federal Trade Commission to police ISPs for anticompetitive acts or unfair and deceptive practices. Against that backdrop, we first decide to retain the transparency rule adopted in the Open Internet Order with slight modifications. History has shown that transparency is critical to openness—consumers and entrepreneurs are not afraid to make their voices heard when ISPs engage in practices to which they object. And we conclude that preexisting federal protections—alongside the transparency rule we adopt today—are not only sufficient to protect Internet freedom, but will do so more effectively and at lower social cost than the Title II Order’s conduct rules. In short, we believe the light-touch framework we adopt today will pave the way for additional innovation and investment that will facilitate greater consumer access to more content, services, and devices, and greater competition.

A. *Transparency*

2. *Refining the Transparency Rule*

215. Today, we retain the transparency rule as established in the Open Internet Order, with some modifications, and eliminate the additional reporting obligations of the Title II Order. We find many of those additional reporting obligations significantly increased the burdens imposed on ISPs without providing countervailing benefits to consumers or the Commission. As a result, we recalibrate the requirements under the transparency rule. Specifically, we adopt the following rule:

Any person providing broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient to enable consumers to make informed choices regarding the purchase and use of such services and entrepreneurs and other small businesses to develop, market, and maintain Internet offerings. Such disclosure shall be made via a publicly available, easily accessible website or through transmittal to the Commission.

216. In doing so, we note that the record overwhelmingly supports retaining at least some transparency requirements. Crucially, the transparency rule will ensure that consumers have the information necessary to make informed choices about the purchase and use of broadband Internet access service, which promotes a competitive marketplace for those services. Disclosure supports innovation, investment, and competition by ensuring that entrepreneurs and other small businesses have the technical information necessary to create and maintain online content, applications, services, and devices, and to assess the risks and benefits of embarking on new projects.

217. What is more, disclosure increases the likelihood that ISPs will abide by open Internet principles by reducing the incentives and ability to violate those principles, that the Internet community will identify problematic conduct, and that those affected by such conduct will be in a position to make informed competitive choices or seek available remedies for anticompetitive, unfair, or deceptive practices. Transparency thereby “increases the likelihood that harmful practices will not occur in the first place and that, if they do, they will be quickly remedied.” Open Internet Order, 25 FCC Rcd. at 17936-37, ¶ 53. We apply our transparency rule to broadband Internet access service, as well as functional equivalents or any service that is used to evade the transparency requirements we adopt today.

B. *Bright-Line and General Conduct Rules*

239. We eliminate the conduct rules adopted in the Title II Order—including the general conduct rule and the prohibitions on paid prioritization, blocking, and throttling. We do so for three reasons. First, the transparency rule we adopt, in combination with the state of broadband Internet access service competition and the antitrust and consumer protection laws, obviates the need for conduct rules by achieving comparable benefits at lower cost. Second,

NPRM); Policy and Rules Concerning Rates for Dominant Carriers, Notice of Proposed Rulemaking, 2 FCC Rcd. 5208, 5222, ¶ 4 n.5 (1987); Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Further Notice of Proposed Rulemaking, 84 FCC 2d 445, 525, ¶ 19 (1981).

scrutinizing closely each prior conduct rule, we find that the costs of each rule outweigh its benefits. Third, the record does not identify any legal authority to adopt conduct rules for all ISPs, and we decline to distort the market with a patchwork of non-uniform, limited-purpose rules.

1. *Transparency Leads to Openness*

240. Transparency, competition, antitrust laws, and consumer protection laws achieve similar benefits as conduct rules at lower cost. The effect of the transparency rule we adopt is that ISP practices that involve blocking, throttling, and other behavior that may give rise to openness concerns will be disclosed to the Commission and the public. As the Commission found in the Open Internet Order, “disclosure increases the likelihood that broadband providers will abide by open Internet principles, and that the Internet community will identify problematic conduct and suggest fixes . . . thereby increas[ing] the chances that harmful practices will not occur in the first place and that, if they do, they will be quickly remedied.” Open Internet Order, 25 FCC Rcd. at 17936-37, ¶ 53. The transparency rule will also assist “third-party experts such as independent engineers and consumer watchdogs to monitor and evaluate network management practices.” *Id.* at 17941, ¶ 60.

241. History demonstrates that public attention, not heavy-handed Commission regulation, has been most effective in deterring ISP threats to openness and bringing about resolution of the rare incidents that arise. The Commission has had transparency requirements in place since 2010, and there have been very few incidents in the United States since then that plausibly raise openness concerns. It is telling that the two most-discussed incidents that purportedly demonstrate the need for conduct rules, concerning Madison River and Comcast/BitTorrent, occurred before the Commission had in place an enforceable transparency rule. And it was the disclosure, through complaints to the Commission and media reports of the conduct at issue in those incidents, that led to action against the challenged conduct.

243. We think the disinfectant of public scrutiny and market pressure, not the threat of heavy-handed Commission regulation, best explain the paucity of issues and their increasingly fast ISP-driven resolution.

245. Transparency thus leads to openness and achieves comparable benefits to conduct rules. Moreover, the costs of compliance with a transparency rule are much lower than the costs of compliance with conduct rules. We therefore decline to impose this additional cost given our view that transparency drives a free and open Internet, and in light of the FTC’s and DOJ’s authority to address any potential harms. To the extent that conduct rules lead to any additional marginal deterrence, we deem the substantial costs—including costs to consumers in terms of lost innovation as well as monetary costs to ISPs—not worth the possible benefits.

2. *Costs of Conduct Rules Outweigh Benefits*

a. *General Conduct Rule*

246. We find that the vague Internet Conduct Standard is not in the public interest. Following adoption of this Order, the FTC will be able to vigorously protect consumers and competition through its consumer protection and antitrust authorities. Given this, we see little incremental benefit and significant cost to retaining the Internet Conduct Standard. The rule has created uncertainty and likely denied or delayed consumer access to innovative new services, and we believe the net benefit of the Internet Conduct Standard is negative.

247. Based on our experience with the rule and the extensive record, we are persuaded that the Internet Conduct Standard is vague and has created regulatory uncertainty in the marketplace hindering investment and innovation. Because the Internet Conduct Standard is vague, the standard and its implementing factors do not provide carriers with adequate notice of what they are and are not permitted to do, i.e., the standard does not afford parties a “good process for determining what conduct has actually been forbidden.” ADTRAN Comments at 23-24. The rule simply warns carriers to behave in accordance with what the Commission *might* require, without articulating any actual standard. Even ISP practices based on consumer choice are not presumptively permitted; they are merely “less likely” to violate the rule. Moreover, the uncertainty caused by the Internet Conduct Standard goes far beyond what supporters characterize as the flexibility that is necessary in a regulatory structure to address future harmful behavior. We thus find that the vague Internet Conduct Standard subjects providers to substantial regulatory uncertainty and that the record before us demonstrates that the Commission’s predictive judgment in 2015 that this uncertainty was “likely to be short term and will dissipate over time as the marketplace internalizes [the] Title II approach” has not been borne out. Title II Order, 30 FCC Rcd. at 5791, ¶ 410.

b. Paid Prioritization

253. We also decline to adopt a ban on paid prioritization. The transparency rule we adopt, along with enforcement of the antitrust and consumer protection laws, addresses many of the concerns regarding paid prioritization raised in this record. Thus, the incremental benefit of a ban on paid prioritization is likely to be small or zero. On the other hand, we expect that eliminating the ban on paid prioritization will help spur innovation and experimentation, encourage network investment, and better allocate the costs of infrastructure, likely benefiting consumers and competition. Thus, the costs (forgone benefits) of the ban are likely significant and outweigh any incremental benefits of a ban on paid prioritization.

c. Blocking and Throttling

263. We find the no-blocking and no-throttling rules are unnecessary to prevent the harms that they were intended to thwart. We find that the transparency rule we adopt today—coupled with our enforcement authority and with FTC enforcement of ISP commitments, antitrust law, consumer expectations, and ISP incentives—will be sufficient to prevent these harms, particularly given the consensus against blocking practices, as reflected in the scarcity of actual cases of such blocking.

3. *The Record Does Not Identify Authority for Comprehensive Conduct Rules*

267. The record in this proceeding does not persuade us that there are any sources of statutory authority that individually, or in the aggregate, could support conduct rules uniformly encompassing all ISPs. We find that provisions in section 706 of the 1996 Act directing the Commission to encourage deployment of advanced telecommunications capability are better interpreted as hortatory rather than as independent grants of regulatory authority. We also are not persuaded that section 230 of the Communications Act is a grant of regulatory authority that could provide the basis for conduct rules here. Nor does the record here reveal other sources of authority that collectively would provide a sure foundation for conduct rules that would treat all similarly-situated ISPs the same.

a. Section 706 of the 1996 Act

268. We conclude that the directives to the Commission in section 706(a) and (b) of the 1996 Act to promote deployment of advanced telecommunications capability are better interpreted as hortatory, and not as grants of regulatory authority. We thus depart from the interpretation of those provisions adopted by the Commission beginning in the Open Internet Order, and return to a reading of that language in section 706 of the 1996 Act consistent with the Commission's original interpretation.

270. The relevant text of section 706(a) and (b) of the 1996 Act is reasonably read as exhorting the Commission to exercise market-based or deregulatory authority granted under other statutory provisions, particularly the Communications Act. The Commission otherwise has authority under the Communications Act to employ price cap regulation for services subject to rate regulation; to employ regulatory forbearance; to promote competition in the local telecommunications market; and to remove barriers to infrastructure investment. The Commission thus need not interpret section 706 as an independent grant of regulatory authority to give those provisions meaning. Further, consistent with normal canons of statutory interpretation, the language "other regulating methods" in section 706(a) is best understood as consistent with the language that precedes it, and thus likewise reasonably is read as focused on the exercise of other statutory authority like that under the Communications Act, rather than itself constituting an independent grant of regulatory authority. This view also comports with the Commission's original interpretation of the language of section 706(a), avoids rendering the provisions of section 706(a) or (b) surplusage, and does not otherwise conflict with the statutory text. Although the term "shall" "generally indicates a command that admits of no discretion," *see, e.g., Ass'n of Civilian Tech. v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994), because the Commission has other authority under the Communications Act that it can exercise consistent with the direction in section 706(a) and (b) of the 1996 Act, our interpretation is not at odds with the use of "shall encourage" in section 706(a) or "shall take immediate action" in section 706(b).

271. We not only find that the relevant language in sections 706(a) and (b) of the 1996 Act permissibly can be read as hortatory, but are persuaded that is the better interpretation. For one, although the relevant provisions in section 706(a) and (b) identify certain regulatory tools (like price cap regulation and regulatory forbearance) and marketplace outcomes (like increased competition and reduced barriers to infrastructure investment), they nowhere identify the providers or entities whose conduct could be regulated under section 706 if interpreted as a grant of such authority. This lack of detail stands in stark contrast to Congress's approach in many other provisions enacted or modified as part of the 1996 Act that clearly are grants of authority to employ similar regulatory tools or pursue similar

marketplace outcomes and that directly identify the relevant providers or entities subject to the exercise of that regulatory authority. The absence of any similar language in section 706(a) and (b) of the 1996 Act supports our view that those provisions are better read as directing the Commission regarding its exercise of regulatory authority granted elsewhere.

278. We also are unpersuaded by the Open Internet Order’s citation of legislative history to support its interpretation of section 706(a) and (b) as grants of regulatory authority. The Open Internet Order cited a Senate report for the proposition that those provisions of section 706 “are ‘a necessary fail-safe’ to guarantee that Congress’s objective is reached.” Open Internet Order, 25 FCC Rcd. at 17969-70, ¶ 120 (quoting S. Rep. No. 104-23, at 50-51 (Mar. 30, 1995)), quoted in *Verizon v. FCC*, 740 F.3d at 639. The Commission itself previously noted the ambiguous significance of that language. In addition, the relevant Senate bill at the time of the Senate report would have directed the Commission, in the event of a negative finding in its deployment inquiry, to “take immediate action *under this section*” and stated that “it may preempt State commissions that fail to act to ensure such availability.” S. 652, § 304(b) (reported in the Senate, Mar. 30, 1995, emphasis added). The final, enacted version of section 706(b), by contrast, omitted the language “under this section,” and also omitted the express preemption language, leaving it ambiguous whether the statement in the Senate report was premised on statutory language excluded from the enacted provision. For its part, the conference report neither repeats the “fail-safe” language from the Senate report nor elaborates on the modifications made to the language in the Senate bill. Even if it were appropriate to consult legislative history, we conclude that that history is ultimately ambiguous and are not persuaded that it supports interpreting section 706(a) and (b) of the 1996 Act as grants of regulatory authority.

281. Our conclusion that section 706 of the 1996 Act is better read as hortatory is not at odds with the fact that two courts concluded that the Commission permissibly could adopt the alternative view that it is a grant of regulatory authority. Those courts did not find that the Commission’s previous reading was the only (or even the most) reasonable interpretation of section 706, leaving the Commission free to adopt a different interpretation upon further consideration. Indeed, the D.C. Circuit in *Verizon* observed that the language of section 706(a) “certainly could be read” as hortatory. *Verizon*, 740 F.3d at 637.⁴ The court also recognized as much with respect to section 706(b), given its lack of clarity. Those cases thus leave us free to act on our conclusion here that section 706 is most reasonably read as hortatory, not as an independent grant of regulatory authority.

282. We also disagree with arguments that we should keep in place a misguided and flawed interpretation of section 706(a) and (b) of the 1996 Act to preserve any existing rules or our ability going forward to take regulatory action based on such assertions of authority. We are not persuaded by concerns that reinterpreting section 706(a) and (b) of the 1996 Act in this manner could undercut Commission rules adopted in other contexts because such arguments do not identify circumstances—nor are we otherwise aware of any—where the prior interpretation of the relevant provisions of section 706(a) and/or (b) was, in whole or in part, a necessary basis for the rules. We also are unpersuaded by arguments for maintaining the prior interpretation in a general effort to retain greater authority to regulate ISPs. Given that agencies like the Commission are creatures of Congress, and given our responsibility to bring to bear appropriate tools when interpreting and implementing the statutes we administer, we find it more appropriate to adopt what we view as the far better interpretation of section 706(a) and (b) given both the specific context of section 706 and the broader statutory context. If Congress wishes to give the Commission more explicit direction to impose certain conduct rules on ISPs, or to impose such rules itself within constitutional limits, it is of course free to do so. We decline to read such wide-ranging authority, however, into provisions that, on our reading today, are merely hortatory, and are at best ambiguous.

283. Independently, we also are not persuaded that the prior interpretation of section 706(a) and (b) of the 1996 Act would better advance policy goals relevant here. We have other sources of authority on which to ground our transparency requirements without adopting an inferior interpretation of section 706(a) and (b). With respect to conduct rules, in addition to our decision that limits on our legal authority counsel against adopting such rules, we separately find that such rules are not otherwise justified by the record here. Consequently, we need not stretch the words of section 706 of the 1996 Act because we can protect Internet freedom even without it. Rather, we are persuaded to act in the manner that we believe reflects the best interpretation given the text and structure of the Act, the legislative history, and the policy implications of alternative interpretations.

b. Section 230 of the Communications Act

284. We are not persuaded that section 230 of the Communications Act grants the Commission authority

⁴ [For those of you looking for it, *Verizon* says “could certainly be read.” Eds.]

that could provide the basis for conduct rules here. In *Comcast*, the D.C. Circuit observed that the Commission there “acknowledge[d] that section 230(b)” is a “statement [] of policy that [itself] delegate[s] no regulatory authority.” *Comcast*, 600 F.3d at 652. Although the NPRM sought comment on section 230, the record does not reveal an alternative interpretation that would enable us to rely on it as a grant of regulatory authority for rules here. Instead, we remain persuaded that section 230(b) is hortatory, directing the Commission to adhere to the policies specified in that provision when otherwise exercising our authority. In addition, even assuming *arguendo* that section 230 could be viewed as a grant of Commission authority, we are not persuaded it could be invoked to impose regulatory obligations on ISPs. In particular, section 230(b)(2) provides that it is U.S. policy “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.” 47 U.S.C. § 230(b)(2). Adopting requirements that would impose federal regulation on broadband Internet access service would be in tension with that policy, and we thus are skeptical such requirements could be justified by section 230 even if it were a grant of authority as relevant here. Consequently, although section 230 is relevant to our interpretation and implementation of other statutory provisions, the record does not reveal a basis for relying on it as a source of regulatory authority for conduct rules here.

VII. PROCEDURAL MATTERS

A. The Administrative Record

344. In reviewing the record in this rulemaking, the Commission complied with its obligations under the Administrative Procedure Act (APA), 5 U.S.C. § 553, including the obligation to consider all “relevant matter” received, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014), quoting *Vermont Public Service Board v. FCC*, 661 F.3d 54, 63 (D.C. Cir. 2011), to adequately consider “important aspect[s] of the problem,” *Motor Veh. Mfrs. Ass’n v. State Farm Ins.*, 463 U.S. 29, 43 (1983), and to “reasonably respond to those comments that raise significant problems,” *North Carolina v. FAA*, 957 F.2d 1125, 1135 (4th Cir. 1992). Consistent with these obligations, the Commission focused its review of the record on the submitted comments that bear substantively on the legal and public policy consequences of the actions we take today.¹¹⁷⁸ Thus, our decision to restore Internet freedom did not rely on comments devoid of substance, or the thousands of identical or nearly-identical non-substantive comments that simply convey support or opposition to the proposals in the [NPRM in this proceeding].

345. Because we have complied with our obligations under the APA, we reject calls to delay adoption of this Order out of concerns that certain non-substantive comments (on which the Commission did not rely) may have been submitted under multiple different names or allegedly “fake” names.¹¹⁷⁹ The Commission is under no legal obligation to adopt any “procedural devices” beyond what the APA requires, such as identity-verification procedures. In addition, the Commission has previously decided not to apply its internal rules regarding false statements in the rulemaking context because we do not want “to hinder full and robust public participation in such policymaking proceedings by encouraging collateral wrangling over the truthfulness of the parties’ statements.” Amendment of Section 1.17 of the Commission’s Rules Concerning Truthful Statements to Commission, Report and Order, 18 FCC Rcd. 4016, 4021-22, ¶ 13 (2003). To the extent that members of the public are concerned about the presence in the record of identical or nearly-identical non-substantive comments that simply convey support or opposition to the proposals in the [NPRM in this proceeding], those comments in no way impeded the Commission’s ability to identify or respond to material issues in the record. Indeed, the Order demonstrates the Commission’s deep engagement with the substantive legal and public policy questions presented in this proceeding.

Notes and Questions

1. Compare and Contrast. What are the most foundational disagreements between the 2015 and 2018 orders? What, if any, significant areas of agreement exist between them?

¹¹⁷⁸ We note, for example, that it appears that 7.5 million identical one-sentence comments were submitted from about 45,000 unique e-mail addresses, all generated by a single fake e-mail generator website. Moreover, we received over 400,000 comments supporting Internet regulation that purported to be from the same mailing address in Russia.

¹¹⁷⁹ See, e.g., Brian Fung, FCC Net Neutrality Process ‘Corrupted’ by Fake Comments and Vanishing Consumer Complaints, Officials Say, *Washington Post* (Nov. 24, 2017), <https://www.washingtonpost.com/news/the-switch/wp/2017/11/24/fcc-net-neutrality-process-corrupted-by-fake-comments-and-vanishing-consumer-complaints-officials-say/>.

2. Congress. Whether you think the FCC should be interpreting or policymaking, where is Congress? Given the importance of the Internet, isn't this one of those fundamental questions that we should want made in the legislature? Throughout this entire saga, Congressional committees and individual Senators and Representatives were quite vocal. But no legislation was enacted. Do you think Congress should act? If so, exactly what should the legislation say?

3. Competition and Net Neutrality. The 2018 order suggests that broadband access providers have strong incentives not to block or impede valuable content for consumers. On what basis would you disagree with that assertion?

Would more robust competition among ISPs reduce the concerns that underlie net neutrality regulations? If so, what forms of such competition would suffice? On what basis should policymakers determine the degree to which wireless broadband offerings are an effective substitute for wireline offerings?

4. Beyond Competition. Would competition among ISPs eliminate (rather than merely mitigate) any need for net neutrality regulations? What are the best arguments for net neutrality regulations even if there is robust competition among ISPs? Are those arguments persuasive?

5. Discrimination, Good and Bad. Discrimination in terms of access can be good or bad, depending on how it is structured. To be sure, new innovators would be harmed if networks had a premium stratum of transmission that they made available only to a few, favored firms. But how much of the concern over net neutrality goes away if networks charge content providers for different levels of access but make that menu of access alternatives available to all providers on an equal basis (in a manner akin to common carriage)?

6. Backbone Non-Regulation. The FCC has not regulated the providers of Internet backbone services — the long-distance carriers of the Internet. The policy is long-standing. *See* Jason Oxman, The FCC and the Unregulation of the Internet (FCC OPP Working Paper Series, no. 31, 1999) (*available at: http://transition.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf*); Michael Kende, The Digital Handshake: Connecting Internet Backbones (FCC OPP Working Paper Series, no. 32, 2000). In 2011, in approving the acquisition of one Internet backbone by another, the Wireline Competition Bureau found there to be at least 12 Tier-1 backbones and at least 38 nationwide providers of transit arrangements. Applications Filed by Global Crossing Ltd. and Level 3 Communs., Inc. for Consent to Transfer Control, 26 FCC Rcd. 14,056 (Wireline Comp. Bur. 2011).

7. Public Comments. This proceeding “prompted more comments than any other rulemaking in the Commission’s history” — more than 22 million comments during the comment period. 2018 Order ¶ 19 (not excerpted above). And as both the excerpt above and independent reports found, many of the comments appear to have been fraudulent. *See, e.g.,* sources cited in ¶¶ 344 & 345; Paul Hiltin et al., Public Comments to the Federal Communications Commission About Net Neutrality Contain Many Inaccuracies and Duplicates, Pew Research Center (November 29, 2017), *available at <http://www.pewinternet.org/2017/11/29/public-comments-to-the-federal-communications-commission-about-net-neutrality-contain-many-inaccuracies-and-duplicates/>*.

The 2018 Order’s response to the public comments is contained in ¶¶ 344 and 345 above. Commissioner Clyburn, dissenting from the 2018 Order, complained about this lack of engagement with the comments: “I hold in my hand letters that plead with the FCC to keep our net neutrality rules in place but what is striking and in keeping with the new norm, despite the millions of comments, letters, and calls received, this Order cites, not even one consumer comment.” Restoring Internet Freedom, 33 FCC Rcd. at 533 (dissenting statement of Commissioner Mignon L. Clyburn).

Should the 2018 Order have said more about the public comments? More fundamentally, multi-member bipartisan agencies with fixed terms (like the FCC) were designed to have great insulation from political considerations and popular pressure. Should the FCC be influenced by comments from the citizenry, assuming it can separate real from fake comments? If so, what category of individuals should be counted — should it be the public as a whole, or only those who really care about the issue? If the answer is the former, then broad-based polls would seem to better reflect the relevant constituency than would the comments by those who took the time and trouble to submit their views. Assuming that the focus was on those who cared about the issue, it is still not clear that individual commenters are a good proxy, because a large percentage of individual comments are prompted (if not scripted) by campaigns launched by interest groups, and it would be quite surprising if the ability and energy required to organize such campaigns was distributed among interest groups in such a way as to reflect the proportions of concerned individuals who are on each side of an issue. *See* Stuart Minor Benjamin, Evaluating E-Rulemaking: Public Participation and Political Institutions, 55 Duke Law Journal 893, 903-08, 933-35 (2006).

Insert on page 653 after §14.C.2:

§14.C.3. Preemption as an Exercise of the FCC’s Section 706 Authority

Under the FCC’s theory of its section 706 powers (affirmed by the D.C. Circuit in *Verizon*), the FCC has authority to adopt regulations to promote the deployment of broadband to all Americans. In some states, municipalities and municipal-owned utilities have desired to offer their own broadband services, only to be met by state-law restrictions on their ability to do so. In *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), the Supreme Court held that 47 U.S.C. § 253(a)’s prohibition on state-law restrictions on entry into a telecommunications market did not compel states to permit municipalities to provide telecommunications services. Relying on Section 706, the FCC decided in 2015 that, where states do permit municipalities and municipally-owned utilities to provide broadband service, the states may not impose restrictions that stand as barriers to broadband deployment. The Sixth Circuit has rejected this use of the Commission’s section 706 authority, freeing the states to craft municipal broadband policy to their liking.

TENNESSEE V. FCC
832 F.3d 597 (6th Cir. 2016)

Opinion for the Court filed by Circuit Judge ROGERS and in which Circuit Judge HOOD joined. Opinion concurring in part and dissenting in part filed by Circuit Judge WHITE.

ROGERS, Circuit Judge.

Municipalities in Tennessee and North Carolina providing broadband service would like to expand their networks beyond their current territorial boundaries to underserved nearby areas. The legislatures of Tennessee and North Carolina have passed laws either forbidding or putting onerous restrictions on such expansion by municipal telecommunications providers. The Federal Communications Commission (FCC), citing its statutory mandates to remove barriers to broadband service and to promote competition in the telecommunications market, has issued an order purporting to preempt these state statutory provisions. Tennessee and North Carolina now seek review of the FCC’s order.

The FCC order essentially serves to re-allocate decision-making power between the states and their municipalities. This is shown by the fact that no federal statute or FCC regulation *requires* the municipalities to expand or otherwise to act in contravention of the preempted state statutory provisions. This preemption by the FCC of the allocation of power between a state and its subdivisions requires at least a clear statement in the authorizing federal legislation. The FCC relies upon § 706 of the Telecommunications Act of 1996 for the authority to preempt in this case, but that statute falls far short of such a clear statement. The preemption order must accordingly be reversed.

Tennessee Law

Under a Tennessee law enacted in 1999, any municipality operating an electric plant is authorized to offer cable services, video services, and Internet services. However, this authority is limited—the statute grants a municipality this authority only “within its service area.” This geographic limitation forbids a municipality from offering Internet services to surrounding areas that are not served by that municipality’s electric plant.

The territorial restriction does not require municipalities to violate any FCC requirement. There are no FCC rules or regulations requiring municipalities to expand their service offerings beyond their territorial boundaries. Tennessee has simply made the choice for its municipalities on the issue of expansion, which is a discretionary decision under the current FCC regulatory scheme.

Chattanooga, Tennessee operates an electric provider known as the Electric Power Board (EPB). The EPB offers high-speed broadband Internet service with speeds up to one Gigabit per second (Gbps). The EPB offers this service to 170,000 residential and commercial customers in its 600-square-mile service area, which includes counties in Tennessee and Georgia. The EPB’s fiber-optic network has received uniform praise. It has led to job growth and attracted businesses to the area. Its introduction led established Internet providers to lower rates while increasing the quality of their services. The fiber network has also put more money in Chattanooga’s coffers, which contributed to

Standard and Poor's upgrading of the EPB's bond rating to AA+ in 2012.

Educational institutions within the EPB's service area have benefitted from the fiber network. The high-speed network is available to Chattanooga schools and allows the schools to offer services not available in many parts of the country.

Neighboring communities outside of the EPB's service area, however, cannot partake in the EPB's high-speed Internet service due to the geographic limitation. Residents from those communities have repeatedly requested expansions of the EPB's services to the surrounding areas. The EPB's surrounding communities allegedly constitute a "digital desert" in which the Internet services are abysmal or nonexistent.

North Carolina Law

Under a North Carolina law originally enacted in 1971, municipalities were authorized to provide broadband Internet services. In 2011, North Carolina's General Assembly passed Session Law 2011-84, entitled "An Act to Protect Jobs and Investment by Regulating Local Government Competition with Private Business," which among other things imposed requirements on city-owned communications service providers. [Under this law], municipalities in North Carolina may not offer Internet services to anyone beyond their municipal boundaries.

The Session Law contains additional restrictions that focus on the financial operation of municipal providers. [M]unicipalities [must] make payments in lieu of taxes that would equal the amount a private-sector provider would have to pay in taxes and fees. [M]unicipalities [must] impute the costs of private providers when pricing the municipal services. [M]unicipalities [must] comply with all of the laws and rules that apply to private providers (without exempting municipalities from generally applicable municipal regulations). [And M]unicipalities [must] open their facilities for private providers at no charge if the municipalities themselves would not have to pay. The Session Law also contains [other process] restrictions on the implementation of municipal services.

Like Tennessee's restriction, the North Carolina provisions do not require municipalities to violate any FCC rule or regulation. This is clear from the record, and in any event was conceded by the FCC's counsel at oral argument. The Session Law is simply an instance of North Carolina making choices for its municipalities on the issues of expansion and municipal offering of telecommunications services.

In 2005, the City of Wilson, North Carolina constructed the backbone of a fiber-optic network connecting all City-owned facilities. Many residents, medical facilities, businesses, and educational institutions requested access to and expansion of the network. In 2006, the Wilson City Council responded to these requests by unanimously voting to build a municipal broadband network that would eventually become known as "Greenlight." In 2013, Wilson rolled out Greenlight to residential customers, offering Gigabit Internet service.

Greenlight has provided benefits for Wilson. Wilson states that its "triple play" services—phone, Internet, and cable—are cheaper than its competitors' and that it offers its Gigabit Internet while maintaining a positive cash flow. Wilson also provides free Wi-Fi to its entire downtown area, which in turn frees up money that downtown businesses would normally spend for Internet. Each of the top seven employers in Wilson is a customer of the fiber network. Local schools benefit from using Greenlight, as does the City's main public library.

Wilson has only deployed Greenlight in one county, Wilson County. It has five other counties for which it provides electric service. Individuals in those five counties have repeatedly requested that Wilson expand its offering of Greenlight. [D]ue to the restrictions in the Session Law, Wilson is unable to expand its offering beyond its municipal limits.

The FCC's Order

The EPB and the City of Wilson separately petitioned the FCC to preempt the restrictions in their respective states' laws. The FCC concluded that preemption of most of the Tennessee and North Carolina statutes at issue would further the purposes of § 706 of the Telecommunications Act of 1996 by increasing broadband investment. Both Wilson and the EPB sought expansion because the private cable providers in their areas were unsatisfactory to the local residents and businesses. The FCC additionally concluded that preemption of the Tennessee restrictions and allowing the EPB to serve the surrounding areas would promote competition in the broadband marketplace, which is a goal of § 706. In response to the EPB's constructing its fiber network, Comcast stopped raising its rates—which had risen sharply for years—and subsequently reduced them. Both of the private providers in the EPB's electric service area, Comcast and AT&T, have vastly improved their Internet download speeds since the EPB's entry. This demonstrates the benefits of increased broadband competition and how a possible expansion for the EPB could promote such competition.

The FCC likewise found that preemption of most of the North Carolina restrictions would promote and increase competition. In response to Wilson’s entry into the broadband market, Time Warner held rates steady in Wilson while simultaneously raising rates in places without such competition. Like the private providers’ responses to the EPB’s entry, Time Warner improved its top download speeds in response to Wilson’s entry. The FCC concluded that these reactions from Time Warner show that municipal-provider entry into the broadband market increases competition.

Judicial Review

Tennessee filed a petition for review of the FCC’s order with this court. North Carolina filed its petition for review with the Fourth Circuit. The Fourth Circuit then transferred the case to this court, and the cases were consolidated. Tennessee argues that the FCC’s order violates the Constitution by infringing on the state’s right to determine the boundaries of its political subdivisions. Tennessee, North Carolina, and NARUC argue that even if Congress has the power to authorize such orders, it has failed to provide the necessary clear statement as required by *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004). The latter argument is persuasive, at least where—as here—the FCC order purports only to restrict the states’ power to make decisions for municipalities that the FCC does not otherwise forbid.

The Clear Statement Rule Applies

Under federal law, municipal telecommunications providers currently have the option to expand their geographic service areas or to restrict their service areas to their municipal boundaries. There are no federal statutes or regulations requiring telecommunications providers to have a set geographic service area. Providers thus have discretion to choose the geographic areas that they serve, whether that means expansion or restriction. Providers likewise have discretion to choose the rates they charge for their services and how long the services-rollout process takes.

What the FCC seeks to accomplish through preemption is to decide *who*—the state or its political subdivisions—gets to make these choices. The FCC wants to pick the decision maker for the discretionary issues of expansion, rate setting, and timeliness of rollout of services. It wants to provide the EPB and the City of Wilson with these options notwithstanding Tennessee’s and North Carolina’s statutes that have already made these choices.

Precedent makes clear, however, that if Congress has the power to allocate state decision making, it must be very clear that it is doing so. As the Supreme Court stated in *Nixon*, the clear statement rule applies when federal-government preemption results in “interposing federal authority between a State and its municipal subdivisions, which our precedents teach, are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion.” 541 U.S. at 140. The political subdivisions of a state are nothing more than that state’s “convenient agencies,” and the state generally retains the power to make discretionary decisions for its subdivisions, just as a board of directors generally retains the power to make discretionary decisions for a company. Any attempt by the federal government to interpose itself into this state-subdivision relationship therefore must come about by a clear directive from Congress, and the FCC can only pick the decision maker here if there exists a clear statement to do so in § 706.

Nixon supports the conclusion that the clear statement rule applies here. In *Nixon*, a Missouri state statute forbade municipalities from entering the telecommunications market altogether. The FCC, under § 253 of the same Telecommunications Act at issue in this case, held that there was no clear statement from Congress to preempt the Missouri law. The Supreme Court agreed with the FCC and held that a clear statement was needed because federal preemption of Missouri’s law threatened “to trench on the States’ arrangements for conducting their own governments.” *Id.* at 140–41. This case similarly involves Tennessee’s and North Carolina’s arrangements for conducting their own governments: if there is a decision to make, one way for states to conduct their own governments is to make the decision for their municipalities. Any attempt by the federal government to reorder the decision-making structure of a state and its municipalities trenches on the core sovereignty of that state.

The FCC sought to distinguish *Nixon* on the ground that there is a difference between preempting a state-law ban on municipal telecommunications providers and preempting state laws regulating municipal broadband providers for which the state has given an underlying authorization. The distinction, however, does not hold up. It is true that the *Nixon* Court, in identifying the “strange and indeterminate results” that would arise, reasoned that if the FCC preempted the ban on municipal providers, “[t]he municipality would be free of the statute, but freedom is not authority, and in the absence of some further, authorizing legislation the municipality would still be powerless to enter the telecommunications business.” *Id.* at 135. This would produce a “national crazy quilt” of municipalities in some states being able to provide services based on state laws authorizing them to do so while municipalities in other states

would still be without any power due to the absence of an authorizing statute. *Id.* at 136. It is true that this particular anomaly does not arise when the FCC’s preemption applies only to municipalities authorized to provide telecommunications services. But a related anomaly, and one equally intrusive on state-municipal relations, is presented. States can flatly prohibit municipalities from engaging in telecommunications altogether, but they cannot do it in limited steps or with conditions based on the governmental nature of the municipalities. This state of affairs, in short, would be at least as anomalous a result.

In any event, the anomalous result of the preemption was only one of the two bases for the Court’s decision in *Nixon*. In the alternative, the Court reasoned, if the preemption in *Nixon* “could operate straightforwardly to provide local choice,” then “the liberating preemption would come only by interposing federal authority between a State and its municipal subdivision,” thus triggering the clear statement rule. *Id.* at 140–41. The same is true here.

A different issue would be presented if there were a federal regulation or statute that removed all discretion from providers, and a state then enacted a law requiring a municipality to violate the regulation. For example, assume a federal regulation requiring a class of telecommunications providers to provide services to areas of at least fifty square miles, and a state law restricting the geographic area municipal providers could serve to areas of twenty-five square miles or less. We need not decide whether the clear statement rule would apply in that situation. That simply is not the case here.

Similarly, the examples put forward by the FCC are not analogous to the present case. The FCC’s examples of federal regulations on radio licensees’ broadcast frequency and strength, bandwidth size, and other non-communications regulations such as OSHA workplace safety standards all involve situations in which the federal government has removed discretion from regulated parties in a particular area.

Section 706 Lacks a Clear Statement

Section 706 does not contain a clear statement authorizing preemption of Tennessee’s and North Carolina’s statutes that govern the decisions of their municipal subdivisions. Section 706(a) instructs the FCC to utilize “measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” Subsection (b) is a similar but broader instruction—it directs the FCC to “remov[e] barriers to infrastructure investment and . . . promot[e] competition in the telecommunications market.” “Remove barriers to infrastructure investment” is unclear regarding whether it applies to public *and* private infrastructure investment or *only* private infrastructure investment. “Infrastructure,” by itself, is not specific to the public sphere. Furthermore, nowhere in the general charge to “promote competition in the telecommunications market” is a directive to do so by preempting a state’s allocation of powers between itself and its subdivisions. Although preemption authority does not have to be explicit, the authority to preempt such allocations must be delegated by way of a clear statement. Because § 706 cannot be read to limit a state’s ability to trump a municipality’s exercise of discretion otherwise permitted by FCC regulations, § 706 cannot be read to authorize such preemption.

Our holding today is a limited one. We do not question the public benefits that the FCC identifies in permitting municipalities to expand Gigabit Internet coverage. Furthermore, we need not, and do not, address a number of legal issues debated by the parties, including (1) whether § 706 provides the FCC any preemptive power at all, (2) whether Congress, if it is clear enough, could give the FCC the power to preempt as it did in this case, (3) whether, if the FCC had such power, its exercise of it was arbitrary or capricious in this case, and (4) whether and to what extent the clear statement rule would apply to FCC preemption if a State required its municipality to act contrary to otherwise valid FCC regulations.

The petitions for review are accordingly granted, and the FCC’s order is reversed.

WHITE, Circuit Judge, concurring in part and dissenting in part.

[Judge White agreed with the majority’s decision, except as to one, limited provision of the North Carolina Session Law, which she said only regulated broadband and was not an ordering of its government.]

Notes and Questions

1. Consistency with *Nixon*. The FCC distinguished *Nixon* on the grounds that the municipalities there did not have *any* state law authority to offer telecommunications. The Sixth Circuit’s decision turns on its rejecting this distinction. Do you find this a persuasive distinction? The *Nixon* Court said that its holding came against a background principal that

municipalities are simply creatures of the state governments, and not independent political entities. It said that “the liberating preemption [sought by the municipalities] would come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach, ‘are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion.’” *Nixon*, 541 U.S. at 140 (quoting *Wisconsin Public Intervenor v. Mortier*, 501 U. S. 597, 607–08 (1991)). Is the FCC’s position that a state must essentially choose between not allowing municipal broadband and allowing *all* municipal broadband without conditions?

2. Public Choice v. Public Interest. The FCC’s decision occurred against the backdrop of concern that powerful private carriers influenced state governments to restrict municipal broadband in order to limit competition. On the other hand, many commentators have argued that states have an interest in avoiding inefficient or wasteful spending by municipalities, which may deter broadband deployment or which may expose the state to financial liability. The FCC said that the question of whether municipal broadband entry deters private deployment is a question solely for *it* under § 706. But what about the states’ other concern? Is there any way to tell whether a state-law restriction is a creature of private interest lobbying or public interest fiscal concern? Setting aside the legal questions, as a matter of good policy (including good government concerns), where do you think the authority should lie?

Insert on page 672, after note 4:

5. Redefining Multichannel Video Program Distributors. As video moves online and is increasingly provided by companies not affiliated with the carriers, the question has arisen whether the market-structuring provisions that Congress applied to cable and other program distributors should be extended. The FCC issued the Notice of Proposed Rulemaking excerpted below seeking to tackle this issue, by addressing what should be the definition of a Multichannel Video Programming Distributor in the over-the-top (OTT) age.

**PROMOTING INNOVATION AND COMPETITION IN THE PROVISION OF
MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTION SERVICES**
Notice of Proposed Rulemaking, 29 FCC Rcd. 15,995 (2014)

I. INTRODUCTION

1. In this Notice of Proposed Rulemaking (NPRM), we propose to update our rules to better reflect the fact that video services are being provided increasingly over the Internet. Specifically, we propose to modernize our interpretation of the term “multichannel video programming distributor” (MVPD) by including within its scope services that make available for purchase, by subscribers or customers, multiple linear streams of video programming, regardless of the technology used to distribute the programming. Such an approach will ensure both that incumbent providers will continue to be subject to the pro-competitive, consumer-focused regulations that apply to MVPDs as they transition their services to the Internet and that nascent, Internet-based video programming services will have access to the tools they need to compete with established providers.

2. Here the Commission faces, as it has before, the impact of technology transition. Incumbent cable systems have made plain their intent to use a new transmission standard that will permit cable systems to deliver video via IP, and other innovative companies are also experimenting with new business models based on Internet distribution. That is not surprising: Over-the-air television has moved from analog transmission to digital. The telephone networks of the 20th Century have become broadband networks, providing a critical pathway to the Internet. And, in our January Technology Transitions Order, the Commission encouraged experiments that assess the impact on consumers of the coming transition from traditional copper facilities to new telecommunications networks composed of fiber, copper, coaxial cable, and/or wireless connections.

4. Adoption of a technology-neutral MVPD definition will not only preserve current responsibilities, it may create new competitive opportunities that will benefit consumers. Increasingly, companies—incumbents and new entrants alike—are interested in using the Internet as the transmission path for packages of video channels. In initiating this proceeding, our goal is to bring our rules into synch with the realities of the current marketplace and consumer preference where video is no longer tied to a certain transmission technology.

5. Specifying the circumstances under which an Internet-based provider may qualify as an MVPD, possessing the rights as well as responsibilities that attend that status, may incent new entry that will increase competition in video markets. In particular, extending program access protections to Internet-based providers would allow them to “access[] critical programming needed to attract and retain subscribers.” Revision of the Commission’s Program Access Rules, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd. 12,605, 12,608, ¶ 3 (2012). And extending retransmission consent protections and obligations to those providers would allow them to enter the market “for the disposition of the rights to retransmit broadcast signals.” S. Rep. No. 92, 102d Cong., 1st Sess. (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1169. Broadcast and cable-affiliated programming could make Internet-based services attractive to customers, who would access the services via broadband. The resulting increased demand for broadband may in turn provide a boost to the deployment of high-speed broadband networks.

6. In this NPRM, we seek comment on possible interpretations of the term MVPD as used in the Communications Act of 1934, as amended (the Act) and seek comment on how each of those interpretations would affect the industry and consumers. In Section III.A, we seek comment on two possible interpretations:

- We propose to interpret the term MVPD to mean distributors of multiple linear video programming streams, including Internet-based services.
 - We tentatively conclude that this interpretation is a reasonable interpretation of the Act, and is most consistent with consumer expectations and conditions in the industry.
- We also seek comment on an alternative interpretation that would require a programming distributor to have control over a transmission path to qualify as an MVPD.
 - We invite comment on whether this interpretation is consistent with the Act and Congressional intent and how this interpretation would apply as companies begin to offer subscription linear video services over the Internet.

7. In Section III.B, we seek comment on the effects that either interpretation would have on entities that are classified as MVPDs, consumers, and content owners.

- We seek comment on how each interpretation would benefit and burden entities that would be subject to our rules.
 - We also ask whether we should consider exemption or waiver of certain regulations, if allowed under the statute.
 - We seek comment on whether to modify our retransmission consent “good faith” negotiation rules with respect to Internet-based MVPDs to protect local broadcasters.
- We seek comment on what impact these interpretations would have on content owners, including broadcasters and cable-affiliated programmers.
- Finally, we seek comment on how to ensure that our interpretation will promote competition and broadband adoption, consistent with the Act and Commission policy.

8. In Section III.C, we note that the fact that an entity uses IP to deliver cable service does not alter the classification of its facility as a cable system and does not alter the classification of the entity as a cable operator. In other words, those video programming services provided over the operator’s facilities remain subject to regulation as cable services. We seek comment on the regulatory status of purely Internet-based linear video programming services that cable operators and direct broadcast satellite (DBS) providers may choose to offer in addition to their traditional services.

II. BACKGROUND

9. The Act defines an MVPD as:

[A] person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming

47 U.S.C. § 522(13). The Act also defines the terms “channel” and “video programming,” which are used in the MVPD definition. A “channel” is defined as “a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the

Commission by regulation).”¹⁰ The Act defines “video programming” as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.” 47 U.S.C. § 522(20).

III. DISCUSSION

13. As discussed below, we tentatively conclude that the statutory definition of MVPD includes certain Internet-based distributors of video programming. Specifically, we propose to interpret the term MVPD to mean all entities that make available for purchase, by subscribers or customers, multiple streams of video programming distributed at a prescheduled time. In reaching this conclusion, we understand that the market for Internet-based distribution of video programming is nascent and that companies continue to experiment with business models. The current business models include, but are not limited to, the following types of Internet-based video service offerings, including combinations of these offerings:

- **Subscription Linear.** We use this term to refer to Internet-based distributors that make available continuous, linear streams of video programming on a subscription basis. This category includes Sky Angel’s service as it existed before 2014 and Aereo’s service as it existed before the Supreme Court decision.
- **Subscription On-Demand.** We use this term to refer to Internet-based distributors that make video programming available to view on-demand on a subscription basis, allowing subscribers to select and watch television programs, movies, and/or other video content whenever they request to view the content without having to pay an additional fee beyond their recurring subscription fee. This category includes Amazon Prime Instant Video, Hulu Plus, and Netflix.
- **Transactional On-Demand.** We use this term to refer to Internet-based distributors that make video programming available to view on-demand, with consumers charged on a per-episode, per-season, or per-movie basis to rent the content for a specific period of time or to download the content for storage on a hard drive for viewing at any time. This category includes Amazon Instant Video, CinemaNow (Best Buy), Google Play, iTunes Store (Apple), Sony Entertainment Network, Vudu (Walmart), and Xbox Video (Microsoft).
- **Ad-based Linear and On-Demand.** We use this term to refer to Internet-based distributors that make video programming available to view linearly or on demand, with consumers able to select and watch television programs, movies, and/or other video content whenever they request on a free, ad-supported basis. This category includes Crackle, FilmOn, Hulu, Yahoo! Screen, and YouTube as they exist today.
- **Transactional Linear.** We use this term to refer to non-continuous linear programming that is offered on a transactional basis. This category includes Ultimate Fighting Championship’s UFC.TV pay-per-view service.

A. Defining MVPD

16. To qualify as an MVPD under the Communications Act, an entity must “make[] available for purchase, by subscribers or customers, multiple channels of video programming.” 47 U.S.C. §522(13). The Commission has previously held that video distributed over the Internet qualifies as “video programming.”³⁵ Thus, the key remaining

¹⁰ 47 U.S.C. § 522(4). The Commission’s regulations define a “television channel” as “a band of frequencies 6 MHz wide in the television broadcast band and designated either by number or by the extreme lower and upper frequencies.” 47 C.F.R. § 73.681; *see also* 47 C.F.R. §§ 73.603, 73.606, 73.682(a)(1). The Commission’s regulations also define a “cable television channel” as a “signaling path provided by a cable television system.” 47 C.F.R. § 76.5(r)–(u).

³⁵ The Act defines “video programming” as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.” 47 U.S.C. § 522(20). Although the Commission stated a decade ago that “Internet video, called ‘streaming video’ . . . has not yet achieved television quality . . . and therefore is not consistent with the definition of video programming,” it recently reached the opposite conclusion in light of technological developments. *Compare* Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, 4834, ¶ 63 n.236 (2002) *with* Preserving the Open Internet, Report and Order, 25 FCC Rcd. 17,905, 17,976, ¶ 129 n.408 (2010), *vacated on other grounds*, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (“intervening improvements in streaming technology and

definitional issue is how to interpret the phrase “multiple channels of video programming.”

17. The Act defines a “channel” as “a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation).” [T]here are at least two possible interpretations of the term “channel” within the definition of MVPD. We tentatively conclude that the best reading is that “channels of video programming” means streams of linear video programming (the “Linear Programming Interpretation”). Under this interpretation, linear video programming networks, such as ESPN, The Weather Channel, and other sources of video programming that are commonly referred to as television or cable “channels,” would be considered “channels” for purposes of the MVPD definition, regardless of whether the provider also makes available physical transmission paths. We also seek comment on an alternative interpretation under which the definition of MVPD would include only entities that make available transmission paths in addition to content, and thus exclude those Internet-based distributors of video programming that do not own or operate facilities for delivering content to consumers (the “Transmission Path Interpretation”).

1. Proposed “Linear Programming Interpretation”

18. Under our proposed rule, we would interpret the term “channels of video programming” to mean prescheduled streams of video programming (which we refer to in this NPRM as “linear” programming), without regard to whether the same entity is also providing the transmission path. We believe that this is the better interpretation for three reasons: (i) it is a reasonable interpretation of the Act and most consistent with Congressional intent, (ii) it best aligns with consumer expectations and industry developments, and (iii) it is consistent with the common meaning of the word channel.

19. We tentatively conclude that our proposed Linear Programming Interpretation is consistent with the language of the statute. The statutory definition of MVPD begins by stating that an MVPD is a “person *such as, but not limited to*, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor” 47 U.S.C. § 522(13) (emphasis added). We tentatively conclude that the essential element that binds the illustrative entities listed in the provision is that each makes multiple streams of prescheduled video programming available for purchase, rather than that the entity controls the physical distribution network. Therefore, we believe that our interpretation is consistent with the illustrative list of MVPDs that the statutory definition provides.

20. In addition, the Commission has previously held that an entity need not own or operate the facilities that it uses to distribute video programming to subscribers in order to qualify as an MVPD. Rather, an MVPD may use a third party’s distribution facilities in order to make video programming available to subscribers. We find, therefore, that our proposed interpretation is consistent with Commission precedent.

21. We also find the term “channel” used in the context of the MVPD definition (i.e., “multiple channels of video programming”) to be ambiguous. Further, we tentatively conclude that Congress did not intend the term “channel” in this context to be interpreted in accordance with the definition in Section 602(4) of the Act, 47 U.S.C. § 522(4), but rather intended the term to be given its ordinary and common meaning. The Act states that “the term ‘*cable channel*’ or ‘*channel*’ means a portion of the electromagnetic frequency spectrum *which is used in a cable system* and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation). 47 U.S.C. § 522(4) (emphasis added). This definition was adopted in the 1984 Cable Act, which focused primarily on the regulation of cable television. In contrast, the term “MVPD” was adopted by Congress eight years later in 1992, when new competitors to cable were emerging, and is specifically “not limited” solely to cable operators.

22. Moreover, using the cable-specific definition of “channel” to interpret the definition of “MVPD” does not seem consistent with the illustrative list of MVPDs that is included in the definition. For example, DBS providers are specifically included in the definition as MVPDs, but the linear streams of video programming that they provide to subscribers do not align with the definition of “channel” in Section 602(4) of the Act, because that definition specifically refers to the electromagnetic spectrum “used in a cable system.” If Congress intended an entity to have control over the transmission path in order to be deemed an MVPD, presumably it would have explicitly specified that in the definition of MVPD, as it did with the definition of cable system. Therefore, we tentatively conclude that, when Congress defined an MVPD as an entity that “makes available . . . channels of video programming,” it did not intend to limit the types of entities that meet the definition to only those that control the physical method of delivery (i.e., a

broadband availability enable such programming to be ‘comparable to programming provided by . . . a television broadcast station’) (quoting definition of “video programming” in 47 U.S.C. § 522(20)).

transmission path). As a consequence, we believe that this is a reasonable interpretation of the Act.

23. We believe that our proposed interpretation is consistent with Congress’s intent to define “MVPD” in a broad and technology-neutral way to ensure that it would not only cover video providers using technologies that existed in 1992, but rather be sufficiently flexible to cover providers using new technologies such as Internet delivery. The Act imposes important pro-consumer responsibilities on MVPDs. As incumbent MVPDs transition to IP delivery, we must ensure that the definition of MVPD is read broadly enough to ensure that consumers do not lose the benefits those provisions are intended to confer. For example, we note that the goals of the program access provision of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act) are to increase competition and diversity in the video programming market, to increase the availability of programming to persons in rural areas, and to spur the development of communications technologies. It would frustrate those goals to exclude from coverage new technologies and services that develop. Consumers are watching more online subscription video, and incumbent operators and new entrants alike are experimenting with or planning to launch linear video services over the Internet. Therefore, we tentatively conclude that the Linear Programming Interpretation is most consistent with consumer expectations and industry trends, and we believe that Congress’s goals are best served by an interpretation of MVPD that accommodates changing technology.

24. Finally, certain commenters suggest that the term “channel” can be interpreted both in the “content” sense and in the “container” sense: “In a video context, the Act uses the term both in a ‘container’ sense, to refer to a range of frequencies used to transmit programming, and in a ‘content’ sense to refer to the programming itself, or the programmer.” Public Knowledge Comments at 2–3. Those commenters argue that, based on the context, the content sense applies when interpreting the definition of MVPD, “since only that reading is consistent with the Act’s pro-competitive purposes.” *Id.* at 4. We note that the legislative history of the 1992 Cable Act refers to ESPN as a “sports channel” and CNN as a “news channel”; given that both of these are linear programming networks, this suggests that Congress used the term channel, at least in this instance, to refer to such programming networks and not to portions of the electromagnetic frequency spectrum. Commenters provide numerous examples of the use of the term “channel” in both the content sense (i.e., a linear video programming network) and the container sense (i.e., a range of frequencies used to transmit programming) in everyday usage and in dictionaries, as well as by Congress and the Commission. Because the term “channel” as used in the definition of MVPD is ambiguous, we tentatively conclude that it is reasonable to read the term to have its common, everyday meaning of a stream of prescheduled video programming when we interpret the definition of MVPD. As discussed above, we believe our proposed interpretation is most consistent with the Act’s goals of increased video competition and broadband deployment. In addition, we believe that it is most consistent with consumer expectations because consumers are focused on the content they receive, rather than the specific method used to deliver it to them.

25. *Scope of the Linear Programming Interpretation.* We also seek comment on whether, under the Linear Programming Interpretation, we can and should carve out certain types of entities that make available multiple linear streams of video programming from the MVPD definition. If we interpret “multiple channels of video programming” to mean multiple linear streams of video programming, could we, consistent with the statute, narrow the category of entities that would qualify as MVPDs? For example, are there niche online subscription programming providers or other small entities that would not be able to remain in business if they qualify as MVPDs? A “multichannel” video programming distributor is required by definition to make multiple channels of video programming available. We seek comment on how to interpret the term “multiple” in the definition of MVPD. Although we believe it is important to modernize our interpretation of MVPD to capture entities that provide service similar to or competitive with more traditional MVPD service but through new distribution methods, we also wish to ensure that our rules do not impede innovation by imposing regulations on business models that may be better left to develop unfettered by the rules applicable to MVPDs. Should we interpret the term MVPD to require that a certain number of channels of video programming, such as twenty, be made available? Would twenty channels be too low or too high? Is there justification for a different number? What if an entity makes multiple channels available nationwide, but makes only one channel available for purchase to each subscriber? Should we interpret the term “channels of video programming” to require a certain number of programming hours per day or per week or to exempt certain niche programmers? Is there justification to require eighteen hours of programming per day, seven days per week, or some other number? We tentatively conclude that an entity that makes linear services available via the Internet is an MVPD, and our regulations apply to all of the MVPD’s video services. Are there other factors that we should consider? For example, should we exempt from the interpretation of linear programming discrete, intermittent events that occur at prescheduled times, such as live individual sporting events? While these events are prescheduled by the programming provider, they are presented sporadically, in contrast to most television channels that broadcast continuously throughout the day. If such events are considered linear programming, our proposed Linear

Programming Interpretation would appear to apply to online subscription video packages that stream multiple sporting events, such as those offered by Major League Baseball, Major League Soccer, the National Basketball Association, and the National Hockey League. We seek comment on whether distributors of these types of services should be included within our interpretation of MVPD and, if not, on the statutory basis for excluding them and bright-line tests that we could use to evaluate whether such an exclusion would apply.

26. We tentatively conclude that we should interpret MVPD so that the definition would not apply to a distributor that makes available only programming that it owns—for example, sports leagues or stand-alone program services like CBS’s new streaming service. A potential consequence of the Linear Programming Interpretation would be that a programmer that decides to sell two or more of its own programming networks directly to consumers online, either instead of or in addition to selling them through cable or DBS operators’ programming packages, might subject itself to the benefits and burdens of MVPD status. For example, if Disney were to offer, for purchase by subscribers, a package of linear feeds of the Disney Channel, Disney XD, and Disney Junior for online streaming to customers, would that make Disney an MVPD? Would this unduly limit consumer options? Would bringing such an offering into our MVPD regulations discourage innovation? We seek comment on our statutory authority to adopt our tentative conclusion.

27. Under the Act, an entity is an MVPD only if it makes multiple channels of video programming “available for purchase.” 47 U.S.C. § 522(13). We seek comment on what it means to make video programming available for purchase, particularly as that term would apply if we were to adopt our proposed Linear Programming Interpretation. We tentatively conclude that the term means making an offer to consumers to exchange video service for money. We seek comment on this tentative conclusion. Are there other forms of consideration that a consumer could use to purchase services? If a cable or satellite company offers its subscribers access to supplemental online linear video services without a separate charge, but as part of their paid television packages, does this offering constitute making the online services “available for purchase”? Do any cable or satellite companies charge subscribers for those services indirectly? Is there any way to trace general subscription fees specifically to supplemental online linear video services? We seek comment on how our proposed interpretation could affect new business models that do not conform with the traditional monthly subscription model, and whether we should treat those business models on a case-by-case basis.

28. We also seek comment on how our proposed interpretation would apply to entities that are located overseas but make linear video programming networks available for purchase in the United States over the Internet. An entity could meet the definition of MVPD under our proposed definition even if it has no physical presence in the United States. We tentatively conclude that the Commission should not assert jurisdiction over these entities. If commenters disagree, they should provide the authority under which the Commission could assert jurisdiction. If we assert jurisdiction solely over entities with a physical presence in the United States, will some Internet-based distributors of video programming locate their operations overseas to avoid Commission regulation? Would the alternative interpretation discussed below, which would consider an entity to be an MVPD only if it maintains control over a transmission path, avoid this result by requiring an MVPD to have a jurisdictional presence in the United States?

2. *Alternative “Transmission Path Interpretation”*

29. We seek comment also on an alternative approach that would interpret the term channel in this context as requiring a transmission path. Citing the statutory definition of “channel” as “*a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel,*” 47 U.S.C. § 522(4), the Media Bureau [has previously] expressed the tentative view that the term “channel” as used in the definition of MVPD “appear[s] to include a transmission path as a necessary element.” *Sky Angel U.S., LLC, Order*, 25 FCC Rcd. 3879, 3882–83, ¶ 7 (MB, 2010). Under this interpretation, we would not consider Internet-based linear video providers to be MVPDs unless they control at least some portion of the physical means by which the programming is delivered—for example, via a physical cable that the provider owns or via spectrum that the provider is licensed to use.

30. We also seek comment on whether Congress intended to promote only facilities-based competition in the video distribution market, which might support the Transmission Path Interpretation. The Conference Report accompanying the 1992 Cable Act includes a statement that Congress intended to promote “facilities-based” competition. *See* H.R. Rep. No. 102-862 (1992) (Conf. Rep.), at 93, *reprinted in* 1992 U.S.C.C.A.N. 1231, 1275 (discussing the program access provision of the 1992 Cable Act and stating that the “conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable”). Moreover, the Commission has previously stated that “[f]acilities-based competition” is a term used in the legislative history of the Act to emphasize that program competition can only become possible if alternative facilities to deliver programming to

subscribers are first created. The focus in the 1992 Cable Act is on assuring that facilities-based competition develops.” Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage, First Report and Order, 8 FCC Rcd. 3359, 3384, n.79 (1993). On the other hand, the ABC/CBS/NBC Affiliates note that “there is but one reference to ‘facilities-based competition’ in the lengthy House Report. . . . Certainly, that single reference cannot support the incorporation of a ‘transmission path’ requirement into a statutory definition that does not, on its face, contain any such restriction.” ABC/CBS/NBC Affiliates Reply Comments at 10–11. Accordingly, we seek comment on whether Congress sought to increase facilities-based competition exclusively, or sought to encourage competition to incumbent cable operators more generally, regardless of how the competitive service is delivered.

31. *Scope of the Transmission Path Interpretation.* As we note above, incumbent MVPDs are obtaining rights to distribute content online at a rapid pace and appear prepared to launch online linear video services that are not tied to their facilities. We seek comment on our regulatory authority under the Transmission Path Interpretation in these cases. The Transmission Path Interpretation seems difficult to apply in certain cases because an entity’s status would change depending on how and where the subscriber receives the content. For example, consider a subscriber who views video at her home on a tablet over broadband infrastructure that the video distributor owns, and then visits a local coffee shop and views video on that same tablet via the Internet using broadband infrastructure that the video distributor does not own. In that case, the video provider would be an MVPD at the subscriber’s home, but not at the coffee shop. We believe that this would lead to regulatory uncertainty, thus providing more support for the Linear Programming Interpretation.

B. Regulatory Implications of Alternative Interpretations

33. Below, we seek comment on the policy ramifications of the various interpretations set forth above. To the extent possible, we encourage commenters to quantify any costs and benefits and submit supporting data. In addition to the specific effects that we ask about below, we invite commenters to identify other possible effects of the Linear Programming Interpretation and the Transmission Path Interpretation and how those effects should influence our interpretation.

1. Application of MVPD-Specific Regulatory Privileges and Obligations to Internet-Based Distributors of Video Programming

35. [O]ur proposed interpretation would ensure that incumbent MVPDs do not evade our regulations by migrating their services to the Internet. It would also allow Internet-based distributors of video programming, including those that do not control any facilities, to take advantage of the privileges of MVPD status but would also require them to comply with the legal obligations applicable to MVPDs. Conversely, the Transmission Path Interpretation could allow many if not most Internet-based distributors of video programming to avoid regulation, including obligations that promote important public interest benefits, and would also deprive them of certain regulatory privileges.

a. General Privileges and Obligations

36. An entity that meets the definition of an MVPD is subject to both privileges and legal obligations under the Communications Act and the Commission’s rules. The regulatory privileges of MVPD status include the right to seek relief under the program access rules and the retransmission consent rules. Among the regulatory obligations of MVPDs are statutory and regulatory requirements relating to (i) program carriage; (ii) the competitive availability of navigation devices (including the integration ban); (iii) good faith negotiation with broadcasters for retransmission consent; (iv) Equal Employment Opportunity (EEO); (v) closed captioning; (vi) video description; (vii) access to emergency information; (vi) signal leakage; (vii) inside wiring; and (viii) the loudness of commercials.

b. Specific Privileges and Obligations

(i) Privileges

(a) Program Access

40. As required by Section 628 of the Act, the Commission’s program access rules provide certain protections to MVPDs in their efforts to license cable-affiliated programming. *See* 47 U.S.C. § 548. These rules: (i) prohibit a cable operator or its affiliated, satellite-delivered programmer from engaging in “unfair methods of competition or unfair or deceptive acts or practices” that have the “purpose or effect” of “hinder[ing] significantly or prevent[ing]” an MVPD from providing programming to subscribers or consumers (the “unfair act” prohibition), *see* 47 U.S.C. § 548(b); (ii) prohibit a cable operator from unduly or improperly influencing the decision of its affiliated, satellite-delivered

programmer to sell, or unduly or improperly influencing the programmer's prices, terms, and conditions for the sale of, satellite-delivered programming to any unaffiliated MVPD (the "undue or improper influence" rule), *see* 47 U.S.C. § 548(c)(2)(A); and (iii) prohibit a cable-affiliated, satellite-delivered programmer from discriminating in the prices, terms, and conditions of sale or delivery of satellite-delivered programming among or between competing MVPDs (the "non-discrimination" rule). *See* 47 U.S.C. § 548(c)(2)(B). To the extent that an MVPD believes that a cable-affiliated programmer has violated these rules, it may file a complaint with the Commission. *See* 47 U.S.C. § 548(d).

41. If the program access rules were to apply, would cable-affiliated programmers be required to negotiate with and license programming to potentially large numbers of Internet-based distributors? How will this impact the value of cable-affiliated programming to traditional MVPDs, especially as compared to non-cable-affiliated programming? To the extent that licensing programming to a particular Internet-based distributor presents reasonable concerns about signal security and piracy, do the program access rules adequately address this issue by recognizing these concerns as a legitimate reason for a cable-affiliated programmer to withhold programming from an MVPD? Would extending the reach of the program access rules have a positive effect for consumers?

42. We also seek comment on whether and how our proposed rule and alternative interpretations would impact competition in the video distribution market (both at present and in the future), specifically with respect to the program access rules. Among other things, the program access rules are intended to prevent cable-affiliated programmers from discriminating among similarly situated MVPDs. If Internet-based distributors of video programming are deemed not to be MVPDs because they do not make available transmission paths (and therefore are ineligible for the benefits of the program access rules), would there be any regulatory or other constraint that would prevent a cable-affiliated programmer from making its affiliated programming available for online distribution to only certain Internet-based distributors of video programming, such as those owned by its affiliated cable operator, but not to those owned by other MVPDs?

(b) Retransmission Consent

43. Section 325(b) of the Act benefits MVPDs by requiring broadcasters to negotiate in good faith with MVPDs for retransmission consent and prohibiting broadcasters from negotiating exclusive retransmission consent agreements with any MVPD. *See* 47 U.S.C. § 325(b)(3)(C)(ii). Absent these provisions, broadcasters could potentially refuse to negotiate with and thereby withhold their signals from MVPDs that wish to carry these signals. To the extent that an MVPD believes that a broadcaster has violated these provisions, it may file a complaint with the Commission.

45. Section 325(b)(1)(A) of the Act provides that "no cable system or other *multichannel video programming distributor*" shall retransmit a broadcast signal without the broadcaster's consent. 47 U.S.C. § 325(b)(1)(A) (emphasis added). But an entity wishing to retransmit a broadcast signal also must obtain authorization to publicly perform the copyrighted works within the broadcast signal. 17 U.S.C. §§ 106, 111. If we adopt the Linear Programming Interpretation and the Copyright Office does not afford statutory licenses to Internet-based video providers, how would we construe a broadcaster's obligation to negotiate in good faith? What effect should the answer to that question have on our policy analysis?

(ii) Obligations

(a) Program Carriage

48. The program carriage rules prohibit MVPDs from (i) requiring a financial interest in a video programming vendor's program service as a condition for carriage; (ii) coercing a video programming vendor to provide, or retaliating against a vendor for failing to provide, exclusive rights as a condition of carriage; or (iii) unreasonably restraining the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage. *See* 47 C.F.R. § 76.1301(a)–(c); *see also* 47 U.S.C. § 536(a)(1)–(3). To the extent that a programming vendor believes that an MVPD is not in compliance with these rules, it may file a complaint with the Commission.

49. What practical impact, if any, would these rules have on Internet-based distributors of video programming? As we note above, large, established cable operators, DBS providers, and technology companies have announced plans to launch Internet-based video programming services that would be MVPD services under the Linear Programming Interpretation. If these companies follow through with these plans, absent application of the program carriage rules there may be no regulatory constraint preventing them from demanding a financial interest or exclusive rights from programmers as a condition for carriage.

(b) Retransmission Consent

50. As discussed above, Section 325(b)(1)(A) of the Act provides that “No cable system or other *multichannel video programming distributor* shall retransmit the signal of a broadcasting station, or any part thereof, except—(A) with the express authority of the originating station” 47 U.S.C. § 325(b)(1)(A). Thus, to the extent that an Internet-based distributor of video programming qualifies as an MVPD, it must receive the consent of the broadcaster before retransmitting the broadcaster’s signal. Moreover, Section 325(b) of the Act imposes an obligation on MVPDs to negotiate in good faith with broadcasters in obtaining retransmission consent. If a broadcaster believes that an MVPD has violated these provisions, it may file a complaint with the Commission.

(c) Other MVPD Obligations

[Discussion of many specific rules omitted, including closed captioning, video description, accessibility of emergency information, accessibility of user interfaces and guides, equal employment rules, openness of navigation devices, signal leakage, inside wiring, and loudness of commercials.]

2. *Impact on Content Owners*

a. Broadcast Content

66. Section 111 of the Copyright Act provides “cable systems” (as defined by the Copyright Act) a statutory license to retransmit copyrighted broadcast performances if the “cable system” pays a statutory fee for those performances. 17 U.S.C. § 111. Some content creators and owners contend that the Commission, in interpreting the definition of MVPD in the Communications Act, should be cognizant of the interplay between Section 111 of the Copyright Act and the Communications Act and even suggest that a Commission decision interpreting the definition of MVPD to include Internet-based distributors would conflict with copyright law. But the market and legal landscape has changed significantly since content creators and owners made those claims. Therefore, we ask commenters to update the record with respect to how expanding the definition of MVPD in the Communications Act to include some Internet-based distributors interrelates with copyright law.

b. Cable-Affiliated Content

67. Through application of the program access rules, Internet-based distributors that qualify as MVPDs will be entitled to non-discriminatory access to cable-affiliated networks. Generally speaking, a programmer licenses content from various content creators, aggregates the content into a network, and then licenses the network to MVPDs for distribution. Discovery claims, however, that cable-affiliated networks cannot license all of the content displayed on their networks for distribution on the Internet because they frequently do not possess the right to authorize Internet distribution of that content. Rather, Discovery argues that (i) content creators frequently retain for themselves the rights to Internet distribution in order to generate a separate revenue stream by displaying the content on their own websites or by selling the content to other video providers; and (ii) obtaining Internet distribution rights is simply too expensive for some networks. What effect should the Copyright Office’s decisions have on our statutory and policy analysis?

68. To what extent do cable-affiliated networks possess—or have the ability to negotiate for—the right to authorize distribution of content displayed on their network over the Internet? If we adopt the Linear Video Interpretation, what impact does that have on existing rights for content distribution? We note that some cable-affiliated networks are made available over the Internet to authenticated MVPD subscribers. Does this reflect that cable-affiliated programmers possess the right to authorize distribution of content displayed on their network over the Internet? Does the concern about lack of rights to authorize Internet distribution of content apply only with respect to content not owned by the network? To what extent do cable-affiliated networks own the content displayed on their networks (or are affiliated with the content creators or otherwise possesses all of the rights with respect to distribution of that content)? To what extent is the content displayed on cable-affiliated networks owned by entities unaffiliated with the network?

69. Would or should the adoption of the proposed definition of an MVPD have any effect on a cable-affiliated network that does not possess the right to authorize Internet distribution of content displayed on its network? In other words, would or should the network be required to obtain such rights to comply with the program access rules if certain Internet-based distributors qualify as MVPDs? We seek comment on how the resolution of this question would impact content creators, cable-affiliated programmers, and MVPDs, either traditional or Internet-based. We also seek comment on our authority to require entities to enter into contracts for these distribution rights.

c. Non-Broadcast, Non-Cable-Affiliated Content

70. If we were to require cable-affiliated networks to obtain Internet distribution rights from content creators to comply with the program access rules, what impact, if any, would or should this have on non-cable-affiliated networks? For example, Ovation claims that, if cable-affiliated networks are required to obtain Internet distribution rights, “marketplace pressures would foreseeably require other networks to do the same.” Ovation Reply Comments at 4. We seek comment on this concern.

C. Regulatory Treatment of Cable Operators and DBS Providers that Provide Linear Video Services via IP

71. It seems evident that merely using IP to deliver cable service does not alter the classification of a facility as a cable system or of an entity as a cable operator. That is, to the extent an operator may provide video programming services over its own facilities using IP delivery within its footprint it remains subject to regulation as a cable operator. At the same time, we understand that some cable operators and DBS providers are exploring new business models that might be indistinguishable from other over-the-top (OTT) services. As mentioned above, cable operators and DBS providers are obtaining rights for online distribution of content, and some have launched or may soon launch Internet-based video programming services. Below, we seek comment on the regulatory treatment of national OTT video services that a cable operator or DBS provider may provide nationally—as contrasted to the traditional services it offers.

1. Cable Service Provided via IP Over the Operator’s Facilities

72. The Act defines a cable operator as, essentially, an entity that provides cable service over a cable system. 47 U.S.C. § 522(5). Thus, we must interpret the three terms—cable service, cable system, and cable operator—together to determine the proper regulatory treatment of IP-based services provided by cable operators. The Act defines cable service as “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.” 47 U.S.C. § 522(6). The Commission and other authorities have previously concluded that the statute’s definition of “cable service” includes linear IP video service. *See* Cable Television Technical and Operational Requirements, Notice of Proposed Rulemaking, 27 FCC Rcd. 9678, 9681, ¶ 5 (referring to “IP delivery of cable service”); *Office of Consumer Counsel v. Southern New England Telephone Co.*, 515 F.Supp.2d 269, 276 (D. Conn. 2007), *vacated on other grounds*, 368 F. App’x 244 (2d Cir. 2010) (“The statutory language itself appears to require the conclusion that [IP-based] video programming service does constitute a ‘cable service,’ as defined by the Cable Act.”).

73. Second, to the extent a cable operator uses “a set of closed transmission paths” to provide cable service, as one providing IP video programming over its copper wire (including coaxial cable) or fiber optic cable does, its facility meets the definition of cable system:

a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves subscribers without using any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter, except that such facility shall be considered a cable system (other than for purposes of section 541(c) of this title) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (D) an open video system that complies with section 573 of this title; or (E) any facilities of any electric utility used solely for operating its electric utility system.

47 U.S.C. § 522(7).

74. Finally, an entity that delivers cable services via IP is a cable operator to the extent it delivers those services as managed video services over its own facilities and within its footprint. This is compelled by the Act’s definition of a cable operator as a “person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.” 47 U.S.C. § 522(5).

75. IP-based service provided by a cable operator over its facilities and within its footprint must be regulated as a cable service not only because it is compelled by the statutory definitions; it is also good policy, as it ensures that cable operators will continue to be subject to the pro-competitive, consumer-focused regulations that apply to cable

even if they provide their services via IP.

76. Congress and the Commission advanced several pro-competitive, consumer-focused values when they adopted the cable-specific provisions of the Act and the rules implementing these important provisions. The Act and our rules include many cable-specific requirements, including the following: annual regulatory fees; Emergency Alert System (EAS) requirements; the V-Chip; commercial limits in children's programs; network non-duplication; syndicated program exclusivity; notice to broadcasters regarding: (i) deletion or repositioning of a broadcast signal, (ii) a change in designation of principal headend, (iii) change in technical configuration, (iv) the provision of service to 1000 subscribers, thereby entitling broadcast stations to exercise non-duplication protection or syndicated exclusivity protection; political programming and candidate access rules; sponsorship identification; lotteries; public inspection file; public, educational, or governmental channels (PEG); program access; leased access; various reporting requirements; cross-ownership restrictions; prohibition on buy outs; national subscriber limits (horizontal ownership restriction); limits on carriage of vertically integrated programming; various franchising requirements; rate regulation, including a requirement to offer a basic service tier, a prohibition on negative option billing, an obligation to offer a tier buy-through option, and requirements pertaining to information on subscriber bills; regulation of services, facilities, and equipment, including minimum technical standards and notification to customers of changes in rates, programming services, or channel positions; consumer protection and customer service; consumer electronics equipment compatibility, including prohibition on scrambling or encrypting the basic service tier; support for unidirectional digital cable products (Plug and Play); protection of subscriber privacy; transmission of obscene programming; and scrambling of cable channels for non-subscribers.

77. In particular, these obligations on cable operators are critical for noncommercial, local, and independent broadcasters. Sections 614 and 615 of the Communications Act and implementing rules adopted by the Commission entitle commercial and noncommercial television broadcasters to carriage on local cable television systems. 47 U.S.C. §§ 534, 535. When the Commission proposed implementing regulations, it noted that Congress emphasized strongly that the public interest demands that cable subscribers be able to access their local commercial and noncommercial broadcast stations. That congressional policy directive persists today; and the continued application of these requirements to cable operators that provide video programming over IP will ensure that local broadcasters will be carried, and that other cable-centric regulations will apply, regardless of the method that the cable operator uses to deliver the cable service.

2. Cable Operators Offering OTT Services

78. We tentatively conclude that video programming services that a cable operator may offer over the Internet should not be regulated as cable services. Some cable operators have announced plans to offer video programming services via the Internet. If a cable operator delivers video programming service over the Internet, rather than as a managed video service over its own facilities, we tentatively conclude that this entity would be (i) a cable operator with respect to its managed video service, and (ii) a non-cable MVPD under our proposed Linear Programming Interpretation with respect to its OTT service.

3. DBS Providers Offering OTT Services

79. Some DBS providers offer linear OTT services (and have announced plans to expand those services) via the Internet. To the extent that DBS providers offer video programming services over the Internet, we tentatively conclude that those services should not be regulated as DBS service, and therefore should not be subject to the regulatory and statutory obligations and privileges of such services. If we adopt our proposed Linear Programming Interpretation, those services would be MVPD services subject to the regulatory and statutory obligations and privileges of such services. We reach this tentative conclusion because that service does not use the providers' satellite facilities, but rather relies on the Internet for delivery. We believe that this tentative conclusion is consistent with the Act and our rules.

Notes and Questions

1. Congressional Intent. The relevant statutory definitions and substantive requirements are from the 1984 or 1992 Cable Acts. Do you have a clear idea of the potential harms (or at least issues) that Congress had in mind when it passed those statutes? (See Chapters 9 and 10.) Do you think that the definitions have the ambiguity that the FCC asserts in this NPRM?

2. Competition on the Internet. One of Google’s favorite sayings when confronted with evidence of its 65% (or greater) market share in search is to say that competition is “only a click away.” Is this how competition works among online video providers? As we saw in Chapters 9 and 10, Congress was concerned about two kinds of potential entry barriers: the entry barrier created by carriers’ control over distribution infrastructure, and the entry barrier created by portfolios of content. Are these concerns tied together or are they independent? Do online video providers need access to all content (or certain especially important content) in order to compete? Are the concerns uniquely tied to content that is controlled by companies that also own infrastructure, or are they independent?

3. Aereo Redux. In Chapter 9, we excerpted the Second Circuit’s decision finding that Aereo violated copyright laws with its Internet-based broadcast distribution product. Aereo’s odyssey was one of the prods for the FCC’s NPRM here. How would the FCC’s proposed result (or the alternative) help or not help Aereo return to the market?

Chapter 16

Direct Regulation of Content Deemed Harmful

Insert on page 839 after note 6:

7. Social Media, the Cyber Age, and Caution. In *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), the Supreme Court unanimously voted to invalidate a North Carolina statute making it a felony for a registered sex offender “to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages.” But Justice Alito, joined by Roberts and Thomas, concurred only in the judgment. All eight Justices agreed that the statute was not sufficiently tailored. Both opinions emphasized the possible application of the statute to Amazon.com, washingtonpost.com, and webmd.com.

So where did the opinions differ? The central disagreement between the two opinions is how judges applying the First Amendment should respond to the changing nature of cyberspace. From the majority:

The nature of a revolution in thought can be that, in its early stages, even its participants may be unaware of it. And when awareness comes, they still may be unable to know or foresee where its changes lead. So too here. While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.

This case is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet. As a result, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.

Packingham, 137 S. Ct. at 1736.

And from the concurrence:

The Court is correct that we should be cautious in applying our free speech precedents to the internet. *Ante*, at 6. Cyberspace is different from the physical world, and if it is true, as the Court believes, that “we cannot appreciate yet” the “full dimensions and vast potential” of “the Cyber Age,” *ibid.*, we should proceed circumspectly, taking one step at a time. It is regrettable that the Court has not heeded its own admonition of caution.

Packingham, 137 S. Ct. at 1744 (Alito, J., concurring).

These dueling opinions pick up on two themes that arose in other cases noted in the casebook. The first is the majority’s point that “what [courts] say today might be obsolete tomorrow.” This has long been a major consideration in cases involving changing technologies like the Internet, *see* Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 Texas L. Rev. 269 (1999), and the Court invoked rapidly changing facts in its remand in *Ashcroft II* on page 825 of the casebook.

The second is the question of the best default position with respect to the First Amendment when applied to changing phenomena (like cyberspace). Should judges err on the side of starchy application of free speech tests, or a more flexible approach? This debate arose in *Denver Area* on page 781 of the casebook. In that case, Justice Souter wrote a concurrence suggesting that, in the fast-changing world of telecommunications, judges should heed the admonition “First, do no harm.” Justice Kennedy responded: “Justice Souter recommends to the Court the precept, ‘First, do no harm.’ The question, though, is whether the harm is in sustaining the law or striking it down.” In *Packingham*, Justice Kennedy’s majority opinion, consistent with his concurrence in *Denver Area* and his First Amendment jurisprudence more generally, treats broad and rigorous application of First Amendment tests as the “do no harm” position in the ever-changing world of cyberspace. Justice Alito’s concurrence wants a default that takes smaller steps and gives judges (and thus legislatures) more flexibility.