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# A COMMUNICATIONS REFORM PRIORITY: CURTAILING FCC ANCILLARY JURISDICTION UNDER TELECOM ACT § 706

by

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# A COMMUNICATIONS REFORM PRIORITY:
## CURTAILING FCC'S ANCILLARY JURISDICTION UNDER TELECOM ACT § 706

### INTRODUCTION

Despite the Federal Communications Commission's (FCC or Commission) 2016 legal victory in *US Telecom Association v. FCC*,[1] the protracted battle over federal network neutrality rules persists. Through successful *en banc* petition or Supreme Court appeal by the petitioners, or at the hands of a new Commission, the reclassification of the Internet as a common-carriage service may ultimately be reversed. Notwithstanding the fate of the Open Internet Order, Title II reclassification represents only the tip of the iceberg with respect to FCC regulation of the Internet economy. Although much speculation has centered on FCC's potential for regulatory initiatives under Title II, the next battles over Internet regulation will likely be fought under § 706 of the 1996 Telecommunications Act. This WORKING PAPER argues that the following areas are susceptible to Commission intervention under its highly expansive claims of ancillary powers under § 706:

1. Neutrality beyond broadband providers;
2. Privacy policies of edge providers; and
3. Broadband service, notwithstanding the Open Internet Order.

[1] *United States Telecom Ass'n v. FCC*, 825 F.3d 674 (DC. Cir. 2016). [Ed. Note: WLF filed an *amicus curiae* brief on behalf of former FCC Commissioner Harold Furchtgott-Roth in this case. *See* http://www.wlf.org/litigating/case_detail.asp?id=827.

 

Absent a major revision of federal communications law, Congress should prioritize clarifying the scope of FCC's ancillary discretion under § 706. Such an effort is necessary to provide legal stability and encourage innovation and investment in the Internet economy in a regulatory climate currently racked by uncertainty and fluctuating partisan leadership.

## I. BACKGROUND

Congress did not draft the federal communications laws with the modern Internet in mind. The last time Congress substantially updated the Communications Act—1996—the Internet was in its nascence. Since its potential was not yet well-understood, legislators chose to leave it largely unregulated.[2] Unlike the Federal Trade Commission (FTC), which has broad authority to regulate consumer protection and competition in practically all industries, FCC is confined by statute to regulating specific industries. The Communications Act provides FCC with authority to regulate telephone, broadcast, and cable—but not the Internet.

Now is not the first time FCC has dealt with new technology not contemplated in its governing act. The 1934 Communications Act was promulgated to regulate telephone and telegraph companies under Title II and broadcasters under Title III. Cable and satellite television providers—which retransmit broadcast signals, but are not categorized as broadcasters—did not arise until decades later. Due to pressure in

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[2] 47 U.S.C. § 230(b)(2). *See also* Jonathan E. Nuechterlein & Philip J. Weiser, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 231 (2nd ed. 2013).

the 1960s from broadcasters to regulate cable, FCC asserted its jurisdiction over cable as ancillary to its authority over broadcasting, as well as its general mandate under Title I to regulate "all interstate and foreign communication by wire or radio"[3] and "perform any and all acts, make such rules and regulations, and issue such orders [...] as may be necessary in the execution of its functions."[4] In a trilogy of cases, the Supreme Court shaped the boundaries of FCC's Title I ancillary jurisdiction and determined that absent a directive from Congress, the Commission's authority to regulate cable was not a comprehensive mandate but was "delimited by its statutory responsibilities over television broadcasting."[5] Finally, in 1984, after decades of regulating cable under ancillary provisions, Congress explicitly gave FCC direct authority to regulate cable by adding Title VI to the Communications Act.

As in its treatment of cable television, FCC's lack of a specific directive from Congress to regulate the Internet has not precluded it from assuming jurisdiction over Internet companies and pigeonholing regulation of services like broadband and Voice Over Internet Protocol into ancillary categories.[6] According to a 2013 study, "[t]he Commission has invoked its ancillary authority roughly 65 times since 2007—approximately the same number of times it has invoked its ancillary authority during

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[3]47 U.S.C. § 152(a).

[4]47 U.S.C. § 154(i).

[5]*FCC v. Midwest Video Corp.*, 440 U.S. 689, 698 (1979).

[6]*See*, *e.g.*, *Comcast Corp. v. FCC*, 600 F. 3d 642 (DC Cir. 2010); *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1235 (DC Cir. 2007).

the entirety of its history up to that point."[7] In light of rapid technological development, the main subject of FCC regulation is no longer the traditional industries of broadcast, cable or telephone, but is rather the Internet.

Scholars have made lofty proposals for rewriting the Act for the Internet Age and House and Senate committees have attempted several reform efforts.[8] Given the realities of America's bicameral system, however, any significant rewrite of major legislation is a rare occurrence, and past plans for an overhaul have not come to fruition. Notwithstanding the election of a new President whose party also has controlling majorities in Congress, it is unlikely that major law reform delimiting FCC's jurisdiction over the Internet will arise any time soon.

In recent years, the Commission's chief source of ancillary authority over the Internet has been § 706 of the 1996 Telecommunications Act. It states that FCC:

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

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[7] Daniel A. Lyons, *Restoring Limits on the FCC's Ancillary Authority*, FREE STATE FOUNDATION PERSPECTIVES 8, no. 34, 5 (2013), *available at* http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1725&context=lsfp.

[8] For scholarly proposals for rewriting the Act, *see*, *e.g.*, Kevin Werbach, *Breaking the Ice: Rethinking Telecommunications Law for the Digital Age*, 4 J. ON TELECOMM. & HIGH TECH. L. 59 (2005); Randolph May, *Recent Developments in Administrative Law-The FCC's Tumultuous Year in 2003: An Essay on an Opportunity for Institutional Agency Reform*, 56 ADMIN. L. REV. 1307 (2004); and James B. Speta, *Deregulating Telecommunications in Internet Time*, 61 WASH. & LEE L. REV. 1063 (2004).

Section 706(b) instructs the Commission to initiate annual inquiries into the rate of deployment of advanced telecommunications, and, should it find it deployed at an insufficient rate, to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[9]

In 2010, FCC attempted to rely on § 706(a) to promulgate network neutrality regulations for broadband—then classified as a non-common carrier "information service." Even though the DC Circuit ultimately struck down those rules in *Verizon v. FCC*, the court accepted that § 706 was ambiguous as to whether it constituted a grant of regulatory authority or a broad statement of policy and deferred under *Chevron* to FCC's argument that § 706(a) *was* an independent grant of authority for FCC to promulgate rules that would spur the deployment of broadband. The DC Circuit accepted the Commission's theory that the proposed network neutrality rules were justified on the basis that they fostered a virtuous cycle of investment and innovation.[10] According to that argument, network neutrality regulations would spur innovation among edge providers, which would boost demand for broadband and in turn promote broadband deployment.[11] The court's ultimate rejection of the 2010 network neutrality rules was not on account of FCC's interpretation of § 706 (which it

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[9]47 U.S.C. § 1302.

[10]*Verizon v. FCC*, 740 F.3d 623, 644-46 (DC Cir. 2014).

[11]*Id*. at 634.

endorsed), but on the basis of § 153(51) of the Communications Act, which precludes the Commission from imposing common-carriage obligations on non-telecommunications services.[12]

FCC's theory in *Verizon* was counter to previous interpretations of § 706 by the Commission. As FCC stated in 1998:

> After reviewing the language of section 706(a), its legislative history, the broader statutory scheme, and Congress' policy objectives, we agree with numerous commenters that section 706(a) does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods. Rather, we conclude that section 706(a) directs the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced services."[13]

In other words, FCC interpreted the provision as *limiting*, rather than *expanding*, its regulatory authority, to provisions elsewhere in the Act.

Critics attacked the new "virtuous cycle" interpretation for lacking a limiting principle. In *Verizon*, Judge Tatel asserted that the new interpretation was limited by two criteria: 1) "[a]ny regulatory action authorized by section 706(a) would thus have to fall within the Commission's subject matter jurisdiction over interstate and foreign communication by wire and radio;" and 2) "any regulations must be designed to achieve a particular purpose: to 'encourage the deployment on a reasonable and

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[12] *Id.* at 649-50.

[13] *Advanced Services Order*, 13 F.C.C.R. at 24044 ¶ 69 (1998), *available at* https://ecfsapi.fcc.gov/file/6518711178.pdf. Note that the DC Circuit held FCC to its 1998 interpretation of § 706 in *Comcast Corp. v. FCC*, 600 F.3d 642 (DC Cir. 2010), and as a result, struck down the Commission's 2008 attempt to promulgate network neutrality rules.

timely basis of advanced telecommunications capability to all Americans.' … Section 706(a) thus gives the Commission authority to promulgate only those regulations that it establishes will fulfill this specific statutory goal."[14]

In contrast with Judge Tatel, Judge Silberman argued in his partial *Verizon* dissent that the virtuous cycle interpretation gave FCC authority to implement any rule that would "arguably make the Internet 'better'" by "spur[ring] demand for broadband infrastructure" and constituted "carte blanche to issue any regulation that the Commission might believe to be in the public interest."[15] Insofar as a regulation need only be arguably related to expanding Internet deployment, according to Judge Silberman, FCC is at liberty to regulate all aspects of the Internet industry.

Echoing Judge Silberman's concerns, Professor Christopher Yoo has noted that the DC Circuit's holding in *Verizon* recalls the Supreme Court's expansive interpretation of the Commerce Clause. Much like how *Wickard v. Filburn* left few activities outside the scope of the interstate commerce power, *Verizon* opened the door for FCC to justify any regulation based on its tangential effects on the rate of broadband deployment.[16]

The virtuous cycle interpretation of § 706 has been criticized for violating fundamental canons of statutory construction such as the Whole Act Rule, which

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[14] *Verizon*, 740 F.3d at 640.

[15] *Id*. at 662.

[16] Christopher Yoo, Wickard *for the Internet? Network Neutrality after* Verizon v. FCC, 66 FED. COMM. L.J. 415, 427 (2014).

 

asserts that a provision must be read in reference to other provisions in the scheme to resolve ambiguity. Whereas FCC viewed § 706 as giving the Commission broad regulatory authority over the Internet, in § 230(b)(2), one of the only sections of the 1996 Act that mentions the Internet, Congress exhorts FCC "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."[17] Reinforcing § 230(b)(2), § 706(c) notes that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation."[18] Insofar as § 230(b)(2) and § 706(c) articulate a clear intent to leave the Internet unregulated, interpreting § 706 as providing FCC with broad regulatory authority over the Internet undermines the textual integrity and internal coherence of the 1996 Telecommunications Act.

FCC's assertion of broad authority under § 706(a) is further questionable in light of § 706(b), which instructs the Commission to undertake annual inquiries into the rate of broadband deployment, and upon a finding of insufficient deployment, to enact remedial measures ("removing barriers to infrastructure investment and by promoting competition in the telecommunications market"). Had the Commission already been given a broad regulatory mandate to increase broadband deployment under § 706(a), irrespective of the rate of deployment, § 706(b) would be superfluous.

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[17] 47 U.S.C. § 230(b)(2).

[18] 47 U.S.C. § 1302.

The logical way to interpret § 706(a) in light of § 706(b) is therefore under the FCC's previous 1998 understanding, which interpreted the provision as limiting the Commission's regulatory authority over broadband to specifically delineated provisions elsewhere in the Act. By interpreting § 706(a) as independent from § 706(b), the DC Circuit permitted FCC to ensure that its power under § 706 could persist indefinitely, irrespective of the speed of broadband deployment.[19], [20]

Not all courts agree with the DC Circuit's limitless interpretation of § 706. Recently, in *Tennessee v. FCC,* a case involving a challenge to FCC preemption of state rules governing municipal broadband, the Sixth Circuit constrained FCC's authority under § 706. The Sixth Circuit held that in the absence of a clear statement intending pre-emption § 706 could not override an intrastate law, and it struck down FCC's preemptive order.[21] However, the scope of that decision was confined to specific federalism circumstances and does not otherwise significantly limit FCC's discretion under § 706. After all, the Sixth Circuit did not revisit the DC Circuit's acceptance of FCC's interpretation of § 706 and limited its analysis to federalism arguments. Section 706 remains, at least under *Verizon*, an expansive source of FCC authority.

[19]See Lawrence J. Spiwak, *What Are the Bounds of the FCC's Authority over Broadband Service Providers? A Review of the Recent Case Law*, 18 J. INTERNET L. 1, 24 (2015).

[20]For further statutory analysis rejecting FCC's new interpretation of § 706, *see* TechFreedom & International Center for Law and Economics Comments on 2014 FCC Network Neutrality NPRM, 72-75 (July 17, 2014), *available at* https://ecfsapi.fcc.gov/file/7521706377.pdf. [Ed. Note: *See also* WLF;s *amicus curiae* brief in *United States Telecom Ass'n v. FCC*, http://www.wlf.org/litigating/case_detail.asp?id=827.

[21]*Tennessee v. FCC*, 2016 U.S. App. LEXIS 14681.

Nor does FCC's decision to reclassify broadband as a telecommunications service under Title II in the 2015 Open Internet Order limit the relevance of § 706 as a regulatory tool. Even though FCC's primary § 706 target over the past decade has been broadband service, broadband providers are not the sole Internet entities within the ambit of § 706's potential grasp. Insofar as a regulation need only arguably spur demand for the Internet, no entity in the Internet economy is immune from its authority. Moreover, in the aftermath of the Title II ruling for broadband, § 706 appears as a relatively light-touch provision, and it may become a stepping stone to common-carrier classification and even more burdensome regulation.

The three sections below outline the three facets of the Internet economy which, without legislative clarification of the parameters of § 706, are most at risk of future FCC regulatory overreach.

## II. NEUTRALITY REGULATION BEYOND BROADBAND PROVIDERS

Some "edge providers" favored subjecting broadband companies to network neutrality rules. However, the arguments for subjecting broadband companies to coercive neutrality rules apply equally to edge providers and other Internet companies that enable accessing online content. After all, search engines are arguably more powerful gatekeepers of the Internet than broadband companies, given that websites rely on favorable search rankings. Indeed, Professor Tim Wu, who coined the term "network neutrality," never understood the concept to be limited to broadband providers, but viewed it as applicable to other Internet gatekeepers as well.[22]

Under the unconstrained virtuous cycle theory, FCC could argue that regulating search algorithms under § 706 to reflect principles of neutrality would accelerate demand for web content, and in turn accelerate broadband deployment. Such rules could easily be extended to entities such as Alphabet's Google, Microsoft's Bing, Apple's iTunes store, Amazon, and Facebook's search function, on the same basis.

The prospect of such a rulemaking in the future is not merely hypothetical. Even apart from FCC's preoccupation with neutrality in the broadband context, the Commission under past leadership was inclined to broadly preclude content discrimination by purveyors of communications. For example, the proposed rule to unbundle set-top boxes from cable television service would suppress cable companies' capacity to curate content and control channel placement.[23]

Attempted regulation of search neutrality would, however, raise the practically impossible problem of defining what constitutes a "neutral" search algorithm. Unlike in the case of broadband providers, where content is end-to-end user-directed, search functions inherently rely on a middleman algorithm to sort results. As Professors Geoffrey Manne and Joshua Wright have pointed out:

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[22] Timothy Wu, *Why Have a Telecommunications Law? Anti-Discrimination Norms in Communications*, 5 J. TELECOMM. & HIGH TECH. L. 15, 46 (2006).

[23] *See Fact Sheet: Chairman Wheeler's Proposal to Increase Consumer Choice and Innovation in the Video Marketplace* (September 8, 2016), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-341152A1.pdf.

> Search results and ad space are scarce and some mechanism must be deployed to ration them (including via the price mechanism, in the case of advertisements), but there is an enormous range of possible 'objective' arrangements for this rationing. Relevance is a slippery and subjective concept, different for every user and every query, and there is no a priori way to define it; as with pro- and anti-competitive conduct, it can be nearly impossible to differentiate between 'relevant' and 'manipulated' search results.[24]

Replacing a company's algorithm with a government-mandated one is by no means neutral. That maneuver would merely substitute one subjective view of how results should be ranked with another.

Apart from the irrationality of producing an objectively neutral search algorithm, significant First Amendment concerns arise when forcing edge companies to carry all content in a neutral manner. Entities that act as conduits for others' speech are eligible for First Amendment protection. Indeed, two decades ago in *Turner Broadcasting v. FCC*, the Supreme Court held that cable television companies—also conduits for the speech of others—had a right under the First Amendment, just like newspapers, to exercise editorial control over the content they transmitted.[25] Companies like Google have just as strong an interest as cable companies in curating their content. To maintain market dominance, Google must ensure that its search algorithm remains appealing to consumers, and it can only do so by exercising content control over search results. The DC Circuit in *US Telecom* showed little concern for

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[24]Geoffrey A. Manne and Joshua D. Wright, *If Search Neutrality Is the Answer, What's the Question?,* 2012 COLUM. BUS. L. REV. 151, 162 (2012).

[25]*Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994).

such First Amendment arguments as applied to broadband providers, and it construed the latter as common carriers committed to serving the public nondiscriminatorily.[26] The court's First Amendment indifference was likely due to the broadband providers' traditional abstention from editorial control and their largely unconstrained capacity to make content available to customers.[27] Courts would be expected to take First Amendment concerns much more seriously when applied to entities that curate and organize Internet content and are necessarily constrained in deciding what speech ought to be prioritized.

In any event, if FCC were to impose a presumption against content discrimination by search engines, or ban the practice altogether, the rule would likely be overturned under the DC Circuit's precedent in *Verizon*, which rejected the 2010 network neutrality rules on the basis of the Communications Act's ban on extending anti-discrimination rules to non-common carriers.[28] However, foreclosure under § 706 would simply provide FCC with an excuse to classify search engines—and possibly providers of other online services—as common carriers. As noted earlier, FCC regulation of neutrality at the edge under § 706 would not preclude future classification of these companies under Title II. As in the broadband context, § 706 could serve as a stepping stone to Title II classification.

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[26] *US Telecom*, 825 F.3d at 740-43.

[27] *Id.* at 743.

[28] *Verizon*, 740 F.3d at 649-50.

 

Needless to say, regulating Internet giants like Google, Facebook, or Microsoft—either under § 706 or Title II—would have profound consequences for investment and the vitality of the Internet for consumers. How Internet users access information is constantly evolving and changing, and to require companies to adhere to government-mandated search algorithms would deeply affect the current environment for innovation.

## III. REGULATING THE PRIVACY POLICIES OF EDGE PROVIDERS

FCC recently adopted new privacy rules for broadband providers, precluding the sharing or monetization of consumers' Internet browsing data and other private information in the absence of their opt-in consent.[29] It did so under the guise of applying Title II's "customer proprietary network information" (CPNI) provisions—originally written for telephone companies—to broadband providers. Many observers have criticized the rules for unfairly disadvantaging broadband providers in relation to edge providers and creating asymmetry in the Internet industry. Whereas broadband companies are subject to the new rules as common carriers under the 2015 Open Internet Order, non-common carriers with arguably deeper access to users' sensitive data like Google and Facebook would be exempt from requiring customers' opt-in

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[29] *See Fact Sheet: The FCC Adopts Order to Give Broadband Consumers Increased Choice Over Their Personal Information* (Oct. 27, 2016), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1027/DOC-341938A1.pdf.

consent with respect to monetizing the same user information.[30]

That is not to say that edge providers are left unregulated. Commercial agents—with the exception of common carriers, among other entities—are subject to FTC's authority to police "unfair or deceptive acts or practices."[31] FTC has exercised this power by ensuring that companies honor their privacy commitments to consumers, and it has occasionally required companies to provide an opportunity to opt out of certain data-sharing practices. However, unlike FCC's proposed rules, which require broadband providers to obtain opt-in consent for the sharing of practically all browsing history, FTC has only required opt-in consent in narrow circumstances and on a case-by-case basis.[32]

FCC will likely face pressure to correct the ensuing regulatory asymmetry between the two agencies and to extend its privacy rules to edge providers under § 706. When the Commission dismissed a petition by Consumer Watchdog to regulate edge-provider privacy last November, it reasoned that unlike broadband providers, edge providers are not subject to the CPNI provisions under § 222.[33] But that of

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[30]*See* Peter Swire, Justin Hemmings & Alana Kirkland, *Online Privacy and ISPs: ISP Access to Consumer Data Is Limited and Often Less than Access by Others*, A Working Paper of the Institute for Information Security & Privacy at Georgia Tech (Feb. 29, 2016), *available at* http://www.iisp.gatech.edu/sites/default/files/images/online_privacy_and_isps.pdf.

[31]15 U.S.C. § 45(a)(1).

[32]*See Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers*, FTC Report 57-60 (Mar. 2012), *available at* https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.

[33]*In the Matter of Consumer Watchdog Petition for Rulemaking to Require Edge Providers to*

course did not close the door on introducing regulation under § 706. As the argument goes, ensuring customer privacy would boost demand for the Internet, spurring broadband deployment.

Indeed, FCC has cited § 706 as authority for its privacy rules for broadband companies.[34] This is likely because the 1990s-era CPNI provisions, designed for telephone companies, are quite attenuated from the proposed privacy rules, and FCC felt it necessary to rely on alternate heads of authority. However, FCC's reliance on § 706 simply demonstrates the extent to which the provision has become a catch-all category for promulgating the Commission's will. Should the latter decide to extend the same privacy rules to edge providers, § 706 would be the likely source it would cite as authority.

Whether correcting asymmetric regulation of edge providers under § 706 would produce a gain in consumer welfare is a separate question. FCC's new privacy rules for broadband have been criticized for forgoing economic analysis and ignoring the costs of effectively prohibiting the monetization of consumer data by broadband companies.[35] Imposing the same rules through the malleable § 706 might deflect

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*Honor 'Do Not Track' Requests*, RM-11757, FCC Order, DA 15-1266 (Nov. 6, 2015), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DA-15-1266A1_Rcd.pdf.

[34] *In re Protecting the Privacy of Broadband and Other Telecommunications Services*, WC Docket No. 16-106, Notice of Proposed Rulemaking, FCC 16-39 ¶308-309 (Apr. 1, 2016), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-39A1.pdf.

[35] Gerard R. Faulhaber and Hal J. Singer, "The Curious Absence of Economic Analysis at the Federal Communications Commission: An Agency in Search of a Mission," Draft submitted to FCC *In re Protecting the Privacy of Broadband and Other Telecommunications Services*, WC Docket No. 16-106,

criticism of regulatory asymmetry, but it would not necessarily result in a net consumer benefit.

## IV. REGULATING BROADBAND PROVIDERS, NOTWITHSTANDING THE OPEN INTERNET ORDER

In its 2005 *NCTA v. Brand-X* decision, the Supreme Court held that the Communications Act was ambiguous as to whether broadband Internet was properly classified as a "telecommunications service" or an "information service," and that despite Ninth Circuit precedent interpreting broadband to be a common-carrier telecommunications service, FCC was entitled to deference under *Chevron* to classify broadband as an information service.[36] A decade later, in *US Telecom v. FCC*, the DC Circuit held that despite FCC's previous classification of broadband, it owed the agency deference in its decision to reverse course in the Open Internet Order and reclassify broadband as a telecommunications service subject to Title II. The logical consequence of the DC Circuit's opinion is that as easily as FCC was able to reclassify broadband service as a telecommunications service, a future Commission would be at liberty to switch back to defining broadband as an information service.

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54-56 (July 11, 2016), *available at* https://ecfsapi.fcc.gov/file/10711657902329/FaulhaberSinger_FINAL%20TO%20FILE.pdf. *See also* Joshua Wright, "An Economic Analysis of the FCC's Proposed Regulation of Broadband Privacy," Ex Parte White Paper submitted to FCC *In re Protecting the Privacy of Broadband and Other Telecommunications Services*, WC Docket No. 16-106, 10-28 (May 27, 2016), *available at* https://www.ustelecom.org/sites/default/files/documents/ExParte_re_Wright_Privacy_FINAL.pdf.

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

 

Nor would the Commission need to be driven by empirical data in order to do so. Faulhaber and Singer note that the 2010 Open Internet Order's claims that broadband providers had an incentive to discriminate against Internet traffic were grounded not in economic analysis or findings of market failure but on the comments of edge providers.[37] They similarly criticize the ban on paid prioritization for eschewing cost-benefit analysis and ignoring costs to investment.[38] Judge Williams's dissent in *US Telecom*, which argues that FCC's failure to ground its reclassification, paid-prioritization, and forbearance decisions in evidence renders them arbitrary and capricious, echoes this view.[39] To the extent that FCC need not rely on economic analysis to reclassify broadband, a future Commission of different political persuasion would be at liberty to change the designation. This prospect of reversal creates uncertainty in the industry and ultimately harms investment.

Aggravating this uncertainty is that, even if a future FCC were to re-reclassify broadband as an information service, burdensome FCC regulation of broadband would be unlikely to cease. Indeed, under FCC's expansive interpretation of § 706 as accepted by the DC Circuit, the Commission would be able to accomplish much of its network neutrality mandate under § 706—albeit in a neutered manner, reflecting the

[37] Faulhaber and Singer, *supra* note 35 at 29.

[38] *Id*. at 33.

[39] *US Telecom*, 825 F.3d at 745-78.

 

roadmap provided by the DC Circuit in *Verizon*.[40] This might be an attractive option for a future Commission, wishing to promote the optics of deregulation while preserving its image as an arbiter of network neutrality.

Even without a reversal of its reclassification order, FCC will likely continue to rely on § 706 to regulate broadband. One of the criticisms of the Open Internet Order, and specifically of FCC's decision to forbear from much of Title II, was that FCC was applying an outdated and inapplicable legal regime written for the telephone industry to broadband. On the flipside, there are many areas of potential regulation of broadband providers not contemplated by or in conflict with Title II that would require reliance on § 706. For example, Netflix recently lobbied FCC to declare—under its § 706(b) authority—that data caps by broadband providers constitute "an unnecessary constraint on advanced telecommunications capability."[41] Moreover, if FCC were to reverse its decision to forbear from imposing unbundling access requirements on broadband companies under § 251,[42] but also wished to contravene § 251's stipulation that unbundling obligations only apply to incumbent local exchange carriers, it would likely need to rely on § 706 to extend unbundling requirements to non-incumbents. Whereas regulating under Title II may be limited by virtue of being

[40] *Verizon*, 740 F.3d at 658.

[41] Comments of Netflix, Inc., GN Docket No. 16-245 (Sept. 6, 2016), *available at* https://ecfsapi.fcc.gov/file/10907201207103/Netflix%2016-245%20Comment.pdf.

[42] *In re Protecting & Promoting the Open Internet*, GN Docket No. 14-28, 30 FCC Rcd 5601 ¶ 513 (Mar. 12, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-13/pdf/2015-07841.pdf.

written for a different era, § 706 has been interpreted to be sufficiently open-ended that it can function as a catch-all category for any regulation—no matter how attenuated from the statutory language—that FCC chooses to pursue.

## CONCLUSION: CONGRESS MUST CLARIFY FCC'S DISCRETION UNDER § 706

Ideally, Congress would rewrite the Communications Act to account for the rise of the Internet and profound changes in the communications industry over the past 20 years. However, absent a major overhaul of the Communications Act, Congress should at least provide clear guidance on the limits to agency jurisdiction under § 706. Such a reform would not resolve every question with respect to the Commission's jurisdiction over the Internet. Without a reversal of the DC Circuit's decision in *U.S. Telecom v. FCC*, the Commission would still possess considerable power to subject Internet telecommunications services to Title II.

As § 706 increasingly becomes the catch-all source for the Commission's authority over the Internet, it is crucial to set guidelines based in law and democratic governance. As it stands, the provision is a source of unlimited regulatory control over the Internet, adaptable to the political impulses of the majority of commissioners at any given moment and prone to producing regulatory flux, thereby harming investment and innovation. Worse yet, the provision threatens to function as a mere intermediary to more burdensome common-carriage regulation. It is ultimately up to Congress to keep § 706 from doing further damage.

 