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NET NEUTRALITY AND THE FCC'S 2015 OPEN INTERNET ORDER

Simone A. Friedlander[†]

Forty percent of the world's population uses the Internet.¹ In the United States, eighty-seven percent of the population uses the Internet.² As of 2016, the Internet is ubiquitous, popular, and as vital to public communication as any technology that came before it.³ The United States Congress recognized the value of the Internet when it enacted legislation in furtherance of the explicit policy "to preserve the vibrant and competitive free market that presently exists for the Internet."⁴ And the American people have indicated that they too think the Internet and its regulation are vitally important: the latest round of public comment on the net neutrality rules the Federal Communications Commission (FCC) proposed saw a record-breaking number of comments.⁵

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1. INT'L TELECOMM. UNION, ICT FACTS AND FIGURES 2014 (2014), <http://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2014-e.pdf> [<https://perma.cc/4BRW-YP3K>].

2. *United States of America: Internet Usage and Broadband Usage Report*, INTERNET WORLD STATS <http://www.internetworldstats.com/am/us.htm> [<https://perma.cc/P7JT-25KW>].

3. *See, e.g.*, FED. COMM'NS COMM'N, FCC-15-24, *IN RE PROTECTING AND PROMOTING THE OPEN INTERNET* ¶ 2 (Mar. 12, 2015) [hereinafter 2015 OPEN INTERNET ORDER] (noting that broadband providers invested \$212 billion between 2011 and 2013); *id.* ¶ 3 ("Netflix sends the most peak downstream traffic in North America of any company . . . Etsy reports that it has grown from \$314 million in merchandise sales in 2010 to \$1.35 billion in merchandise sales in 2013.").

4. Communications Act, 47 U.S.C. § 230(b)(2) (2012).

5. *FCC Receives Record 3 Million Net Neutrality Comments: What now?*, PCWORLD.COM (Sept. 16, 2014), <http://www.pcworld.com/article/2684395/fcc-gets-record-number-of-net-neutrality-comments-what-now.html> [<https://perma.cc/83G3-A4GT>]; *see also* *FCC Received a Total of 3.7 Million Comments on Net Neutrality*, THE VERGE (Sept. 16, 2014), <http://www.theverge.com/2014/9/16/6257887/fcc-net-neutrality-3-7-million-comments-made> [<https://perma.cc/A2D3-5FU5>]. To put that in perspective, the next highest amount of comments ever received by the FCC was 1.4 million in response to Janet Jackson's wardrobe malfunction at the 2004 Super Bowl. *See Net Neutrality Debate Surpasses Janet Jackson's 'Nip Slip' in Number of Comments Sent to the FCC*, ENTREPRENEUR, <http://www.entrepreneur.com/article/237382> [<https://perma.cc/L3QR-HVQ2>].

The Internet is a valuable tool for individuals to reach an audience that might otherwise be inaccessible.⁶ It is also a valuable tool for businesses to reach consumers.⁷ Further, because it enables the uninhibited exchange of ideas and money, the Internet itself is a valuable product. Internet gatekeepers (i.e., Internet Service Providers or ISPs) such as Comcast and Verizon recognize its market value. And these valuable aspects of the Internet affect three interested parties in the net neutrality debate: end-users, edge providers, and the telecommunication companies that connect the two. Given the many competing interests surrounding Internet policy, it is no surprise that the debate over how best to regulate the Internet is a national discussion amongst politicians, social activists, and the public.

But while the implications of Internet regulation are undoubtedly political and social, the mechanics of such regulation are technical and grounded in legal precedent. Over the past thirty years, Congress, the FCC, and the judiciary have been creating a framework for Internet regulation piece by piece. That framework has evolved into the current state-of-the-art Internet regulation, the 2015 Open Internet Order, which classifies the Internet as a Title II telecommunications service subject to common carrier regulation and within the jurisdiction of the FCC.⁸

The telecommunications industry has already challenged the 2015 Open Internet Order at the D.C. Circuit.⁹ The challenges to the Order

6. *MAG-Net Speaks: Net Neutrality Federal Communications Commission Filing*, CTR. FOR MEDIA JUSTICE (July 15, 2014), <http://centerformediajustice.org/2014/07/15/mag-net-speaks-net-neutrality-federal-communications-commission-filing> [<https://perma.cc/H4DF-EEX5>].

[A]ny devolution of network neutrality rules will harm independent artists, musicians and social justice advocates that currently use the open Internet to reach audiences otherwise inaccessible in a heavily corporatized and consolidated media. Without an Open Internet, these innovators and entrepreneurs face tremendous barriers to entry that choke their opportunities for creative expression, opportunity, democratic participation and community building.

Id.

7. For example, e-commerce sales are expected to ultimately total more than \$1.92 trillion in 2016, to exceed \$2.1 trillion in 2017, and are projected to continue growing in the coming years. *B2C E-commerce Sales Worldwide from 2012 to 2018*, STATISTA, <http://www.statista.com/statistics/261245/b2c-e-commerce-sales-worldwide> [<https://perma.cc/X7VY-E5UF>]. Worldwide digital buyer penetration is projected to reach forty-five percent as of 2016 and is also projected to increase further. *Digital Buyer Penetration Worldwide from 2011 to 2018*, STATISTA, <http://www.statista.com/statistics/261676/digital-buyer-penetration-worldwide> [<https://perma.cc/PQ3Y-X3EG>].

8. 2015 OPEN INTERNET ORDER.

9. *United States Telecom Assoc. v. FCC, et al.* [consolidated cases], *appeal docketed*, No. 15-1063, 15-1078, 15-1086, 15-1090, 15-1091, 15-1092, 15-1095, 15-1099, 15-1117,

question whether the FCC acted reasonably in its reclassification of broadband Internet, under both the Administrative Procedure Act (APA) and the Telecommunications Act.¹⁰ This Note argues that the FCC did in fact conform to the APA and reasonably reclassified broadband Internet as a Title II telecommunications service. Further, this Note predicts that the FCC's actions will withstand judicial scrutiny under both the *Chevron* doctrine and the arbitrary and capricious standard of the APA.

Part I of this Note contextualizes the net neutrality debate. Part II examines the judicial, legislative, and administrative history of net neutrality regulation. Part III surveys the FCC's 2015 Open Internet Order and the pending litigation challenging the Order. Part IV analyzes the 2015 Open Internet Order against previously established judicial standards, namely the *Chevron* and arbitrary and capricious doctrines. Finally, Part V concludes that the 2015 FCC Order will survive judicial scrutiny.

I. BACKGROUND

Before addressing the legal and administrative principles behind Internet regulation, it is important to understand the architecture and politics of both the Internet and net neutrality.

A. DEFINING NET NEUTRALITY

Net neutrality (a.k.a. “network neutrality” or “open Internet”) “is the principle that those who manage networks should provide access to all applications, content, platforms, and websites on a non-discriminatory basis.”¹¹ In layman's terms, a truly neutral Internet treats all content equally, regardless of origin or type. For example, Amazon's ability to reach an end user would be no different than that of a local mom-and-pop retailer. One current hot topic in net neutrality is the concept of “fast lane” access, where a company must pay in order to ensure competitive transmission speeds.¹²

However, the broader net neutrality debate encompasses a range of concerns, including fears of ISPs blocking access to certain content for

15-1128, 15-1151, 15-1164 (D.C. Cir. 2015). Oral argument in the D.C. Circuit took place on December 4, 2015.

10. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

11. ZACK STIEGLER, REGULATING THE WEB: NETWORK NEUTRALITY AND THE FATE OF THE OPEN INTERNET 2 (Zack Stiegler ed., 2012).

12. See, e.g., Jon Brodtkin, *FCC Votes for Net Neutrality, a Ban on Paid Fast Lanes, and Title II*, ARS TECHNICA (Feb. 26, 2015), <http://arstechnica.com/business/2015/02/fcc-votes-for-net-neutrality-a-ban-on-paid-fast-lanes-and-title-ii> [https://perma.cc/H54C-KEU8]. But see Jeffrey Dorfman, *Net Neutrality Puts Everyone in the Internet Slow Lane*, FORBES (Feb. 27, 2015), <http://www.forbes.com/sites/jeffreydorfman/2015/02/27/net-neutrality-puts-everyone-in-the-internet-slow-lane/#15b2a2a29ab7> [https://perma.cc/N9U2-WFYV].

political, anti-competitive, or censorship reasons; vertically integrated companies favoring or only allowing access to their subsidiaries; and larger, more well-funded competitors denying market entry to smaller sites, services, and companies.

While net neutrality is a highly charged term that means many different things to many different people, the regulatory debate surrounding net neutrality revolves around the statutory language of the Communication Act, the Telecommunication Act, the FCC's declaratory rulings and orders, and the judicial decisions. But first, an understanding of how the Internet functions will help lay the foundation for the legal and regulatory analysis of net neutrality that follows.

B. AN INTRODUCTION TO HOW THE INTERNET WORKS

The Telecommunications Act defines the Internet as an “international computer network of both Federal and non-Federal interoperable packet switched data networks,”¹³ and as “the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide network of computer networks that employ the [TCP/IP] or any successor protocol to transmit information.”¹⁴ The Supreme Court more succinctly described the Internet as a “network of interconnected computers.”¹⁵

The infrastructure of the Internet involves interconnected Network Service Providers (NSPs), which are connected to Network Access Points, which are, in turn, connected to ISPs that route information to a computer. The NSP and the ISP may be the same company, or the NSP may lease bandwidth or network access to independent ISPs. For purposes of this net neutrality discussion, it is important to keep in mind three major players in the Internet ecosystem: the backbone (cable or telephone companies that act as NSPs), the edge providers (content providers such as Netflix), and the end users (people who consume content via the Internet). These key players interact with a broader set of political players and interest groups; those interactions help frame the net neutrality debate.

C. POLITICAL PLAYERS AND INTEREST GROUPS

Net neutrality, while judicially defined in terms of legal and administrative precedent, is a resonant political issue for those concerned

13. 47 U.S.C. § 230(f)(1) (2012). TCP/IP, short for Transmission Control Protocol/Internet Protocol, is the basic communication language of the Internet and between computers.

14. *Id.* at § 231(e)(3) (2012).

15. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 974 (2005).

with various issues such as free and open communication, consumer rights, business interests, economic autonomy, and limited government.

1. *Pro-Net-Neutrality Parties and Their Interests*

Pro-net-neutrality parties support neutrality for both political and economic reasons. Those invested in net neutrality for financial reasons include many Internet-based companies such as Google and Netflix.¹⁶ Without network neutrality, these companies would likely need to redesign their business models in order to accommodate the added costs of doing business with unregulated telecommunications providers. Services such as Netflix and Google's YouTube are particularly invested in net neutrality rules that prevent ISPs from charging more for fast lane access because their business models rely on quality and consistent video streaming, the type of content that would be penalized by "fast lane" policies.¹⁷ Companies such as Reddit and Netflix have even participated in online protests such as the September 10, 2014 Internet Slowdown protest.¹⁸

Internet and general rights organizations such as Electronic Frontier Foundation, SaveTheInternet, and the ACLU are vociferous pro-neutrality supporters.¹⁹ Politically, pro-neutrality proponents are wary of the gatekeeping potential of unregulated ISPs, which now have the unprecedented ability to control the most widely used form of communication in the country. Top policy reasons to support net-neutrality include concerns about ISPs being able to block content for censorship or anti-competitive reasons.

16. Alex Wilhelm & Cat Zakrzewski, *Google, Other Leading Internet Companies Support Net Neutrality, Call for Extension to Mobile Providers*, TECHCRUNCH (July 14, 2014), <http://techcrunch.com/2014/07/14/google-other-leading-internet-companies-support-net-neutrality-call-for-extension-to-mobile-providers> [https://perma.cc/NA36-6DHL].

17. Gene Marks, *Netflix and Youtube Now Consume 50% of the Internet as the Argument for Net Neutrality Weakens*, FORBES (Nov. 24, 2014), <http://www.forbes.com/sites/quickerbetteartech/2014/11/24/netflix-and-youtube-now-consume-50-of-the-internet-as-the-argument-for-net-neutrality-weakens/#33acca0b7982> [https://perma.cc/XS25-Z46F]; see also Marguerite Reardon, *Comcast vs. Netflix: Is This About Net Neutrality?*, CNET (May 15, 2014), <http://www.cnet.com/news/comcast-vs-netflix-is-this-really-about-net-neutrality> [https://perma.cc/5PJS-YJ79].

18. *Sept. 10th Is the Internet Slowdown*, BATTLEFORTHENET, <https://www.battleforthenet.com/sept10th> [https://perma.cc/J84V-6QL5].

19. See *Net Neutrality*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/net-neutrality> [https://perma.cc/MV9V-VBWK]; *Take Action*, SAVE THE INTERNET, <http://www.savetheinternet.com/sti-home> [https://perma.cc/GJR6-6VSL]; *What is Net Neutrality?*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/feature/what-net-neutrality> [https://perma.cc/3U78-ZPG2].

2. *Anti-Net-Neutrality Parties and Their Interests*

Another set of parties opposes net neutrality for business, financial, political, and ideological reasons. SBC CEO Edward Whitacre, Jr. articulated the anti-neutrality concerns of telecommunications companies in a 2005 interview by arguing that the capital investment of companies like his gives such companies a right to exclude competitors from using their “pipes for free.”²⁰ Telecommunication companies are also concerned about the costs of burdensome regulation, especially if Title II reclassification requires them to adhere to the common carriage principles of the Telecommunications Act.²¹ This concern is not necessarily unfounded, as an increase in streaming video traffic has created severe network management problems, solutions for which could be stymied by the enforcement of Title II anti-discrimination provisions.²²

Others argue that the FCC’s net neutrality rules are a solution in search of a problem. Key players within the Internet ecosystem have generally acted neutrally, even without FCC regulation.²³ But telecommunication companies may also oppose regulation simply because they see profit in the type of behavior that net neutrality is supposed to address. For example, the controversy that led to the *Comcast* decision of 2010 began when Comcast attempted to throttle peer-to-peer Internet traffic, demonstrating the exact kind of discriminatory behavior that net neutrality rules are designed to prevent.²⁴ Further, companies such as AT&T have proposed creating “fast lane” access or “paid prioritization” for edge providers willing to pay a

20. Arshad Mohammed, *SBC Head Ignites Access Debate*, WASHINGTON POST (Nov. 4, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/03/AR2005110302211.html> [<https://perma.cc/9X5N-WWA4>].

21. See *Why Congress Should Act to Ensure Net Neutrality*, NAT’L CABLE & TELECOMM. ASS’N, <https://www.ncta.com/positions/title-ii> [<https://perma.cc/LQC9-28PR>]; see also Jon Brodtkin, *Making the Internet a Utility—What’s the Worst that Could Happen?* (Dec. 17, 2014), <http://arstechnica.com/business/2014/12/worst-case-scenario-why-the-cable-lobby-is-scared-of-becoming-a-utility> [<https://perma.cc/575C-JT48>].

22. See *Net Neutrality – Issues*, CISCO, http://www.cisco.com/web/about/gov/issues/net_neutrality.html [<https://perma.cc/96ZX-N4QC>].

23. Nick Gillespie & Todd Krainin, *FCC Commissioner Ajit Pai: Net Neutrality is a “Solution That Won’t Work to a Problem That Doesn’t Exist,”* REASON.COM (Feb. 25, 2015), <http://reason.com/reasonTV/2015/02/25/fccs-ajit-pai-on-net-neutrality-a-soluti> [<https://perma.cc/9REH-R6EB>]; see also Daniel Brenner, *Net Neutrality: A Solution in Search of a Problem*, FORBES (Sept. 25, 2012), <http://www.forbes.com/sites/ciocentral/2012/09/25/net-neutrality-a-solution-in-search-of-a-problem/#41600cce3ffc> [<https://perma.cc/7RWM-QTGY>].

24. *Comcast v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010).

premium to make sure their content reaches end users quickly and without interruption.²⁵

A major telecommunications lobby and current litigant against the FCC's 2015 Open Internet Order, USTelecom maintains that it

fully supports a broad public inquiry on how best to maintain and improve an open and transparent Internet, and our industry remains firmly committed to open Internet principles. But the Title II approach is ill-advised. The robust investment and rapid innovation that characterizes the Internet today exists precisely because prior Democratic and Republican FCC chairmen have recognized the importance of keeping 19th century regulation away from 21st century technology.²⁶

This position is neither nefarious nor unfounded. The Internet is not an unlimited resource. Congestion increases as more consumers access the Internet more regularly.²⁷ Network management practices, which involve de facto discrimination in order to make sure that as much data as possible is transmitted from end-to-end, could be stymied by a net neutrality regime, even one that purports to include an exception for network management practices.²⁸ Further, online streaming is only increasing in popularity, using an enormous portion of the Internet's bandwidth.²⁹ Anti-neutrality proponents argue that basic business practices support allowing telecommunication companies, as private entities, to charge more for the use of such a large portion of their service.³⁰ These players and their viewpoints—on both sides of the debate—have influenced legislative, judicial, and administrative developments in Internet regulation.

25. See Ernesto Van der Sar, *AT&T Patents "Fast Lane" for File-Sharing Traffic*, TORRENTFREAK (Feb. 19, 2015), <https://torrentfreak.com/att-patents-fast-lane-for-bittorrent-traffic-150219> [<https://perma.cc/5PTR-VUAG>]; Brendan Sasso, *On Net Neutrality, Verizon Leads Push for 'Fast Lanes'*, NATIONAL JOURNAL (July 18, 2014, 9:47 AM), <http://www.nationaljournal.com/tech/2014/07/18/Net-Neutrality-Verizon-Leads-Push-Fast-Lanes> [<https://perma.cc/6L5S-ZGDH>].

26. *Open Internet*, USTELECOM, <http://www.ustelecom.org/issues/open-internet> [<https://perma.cc/GC9A-YRVH>].

27. See *Limiting Internet Congestion a Key Factor in Net Neutrality Debate*, PHYS.ORG (Dec. 10, 2014), <http://phys.org/news/2014-12-limiting-internet-congestion-key-factor.html> [<https://perma.cc/P5QH-EQRH>].

28. *Id.*

29. Gene Marks, *Netflix and Youtube Now Consume 50% of the Internet as the Argument for Net Neutrality Weakens*, FORBES (Nov. 24, 2014), <http://www.forbes.com/sites/quickerbetteertech/2014/11/24/netflix-and-youtube-now-consume-50-of-the-internet-as-the-argument-for-net-neutrality-weakens/#33acca0b7982> [<https://perma.cc/XS25-Z46F>].

30. *Id.*

II. PRE-OPEN-INTERNET-ORDER LEGISLATIVE, JUDICIAL, AND ADMINISTRATIVE DEVELOPMENTS IN INTERNET REGULATION

The FCC derives its authority to regulate the Internet from the Telecommunications Act of 1996,³¹ passed to update and amend the Communications Act of 1934.³² Prior to passage of the 1996 Telecommunications Act, the FCC regulated the Internet under the auspices of the *Computer II* rules, developed to regulate those data-processing services transmitted over telephone wires.³³ The *Computer II* regime categorized communications services in one of two mutually exclusive categories depending on the extent to which information was processed during transmission: either as a “basic service” or as an “enhanced service.”³⁴ Basic services were subject to Title II common carrier regulation,³⁵ while enhanced services were not.³⁶ The FCC reasoned at the time that Title II regulation of this nascent data-processing technology would be inappropriate, as it would limit the potential services that vendors could offer in this fast-moving, competitive market. The FCC further reasoned that “[r]egulation also would disserve the interest of consumers

31. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

32. 47 U.S.C. § 151(1) (2012).

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the ‘Federal Communications Commission,’ which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

Id. For the purpose of this note, the Telecommunications Act and the Communications Act shall be referred to herein collectively as either The Act or the Communications Act.

33. *In re* Amendment of Section 64.702 of the Commission’s Rules and Regulations (*Computer II Order*), 77 F.C.C. 2d 384 (1980).

34. *Id.* at 422.

35. *Id.* at 428, ¶ 114. Common carrier duties include furnishing communication services upon reasonable request, not engaging in unjust or unreasonable discrimination in “charges, practices, classifications, regulations, facilities, or services,” and charging “just and reasonable” rates. *Id.*

36. *Id.* at 428–432, ¶¶ 115–23.

and the goals of the Communications Act.”³⁷ This classification regime lasted for more than twenty years.

Then the Telecommunications Act was enacted, at which point the categorization was re-named from “basic” and “enhanced” communication services to “telecommunication”³⁸ and “information” services,³⁹ respectively. Although the FCC, during the *Computer II* regime, opted not to regulate Internet service furnished over telephone lines as a basic/telecommunications service subject to Title II common carrier regulations, the FCC initially categorized DSL Internet, or broadband Internet service furnished over telephone lines, as a telecommunication service, subjecting it to Title II regulation.⁴⁰

The categorization of communications services as being either an information service or a telecommunications service is vital to understanding the extent of the FCC’s authority to enforce certain regulations upon a particular service. While both Title I information services and Title II telecommunication services fall under the FCC’s jurisdiction, the FCC can only impose common-carrier-type regulations on services classified as telecommunication services and subject to Title II regulation.⁴¹ The Act also gives the FCC authority to regulate communications via “ancillary authority”⁴² and a mandate under § 706.⁴³ For years, the FCC has been trying to use this authority to implement net neutrality principles. One early iteration of the FCC’s net neutrality principles was the 2002 Cable Broadband Order.

37. *Id.* at 434, ¶ 129.

38. 47 U.S.C. § 153(53) (2010).

39. *Id.* at § 153(24).

40. *In re* Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 F.C.C.R. 24012, 24014, 24029–30 ¶¶ 3, 35–36 (1998).

41. *See* *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

42. 47 U.S.C. § 154(i). Ancillary jurisdiction grants the FCC power to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with the [the Act], as may be necessary in the execution of its functions.” *Id.*; *see also* *NCTA v. Brand X*, 545 U.S. 967, 976 (2005) (“[T]he Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications.”).

43. 47 U.S.C. § 706(a). “[T]he Commission . . . 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.” *Id.*

A. 2002 CABLE BROADBAND ORDER

Prior to 2002, the FCC abstained from classifying cable modem service for high-speed Internet access. The FCC addressed the issue of cable modem service classification in 2002, in a Declaratory Ruling and Notice of Proposed Rulemaking titled *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*.⁴⁴ In determining how to classify cable modem services, the FCC looked to its *Universal Service Report*, which had found that Internet access services should be classified as information services under the Act “because the provider offers a single, integrated service” to the user.⁴⁵ The FCC reasoned that elements of Internet service such as e-mail, web browsing, access to applications, and computer interconnectivity are not separate services and therefore should not “be deemed to have separate legal status” as a telecommunication service.⁴⁶

The FCC also looked to the Act’s definitions of the terms “telecommunications service,” “telecommunications,” and “information service.”⁴⁷ All of the statutory definitions concerned the function the service makes available to the consumer, not the facility used by the service.⁴⁸ As such, the FCC determined that the classification of cable modem service should rest on its function, not the facilities used.⁴⁹ The FCC found “that cable modem service is an offering of Internet access service,” because cable modem service functions in the same way: providing consumers with access to a combination of functions, such as “e-mail, newsgroups, maintenance of the user’s World Wide Web presence, and the DNS.”⁵⁰

The FCC further concluded that cable modem service does not include a separable telecommunications component.⁵¹ While the cable modem

44. 17 F.C.C.R. 4798 (2002).

45. *Id.* at 4821.

46. *Id.*

47. *Id.* at 4820.

48. *Id.* at 4822. The “function” of a service would be its activity or purpose, whereas the “facility” used by the service refers to the physical method through which the service is provided (e.g., wireline, broadband, wireless, etc.).

49. *Id.*

50. *Id.* DNS, or Domain Name System, is a system for naming and organizing into a hierarchy of domains computers and network services. *DNS Defined*, MICROSOFT (Jan. 21, 2005), <https://technet.microsoft.com/en-us/library/cc787920> [<https://perma.cc/R8YD-G65L>].

51. *Id.* at 4823.

service provides its functions to consumers via telecommunications, “the Act distinguishes ‘telecommunications’ from ‘telecommunications service.’”⁵²

B. THE FCC’S FOUR PRINCIPLES OF INTERNET FREEDOM

On February 8, 2004, FCC Chairman Michael Powell called for four principles of Internet Freedom at the Silicon Flatirons Symposium in Boulder, Colorado.⁵³ Powell highlighted the FCC’s broadband Internet policy goals, which were to “promote investment in diverse, faster, and more sophisticated Internet and related digital technologies [in order to] foster economic growth, innovation and empower American consumers to make more choices in how they live, work and play.”⁵⁴ Powell spoke of the FCC’s opportunity to fulfill its mandate of “encourag[ing] the deployment of [broadband] on a reasonable and timely basis” and in doing so, addressing the issues of “last mile” problems that had “plagued competition for a century and invited heavy monopoly regulation.”⁵⁵ Powell also suggested that Congress intended to keep the Internet “free of unnecessary regulation that might distort or slow its growth.”⁵⁶ Given the relative novelty of broadband Internet and the lack of data on the effects of regulation, Powell was disinclined to create official regulations.⁵⁷ Instead, he called for the telecommunications industry (“Industry”) to act to protect certain Internet freedoms.⁵⁸

In his remarks, Powell called for the Industry to preserve (1) the “Freedom to Access Content,” (2) the “Freedom to Use Applications,” (3) the “Freedom to Attach Personal Devices,” and (4) the “Freedom to Obtain Service Plan Information.”⁵⁹ With these four principles of Internet freedom, Powell seemed to be suggesting a path for telecommunications companies to avoid stringent regulation through good corporate behavior (e.g., avoiding anti-competitive vertical integration, ensuring that consumers have access and choice among their providers, etc.).

52. *Id.* at 4823 (“Although the transmission of information to and from . . . computers may constitute ‘telecommunications,’ that transmission is not necessarily a separate ‘telecommunications service.’”).

53. Michael K. Powell, *Preserving Internet Freedom: Guiding Principles for the Industry*, 3 J. ON TELECOMM. & HIGH TECH. L. 1 (2004).

54. *Id.* at 6.

55. *Id.* at 7.

56. *Id.* at 9.

57. *Id.* at 10.

58. *Id.* at 11–12.

59. *Id.*

C. *BRAND X* DECISION

The year after Commissioner Powell published the FCC's Four Principles of Internet Freedom, the Supreme Court decided *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, which began to define the contours of the FCC's ability to regulate the Internet as well as the framework for judicial oversight of such regulation.⁶⁰ The *Brand X* Court held that: (1) the *Chevron* framework applied to the FCC's construction of the Act; (2) the FCC's interpretation of "telecommunications service" was a lawful construction of the Act under *Chevron*; and (3) the FCC's ruling was not arbitrary or capricious under the APA.⁶¹ *Brand X* is important because it: (a) instructs the courts to apply *Chevron* to the FCC's interpretation of "telecommunications service;" (b) gives an example of what the Court considers to be a lawful construction of the Communications Act; and (c) gives an example of what agency actions the Court finds to not be "arbitrary and capricious" under the APA.⁶²

Prior to the advent of cable Internet, most users accessed the web through DSL Internet provided via telephone lines.⁶³ Until its later reclassification, DSL Internet was grouped under the Title II classification of telephony and was therefore subject to common carrier requirements.⁶⁴ One element of DSL common carriage required telephone companies to allow competing ISPs to access the telephone company's wires in order to provide Internet service to consumers.⁶⁵ Essentially, these independent ISPs were able to use privately-owned wires in a public manner due to the classification of DSL Internet as a Title II "telecommunications service."⁶⁶

Because the 2002 Cable Broadband Order classified cable modem service as Title I "information service" not subject to common carrier obligations, these independent ISPs did not have the de facto right to access cable lines in the same public manner as telephone lines. The independent ISPs petitioned for judicial review and ended up in the Ninth Circuit Court of Appeals via judicial lottery.⁶⁷ The Ninth Circuit vacated the portion of

60. 545 U.S. 967, 974 (2005).

61. *Id.*

62. *Id.*

63. *Id.* at 974.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 979. Judicial lottery is "a system of random selection to determine which court will review a Commission order when petitions for review are filed in multiple federal circuit courts of appeals." *Judicial Lottery Procedure*, FED. COMM'N COMM'N, <https://www.fcc.gov/general/judicial-lottery-procedure> [<https://perma.cc/N7FL-FYEX>].

the 2002 Order concluding that cable modem service was not a telecommunication service, holding that the FCC could not permissibly construe the Communications Act to exempt cable companies that act as ISPs from Title II regulation and common carrier obligations.⁶⁸ The FCC appealed, and the Supreme Court granted certiorari.⁶⁹

The Supreme Court overturned the Ninth Circuit decision for its improper analysis of the validity of the FCC's Order.⁷⁰ First, the Court determined that the Ninth Circuit erred in failing to apply the *Chevron* analysis for determining whether an agency's legal interpretation of a statute is valid to the 2002 Order.⁷¹ It then proceeded to apply a *Chevron* analysis to the Order, which requires a court faced with reviewing an agency's construction of a statute that agency administers to address two questions.⁷² First, a court must ask whether Congress has spoken to the precise question at issue, that is, whether the statute is ambiguous.⁷³ Second, if the statute is ambiguous, a court must ask whether the agency's answer to the question is based on a permissible construction of the statute.⁷⁴ The rationale behind this framework is that agencies are better positioned than courts to make the difficult policy determinations required to fill such statutory gaps.⁷⁵ If the statute is ambiguous and the agency's construction is reasonable, the court must defer to the agency.⁷⁶ In such a situation, a court may not use its own interpretation of the statute even if that interpretation differs from the

68. *Id.* The Ninth Circuit did not engage in *Chevron* analysis; instead, it based its decision on *AT&T Corp. v. Portland*, 216 F.3d 871 (9th Cir. 2000), a case which did not review an administrative proceeding, to which the FCC was not a party, and which held that cable modem service was a telecommunications service.

69. *Id.* at 980.

70. *Id.*

71. *Id.* at 982. The FCC has the authority, delegated by Congress, to "execute and enforce" the Communications Act. *Id.* at 969. The FCC also has the authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Communications Act, which includes "promulgat[ing] binding legal rules." *Id.* at 981. The 2002 Order was an exercise of the FCC's authority and within the FCC's jurisdiction. *Id.* at 974. Therefore, in determining whether the FCC properly constructed the Communications Act, the Court must apply the *Chevron* framework, because "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework." *Id.* at 981.

72. *Id.* at 982.

73. *Id.* at 980.

74. *Id.* at 986.

75. *Id.* at 980.

76. *Id.*

agency's interpretation.⁷⁷ The Court held that the FCC's interpretation of the Act was "permissible at both steps."⁷⁸

The Court's holding was based on its analysis of the FCC's Declaratory Ruling, where FCC decided "whether cable companies providing cable modem service[s] are providing a 'telecommunications service' in addition to an 'information service.'"⁷⁹ The FCC concluded that cable modem service is an information service.⁸⁰ The FCC also concluded that cable modem service was not a telecommunications service under the definition provided in the Act.⁸¹ "[T]he question whether cable broadband Internet providers 'offer' telecommunications involved more than whether telecommunications was one necessary component of cable modem service."⁸² "Instead . . . 'offering' 'turn[ed] on the nature of the function the *end user* is offered," not the "particular type of facilities used."⁸³ The FCC concluded that cable modem service is not a telecommunications offering because the information-processing capabilities of Internet access cannot be separated from the high-speed wire used to access such offerings.⁸⁴ Therefore, "[t]he integrated character of this offering" leads to the conclusion that "cable modem service is not a 'stand-alone,' transparent offering of telecommunications."⁸⁵ The Court determined that this construction satisfied *Chevron's* first step.⁸⁶

Further, the FCC's construction was "a reasonable policy choice" under *Chevron's* second step.⁸⁷ The Court reasoned that "the [FCC] provided a reasoned explanation for treating cable modem service differently from DSL service."⁸⁸ It also noted that the FCC "is free within the limits of reasoned interpretation to change course if it adequately justifies the change," and it did.⁸⁹ There was nothing arbitrary about the FCC's new analysis of current Internet market condition.⁹⁰ The FCC conducted a thorough analysis that led to a reasoned conclusion upon which it based its

77. *Id.* at 980.

78. *Id.* at 986.

79. *Id.*

80. *Id.* at 987.

81. *Id.*

82. *Id.* at 988.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 989.

87. *Id.* at 997.

88. *Id.* at 1000-01.

89. *Id.* at 1001.

90. *Id.* at 1001-02.

deviation from the previous position it held in *Computer II*.⁹¹ Thus the Court held that the FCC's action in this case passed muster under *Chevron*. *Brand X* would lay the foundation for a series of cases that would both limit and define the FCC's power to regulate the Internet and to impose open Internet principles.

D. POST-*BRAND X* AND THE 2005 FCC INTERNET POLICY STATEMENT PRINCIPLES

Following the *Brand X* decision, the FCC reclassified DSL Internet from a telecommunications service to an information service.⁹² The FCC then classified wireless Internet as an information service,⁹³ essentially categorizing all broadband ISPs as information service providers not subject to common carrier regulation under Title II. The FCC left open the possibility of regulating broadband providers under Title I of the Act,⁹⁴ but the extent of its authority after reclassification was unclear.

In 2005, the FCC adopted four non-binding principles for the Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities:

To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to[:]

- access the lawful Internet content of their choice.⁹⁵
- . . . run applications and use services of their choice, subject to the needs of law enforcement.⁹⁶
- . . . connect their choice of legal devices that do not harm the network.⁹⁷
- . . . competition among network providers, application and service providers, and content providers.⁹⁸

These principles, though still too broad to serve as an enforceable framework for net neutrality, represented the FCC's next step in creating a net neutrality regime after the policy statement released in 2004. The

91. *Id.*

92. Federal Communications Commission, FCC 05-150, *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities* (Sept. 23, 2005).

93. Federal Communications Commission, FCC 07-30, *In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks* (Mar. 23, 2007).

94. *Id.*

95. FCC Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities Rule, 70 Fed. Reg. 60222 (Oct. 17, 2005).

96. *Id.*

97. *Id.*

98. *Id.*

principles demonstrated an early articulation of the non-blocking, non-throttling, and non-paid prioritization themes that appear in almost every attempt by the FCC to institute net neutrality. However, the FCC still struggled to ground its authority in judicially accepted administrative law, as seen in the 2010 *Comcast* decision.

E. *COMCAST V. FCC: IN WHICH THE THEORY OF ANCILLARY AUTHORITY FALLS FLAT*

In the 2010 case *Comcast v. FCC*, the D.C. Circuit held that the FCC had failed to justify its exercise of ancillary authority to regulate an ISP's network management practices.⁹⁹ In 2007, two non-profit advocacy groups accused Comcast of interfering with its subscribers' peer-to-peer networking applications in contravention of the FCC's Open Internet Principles.¹⁰⁰ Free Press and Public Knowledge filed a complaint against Comcast with the FCC arguing that the Open Internet Principles entitled consumers "to access the lawful Internet content of their choice . . . [and] to run applications and use services of their choice."¹⁰¹ The FCC issued an order censuring Comcast and declaring jurisdiction over ISP network management practices based on the ancillary jurisdiction given to it by the Communications Act.¹⁰² Comcast appealed the FCC's ruling that it had unlawfully impeded consumer access to lawful content and applications in contravention to open Internet policies.¹⁰³

The D.C. Circuit court applied the two-part *Library Associations*¹⁰⁴ test for ancillary authority: (1) whether the FCC's general jurisdictional grant under Title I covers the regulated subject; and (2) whether the regulations are reasonably ancillary to the FCC's effective performance of its statutorily mandated responsibilities.¹⁰⁵ While the court found that the FCC satisfied the first part of the test, its basis for authority to regulate Comcast's network management practices—a Congressional statement of policy and various provisions of the Communications Act—did not qualify as a "statutorily-mandated authority."¹⁰⁶ Thus Comcast ultimately prevailed, the *Comcast*

99. *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

100. Peter Svensson, *Comcast Blocks Some Internet Traffic*, ASSOCIATED PRESS (Oct. 19, 2007), http://www.nbcnews.com/id/21376597/ns/technology_and_science-internet/t/comcast-blocks-some-internet-traffic [<https://perma.cc/8KRW-EWNE>].

101. *Comcast*, 600 F.3d at 644.

102. *Comcast Order*, 23 F.C.C.R. 13028 (2008).

103. *Comcast*, 600 F.3d at 642.

104. *Am. Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005).

105. *Comcast*, 600 F.3d at 646.

106. *Id.* at 646, 661.

order was vacated, and the FCC was no longer able to rely on a theory of ancillary authority to enforce net neutrality principles. However, the FCC continued to develop and refine its vision of an open Internet, even in the face of administrative challenges.

F. 2010 FCC OPEN INTERNET ORDER

After the D.C. Circuit decided *Comcast*, the FCC released a new order regarding the regulation of the Internet.¹⁰⁷ The new open Internet order created two classes of Internet access: wired/fixed and wireless.¹⁰⁸ The wired net neutrality policies are stricter, whereas wireless has more leniencies. This is in part due to the still developing nature of wireless Internet access, and the FCC's policy of not burdening developing technologies with overregulation.¹⁰⁹ The three rules laid out in this order were: (1) transparency for both fixed and mobile broadband providers; (2) a no-blocking provision for both fixed and mobile broadband providers; and (3) an anti-discrimination rule for fixed providers, under which they could not unreasonably discriminate against lawful network traffic.¹¹⁰ Verizon mounted a challenge to these rules, which culminated in a D.C. Circuit decision that helped to clearly define the mechanisms of the FCC's authority to regulate the Internet.

G. *VERIZON V. FCC*

In 2014, the D.C. Circuit laid out a roadmap for administratively sound implementation and enforcement of net neutrality rules. The *Verizon* decision of 2014 clarified that while the FCC has broad powers under its § 706 authority, those powers do not include the authority to enforce common-carrier-style regulation on communications services that are categorically exempt from such regulation.¹¹¹ In *Verizon*, Verizon sued the FCC over the 2010 Open Internet Order, arguing that the order exceeded the FCC's statutory authority.¹¹² The D.C. Circuit ultimately held that the transparency principle could stand but vacated the anti-blocking and the anti-discrimination principles on the basis that they were per se common carrier regulations on "information services," which cannot be regulated as common carriers under the Communications Act.¹¹³

107. FED. COMM'CN COMM'N, FCC 10-201, *IN RE PRESERVING THE OPEN INTERNET*, SEC. III (Dec. 23, 2010) [hereinafter 2010 OPEN INTERNET ORDER].

108. *Id.*

109. 2010 OPEN INTERNET ORDER at 59199.

110. *Id.*

111. *Verizon Commc'ns, Inc. v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014).

112. *Id.*

113. *Id.*

The court focused much of its analysis on the FCC's reliance on its statutory authority under § 706(a) of the Telecommunications Act:

[T]he Commission . . . 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.¹¹⁴

Section 706(b) requires that the FCC conduct a regular inquiry regarding whether advanced telecommunications capability¹¹⁵ is available and being deployed to all Americans.¹¹⁶ If it is not, § 706(b) requires the FCC to “take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”¹¹⁷ The court found that § 706 was not a statement of congressional policy, as suggested by Verizon, but rather a Congressional delegation of authority to the FCC to carry out the actions described in § 706.¹¹⁸ The FCC persuaded the court that the relationship between broadband providers and edge providers directly affects the deployment of advanced telecommunications capabilities to the American public and thus falls within the FCC's authority to regulate such a relationship in order to fulfill its obligations under § 706.¹¹⁹

However, the D.C. Circuit also acknowledged that the FCC's § 706 authority was not limitless; the power granted to the FCC under § 706 could not be used “in a manner that contravene[d] any specific prohibition contained in the Communications Act.”¹²⁰ The court held that “the [FCC] would violate the Communications Act were it to regulate broadband providers as common carriers,” in light of the FCC's “still-binding decision to classify broadband providers” as information services and not telecommunication services.¹²¹ Since the two classifications remain mutually exclusive, the court concluded that the FCC could not on one hand classify a service as an information service and, on the other hand, impose common

114. 47 U.S.C. § 1302(b) (2012).

115. “Advanced telecommunications” includes broadband Internet.

116. 47 U.S.C. § 1302(b) (2012).

117. 47 U.S.C. § 706(b).

118. *Verizon*, 740 F.3d at 637–38.

119. *Id.* at 641.

120. *Id.* at 649.

121. *Id.* at 650.

carrier obligations designed for a telecommunication service.¹²² The court rejected the FCC's argument that the Open Internet Order's requirements of non-discrimination and no-blocking were not per se common carrier obligations.¹²³ These requirements left no room for "individualized bargaining"¹²⁴ and therefore were common carriage requirements.¹²⁵

The *Verizon* decision was vital to the development of the FCC's current net neutrality regime. Essentially, the D.C. Circuit laid out a roadmap for the FCC of the steps necessary to create a legally and administratively sound and enforceable net neutrality regime. The FCC took the court's message to heart when it began work on issuing notice of proposed rulemaking, which culminated in the groundbreaking 2015 Open Internet Order.

III. 2015 OPEN INTERNET ORDER

The 2015 Open Internet Order ("Order") is arguably the strongest net neutrality rulemaking in FCC history. In it, the FCC reclassified the Internet in order to be able to enforce the Title II common carrier provisions of non-discrimination and no-blocking.¹²⁶ The Order also thoroughly analyzed the FCC's ability to rely on other theories of regulation, such as its forbearance authority and its authority under § 706.¹²⁷

In May of 2014, the FCC released a Notice of Proposed Rule Making (NPRM) positing the fundamental question: "What is the right public policy to ensure that the Internet remains open?"¹²⁸ The NPRM aimed to "enhance the transparency rule, and follow the *Verizon* court's blueprint by relying on [§] 706 to adopt a no-blocking rule and a requirement that broadband providers engage in 'commercially reasonable' practices."¹²⁹ The NPRM also queried whether the FCC "should adopt other bright-line rules or different standards using other sources of [FCC] authority, including Title II."¹³⁰ Finally, the FCC asked, "if Title II were to apply . . . how [should the FCC] exercise its authority to forbear from Title II obligations" and whether mobile services should also fall under Title II classification.¹³¹

122. *Id.* at 628.

123. *Id.*

124. *Cellco P'ship v. FCC*, 700 F.3d 534, 548 (D.C. Cir. 2012).

125. *Verizon*, 740 F.3d at 658.

126. 2015 OPEN INTERNET ORDER.

127. *Id.*

128. Federal Communications Commission, FCC 14-61, *In re Protecting and Promoting the Open Internet*, 29 FCC Rcd at 5562, ¶ 2 (proposed May 15, 2014).

129. 2015 OPEN INTERNET ORDER ¶ 10.

130. *Id.*

131. *Id.*

The response to the NPRM was overwhelming, with an unprecedented nearly four million comments submitted during the comment period.¹³²

A. SUMMARY OF ORDER

In answering the fundamental question of the 2014 Open Internet NPRM, three overarching objectives guided the FCC: “America needs more broadband, better broadband, and open broadband networks.”¹³³ According to the Order, an open Internet is important because it “drives the American economy and serves every day as a critical tool for America’s citizens to conduct commerce, communicate, educate, entertain, and engage in the world around them.”¹³⁴ The Internet must remain open for commerce, innovation, speech, consumers, innovation by application developers and content companies, expansion, and investment by broadband providers.¹³⁵ “[C]arefully-tailored rules to protect Internet openness will allow investment and innovation to continue to flourish.”¹³⁶ The Order adopts rules to prevent harmful practices (specifically blocking, throttling, and paid prioritization), an enhanced transparency rule, and “a strong standard of conduct designed to prevent the deployment of new practices that would harm Internet openness.”¹³⁷ The Order also adopts a twenty-first century Title II regime “consistent with the ‘light-touch’ regulatory framework that has facilitated the tremendous investment and innovation on the Internet.”¹³⁸ By reclassifying the Internet as a Title II communications service, the FCC may regulate the Internet in a way that was impermissible when the Internet was classified as an “information service” under Title I, because it can impose common-carrier-style regulations (e.g., anti-discrimination and no-blocking principles).¹³⁹

In the Open Internet Order, the FCC stated that a net neutrality regime is necessary in order to uphold the principles of an open Internet because broadband providers are economically incentivized to, and actually capable of, limiting Internet openness.¹⁴⁰ In order to prevent providers from limiting openness, the FCC decided to promulgate strong rules to protect

132. *Id.* ¶ 13.

133. *Id.* ¶ 11.

134. *Id.* ¶ 1.

135. *Id.*

136. *Id.* ¶ 4.

137. *Id.*

138. *Id.* ¶ 5.

139. *See, e.g., Verizon Commc’ns, Inc. v. FCC*, 740 F.3d 623, 630–31 (D.C. Cir. 2014).

140. 2015 OPEN INTERNET ORDER ¶ 86.

consumers. These rules are clear, bright lines to guide industry and users.¹⁴¹ They prohibit unreasonable interference with Internet conduct and include transparency requirements to ensure openness.¹⁴²

B. SUBSEQUENT LITIGATION

Almost immediately after the official release of the Order,¹⁴³ the United States Telecommunications Association¹⁴⁴ petitioned the D.C. Circuit to review the Order on the grounds that it was “arbitrary, capricious, and an abuse of discretion within the meaning of the [APA]; violates federal law, including, but not limited to, the Constitution, the Communications Act of 1934 . . . and FCC regulations promulgated thereunder; conflicts with the notice-and-comment rulemaking requirements of 5 U.S.C. § 553; and is otherwise contrary to law.”¹⁴⁵

The D.C. Circuit heard oral arguments for this and the consolidated cases on December 4, 2015.¹⁴⁶ The major challenges to the Order are: (1) the FCC lacked statutory authority to reclassify broadband as a telecommunications service; (2) the FCC lacked authority to reclassify mobile broadband as a commercial mobile service or its functional equivalent; (3) the FCC’s Open Internet Rules violate the First Amendment; and (4) the FCC did not go far enough in regulating broadband providers, and improperly forbore from certain provisions of Title II.¹⁴⁷

141. *Id.*

142. *Id.*

143. The Order was released March 12, 2015; USTelecom filed its petition for review 11 days later on March 23, 2015. The USTelecom case became the umbrella under which other challenges to the FCC’s Order were consolidated. Other petitioning parties include Alamo Broadband, Inc.; Telecommunications Industry Association; Full Service Network; Sage Telecommunications LLC, Telescape Communications, Inc.; Truconnect Mobile; CTIA; The Wireless Association; American Cable Association; Daniel Berninger; Wireless Internet Service Providers Assoc.; the National Cable & Telecom Association; and AT&T, Inc.

144. USTelecom is a representative trade association for the telecommunications industry. Self-published information about the organization can be found at www.ustelecom.org.

145. *USTelecom v. FCC* (15-1063), Protective Petition for Review (Mar. 23, 2015).

146. *Id.*

147. *Id.*

IV. THE 2015 ORDER SHOULD BE UPHELD UNDER STARE DECISIS AND THE *CHEVRON* DOCTRINE

The Order will likely survive the telecommunication industry's challenge to the FCC's authority to reclassify broadband Internet as a telecommunications service instead of an information service. According to the *Verizon* court, which will also be deciding the current challenge to the Order, the classification of broadband Internet as an information service was the primary roadblock to the FCC's ability to enforce the net neutrality provisions of no-blocking and non-discrimination because these provisions were de facto common carrier regulations.¹⁴⁸ If the *USTelecom* court finds that the FCC has the authority to reclassify broadband Internet as a telecommunications service subject to Title II common carrier regulations, it is likely that the 2015 Order will survive the current challenge and that the FCC's current net neutrality regime will remain intact. Based on the holdings in *Brand X* and *Verizon*, it is likely that the FCC does in fact have the authority to reclassify the Internet as a telecommunications service and therefore to enforce its net neutrality Order.

A. THE ORDER SURVIVES UNDER *BRAND X* ANALYSIS

The D.C. Circuit will likely rely heavily on *Chevron* and *Brand X* in its analysis of the 2015 Order. Like this case, *Brand X* dealt with the question of the FCC's authority to classify broadband Internet service as either a telecommunications service or an information service.¹⁴⁹ The *Brand X* decision guides the court to apply *Chevron* to the question of the FCC's construction of the Act.¹⁵⁰ First, the Order will likely survive a challenge that it was an invalid legal interpretation of the Act under *Chevron*. As to the first step in *Chevron*, the *Brand X* Court found that Congress had not spoken to the precise question at issue because the Act did not explicitly instruct how to categorize communication services, therefore delegating such interpretive power to the FCC.¹⁵¹ As to the second step in *Chevron*, the *Brand X* Court also found that the FCC's answer to the question of how to classify the Internet was legally justified.¹⁵² Given that both *Brand X* and the current challenge deal with the FCC's construction of the terms "information service" and "telecommunications service" in the Act, the D.C. Circuit is likely to similarly conclude that the 2015 Order is a valid legal

148. *Verizon Commc'ns, Inc. v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014).

149. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 975 (2005).

150. *Id.* at 980.

151. *Id.* at 980–81.

152. *Id.* at 986.

interpretation of the Act. Second, the Order will likely survive a challenge that the FCC's policy determinations in the Order were arbitrary and capricious under APA § 706(2)(A) given the diligence with which the FCC prepared its Order.

1. *Chevron Analysis*

In *Brand X*, the Court determined that *Chevron* was the appropriate framework to analyze the FCC's interpretation of the term "telecommunications service" in the Act.¹⁵³ The Court held that *Chevron* applied to the FCC's construction of the Act because Congress had delegated the authority to "execute and enforce" the Act to the FCC and to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Act.¹⁵⁴ Because the current challenge also deals with the construction of the term "telecommunications service" within the Act, it follows that the D.C. Circuit will apply the *Chevron* framework to its analysis of the 2015 Open Internet Order.

The *Chevron* test requires the court to first determine whether Congress spoke to the specific issue at controversy.¹⁵⁵ Then, if Congress did not, the court must determine whether the FCC's answer to the question was a reasonable policy choice for it to make.¹⁵⁶ If the court determines that the FCC's decisions embodied in the Order were based on a permissible construction of the statute, the court will defer to those decisions.

As in *Brand X*, the court will likely find that the FCC's interpretation is permissible under both steps of the *Chevron* framework.¹⁵⁷ The *Brand X* court, in analyzing the Act's definitions of "telecommunications service" and "information services" found that the Act "fails unambiguously to classify" whether certain facilities offer telecommunications or information services¹⁵⁸ and that the "silence suggests . . . that the [FCC] has the discretion to fill the consequent statutory gap."¹⁵⁹ It is likely that the D.C. Circuit will follow the *Brand X* Court's analysis in addressing whether the FCC has the authority to interpret the Act under the first step of *Chevron*. Similarly, the D.C. Circuit will likely determine that the FCC does in fact have such authority.

153. *Id.* at 980.

154. *Id.* at 980 (citing the Communications Act §151).

155. *Chevron U.S.A., Inc., v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984).

156. *Id.* at 845.

157. *Brand X*, 545 U.S. at 986.

158. *Id.* at 996–97.

159. *Id.* at 997.

Under *Chevron's* second and final step, the court must determine whether the FCC's policy answer to the question at hand reflected a reasonable construction of the Act.¹⁶⁰ Again, and as in *Brand X*, it is likely that the D.C. Circuit will find that the FCC's classification of broadband Internet as a telecommunications service is a reasonable construction of the statute. Further, the court is unlikely to find that the FCC's reclassification was an unreasonable policy choice, given the FCC's thorough research, its development of a modern Title II framework designed to protect both Internet users and ISPs, and the overwhelming number of pro-neutrality comments in response to the 2015 Open Internet NPRM.

2. *Arbitrary and Capricious Analysis*

Further, the D.C. Circuit will likely hold that, given the diligence and reasoning that went into the 2015 Order, the FCC's construction of the Act was neither arbitrary nor capricious. The *Brand X* Court held that "the [FCC] is free within the limits of reasoned interpretation to change course if it adequately justifies the change."¹⁶¹ Because the FCC has provided, via its 2015 Open Internet Order, a "reasoned explanation" for reclassifying broadband Internet as a telecommunications service, the D.C. Circuit will likely defer to the FCC. With the *Brand X* and *Chevron* analysis satisfied, the court will likely look to its prior *Verizon* decision to ensure that the FCC followed the *Verizon* roadmap.

B. *VERIZON* COURT ANALYSIS

The *Verizon* court was generally amenable to the Open Internet Principles but found that the FCC could not impose common carrier regulations on a communications service that the FCC itself had specifically classified as exempt from such common carrier regulations.¹⁶² Because the FCC has appropriately reclassified broadband Internet as a telecommunications service subject to common carrier regulation, the D.C. Circuit's concerns in *Verizon* will have been satisfied and should no longer impede the FCC's ability to enforce its Open Internet Order.¹⁶³

The *Verizon* court held that "the [FCC] would violate the Communications Act were it to regulate broadband providers as common carriers," in light of the FCC's "still-binding decision to classify broadband providers" as information services and not telecommunication services.¹⁶⁴

160. *Chevron*, 467 U.S. at 855.

161. *Brand X*, 545 U.S. at 1001.

162. *Verizon*, 740 F.3d at 628.

163. *See id.*

164. *Id.* at 650.

Since the two classifications remain mutually exclusive, the court concluded that the FCC could not classify a service as an information service with one hand and impose common carrier obligations designed for a telecommunication service with the other.¹⁶⁵

But the *Verizon* court did not reject the Open Internet principles on substantive grounds. Rather, it determined that, given the FCC's construction of the Communications Act, the FCC did not have the authority to impose or enforce such principles.¹⁶⁶ Because the FCC adhered to the roadmap set out in the *Verizon* decision by reclassifying broadband Internet as a telecommunication service, it is likely that the *Verizon* court would accept the FCC's new construction of the Act and agree that the FCC now has the authority to impose and enforce its Open Internet principles.

V. CONCLUSION

The 2015 Open Internet Order will likely overcome judicial scrutiny because the FCC laid sufficient foundational groundwork in the Order to both overcome the *Chevron* analysis and avoid being found to have acted in an arbitrary and capricious manner under the Administrative Procedure Act. While the Order will be vigorously challenged by net neutrality opponents, and while no one can predict with certainty the outcome of such challenges, the fact that the Order is so well supported by proper adherence to the APA offers a measure of security and certainty for Internet users and businesses that trade in or rely on Internet services. Regardless of the outcome, everyone who is affected by the Internet will benefit from clear and enforced rules. If the current Order stands, end-users and consumers will receive the benefit of certainty as well as the protection of anti-discrimination, anti-blocking, anti-throttling Internet principles, making the Internet more free and users less affected by the business decisions of Internet gate-keepers.

165. *Id.* at 628.

166. *Id.*

