NOTES

The Third Way 2.0: Evaluating the Title II Reclassification and Forbearance Approach to Net Neutrality

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INTRODUCTION

As a *Los Angeles Times* editor put it, "In essence, the [net neutrality] debate boils down to a question of what freedom online is most worth preserving: the freedom from regulation, or the freedom from interference by [Internet service providers]."[1] Nearly four million comments were filed with the Federal Communications Commission to weigh in on the net neutrality rulemaking proceeding,[2] eclipsing the previous record set when it received 1.4 million comments in response to Janet Jackson's Super Bowl "wardrobe malfunction" in 2004.[3] This Note seeks to explain some of the key legal and policy arguments embedded in those rulemaking comments. This Note also discusses the costs and benefits associated with the net neutrality rules approved by the FCC in March 2015.[4]

Columbia Law Professor Tim Wu coined the term "net neutrality"—short for network neutrality.[5] Net neutrality is synonymous with an "open Internet": the idea that users should choose what lawful content, services, and applications to use online, without interference from Internet service providers (ISPs).[6] To provide for an open Internet, the FCC adopted rules that apply to providers of "broadband Internet access service"—that is, mass-market retail service that provides the capability to send and receive data over the Internet.[7] In general, there are two categories of broadband service: (1) "fixed" broadband service provides Internet access at stationary locations (for example, home modems); and (2) "mobile" broadband service provides Internet access to users of mobile stations (for example, smartphones).[8] Whereas the net neutrality rules imposed

1. Jon Healey, *Backgrounder on 'Net Neutrality'*, L.A. TIMES (Nov. 9, 2011), http://articles.latimes.com/2011/nov/09/opinion/ la-oe-healey-20111109/2.

2. *See* Gigi B. Sohn, *FCC Releases Open Internet Reply Comments to the Public*, OFFICIAL FCC BLOG (Dec. 23, 2014, 11:17 AM), http://www.fcc.gov/blog/fcc-releases-open-internet-reply-comments-public.

3. *See* Grant Gross, *FCC Receives Record 3 Million Net Neutrality Comments: What Now?*, PC WORLD (Sept. 16, 2014, 9:25 AM), http://www.pcworld.com/article/2684395/fcc-gets-record-number-of-net-neutrality-comments-what-now.html (internal quotation marks omitted).

4. *In re* Protecting & Promoting the Open Internet, FCC 15-24 (2015) (report and order) (No. 14-28) [hereinafter 2015 Open Internet Order].

5. *See* Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141, 145 (2003) (defining a "neutral network" as "an Internet that does not favor one application . . . over others").

6. *See* FCC, OPEN INTERNET, http://www.fcc.gov/openinternet (last visited Mar. 12, 2015); *see also In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd. 14986, 14987–88, ¶ 4 (2005) (outlining four principles for broadband service providers to follow).

7. *See* 2015 Open Internet Order, FCC 15-24, ¶ 25.

8. *See id.* ¶ 188.

by the FCC in 2010 exempted mobile Internet service from certain rules,[9] the 2015 rules generally apply with equal force to both fixed and mobile service.[10] This Note focuses on how the FCC's new regulatory regime affects fixed broadband Internet access service.[11]

The FCC classifies Internet service as "broadband" when certain thresholds for upload and download speeds are met,[12] and that capability enables users "to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."[13] In January 2015, the FCC significantly raised the threshold speed for Internet access to qualify as broadband.[14] The change in definition effectively triples the percentage of U.S. households lacking broadband access[15] and potentially provides the FCC with a stronger justification to exert regulatory authority to increase access.[16] Under this new definition of broadband, 83% of Americans and 47% of Americans living in rural areas have access to fixed broadband service.[17] Although reasonable minds disagree about how to define broadband or increase access to it, virtually everyone agrees that increasing broadband capacity is a good thing. The pivotal question is how the United States can increase broadband capacity and, at the same time, maintain an open Internet as a platform for innovation and free expression.

This Note evaluates the "Third Way" approach to net neutrality, which derives its name from how former FCC Chairman Genachowski described the

9. *See In re* Preserving the Open Internet Broadband Indus. Practices, 25 FCC Rcd. 17905, 17906, ¶ 1 (2010) (report and order), *aff'd in part, vacated in part sub nom.* Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

10. *See* 2015 Open Internet Order, FCC 15-24, ¶ 25.

11. This Note does not address how the FCC should regulate mobile broadband service.

12. *See In re* Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Ams. in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecomms. Act of 1996, as Amended by the Broadband Data Improvement Act, 30 FCC Rcd. 1375, ¶¶ 1–3 (2015) (changing the definition of broadband by raising the minimum download speed from four megabits per second (Mbps) to twenty-five Mbps, and the minimum upload speed from one Mbps to three Mbps).

13. *See* 2015 Open Internet Order, FCC 15-24, ¶ 25 n.27 (quoting 47 U.S.C. § 1302(d)(1) (2010)) (internal quotation mark omitted) (noting that the definition of "broadband" includes but is not limited to services meeting the threshold for "advanced telecommunications capability," as defined in section 706 of the Telecommunications Act of 1996, as amended (internal quotation marks omitted)).

14. *See In re* Inquiry Concerning the Deployment of Advanced Telecomms. Capability, 30 FCC Rcd. 1375, ¶¶ 1–3 (changing the definition of broadband by raising the minimum download speed from 4 Mbps to 25 Mbps, and the minimum upload speed from one Mbps to three Mbps).

15. *See* Micah Singleton, *The FCC Has Changed the Definition of Broadband*, THE VERGE (Jan. 29, 2015, 11:48 AM), http://www.theverge.com/2015/1/29/7932653/fcc-changed-definition-broadband-25 mbps.

16. *See* 47 U.S.C. § 1302(b) (2012) (requiring the FCC to report annually on whether broadband "is being deployed to all Americans in a reasonable and timely fashion," and to take "immediate action" if it is not); *see also* 2015 Open Internet Order, FCC 15-24, ¶ 275 (relying on 47 U.S.C. § 1302(b) as affirmative legal authority to implement open Internet rules).

17. *See In re* Inquiry Concerning the Deployment of Advanced Telecomms. Capability, 30 FCC Rcd. 1375, ¶¶ 4–6.

three fundamental ways to regulate broadband access.[18] The first method calls for treating broadband access as an "information service" regulated under Title I of the Communications Act of 1934 (the Communications Act or Act).[19] Of the three options, regulating broadband under Title I, the first method, provides the FCC with the least amount of regulatory authority. The second method involves treating broadband access as a "telecommunications service" regulated under Title II of the Act and applying the full suite of Title II regulations.[20] Under this second approach, the FCC would wield significant power over broadband providers—as it does for public utilities—and could, for example, require broadband providers to charge certain rates and bundle their services in certain ways.[21] The third method—that is, the Third Way—involves the FCC classifying broadband access as a telecommunication service regulated under Title II, but instead of applying all the Title II provisions, the FCC would refrain, or "forebear," from enforcing the majority of those provisions.[22] Put differently, the Third Way approach is akin to a middle ground between light regulation under Title I and heavy regulation under Title II. And even within the Third Way approach, there is a continuum of light and heavy regulation, depending on which Title II provisions the FCC applies and which it forbears from.

There is virtually no support for the second approach because enforcing all forty-eight Title II provisions would amount to a heavy-handed regulatory approach.[23] The real question—the one raised and answered in this Note—is whether the FCC should have limited itself to regulating broadband access as an information service under Title I, or whether it was appropriate for the FCC to adopt the Third Way approach. Although, a fourth option is for the FCC to do nothing and simply defer to Congress.[24] Therefore, in evaluating the costs and benefits of the Third Way approach, one should contrast that approach with the

18. *See* Julius Genachowski, *The Third Way: A Narrowly Tailored Broadband Framework*, FCC 4–5 (May 6, 2010), https://apps.fcc.gov/edocs_public/attachmatch/DOC-297944A1.pdf.

19. *See id.* at 3–4 (internal quotation marks omitted) (discussing how broadband could be regulated as an information service under the Communications Act of 1934 (codified as amended at 47 U.S.C. § 153(24))).

20. *See id.* at 4 (internal quotation marks omitted).

21. *Cf.* James B. Speta, *Unintentional Antitrust: The FCC's Only (and Better) Way Forward with Net Neutrality After the Mess of* Verizon v. FCC, 66 FED. COMM. L.J. 491, 497–98 (2014) (discussing the history of the Communications Act and the power that Congress afforded the FCC to regulate common carriers).

22. Genachowski, *supra* note 18, at 5.

23. *See, e.g.*, Letter from Kathryn A. Zachem, Senior Vice President, Comcast Corp., to Marlene H. Dortch, Sec'y, FCC 17 (Dec. 24, 2014), *available at* http://corporate.comcast.com/images/Comcast-OI-ex-parte-12-24-14.pdf (discussing how even the most vocal proponents of reclassifying broadband as a telecommunications service under Title II have acknowledged that not enforcing all the Title II provisions is appropriate).

24. *See In re* Protecting and Promoting the Open Internet, 29 FCC Rcd. 5561, 5657 (2014) (notice of proposed rulemaking) [hereinafter 2014 Notice of Proposed Rulemaking] (Pai, Comm'r, dissenting) (suggesting that the FCC is "usurp[ing] Congress's role" by "mak[ing] fundamental policy choices for the American people").

two most likely alternatives: no additional regulation, or regulating broadband as an information service under Title I.

This Note proceeds in four Parts. Part I provides background information regarding the FCC's statutory authority and charts the relevant history of the net neutrality debate. Part II outlines the five principal rules set forth in the Commission's 2015 Open Internet Order. Part III assesses the legality of reclassifying broadband access, an issue the D.C. Circuit is currently adjudicating. And Part III also assesses how the FCC used its "forbearance" authority—that is, its authority to refrain from enforcing certain provisions of the applicable statute. In Part IV, this Note analyzes the costs and benefits associated with the Third Way approach, an approach that calls for classifying broadband under Title II, but with less regulation than would normally apply to common carriers.[25] This Note concludes that the Third Way approach furthers the FCC's ability to respond to market changes and anticompetitive behavior, helps edge providers who create Internet content and applications continue to serve as a driving force of innovation, and protects users' freedom of expression.

I. WHAT'S PAST IS PROLOGUE: THE HISTORY OF NET NEUTRALITY

The relevant history of the net neutrality debate can be broken down into four components: (1) the legislation providing the FCC with regulatory authority over the communications industry; (2) the evolution of FCC rulemaking and case law prior to 2010; (3) the rules imposed by the FCC in 2010—rules that a court subsequently struck down, but which provide the foundation for the current rules; and (4) the 2014 D.C. Circuit decision that struck down the FCC's second attempt to impose net neutrality rules.

A. THE FCC'S AUTHORITY UNDER THE COMMUNICATIONS ACT AND TELECOMMUNICATIONS ACT

The FCC derives its authority from the Communications Act of 1934.[26] Since its enactment, the Act has been amended many times—most notably by the Telecommunications Act of 1996 (the 1996 Act).[27] Although the Communications Act, as amended, includes seven titles, this Note primarily focuses on two: Title I (relating to "General Provisions")[28] and Title II (relating to "Common Carriers").[29]

The general objective of the 1996 Act was to promote competition by removing unnecessary regulatory barriers to entry.[30] In doing so, the 1996 Act

25. *See In re* Framework for Broadband Internet Serv., 25 FCC Rcd. 7866, 7867, ¶ 2 (2010) (notice of inquiry) (framing what the original Third Way approach would have entailed in 2010).

26. Communications Act of 1934 (codified as amended at 47 U.S.C., ch. 5).

27. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

28. 47 U.S.C., ch. 5, tit. I.

29. 47 U.S.C., ch. 5, tit. II.

30. *See* Telecommunications Act of 1996, 110 Stat. at 56, pmbl.

created a dichotomy between what it classifies as an information service (subject to Title I regulation) and what it classifies as a telecommunications service (subject to Title II regulation).[31] Put differently, the 1996 Act created a specific regulatory regime for telecommunications services and left information services unregulated by a specific regime, subjecting the latter to the generally applicable provisions.

Title I sets forth the general provisions of the Act and contains two key sections. Section 160(a) contains the forbearance provision, which essentially directs the FCC to refrain from enforcing certain provisions when the Commission determines that enforcement is unnecessary in light of developments in competition or technology.[32] Importantly, Title I also grants the FCC ancillary authority. More specifically, the Act authorizes the FCC to "perform any and all acts . . . not inconsistent with [the Act], as may be necessary in the execution of its functions."[33] As communications law experts Nuechterlein and Weiser suggest, this provision is essentially the FCC's necessary and proper clause.[34] Like the Necessary and Proper Clause of the Constitution, which allows Congress to create laws that are necessary for executing express constitutional authority,[35] the ancillary authority clause in the Communications Act allows the FCC to create rules to support the objectives for which it has express authority.[36]

The Supreme Court outlined the limits of the use of ancillary authority five decades ago in *United States v. Southwestern Cable Co*.[37] Based on *Southwestern Cable* and its progeny, the FCC must show that its rules are "reasonably ancillary" to the effective performance or achievement of a "substantive" statutory provision—not just a policy statement.[38] For example, in 1988 the D.C. Circuit upheld the FCC's creation of a Universal Service Fund to provide subsidies for telephone service in rural and other high-cost areas.[39] The FCC had ancillary authority to create the fund because the Act effectively grants the Commission with substantive authority to "ensure that telephone rates are

31. *See* 47 U.S.C. § 153(24), (53) (2012); *see also* CHARLES B. GOLDFARB, CRS REPORT FOR CONG., TELECOMMUNICATIONS ACT: COMPETITION, INNOVATION, AND REFORM 4 nn.7–8 (2006) (explaining how Title I of the 1996 Act was incorporated into Title II of the 1934 Communications Act as amended, and how Title II of the 1996 Act was incorporated into Title VI of the 1934 Act).

32. *See* 47 U.S.C. § 160(a) (2012).

33. 47 U.S.C. § 154(i) (2012).

34. *See* JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: TELECOMMUNICATIONS LAW AND POLICY IN THE INTERNET AGE 232 (2d ed. 2013).

35. *See* U.S. CONST. art. I, § 8, cl. 18.

36. *See* 47 U.S.C. § 154(i) (2012) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.").

37. 392 U.S. 157, 178 (1968).

38. *See* FCC v. Midwest Video Corp., 440 U.S. 689, 708 (1979); United States v. Midwest Video Corp., 406 U.S. 649, 657 (1972); *Southwestern Cable Co.*, 392 U.S. at 178; Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601, 612 (D.C. Cir. 1976).

39. *See* Rural Tel. Coal. v. FCC, 838 F.2d 1307, 1315 (D.C. Cir. 1988).

within the means of the average subscriber in all areas of the country."[40]

Title II governing telecommunications service was designed to regulate common carriers. For instance, Title II governs the services provided by land-line telephone companies. It sets forth the duties of common carriers, including the duty to "furnish . . . communication service upon reasonable request."[41] Title II also contains provisions regarding the rates common carriers may charge and makes it unlawful for common carriers to engage in "unjust or unreasonable" discriminatory practices.[42] From roughly the 1930s to the 1980s, telephone companies formed natural monopolies like traditional utility companies.[43] In response, Title II provisions were designed to ensure that any company that achieved a monopoly in a given region would not abuse its market power to the detriment of consumers. Although the 1996 Act was intended to facilitate a transition from monopolies to a competitive market, the 1996 Act left various Title II provisions in place during the transition.[44]

The Title I–Title II distinction in the 1996 Act is a reflection of how the communications industry operated at that time.[45] During that era, the communications industry was characterized by service-specific networks that did not compete with one another, telephone service was provided over certain networks, and cable service was provided over different networks.[46] The 1996 Act created distinct regulatory regimes for these service-specific networks to foster competition from new entrants that used network architectures and technologies similar to those of the incumbents.[47] Furthermore, the distinction in the 1996 Act between telecommunications service and information service is an outgrowth of the FCC's so-called Computer II regime—a series of FCC rulings dating back to the 1970s.[48] Under the Computer II framework, the rules drew a line between services by distinguishing between "basic" services (those services that merely involved the transmission of information) and "enhanced" services (those services that involved the processing of information).[49] The FCC chose not to regulate enhanced services in order to foster their development and deployment.[50]

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40. *Id.* at 1311 (quoting *In re* Amendment of Part 67 of the Com'n's Rules and Establishment of a Joint Bd., 96 F.C.C.2d 781, 795, ¶ 30 (1984)) (internal quotation mark omitted).

41. 47 U.S.C. § 201(a) (2012).

42. *See id*. §§ 201(b)–202.

43. *See* Joseph D. Kearney, *From the Fall of the Bell System to the Telecommunications Act: Regulation of Telecommunications Under Judge Greene*, 50 HASTINGS L.J. 1395, 1403 & n.18 (1999) (describing the evolution of AT&T's regional Bell companies).

44. *Cf.* GOLDFARB, *supra* note 31, at 4 & nn.7–8, 11.

45. *See* NUECHTERLEIN & WEISER, *supra* note 34, at 231.

46. *See* GOLDFARB, *supra* note 31, at 4.

47. *See id.*

48. *See id.* at 4 & n.11.

49. *See In re* Amendment of Section 64.702 of the Comm'n's Rules and Regs. (Second Computer Inquiry), 77 F.C.C.2d 384, 387, 420–21 (1980) [hereinafter Computer Inquiry II].

50. *See* GOLDFARB, *supra* note 31, at 4.

Technological convergence has made these statutory and regulatory distinctions problematic because the lines between classifications of networks and classifications of services have been blurred. For example, companies like Vonage and MagicJack offer voice over Internet protocol (VoIP) services that may fall within the definition of an information service, but they also compete with traditional phone companies that provide telecommunications service.[51] The result is that the 1996 Act created artificial distinctions in how the FCC regulates the communications industry, even though those distinctions no longer exist in the marketplace.

The actual provisions of the Act are not, however, all that matter. Just as important is how courts and the FCC have chosen to interpret their commands. Under the test articulated by the Supreme Court in *Chevron*, courts must defer to an agency's interpretation of a statute if: (1) the statutory language is silent or ambiguous with respect to the question at issue; and (2) the agency's interpretation is based on a permissible construction of the statute.[52] Here, the statute that the FCC is charged with implementing is broad, in part, because Congress recognized that it could not create detailed regulations in a field that rapidly changes with technological advances.[53] Because the Act is either silent or ambiguous in many respects, the FCC's interpretation is often controlling.

B. THE PREOPEN INTERNET ORDER ERA

The current net neutrality debate is better understood in context with the events preceding the FCC's 2010 Open Internet Order. In 2002, the FCC issued a declaratory ruling that classified cable modem service as exclusively a Title I information service without any Title II telecommunications component.[54] The Ninth Circuit disagreed, holding that cable modem service was both an information and telecommunications service.[55] Nevertheless, in 2005, the Supreme Court reversed the Ninth Circuit in the *Brand X* case.[56] There, the Court applied the *Chevron* deference standard in upholding the FCC's classification of cable broadband service as purely an information service exempt from Title II regulation.[57] Subsequently, the FCC expounded on its classification of cable modem service by classifying all fixed broadband access as an information service,[58] including digital subscriber line (DSL) service provided by telephone

51. *See id*. at 5.

52. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

53. *See* Nat'l Broad. Co. v. United States, 319 U.S. 190, 219–20 (1943); *see also* 2015 Open Internet Order, FCC 15-24, ¶ 310 (2015) (report and order) (No. 14-28).

54. *See In re* Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, 17 FCC Rcd. 4798, 4819, ¶ 33 (2002) (declaratory ruling) [hereinafter Cable Modem Order].

55. Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1135 (9th Cir. 2003), *rev'd and remanded sub nom*. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

56. *See Brand X*, 545 U.S. at 1003.

57. *See id.* at 986.

58. *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. 7, 15 (2015). "The FCC eventually

companies.[59]

The FCC's decision not to classify broadband as a telecommunications service was guided, in part, by two assumptions. First, the FCC believed that it retained sufficient authority to protect the public interest through its Title I authority.[60] Second, the FCC was reluctant to add common-carrier regulation because it originally believed that market competition would curtail undesirable practices by broadband providers.[61] For reasons discussed below, neither of those assumptions has panned out.[62]

The next significant precursor to the modern net neutrality debate was the 2010 D.C. Circuit decision in *Comcast Corp. v. FCC*.[63] That case concerned Comcast's practice of degrading the service of BitTorrent and other peer-to-peer file-sharing applications.[64] In response, the Commission issued the 2008 Comcast Order, in which it found that Comcast violated the Act and prior FCC rulings.[65] The FCC grounded its authority to issue the 2008 Comcast Order in section 230, as a grant of "statutorily mandated responsibility."[66] Section 230 provides, in relevant part, that it "is the policy of the United States . . . to promote the continued development of the Internet . . . [and] to encourage the development of technologies which maximize user control . . . ."[67] The D.C. Circuit rejected the FCC's reliance on that provision, explaining that it contains mere "statements of policy . . . . not delegations of regulatory authority."[68] The FCC tried to rely on six other statutory provisions to further justify its authority to order Comcast to adhere to open network management practices, but the court rejected those arguments as well because the Commission either failed to link its assertion of ancillary authority to a "statutorily mandated responsibility" or failed on procedural grounds.[69] And ultimately, the D.C. Circuit vacated the 2008 Comcast Order.[70]

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classified everything from cable broadband, wireline broadband, wireless broadband and even broadband over powerline as a Title I information service." *Id.* (footnotes omitted).

59. *See In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd. 14853, 14856, ¶ 2 (2005) (order and notice of proposed rulemaking).

60. *See id.* at 14913–14, ¶ 109; *see also* Cable Modem Order, 17 FCC Rcd. 4798, 4819, ¶ 33 (2002) (declaratory ruling) (Powell, Chairman, statement).

61. *See* Computer Inquiry II, 77 F.C.C.2d 384, 385–89 (1980).

62. *See infra* Part IV.A.

63. 600 F.3d 642 (D.C. Cir. 2010).

64. *See id.* at 644; *see also* Peter Svensson, *Comcast Blocks Some Internet Traffic*, ASSOCIATED PRESS (Oct. 19, 2007, 6:32 PM), http://www.washingtonpost.com/wp-dyn/content/article/2007/10/19/AR2007101900842.html (describing how Comcast degraded certain uploads transferred using the BitTorrent).

65. *See In re* Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp., 23 FCC Rcd. 13028, 13028, ¶ 1 (2008) (memorandum opinion and order) [hereinafter 2008 Comcast Order].

66. *See id.* at 13034–36, ¶¶ 13–16 (internal quotation mark omitted); *see also Comcast*, 600 F.3d at 655.

67. 47 U.S.C. § 230(b) (2012).

68. *Comcast*, 600 F.3d at 654.

69. *See id.* at 659–61 (discussing how the FCC relied on sections 1, 201(b), 230(b), 256, 257(b), and 601(4) of the Communications Act, and section 706 of the 1996 Act).

70. *Id.* at 661.

Importantly, the FCC could not rely on direct authority under Title II in the *Comcast* case because, as previously mentioned, the Commission issued a 2002 ruling that classified cable modem service as an information service. According to then-FCC General Counsel Austin Schlick, the key takeaway from *Comcast* was that "when the Commission classified residential broadband services as solely and entirely information services despite their substantial transmission component, the Commission unintentionally went too far in limiting its ability to protect consumers and small businesses."[71]

A month after the *Comcast* decision, Schlick and then-FCC Chairman Julius Genachowski issued companion statements outlining their solution: the Third Way approach.[72] The approach called for partially reclassifying broadband access as a telecommunications service under Title II and forbearing the imposition of most Title II provisions.[73] The 2010 proposal received harsh criticism from ISPs and certain members of Congress.[74] However, "edge providers"—the providers of content and applications such as Google and Skype—supported it.[75] Advocacy groups fell on both sides of the debate: some supported the Third Way approach as a way to protect consumers from the power of large corporations whereas other groups adamantly opposed the approach based on free-market principles.[76] In the end, the Third Way proposal was put aside, and the FCC settled on a different path forward.

C. THE 2010 OPEN INTERNET ORDER

Later that year, the Commission issued the 2010 Open Internet Order,[77] maintaining the classification of broadband as an information service under Title I rather than a telecommunications service under Title II.[78] The 2010 Open Internet Order is important because it forms the foundation for the 2015 rules. The FCC's stated purpose for issuing the 2010 Open Internet Order was "to preserve the Internet as an open platform for innovation, investment, job creation, economic growth, competition, and free expression."[79] To achieve those goals, the FCC adopted the following three fundamental rules:

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71. *See* Austin Schlick, *A Third-Way Legal Framework for Addressing the* Comcast *Dilemma*, FCC 2 (May 6, 2010), https://apps.fcc.gov/edocs_public/attachmatch/DOC-297945A1.pdf.

72. *See id*. at 3–10; Genachowski, *supra* note 18, at 5–6.

73. *See* Genachowski, *supra* note 18, at 5.

74. *See* NUECHTERLEIN & WEISER, *supra* note 34, at 238.

75. *See* Letter from Open Internet Coal. to Julius Genachowski, Chairman, FCC (May 6, 2010), *available at* http://apps.fcc.gov/ecfs/comment/view;ECFSSESSION=lHn7J2Cn6bqwnsYvvcvd8vLyrScvtqyVLhJ1QypPf7jT22Xg4C!1175060748!1957906226?id=6015593794.

76. *See, e.g*., Ryan Singel, *Feds Start Move to Reimpose Rules on ISPs*, WIRED (June 17, 2010, 5:13 PM), http://www.wired.com/2010/06/fed-rules-isps/.

77. 2010 Open Internet Order, 25 FCC Rcd. 17905 (2010) (report and order), *aff'd in part, vacated in part sub nom.* Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

78. *See Verizon*, 740 F.3d at 631–32 (compiling the series of orders and rulings the FCC used to classify various types of broadband service as an "information service").

79. *See* 2010 Open Internet Order, 25 FCC Rcd. at 17906, ¶ 1.

(1) *Transparency Rule.* The first rule required broadband providers to "publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services."[80]

(2) *No Blocking Rule.* The second rule prohibited broadband providers from blocking customer access to lawful content, applications, services, or devices.[81] Further, this rule prohibited degrading particular content so as to render it effectively unusable.[82]

(3) *No Discrimination Rule.* The third rule declared that fixed broadband providers shall not unreasonably discriminate in transmitting lawful network traffic.[83]

The first two rules—the transparency and antiblocking rules—applied to both fixed broadband and mobile broadband service. The third rule—the antidiscrimination rule—applied only to fixed broadband service.[84] In a post-*Comcast* world, the FCC had to find statutory authority in the Communications Act to authorize the rules just described. It did so in the 2010 Open Internet Order by relying heavily on two sources of authority. The 2010 Open Internet Order relied on section 706 of the 1996 Act, which provides that the FCC "shall encourage the deployment . . . of advanced telecommunications capability" by using measures to "promote competition" and "remove barriers to infrastructure investment."[85] Not only did the FCC interpret section 706 to constitute an independent grant of direct authority,[86] the FCC also used section 706 to serve as a hook on which it placed ancillary authority: the second main source of authority in the 2010 Open Internet Order.[87] In total, the FCC created rules based on a hodgepodge of twenty-four disparate provisions in the Act.[88]

Almost immediately, the 2010 Open Internet Order was the subject of intense judicial scrutiny. Although parties challenged the 2010 Open Internet Order in various courts, the case was assigned by lottery to the D.C. Circuit—the same court that struck down the 2008 Comcast Order.[89]

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80. *See id.* at 17937, ¶ 54 (emphases omitted); 47 C.F.R. § 8.3 (2015).
81. *See* 2010 Open Internet Order, 25 FCC Rcd. at 17942, ¶ 63; 47 C.F.R. § 8.5(a) (2015).
82. *See* 2010 Open Internet Order, 25 FCC Rcd. at 17943, ¶ 66.
83. *See id.* at 17944, ¶ 68; 47 C.F.R. § 8.7 (2015).
84. *See* 2010 Open Internet Order, 25 FCC Rcd. at 17958, ¶ 96.
85. *See* 47 U.S.C. § 1302(a) (2012).
86. *See* 2010 Open Internet Order, 25 FCC Rcd. at 17969–71, ¶¶ 119–22.
87. *See* Speta, *supra* note 21, at 495; Spiwak, *supra* note 58, at 16.
88. *See* 2010 Open Internet Order, 25 FCC Rcd. at 18093 (Baker, Comm'r, dissenting) ("The majority, however, tries the everything-but-the-kitchen-sink defense—24 different claimed statutory bases. The majority elects sheer quantity to make up for quality, and, in doing so, contorts the letter and spirit of the Act to try to justify rules adopted in a result-orientated process."); *see also* Verizon v. FCC, 740 F.3d 623, 634 (D.C. Cir. 2014) ("As authority for the adoption of [the 2010 Open Internet Order], the Commission invoked a plethora of statutory provisions." (citing 2010 Open Internet Order, 25 FCC Rcd. at 17966–81, ¶¶ 115–37)).
89. NUECHTERLEIN & WEISER, *supra* note 34, at 240.

D. *VERIZON V. FCC*: THE LEGAL CHALLENGE TO THE OPEN INTERNET ORDER

Verizon v. FCC, decided by the D.C. Circuit in January 2014, involved two appellants who opposed the 2010 Open Internet Order—Verizon and MetroPCS.[90] Verizon and MetroPCS challenged the order on five separate grounds, including two constitutional grounds.[91] First, the *Verizon* court addressed whether the FCC's reinterpretation of section 706 as a grant of direct authority was reasonable, and concluded that it was.[92] Next, the court assessed whether the FCC provided a reasonable rationale for seeking to promote increased broadband service through the 2010 Open Internet Order by claiming it spurred a "virtuous cycle" of innovation.[93] This three-step cycle occurs, according to the FCC, when (1) openness leads to investment and development by "edge providers" in new content and applications over the Internet, (2) which leads to increased end-user demand for broadband access, and (3) which leads to increased investment in broadband network infrastructure and technologies.[94] The FCC issued the 2010 Open Internet Order to prevent broadband providers from disrupting this "virtuous circle" by restricting the relationship between end users and edge providers—that is, those that provide content (like the *New York Times*) or services (like Google) over the Internet.[95]

Even after accepting section 706 as a grant of direct authority and accepting the virtuous-cycle rationale as reasonable, the *Verizon* court struck down two of the three rules—the antiblocking and antidiscrimination rules.[96] The court did so because those two rules imposed per se common-carriage requirements on broadband providers such as Verizon.[97] Because, as previously mentioned, the FCC chose to classify broadband Internet access as purely an information service, broadband providers were exempt from common-carrier requirements under Title II.[98] The court did, however, conclude that the transparency rule was severable from the other two rules because it operated separately and did not impose common-carrier obligations.[99] Therefore, the 2010 Open Internet Order's transparency rule remained in effect.[100]

Senior Circuit Judge Silberman generally concurred with the majority's conclusion that the FCC unlawfully treated broadband providers as common carriers, but he dissented in part to express his belief that even though section 706 is a grant of direct authority, the FCC could not rely on that provision to

90. 740 F.3d 623, 627 (D.C. Cir. 2014).
91. *See id.* at 634.
92. *See id.* at 637.
93. *See id.* at 644 (internal quotation marks omitted).
94. *See id.* at 649; 2010 Open Internet Order, 25 FCC Rcd. 17905, 17910–11, ¶ 14.
95. *See* 2010 Open Internet Order, 25 FCC Rcd. at 17910–11, ¶ 14.
96. *Verizon*, 740 F.3d at 659.
97. *See id.* at 650, 657–59 (relying on 47 U.S.C. § 153(51) (2012)).
98. *See* 47 U.S.C. § 153(51).
99. *See Verizon*, 740 F.3d at 659.
100. *Id.*; *see also* 2015 Open Internet Order, FCC 15-24, ¶ 157 (2015) (report and order) (No. 14-28) (describing the existing transparency rule that remained in effect post-*Verizon v. FCC*).

justify the 2010 Open Internet Order's rules.[101] According to the dissenting opinion's interpretation of the 1996 Act, the 2010 Open Internet Order's rules fell outside the scope of what section 706 authorized. In addition, Judge Silberman concluded that the FCC violated the Administrative Procedure Act because its decision was "arbitrary and capricious" due to a lack of evidence on which the Commission based its findings.[102]

A key takeaway from *Verizon* was that the majority opinion could be interpreted to leave open the possibility for the FCC to regulate broadband access under section 706, so long as the FCC stops short of imposing per se common-carriage requirements.[103] More specifically, if the antiblocking rule allowed individualized bargaining above the minimum level of service necessary to access other Internet subscribers, the court indicated that the rule might not create per se common-carriage obligations.[104] Further, with respect to the antidiscrimination rule, the *Verizon* court suggested that a rule preventing certain types of conduct by broadband providers might be acceptable if the FCC articulated a discrete, flexible standard that prohibited practices that could reasonably be understood to harm Internet openness, while allowing individualized broadband provider practices.[105]

What's past is prologue. After the D.C. Circuit struck down the 2008 Comcast Order in 2010, the FCC considered the Third Way approach. And after the D.C. Circuit struck down the 2010 Open Internet Order in 2014, the FCC formally introduced the Third Way approach as one of the regulatory options. Through the 2014 Notice of Proposed Rulemaking, the FCC sought to answer a decade-old question: "What is the right public policy to ensure that the Internet remains open?"[106] The next Part of this Note analyzes how the Commission chose to answer that question.

II. THE 2015 OPEN INTERNET ORDER'S FIVE-RULE FRAMEWORK

If the Third Way approach is the means to net neutrality, then the five-rule framework in the 2015 rules is the end. The 2015 Open Internet Order creates three clear, bright-line rules, which target three specific practices that harm Internet openness—blocking, throttling, and paid prioritization.[107] The 2015 Open Internet Order also creates a fourth, "catch-all" rule to prevent broadband providers from interfering with or disadvantaging end users or edge providers.[108] And fifth, the 2015 Open Internet Order enhances the 2010 Open Internet Order's transparency rule by requiring broadband providers to disclose certain

101. *See Verizon*, 740 F.3d at 659 (Silberman, J., concurring in part and dissenting in part).
102. *See id.* at 662–64.
103. *See id.* at 650, 658; *see also* Speta, *supra* note 21, at 492.
104. *See Verizon*, 740 F.3d at 658.
105. *See id.* at 657.
106. 2014 Notice of Proposed Rulemaking, 29 FCC Rcd. 5561, 5563, ¶ 2 (2014).
107. *See* 2015 Open Internet Order, FCC 15-24, ¶ 14 (2015) (report and order) (No. 14-28).
108. *See id.* ¶¶ 20–22.

information.[109]

The 2010 Open Internet Order included a rule against blocking, as well as a subsidiary prohibition against the degradation of lawful content, applications, services, and devices, on the grounds that such degradation would be tantamount to blocking.[110] By contrast, the 2015 Open Internet Order creates separate rules to (1) guard against blocking and (2) guard against degradation targeted at specific uses of a customer's broadband connection.[111] The "No Blocking" rule provides: "A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management."[112] And the "No Throttling" rule provides: "A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management."[113]

The no throttling rule closes a potential regulatory loophole that might otherwise permit a broadband provider to slow down service to "render[] an application effectively, but not technically, unusable."[114] Thus, for example, the FCC could rely on this rule to restrict Comcast's ability to degrade Netflix service in order to create an advantage for its video-on-demand service, or restrict AT&T's ability to degrade VOIP services.

In addition to those rules, the 2015 Open Internet Order contains a "No Paid Prioritization" rule.[115] "Paid prioritization occurs when a broadband provider accepts payment (monetary or otherwise) to manage its network in a way that benefits particular content, applications, services, or devices."[116] Unlike the blocking rule,[117] throttling rule,[118] and unreasonable interference/disadvantage standard,[119] the no paid prioritization rule does not contain a reasonable network management exception.[120] The fear is that paid prioritization would create an Internet with "fast lanes" for the haves and "slow lanes" for have-nots.[121] To

109. *Id.* ¶ 23–24.

110. *See* 2010 Open Internet Order, 25 FCC Rcd. 17905, ¶ 66 (2010) (report and order), *aff'd in part, vacated in part sub nom. Verizon*, 740 F.3d 623.

111. *See* 2015 Open Internet Order, FCC 15-24, ¶¶ 15–16.

112. *Id.* ¶ 15 (emphases omitted).

113. *Id.* ¶ 16 (emphases omitted).

114. *See id.* ¶ 17.

115. *Id.* ¶ 18 (emphases omitted).

116. *Id.*

117. *Id.* ¶ 15.

118. *Id.* ¶ 16.

119. *Id.* ¶ 21.

120. *Compare id.* ¶ 18 (including no mention of a reasonable network management exception) *with id.* ¶ 21 (including a reasonable network management exception).

121. *See id.* ¶ 18–19 (internal quotation marks omitted); *see also* Comments of Mozilla at 20 (July 15, 2014), 2015 Open Internet Order, FCC 15-24, ¶ 157 (2015) (report and order) (No. 14-28) (arguing that "[p]rioritization . . . inherently creates fast and slow lanes").

guard against that possibility, the no paid prioritization rule provides: "A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not engage in paid prioritization."[122]

Fourth, the FCC created a standard prohibiting broadband providers from unreasonably interfering with and unreasonably disadvantaging end users and edge providers.[123] This rule is based on the premise that broadband providers may serve as Internet gatekeepers, and is intended to ensure that broadband providers cannot stifle free expression by controlling what information and applications are available online. The no unreasonable interference/disadvantage standard provides:

> Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.[124]

And finally, the fifth rule provides for enhanced transparency. The 2010 Open Internet Order provided guidance on both the information to be disclosed and the method of disclosure within three categories: network management practices, performance characteristics, and commercial terms.[125] Since issuing the 2010 Open Internet Order, the FCC has continued to receive complaints from users and edge providers expressing concerns over the accuracy and availability of disclosures about the Internet speeds provided and the amounts billed.[126] Therefore, even though the *Verizon* court left the 2010 Open Internet Order's transparency rule in effect,[127] the 2015 Open Internet Order includes a rule to enhance transparency and make disclosures more effective. To alleviate the administrative burden that the new transparency rule might create on small companies, the FCC exempted "small providers" from these disclosure requirements.[128]

One cannot help but notice the irony in what led to the FCC's reclassification of broadband service. The FCC points out that many of the vocal opponents of

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122. *See* 2015 Open Internet Order, FCC 15-24, ¶ 18 (emphases omitted).

123. *See id.* ¶¶ 20–22.

124. *See id.* ¶ 21 (emphases omitted).

125. *See* 2010 Open Internet Order, 25 FCC Rcd. 17905, ¶ 56 (2010) (report and order), *aff'd in part, vacated in part sub nom.* Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

126. *See* 2015 Open Internet Order, FCC 15-24, ¶ 163.

127. *See Verizon*, 740 F.3d at 659; *see also* 2015 Open Internet Order, FCC 15-24, ¶ 157 (describing the existing transparency rule that remains in effect post-*Verizon*).

128. *See* 2015 Open Internet Order, FCC 15-24, ¶ 24. The 2015 Open Internet Order defines "small providers" as providers with 100,000 or fewer subscribers. *Id.*

reclassification, such as Verizon and Qwest, previously argued in 2000 that "the Commission not only may, but should, classify the transmission component of broadband Internet access service as a telecommunications service."[129] When the FCC opted to regulate broadband as an information service instead, the *Brand X* Court upheld this classification in 2005.[130] Then, in 2014, when Verizon successfully challenged the FCC's authority to promulgate open Internet rules based on information-service classification in *Verizon*, the FCC created even stronger regulations based on the telecommunications-service classification. The three Democratic FCC commissioners voted in favor of reclassification, and the two Republican commissioners voted against reclassification. And in issuing the 2015 Open Internet Order, the Democratic majority of the board relied heavily on the legal reasoning that Justice Scalia—a Conservative—articulated in his *Brand X* dissent.[131]

In any event, these five rules create the framework for how the FCC seeks to protect and promote an open Internet. The next Part discusses the fundamental steps that the FCC used to adopt this framework.

III. THE THIRD WAY 2.0: A THREE-STEP PROCESS

One method of assessing the legal framework that the FCC used to implement the 2015 Open Internet Order is to analyze the Third Way approach as a three-step process.[132] First, the FCC reclassified broadband access under Title II. Then, the Commission decided the scope of the regulations—that is, what falls within the definition of broadband Internet access service. And finally, the FCC determined how to use its forbearance authority. Each of these three steps is discussed in turn.

A. THE LEGALITY OF RECLASSIFYING BROADBAND UNDER TITLE II

As a threshold issue, it is important to establish whether the FCC can legally reclassify the transmission component of broadband access as a telecommunications service. This Note concludes that it can because reclassifying broadband access is consistent with the Communications Act itself and with Supreme Court precedent.

1. Reclassifying Broadband Is Consistent with the Communications Act

The Act, as amended, defines "information service" as the "*offering* of a capability for generating, acquiring, storing, transforming, processing, retriev-

129. *Id.* ¶ 314.

130. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005).

131. *See* 2015 Open Internet Order, FCC 15-24, ¶¶ 44–46, 333, 356, 366–67. *But see id.* at 359 (Pai, Comm'r, dissenting ("It was this potential last-mile transmission service that was at issue in the *Brand X* case. . . . And it was this last-mile transmission service that Justice Scalia identified in his dissent as being a telecommunications service.").

132. *Cf. In re* Framework for Broadband Internet Serv., 25 FCC Rcd. 7866, 7867, ¶ 2 (2010) (notice of inquiry) (framing the three parts of a third way approach).

ing, utilizing, or making available information via telecommunications."[133] Conversely, the Act defines "telecommunications service" as "the *offering* of telecommunications for a fee directly to the public, . . . regardless of the facilities used."[134] The term "telecommunications" refers to "the *transmission* . . . of information of the user's choosing, without change in the form or content of the information as sent and received."[135] Under the Act, telecommunications service is subject to mandatory Title II regulations, and information service is exempt from such regulations.[136]

The definitions of each type of service must be put in the context of today's marketplace. The two principal kinds of broadband service include: (1) cable modem service, which transmits data between the Internet and users via the network of television cable lines; and (2) DSL service, which uses high-speed wires owned by local telephone companies. Even though both types of broadband service provide functionality for storing or retrieving information—for example, by offering Domain Name System (DNS) functionality—it does not change that broadband service involves at least some transmission component.

Considering how cable modem service and DSL service developed is instructive. Both services were technological developments that spawned from dial-up service. With dial-up service, users connected to the Internet through a local loop of telephone copper and dialed up an ISP, such as America Online.[137] The physical pathway came from the telephone company, and the functionality came from a separate ISP. The telephone company was treated as a common carrier under Title II, and the Internet access from the ISP was treated as an information service subject to Title I.[138] By the mid-1990s, "ninety-eight percent of all households with Internet connections used traditional telephone wires to 'dial-up' their ISP."[139] Thus, during the dial-up era, it was easy to distinguish between a telecommunication service (the transmission component) and the information service (the functionality component); the two components came from two different companies that did not compete with one another.

Distinguishing between the two statutorily defined services became problematic when telephone companies such as Verizon and cable companies such as Comcast began to offer their own Internet service. From 1980 to 2005, the FCC applied Title II regulations to the transmission component of DSL service.[140] "[T]elephone companies were obligated to offer the transmission component of their enhanced service offerings . . . to unaffiliated enhanced service providers

133. 47 U.S.C. § 153(24) (2012) (emphasis added).

134. *Id.* § 153(53) (emphasis added).

135. *Id.* § 153(50) (emphasis added).

136. *See id.* § 153(51); *see also* Verizon v. FCC, 740 F.3d 623, 650 (D.C. Cir. 2014) (treating information service providers like common carriers runs afoul of section 153(51)).

137. Mark Grabowski & Pallavi Guniganti, *Take U.S. Internet Regulations Back to the Future*, 26 STAN. L. & POL'Y REV. ONLINE 36, 37 (2015).

138. *See id.* at 38.

139. *Id.*

140. *See* 2015 Open Internet Order, FCC 15-24, ¶ 313 (2015) (report and order) (No. 14-28).

on nondiscriminatory terms and conditions . . . ."[141] And in 2000, a Ninth Circuit decision put cable companies' cable modem service on a regulatory par with telephone companies' DSL service.[142] The Ninth Circuit in *AT&T Corp. v. City of Portland* held that cable modem service is a telecommunications service to the extent that the cable operator "provides its subscribers Internet transmission over its cable broadband facility," and an information service to the extent that the operator acts as a "conventional" ISP.[143] Thus, the transmission components of the two main types of broadband were once treated as a telecommunications service subject to Title II regulations.

In 2002, the FCC classified cable modem service as purely an information service,[144] and in 2005, the Commission reclassified DSL service as well.[145] The Commission reasoned that "non-facilities-based" providers—those that do not own the transmission facilities used to connect users to the Internet—are solely an information service.[146] In that scenario, the providers do not offer a "telecommunications service"; they merely use a telecommunications service.[147] The FCC further concluded that "facilities-based" providers—those that own the transmission facilities—should be treated the same as non-facilities-based providers.[148] The FCC reasoned that, in this latter scenario, a broadband provider offers a service in which transmission capabilities are "inextricably intertwined" with functionality capabilities, such as various applications and services.[149] So despite the telecommunications service transmission component, the FCC previously treated all the components of broadband Internet access service as a single, integrated information service.

Although the FCC previously took the position that the transmission and functionality components are inextricably intertwined, broadband has always included two components—particularly when one considers how broadband evolved from dial-up service. "Neither the speed of transmission, the format of the information being transmitted, nor the switching technology used to route the information make broadband access any different from earlier basic transmission services."[150]

In the 2015 Open Internet Order, the FCC reclassified broadband, concluding that "retail broadband Internet access service is best understood today as an

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141. *Id.*

142. *See id.* ¶ 316.

143. 216 F.3d 871, 878 (9th Cir. 2000).

144. *See* Cable Modem Order, 17 FCC Rcd. 4798, 4802, ¶ 7 (2002) (declaratory ruling).

145. *See In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd. 14853, 14856, ¶ 1 (2005) (order and notice of proposed rulemaking).

146. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 976, 978 (2005).

147. *See id.* at 979.

148. *See id*. at 978 (citing Cable Modem Order, 17 FCC Rcd. at 4823, ¶ 38).

149. *See id.* at 978–79 (citing *In re* Federal-State Joint Board on Universal Service, 13 FCC Rcd. 11501, 11539–40, ¶ 80 (1998) (report to Congress)).

150. Lee L. Selwyn & Helen E. Golding, *Revisiting the Regulatory Status of Broadband Internet Access: A Policy Framework for Net Neutrality and an Open Competitive Internet*, 63 FED. COMM. L.J. 91, 120 (2010).

offering of a 'telecommunications service.'"[151] The FCC states that it is "unable to maintain [its] prior finding that broadband providers are offering a service in which transmission capabilities are 'inextricably intertwined' with various proprietary applications and services."[152] Further, the Commission contends that "it is more reasonable to assert that the indispensable function of broadband Internet access service is the connection link that in turn enables access to the essentially unlimited range of Internet-based services."[153] This classification of broadband is consistent with the ambiguous terms of the Act, and is, as a practical matter, consistent with the position that the Commission took before the mid-2000s. Whether the FCC adequately supported reversing the finding that the transmission and functionality capabilities are inextricably intertwined is likely to be an important issue when the 2015 Open Internet Order is subject to judicial review because the finding is necessary for reclassification.

2. Reclassifying Broadband Is Consistent with Supreme Court Precedent

Although the FCC's decision to reclassify broadband as a telecommunications service is consistent with the Communications Act, the FCC must also provide an adequate explanation for the change in order to be consistent with Supreme Court precedent.

In its *Brand X* decision, the Supreme Court upheld the FCC's prior classification of cable modem service as an information service.[154] Under the first step of the *Chevron* analysis, the *Brand X* Court determined that the term "offer" in the definition of telecommunications service is ambiguous.[155] Then under *Chevron*'s second step, the Court deferred to the FCC's classification of cable modem service as a reasonable policy choice for the FCC to make.[156] But not without a strong dissent: three dissenting Justices argued that the FCC should have classified cable modem service as a telecommunications service because the transmission component of cable modem service is necessarily "offered" with Internet service.[157] That being said, of those Justices who accepted the FCC's information-service determination, all six potentially would have upheld the FCC's determination had the FCC classified broadband service differently, based on *Chevron* deference principles. In other words, because three Justices thought cable modem service included a telecommunications service and six Justices thought the definition of telecommunications service is at least ambiguous, there is reason to believe the Court would have upheld the FCC's determination had it classified cable modem service as including a telecommunications

151. 2015 Open Internet Order, FCC 15-24, ¶ 308 (2015) (report and order) (No. 14-28).
152. *Id.* ¶ 330.
153. *Id.* (internal quotation marks omitted).
154. *Brand X*, 545 U.S. at 1003.
155. *See id.* at 989–90.
156. *See id.* at 997.
157. *See id*. at 1007–08 (Scalia, J., dissenting).

service.[158]

Separately, the *Brand X* respondents argued that the Court should not accept the FCC's reinterpretation of telecommunications service because the FCC's interpretation was inconsistent with its past practice. The Court rejected that argument, explaining that "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework."[159] The Court noted that the FCC is free to reevaluate and change its interpretations in response to a change in factual circumstances or a change in administrations, so long as the FCC "adequately explains the reasons for a reversal of policy."[160]

In the 2015 Open Internet Order, the FCC put forward several explanations for changing the classification of broadband service. The Commission has not stated that the factual circumstances have changed in the one year since the *Verizon* case; rather, it posits that the previous information-service classification is based on a factual record compiled over a decade ago and that the facts have since changed.[161] The FCC asserts that the "indispensable function" of broadband Internet access service is "the connection link."[162] To support that conclusion, the FCC offers three sources of evidence:

> (1) consumer conduct, which shows that subscribers today rely heavily on third-party services, such as email and social networking sites, even when such services are included as add-ons in the broadband Internet access provider's service;
> (2) broadband providers' marketing and pricing strategies, which emphasize speed and reliability of transmission separately from and over the extra features of the service packages they offer; and
> (3) the technical characteristics of broadband Internet access service.[163]

And fourth, the Commission notes that, when it decided to classify cable modem service as an information service back in 2002, it anticipated vibrant intermodal competition for broadband that does not exist in the current marketplace.[164]

In sum, the Communications Act contains ambiguities such that broadband Internet access service does not fit neatly into either the information service or telecommunications service bucket. Classifying the transmission component of broadband as a telecommunications service is a permissible reading of the Act. And despite the reversal in policy, the FCC has probably provided an adequate explanation to justify changing course, such that the steps taken are consistent with Supreme Court precedent.

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158. *See* 2015 Open Internet Order, FCC 15-24, ¶¶ 333, 359 & n.983.
159. *See Brand X*, 545 U.S. at 981.
160. *See id.* at 981–82.
161. *See* 2015 Open Internet Order, FCC 15-24, ¶ 330.
162. *See id.* (internal quotation marks omitted).
163. *Id.*
164. *See id.*

B. DEFINING THE TELECOMMUNICATIONS SERVICE ASPECT OF BROADBAND ACCESS

One of the key challenges to adopting the Third Way approach is finding a way to separate the transmission component of broadband (the telecommunications service component) from the functionality component (the information service component). Prior to the 2015 Open Internet Order, the FCC classified broadband as an information service because, as seen from the end-user's perspective, "the telecommunications [aspect of broadband] is part and parcel of [the Internet access] service and is integral to its other capabilities."[165] Now the FCC views broadband Internet access service as a telecommunications service, and the add-on functionality capabilities that are typically offered with broadband service as either a statutory exception or a separate service altogether.[166]

Before discussing how the FCC classified the various aspects of broadband service, it is instructive to consider the range of choices the Commission had at its disposal. Three previous proposals, among many, for how to separate the transmission and functionality components of broadband service are as follows. Although telephone companies generally opposed the Third Way approach, in 2010, Sprint offered a definition in the event that the FCC settled on that approach. Sprint posited that Title II provisions should apply only to "Internet connectivity service that includes only those minimum network elements and functions essential to establish a line of transmission."[167] Mozilla's comments during the 2014 Notice of Proposed Rulemaking reveal a second option. Mozilla proposed recognizing a separate telecommunications service within local access networks offered to remote edge providers—those like Amazon or Google who provide content, services, and applications over the Internet.[168] Mozilla argued that by discovering how to identify and differentiate traffic according to individual edge providers, broadband providers created a legally distinguishable service that includes offering the delivery of traffic, upstream and downstream, to remote edge providers.[169] And Columbia Law Professors Narechania and Wu revealed a related third option in their "sender-side" proposal.[170] Under the sender-side proposal, the Commission would identify two services within the local network, but separate them by the direction of Internet traffic. This proposal recognizes that two distinct transmissions compose a single broadband transaction: first, the end user calls an edge provider; and second, the edge provider sends a response. Because the D.C. Circuit in

165. Cable Modem Order, 17 FCC Rcd. 4798, 4823, ¶ 39 (2002) (declaratory ruling).

166. *See* 2015 Open Internet Order, FCC 15-24, ¶¶ 363–65.

167. Comments of Sprint Nextel Corp. at 13, Framework for Broadband Internet Serv., 29 FCC Rcd. 5856 (2014) (No. 10-127).

168. *See* Mozilla Petition to Recognize Remote Delivery Servs. in Terminating Access Networks and Classify Such Servs. as Telecomm. Servs. Under Title II of the Comm. Act at 6–8, 2014 Notice of Proposed Rulemaking, 29 FCC Rcd. 5561, 5657 (2014).

169. *See id.*

170. *See* Letter from Tejas N. Narechania & Tim Wu, Professors, Columbia Law Sch., to Marlene H. Dortch, Sec'y, FCC, at 1 (Mar. 17, 2014).

Verizon recognized it may be "logical to conclude that [a broadband provider] may be a common carrier with regard to some activities but not others,"[171] the sender-side proposal contemplates subjecting only the response transactions to open Internet rules.[172]

These three proposals—the Sprint, Mozilla, and sender-side proposals—are different means to the same end. Each proposal provides a way to separate the telecommunications service component of broadband access from the information service component. Nevertheless, the FCC took a different approach. Despite creating some uncertainty about what does and does not fall within the definition of broadband service, the FCC's approach does appear to be less complex than other alternatives.

The 2015 Open Internet Order recognizes that the Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[173] Second, the Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public."[174] And third, "information service" is defined as the offering of a capability for generating, acquiring, storing, or processing information via telecommunication, with a statutory exception for "any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[175]

Applying the three definitions above, the FCC concluded that broadband Internet access service involves "telecommunications" because users rely on broadband service to transmit "information of the user's choosing."[176] The FCC further concluded that broadband service meets the statutory definition of "telecommunications service" because broadband providers offer and market such services "directly to the public."[177] And to the extent that broadband service is offered along with some capabilities that would otherwise fall within the information service definition, the Commission concluded that these functionality capabilities do not turn broadband into an integrated information service.[178] Instead, the FCC found that "these capabilities either fall within the telecommunications systems management exception or are separate offerings that are not inextricably integrated with broadband Internet access service, or both."[179]

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171. *See* Verizon v. FCC, 740 F.3d 623, 653 (D.C. Cir. 2014) (quoting Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976)).

172. *See* Letter from Tejas N. Narechania & Tim Wu, *supra* note 170, at 1.

173. *See* 2015 Open Internet Order, FCC 15-24, ¶ 355 (2015) (report and order) (No. 14-28) (quoting 47 U.S.C. § 153(50) (2012)) (internal quotation marks omitted).

174. 47 U.S.C. § 153(53) (2012).

175. *Id.* § 153(24).

176. *See* 2015 Open Internet Order, FCC 15-24, ¶ 361.

177. *Id.* ¶ 364.

178. *See id.* ¶ 373.

179. *Id.* ¶ 365.

For example, broadband service comes with a so-called DNS capability to allow a user to reach a website by matching the web site address the user types into the browser with the actual IP address of the website's server.[180] The FCC determined that although DNS and other capabilities such as "caching" (or storing information) might fall within the literal definition of an information service, these capabilities are subject to the systems management exception and thus fall under the definition of a telecommunications service.[181] In addition, even though broadband providers may offer add-ons such as e-mail, cloud-based storage, and spam protection in conjunction with broadband service, the FCC determined that those information services are separate services that do not transform broadband into an information service.[182] Put differently, broadband providers offer add-ons with their broadband service just as traditional telephone companies (qua telephone companies) offer voicemail (the functionality component) with their telephone service (the transmission component). In the FCC's view, this voicemail capability does not exempt traditional telephone companies from Title II regulation the same way that Internet service add-ons do not exempt broadband providers from Title II regulation.[183]

On the one hand, it is important to narrowly define the telecommunications service aspect of broadband to ensure that the FCC lawfully interprets the Act and to ensure that the FCC does not create overinclusive regulations. On the other hand, the FCC must balance those considerations with the possibility that a definition that is too narrow will create loopholes for broadband providers to argue that certain features of their broadband service fall outside the scope of the open Internet rules. The FCC has struck an appropriate balance, even though it may need to release additional guidance to create more certainty for companies that need to know what aspects of their broadband service will (and will not) be subject to Title II common-carrier regulation.

C. USING THE FCC'S FORBEARANCE AUTHORITY

As previously mentioned, section 160(a) contains a forbearance provision. Pursuant to its forbearance authority, the FCC must refrain from enforcing a provision if it determines that: (a) enforcement is not necessary to ensure that market practices are just and reasonable; (b) enforcement is not necessary to protect consumers; and (c) forbearance is consistent with the public interest.[184] Through the 2015 Open Internet Order, the FCC chose to forbear from applying twenty-seven of the forty-eight Title II provisions.[185]

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180. *See id.* ¶ 366.
181. *See id.* ¶¶ 366, 372.
182. *Id.* ¶ 377.
183. *See id.*
184. *See* 47 U.S.C. § 160(a) (2012).
185. *See* 2015 Open Internet Order, FCC 15-24, ¶ 5. The 2015 Open Internet Order applies the following provisions of Title II to broadband service: sections 201 (in part), 202 (in part), 206, 207, 208, 209, 214(e), 216, 217, 222, 224 (including subsection (e)), 225 (excluding subparagraph (d)(3)(B)),

The key Title II provisions that the FCC has applied to broadband service include sections 201, 202(b), and 208.[186] Section 201 requires common carriers to provide communication service upon reasonable request.[187] This provision will help achieve the objectives of the 2010 antiblocking rule, but instead of attempting to stretch "ancillary" authority out of section 706's grant of direct authority, the Commission may now rely on section 201 as a substantive statutory provision to support the antiblocking rule.[188]

Section 202 makes it unlawful for a common carrier to engage in discriminatory practices that are "unjust or unreasonable."[189] Applying this provision does not necessarily mean that the FCC intends to set or cap prices;[190] the FCC should allow the marketplace to determine the appropriate price for broadband service. This provision does, however, enable the FCC to restrict broadband providers' ability to discriminate by offering unfavorable prices to particular parties. For example, the FCC could rely on section 202 to restrict Comcast's ability to discriminate against Netflix in order to favor its video-on-demand service.

In addition to discriminatory prices, the FCC may use section 202 to protect against discriminatory practices. Under the 2010 Open Internet Order, interconnection "peering" arrangements were authorized, while "pay-for-priority" arrangements were presumptively unreasonable.[191] Under the 2015 Open Internet Order, interconnection peering arrangements fall within the definition of broadband Internet access service, but the FCC has not applied the open Internet rules to those arrangements, for now.[192] And instead of the pay-for-priority arrangements being presumptively unreasonable, the FCC created a "bright-line rule" prohibiting such arrangements.[193]

Section 208 of the Act and the associated procedural rules provide a complaint process for enforcement of applicable provisions of the Act and Commission rules.[194] Section 208 broadly permits a person or entity to file a complaint with the Commission and seek redress.[195]

229, 230, 251(a)(2), 254 (excluding the first sentence of subsection (d), and subsections (g) and (k)), 255, 257, 276, and 309(b) & (d)(1) of the Communications Act will apply to broadband Internet access service. *See id.* at 345 (Pai, Comm'r, dissenting).

186. *See id.* ¶ 51.

187. 47 U.S.C. § 201(a) (2012).

188. *See* 2015 Open Internet Order, FCC 15-24, ¶ 289.

189. 47 U.S.C. § 202(a) (2012).

190. *See* 2015 Open Internet Order, FCC 15-24, ¶ 443.

191. *See* 2010 Open Internet Order, 25 FCC Rcd. 17905, 17947, ¶ 76 (2010) (report and order), *aff'd in part, vacated in part sub nom.* Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

192. *See* 2015 Open Internet Order, FCC 15-24, ¶¶ 28–30.

193. *See id.* ¶ 18.

194. *Id.* ¶ 453 & n.1353 (citing 47 U.S.C. § 208, 47 C.F.R. §§ 1.701–.736 (informal and formal complaints regarding common carriers), 8.12–.17 (rules for formal complaints alleging violation of open Internet rules)).

195. *See* 47 U.S.C. § 208 (2012).

In addition to sections 201, 202(b), and 208—the core broadband Internet access service requirements[196]—the FCC applied several other provisions to broadband service. For example, section 222 makes it unlawful for a broadband provider to use its position as a conduit for Internet access as a means to misuse personal information or access another company's proprietary business information—for example, a customer list or software code.[197] Notably, the 2015 Open Internet Order applies section 222 to broadband service not only to promote net neutrality; section 222 could also be used by the FCC when taking enforcement actions against telecommunications companies that fail to adequately safeguard sensitive information, such as social security numbers.[198] Other Title II provisions that the FCC applied to broadband service include: provisions to ensure that those with disabilities can access to the Internet (sections 225, 255, and 251(a)(2));[199] a provision to promote the availability of communications networks in rural and low-income areas (section 254);[200] and a provision to ensure access to communications infrastructure (section 224),[201] which may, for example, allow a company like Google to more easily expand its fiber network by gaining access to utility poles controlled by telephone companies.[202]

By forbearing from the majority of Title II provisions and by applying the provisions just discussed, the FCC seeks to put in place a "light touch" regulatory framework.[203]

IV. COST-BENEFIT ANALYSIS: THE LEGAL AND POLICY IMPLICATIONS OF THE THIRD WAY 2.0 APPROACH

Advocates on both sides of the reclassification debate can probably agree on one thing: consumers have an "insatiable appetite for more content [and] faster speeds."[204] This Part explores whether the Third Way approach adopted in the 2015 Open Internet Order provides a sound policy to satisfy that appetite and maintain an open Internet.

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196. 2015 Open Internet Order, FCC 15-24, ¶ 457.

197. *Cf. id.* ¶ 464.

198. *See id.* ¶ 53 (discussing how "the Commission recently took enforcement action under section 222 (and section 201(b)) against two telecommunications companies that stored customers' personal information, including social security numbers, on unprotected, unencrypted Internet servers publicly accessible using a basic Internet search. . . . [That] unacceptably exposed these consumers to the risk of identity theft and other harms").

199. *Id.* ¶ 456.

200. *Id.* ¶ 456 & n.1370

201. *Id.* ¶ 456

202. *See* Karl Bode, *Google Quietly Argues Broadband Competition, Google Fiber Build Out Could Be Aided by Title II*, TECHDIRT (Jan. 5, 2015, 11:21 AM), https://www.techdirt.com/blog/netneutrality/articles/20150102/06201029579/google-quietly-argues-broadband-competition-google-fiber-build-out-could-be-aided-title-ii.shtml.

203. 2015 Open Internet Order, FCC 15-24, ¶ 59 (internal quotation marks omitted).

204. Deborah T. Tate, *Net Neutrality 10 Years Later: A Still Unconvinced Commissioner*, 66 FED. COMM. L.J. 509, 523 (2014).

A. BENEFITS ASSOCIATED WITH THE THIRD WAY APPROACH

The Third Way approach is preferable to the Title I regulatory approach both legally and as a matter of public policy.

Two legal benefits to the Third Way approach stand out in particular. First, instead of the FCC relying on ancillary authority to support open Internet rules, the FCC will have a stronger legal foundation. Even though the *Verizon* court has already concluded that section 706 of the 1996 Act grants the FCC direct authority to promote broadband deployment,[205] if the FCC's rules or future actions exceed the scope of section 706's direct authority, the FCC could still rely on direct authority under Title II rather than ancillary authority under Title I. Further, the FCC's last two attempts to impose net neutrality under a Title I regulatory regime were struck down by the D.C. Circuit in *Comcast* and *Verizon*. And more importantly, classifying broadband as a telecommunications service is consistent with the Act itself—regardless of the Commission's inconsistencies in classifying broadband in the past.

Second, in the long run, the Third Way approach will engender less uncertainty as a result of litigation. Under a Title I regulatory approach, "the Commission must defend its exercise of ancillary authority on a case-by-case basis."[206] To be sure, litigants will still challenge the FCC's authority under the Title II-Third Way approach in the short term. In fact, various trade groups and ISPs have challenged the 2015 Open Internet Order's legality in cases that have been consolidated in the D.C. Circuit.[207] Nevertheless, if the 2015 Open Internet Order withstands judicial review, the FCC would not need to relitigate the extent of its authority each time it issues a declaratory ruling. Instead of litigating whether the open Internet rules may exist at all, the FCC could finally focus on the appropriate ways to interpret and apply the rules.

In addition to its legal advantages, the Third Way approach also provides public policy benefits. The Third Way approach gives the FCC more regulatory flexibility to deal with a rapidly changing market. The counterargument is that the Department of Justice (DOJ) and the Federal Trade Commission (FTC) already have the authority to enforce antitrust laws, and the FTC has authority to enforce consumer protection laws. However, putting the FCC in a position to curtail misconduct before, or at the time of, the problem is preferable to having the DOJ or FTC try to correct the problem after the fact—especially if the problem is irreversible. Significantly, the Federal Trade Commission Act restricts the FTC's enforcement over common carriers.[208] So now that broadband

205. *See* Verizon v. FCC, 740 F.3d 623, 637 (D.C. Cir. 2014).

206. *See* Comcast Corp. v. FCC, 600 F.3d 642, 651 (D.C. Cir. 2010).

207. *See* U.S. Telecomm. Ass'n v. FCC, No 15-1063 (D.C. Cir. June 11, 2015).

208. *See* Letter from Mike Ananny et al., Professors, to FTC Comm'rs, at 1 (Jan. 29, 2015), *available at* http://www.pijip.org/wp-content/uploads/2015/01/Net-Neutrality-Prof-Letter-01292015.pdf (supporting the repeal of a common carrier exemption—a part of the Federal Trade Commission Act which has the potential to strip the FTC of jurisdiction over telecommunications companies subject to common-carrier regulation); *see also* Jedidiah Bracy, *FTC Officials Concerned About Jurisdiction After*

providers are treated as "common carrier[s]," at least in part, the FTC may lose jurisdiction to regulate these companies.[209] Nevertheless, the FCC might serve as an even more appropriate agency to regulate the actions of broadband providers, given that the FCC's expertise relates specifically to the telecommunications industry.[210]

The Third Way approach is also beneficial because it broadens the scope of harmful conduct that can be prevented. In a letter from a coalition of thirty-six professors of law, economics, business, communication, and political science, the professors articulate why the no paid prioritization rule promotes competition in a way that traditional antitrust laws cannot. The professors point out that, if allowed to charge edge providers for preferential access, broadband providers would have the incentive and ability to undermine the virtuous cycle in three competition-related ways. The first involves exclusionary conduct against targeted edge providers to maintain the market share for specific Internet content, applications, or services.[211] For example, a cable company such as Comcast might target competitors such as Hulu or Netflix because those companies compete with Comcast's video-on-demand service. The second threat to the virtuous cycle stems from the potential for a broadband provider to exploit its gatekeeper position to impose excessive charges on edge providers for access to end users.[212] And a third threat stems from a broadband provider's incentive to degrade or decline to increase the quality of service provided, in order to push edge providers to pay for superior service.[213] The professors point out that an FCC ban on paid prioritization addresses all three problems.[214] By contrast, case-by-case antitrust enforcement after problems arise cannot address the second and third problems, and addresses the first problem only in part.[215]

Moreover, this Note's support for the Third Way approach is guided by the belief that edge providers not only drive demand for the Internet, but actively create efficiencies in other industries. Edge providers like Paypal positively affect other industries because they give companies, both large and small, the ability to conduct transactions over the Internet. The next great innovation—the next Paypal or Facebook—will require capital. These start-ups are less likely to receive the investments they need to grow if broadband providers can charge

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FCC Net Neutrality Order, PRIVACY ADVISORS (Mar. 10, 2015), https://privacyassociation.org/news/a/ftc-officials-concerned-about-jurisdiction-after-fcc-net-neutrality-order/ (discussing how FTC officials expressed concerns that the FCC's reclassification of broadband providers as common carriers may remove the FTC's enforcement authority over them).

209. *See* Letter from Mike Ananny et al., *supra* note 208.

210. *See, e.g.*, Speta, *supra* note 21, at 502 ("The FCC is an appropriate institution for such rules, even though we already have two antitrust agencies (the DOJ and the FTC), because the FCC can use its expertise and agency standing to conduct appropriate inquiries and adopt appropriate (albeit hopefully limited) prophylactic rules.").

211. *See* Letter from Mike Ananny et al., *supra* note 208, at 3.

212. *See id.*

213. *See id.*

214. *Id.*

215. *Id.*

them, or if broadband providers have the power to pick the winners and losers in the Internet marketplace. Under the current thresholds speeds for broadband service, the data suggest that 12% of households have three or more options for broadband service; 27% of households have two provider options; and 45% of households have only one provider option.[216] The crux of the Third Way approach is that it prevents broadband providers from taking advantage of their position as gatekeepers to the Internet.

To be sure, the benefits that broadband providers produce are important, and they should be compensated for making it possible for edge providers and end users to receive high-speed Internet. But broadband providers do receive a benefit from edge providers. If edge providers create demand for the Internet, more consumers will purchase broadband Internet access; and if more consumers purchase broadband or increase their broadband consumption, network investment will increase. Ultimately the relationship between broadband providers and edge providers is mutually beneficial.

Like the 2010 Open Internet Order,[217] the 2015 Open Internet Order's ultimate goal is to preserve the Internet as an open platform for innovation, investment, and free expression.[218] As previously mentioned, the FCC's prior decision not to classify broadband as a telecommunications service was guided, in part, by two assumptions. First, the FCC believed that it retained sufficient authority to protect the public interest through its Title I authority.[219] And second, the FCC was reluctant to add common-carrier regulation because it originally believed that market competition would curtail undesirable practices by broadband providers.[220] The D.C. Circuit decisions in *Comcast* and *Verizon* suggest that the FCC may not have sufficient authority under Title I. Further, the notion that market competition can curtail undesirable practices is inconsistent with the reality that consumers lack an array of options in the broadband marketplace. In sum, the Third Way approach offers tangible benefits, both legally and as a matter of public policy. This approach should not be used to control or micromanage the Internet. Rather, the approach should be used to serve as a check against broadband providers' ability to control the Internet.

B. COSTS ASSOCIATED WITH THE THIRD WAY APPROACH

Opponents of this Third Way approach assert four principal objections: (1) the rules are unnecessary because a problem does not exist; (2) the approach

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216. *See* 2015 Open Internet Order, FCC 15-24, ¶ 81 n.134 (2015) (report and order) (No. 14-28); *see also* 2010 Open Internet Order, 25 FCC Rcd. 17905, 17947, ¶ 32 (2010) (report and order), *aff'd in part, vacated in part sub nom.* Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014) (noting that as of December 2009, nearly 70% of households lived in areas served by one or two broadband providers, and 20% had only one option).

217. *See* 2010 Open Internet Order, 25 FCC Rcd. at 17906, ¶ 1.

218. *See* 2015 Open Internet Order, FCC 15-24, ¶ 1.

219. *See* Cable Modem Order, 17 FCC Rcd. 4798, 4867 (2002) (declaratory ruling) (Powell, Chairman, statement).

220. *See* Computer Inquiry II, 77 F.C.C.2d 384, 385–89 (1980).

could lead to a slippery slope of excessive regulation; (3) the approach will negatively impact investment; and (4) the approach will negatively impact consumers. This section discusses each counterargument in turn.

The first counterargument is that there is scant evidence of a continuing threat to an open Internet.[221] In other words, open Internet rules are "a solution in search of a problem."[222] There are only a handful of abuses that the FCC primarily relied on when it issued the 2010 Open Internet Order,[223] and some of those instances are the same ones often cited by proponents of open Internet rules.[224] For example, in 2005, a broadband provider that was a subsidiary of a telephone company paid to settle an FCC investigation into whether it had blocked Internet ports used for VoIP applications.[225] And around 2008, Comcast disrupted the Internet traffic of a peer-to-peer file-sharing service.[226] In its 2010 Open Internet Order, the FCC relied on these instances, as well as others, to show that broadband providers have taken affirmative steps to limit openness.[227] Then in the 2015 Open Internet Order, the thrust of the FCC's position was that broadband providers have the incentive and ability to limit openness.[228] In a footnote, the 2015 Open Internet Order cites the previous examples of abuse in the 2010 Open Internet Order.[229] The 2015 Open Internet Order also cites comments to the notice of proposed rulemaking describing more recent events involving, for example, how AT&T blocked Apple's FaceTime applications,[230] and how Comcast exempted its own video service from data caps.[231] Still, one of the dissenting FCC commissioners stated that the evidence is "all anecdote, hypothesis, and hysteria."[232] In short, it is undisputed that there have been at least some instances of broadband provider misconduct; the opposing sides essentially disagree on the level of pervasiveness necessary to justify overhauling the regulatory regime.

A second objection is that the 2015 Open Internet Order may lead to a slippery slope of expansive regulation. As commissioner Pai put it in his dissent, the 2015 Open Internet Order is an "unlawful power grab."[233] Among

221. *See, e.g.*, Tate, *supra* note 204, at 515-16.

222. Jonathan Weisman, *Shifting Politics of Net Neutrality Debate Ahead of F.C.C. Vote*, N.Y. TIMES (Jan. 19, 2015), http://www.nytimes.com/2015/01/20/technology/shifting-politics-of-net-neutrality-debate-ahead-of-fcc-vote.html?_r=0.

223. *See* 2010 Open Internet Order, 25 FCC Rcd. at 17925–26, ¶¶ 35–36.

224. *See, e.g.*, *What Is Net Neutrality?*, ACLU, https://www.aclu.org/feature/what-net-neutrality?redirect=net-neutrality#abuses1 (follow "6. Have there been any actual instances of service providers interfering with the internet, or is this just all theoretical?") (last visited Apr. 21, 2015).

225. *See* 2010 Open Internet Order, 25 FCC Rcd. at 17925, ¶ 35.

226. *Id.*

227. *See id.* at 17925–26, ¶¶ 35–36.

228. *See* 2015 Open Internet Order, FCC 15-24, ¶ 78–101 (2015) (report and order) (No. 14-28).

229. *Id.* ¶ 79 n.123.

230. *See id.*

231. *See id.* (citing comments from the Electronic Frontier Foundation and Writers Guild of America, West).

232. *Id.* at 333 (Rosenworcel, Comm'r, dissenting).

233. *Id.* at 321(Pai, Comm'r, dissenting).

other things, he expressed concerns about the 2015 Open Internet Order being littered with language indicating that the FCC is only forbearing "for now" or "at this time," and even though the FCC does not "envision going further," commissioner Pai expects "the regulations to ratchet up as time marches on."[234]

Although it is true that the Third Way approach expands the FCC's power, there are three checks against that power. First, by applying Title II provisions while simultaneously asserting its forbearance authority, the FCC does limit further expansion of its power. Notably, it appears that the FCC has never reversed or undone a forbearance decision.[235] Second, the courts serve as a backstop, so if the FCC attempts to exceed its authority under the Act, the courts have the power to reverse the FCC's decision. Third, Congress serves as a check against the FCC's power. Congress could, for example, pass a bill that requires the FCC not to treat broadband providers as common carriers, or it could pass comprehensive legislation to impose different open Internet rules.[236]

Another counterargument to the Third Way approach is that it will deter network investment.[237] "To put it another way, Title II is not just a solution in search of a problem—it's a government solution that creates a real-world problem."[238] However, the FCC put forth evidence to rebut the contention that reclassification will disrupt broadband investments. For example, the 2015 Open Internet Order cites comments from multiple investment analyst reports concluding that Title II with appropriate forbearance is unlikely to alter broadband provider conduct or negatively impact future profitability.[239] The 2015 Open Internet Order also notes that company executives have repeatedly represented to investors that the prospect of regulatory action will not influence their investment strategies or long-term profitability.[240] Unsatisfied, opponents argue that restricting broadband providers' revenue model[241]—restricting how broadband providers receive revenue from edge providers—will deter network investment. However, even if broadband providers take in more revenue, nothing prevents them from keeping the additional profits rather than reinvesting those profits to improve current networks or build new networks. It is just as likely that the profits will simply change hands from edge providers to broadband providers. This potential two-sided revenue model becomes even more trouble-

234. *Id.* at 325 (internal quotation marks omitted).

235. *See* Genachowski, *supra* note 18, at 6.

236. *See, e.g.*, Barbara van Schewick & Morgan N. Weiland, *New Republican Bill Is Network Neutrality in Name Only*, 67 STAN. L. REV. ONLINE 85 (2015) (discussing one of the bills before Congress).

237. *See* Letter from Kathryn A. Zachem, Senior Vice President, Comcast Corp., to Marlene H. Dortch, Sec'y, FCC 17 (Dec. 24, 2014), *available at* http://corporate.comcast.com/images/Comcast-OI-ex-parte-12-24-14.pdf.

238. 2015 Open Internet Order, FCC 15-24, at 334 (Pai, Comm'r, dissenting).

239. *See id.* ¶ 40.

240. *Id.*

241. *See id.* ¶ 8 ("[A]s Verizon frankly told the court at oral argument [in *Verizon v. FCC*], but for the 2010 rules, it would be exploring agreements to charge certain content providers for priority service.").

some considering that much of online content is free, and edge providers may rely on donations or marketing fees to survive.

A fourth objection is that the Third Way approach would create inefficiencies in pricing models and increase costs for consumers. But the Third Way approach the FCC adopted does not impose tariffing, rate regulation, or cost accounting rules.[242] So if broadband providers need additional revenue to build network infrastructure, they are free to experiment with various pricing models. In short, broadband providers are free to charge users based on their consumption. That pricing might even be more efficient than charging edge providers, because edge providers would probably pass along the additional costs to consumers anyway. If consumers were charged based on what they use, the extra cost would at least be application-agnostic. The Third Way approach thus eliminates pricing that discriminates based on particular content and forces broadband providers to find an alternate way to increase revenue.

Each of these objections illustrates a valid concern with the Third Way approach. Nevertheless, there are sufficient instances of abuse by broadband providers to show that open Internet rules are warranted; there are checks against the FCC's expansive power; the purported negative impact on investment is murky, at best; and the approach generally benefits consumers.

CONCLUSION

The Third Way approach involves: (1) reclassifying broadband access as a telecommunications service; (2) defining the scope of broadband Internet access service; and (3) forbearing from unnecessary Title II provisions. This approach positively impacts the FCC's ability to respond to market changes and anticompetitive behavior, and helps edge providers continue to serve as a driving force of innovation. To the extent that certain portions of the 2015 Open Internet Order contain ambiguities, the FCC should take steps to create greater certainty by issuing additional concrete, easy-to-understand guidance. If the open Internet rules withstand judicial scrutiny this time around, many of the valid concerns over excessive regulation, lower investment, and higher prices will probably dissipate as time passes. If not, the courts and Congress serve as backstops against expansive FCC power. At bottom, the benefits of the Third Way approach outweigh the risks by ensuring that the Internet—"the most important innovation in communications in a generation"[243]—remains open.

242. *See id.* ¶ 37.

243. Comcast v. FCC, 600 F.3d 642, 661 (D.C. Cir. 2010) (quoting Brief for Respondents at 30, *Comcast*, 600 F.3d 642 (No. 08-1291)) (internal quotation mark omitted).