Arielle Roth

Legal Fellow, Center for the Economics of the Internet

Hudson Institute

1201 Pennsylvania Ave., NW

Washington, DC 20004

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Re. WC Docket No. 17-108; Restoring Internet Freedom

Ms. Marlene Dortch, Secretary

Federal Communications Commission

445 12th Street, SW

Washington, DC 20554

Dear Ms. Dortch:

In its Notice of Proposed Rulemaking in the Restoring Internet Freedom proceeding, the Commission requests comment concerning whether § 706(a) and § 706 (b) of the 1996 Telecommunications Act are “are best interpreted as hortatory rather than as delegations of regulatory authority” and whether § 706 “reflects a deregulatory emphasis.”

I submit for inclusion in the record my Working Paper for the Washington Legal Foundation, “[A Communications Reform Priority: Curtailing FCC Ancillary Jurisdiction under Telecom Act § 706](https://s3.amazonaws.com/media.hudson.org/files/publications/201702RothWP.pdf).” In my analysis of § 706, I argue that it does not constitute an independent grant of regulatory authority and that the Commission should return to its pre-2010 limited interpretation of the provision.

Below is a brief excerpt:

The virtuous cycle interpretation of § 706 has been criticized for violating fundamental canons of statutory construction such as the Whole Act Rule, which asserts that a provision must be read in reference to other provisions in the scheme to resolve ambiguity. Whereas FCC viewed § 706 as giving the Commission broad regulatory authority over the Internet, in § 230(b)(2), one of the only sections of the 1996 Act that mentions the Internet, Congress exhorts FCC “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.” Reinforcing § 230(b)(2), § 706(c) notes that “[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.” Insofar as § 230(b)(2) and § 706(c) articulate a clear intent to leave the Internet unregulated, interpreting § 706 as providing FCC with broad regulatory authority over the Internet undermines the textual integrity and internal coherence of the 1996 Telecommunications Act.

FCC’s assertion of broad authority under § 706(a) is further questionable in light of § 706(b), which instructs the Commission to undertake annual inquiries into the rate of broadband deployment, and upon a finding of insufficient deployment, to enact remedial measures (“removing barriers to infrastructure investment and by promoting competition in the telecommunications market”). Had the Commission already been given a broad regulatory mandate to increase broadband deployment under § 706(a), irrespective of the rate of deployment, § 706(b) would be superfluous. The logical way to interpret § 706(a) in light of § 706(b) is therefore under the FCC’s previous 1998 understanding, which interpreted the provision as limiting the Commission’s regulatory authority over broadband to specifically delineated provisions elsewhere in the Act. By interpreting § 706(a) as independent from § 706(b), the DC Circuit permitted FCC to ensure that its power under § 706 could persist indefinitely, irrespective of the speed of broadband deployment.

Thank you for including this submission in the Restoring Internet Freedom record.

Sincerely,

Arielle Roth

Legal Fellow, Center for the Economics of the Internet

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