

David A. LaFuria
8300 Greensboro Dr.
Suite 1200
Tysons, VA 22102

dlafuria@fcclaw.com
(703) 584-8666
WWW.FCCLAW.COM



December 7, 2017

ELECTRONIC FILING

Ajit Pai, Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jessica Rosenworcel, Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mignon Clyburn, Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Brendan Carr, Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Michael O'Rielly, Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Restoring Internet Freedom*, WC Docket No. 17-108

Dear Chairman Pai and Commissioners Clyburn, O'Rielly, Rosenworcel, and Carr:

In response to the Commission's invitation for comments on the draft Declaratory Ruling, Report and Order, and Order ("Draft Order") that Chairman Pai circulated for consideration in the above-reference proceeding and released to the public, the following expresses the views of Union Telephone Company, East Kentucky Network, LLC, d/b/a Appalachian Wireless, Pine Cellular Phones, Inc., and Pioneer Telephone Cooperative, Inc. and its affiliated companies ("Commenters"). Commenters are small telecommunications carriers and Internet Service Providers ("ISPs") serving rural areas in Wyoming, Kentucky and Oklahoma, respectively. They respectfully submit that the Commission cannot adopt the Draft Order, because it has jurisdiction to regulate broadband Internet access service ("BIAS"), which it must exercise, and cannot abdicate purportedly "in favor of returning jurisdiction to the FTC." Draft Order at 105 (¶ 179).

The Draft Order

In Justice Scalia's words, if the Commission adopts the Draft Order, it will concoct "a whole new regime of *non-regulation*" under "the guise of statutory construction." *National Cable*

& *Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 1005 (2005) (Scalia, J., dissenting) (emphasis in original). Under the Draft Order, the Commission will repeal an entire set of rules that it adopted in 2010, *see Preserving the Open Internet*, 25 FCC Rcd 17905, 17992-18000 (2010) (“*Open Internet Order*”), and substantially amended in 2015, *see Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601, 5883-89 (2015) (“*Title II Order*”), and leave Part 8 of its rules with a single (new) rule. *See* Draft Order at 187-88.

The Draft Order does not point to the specific provisions of the Communications Act of 1934 (“Act”) that would authorize the Commission to restore BIAS to “its Title I information service classification” or to formulate a “light-touch information service framework.” *Id.* at 3 (¶ 2). The Draft Order alludes to the Commission’s Title I authority, but the document appears to construct an information service framework by reinterpreting the statutory definitions of the terms “telecommunications service” and “information service.” *See id.* at 10 (¶ 25) (“we find that the best reading of the relevant definitional provisions of the Act supports classifying [BIAS] as an information service”).

Contrary to the Draft Order, the Commission will not be returning to “light-touch Title I regulation,” *id.* at 91 (¶ 154), or the “pre-*Title II Order* light-touch framework.” *Id.* at 98 (¶ 168). The Commission will effectively authorize practices that were unlawful under light-touch Title I regulation. *See id.* at 64 (¶¶ 111, 112) (blocking and throttling were prohibited pre-*Title II Order*). Under the Draft Order, the Commission will require a BIAS provider to comply only with a refined “transparency rule” that it will adopt under authority discovered in §§ 218 and 257 of the Act. *See id.* at 127 (¶ 228), 129 (¶ 230). Remarkably, §§ 218 and 257 are two *Title II* provisions that do not authorize the Commission to regulate telecommunications services, much less a service that it reclassifies as an information service that is exempt from Title II regulation. *See* 47 U.S.C. §§ 218, 257.

Section 706

The Draft Order correctly concludes that § 706 of the Telecommunications Act of 1996 (“1996 Act”) “does not constitute an affirmative grant of regulatory authority, but instead simply provides guidance to this Commission and the state commissions on how to use any authority conferred by other provisions of federal and state law.” Draft Order at 111, n.702. The stated reasons for that correct conclusion, which are set forth below, are misguided.

Given that agencies like the Commission are creatures of Congress, and given our responsibility to bring to bear appropriate tools when interpreting and implementing the statutes we administer, we find it more appropriate to adopt what we view as the far better interpretation of [§] 706(a) and (b) given both the specific context of [§] 706 and the broader statutory context. If Congress wishes to give the Commission more explicit direction to impose certain conduct rules on ISPs, or to impose such rules itself within constitutional limits, it is of course free to do so. We decline to read such wide-ranging authority, however, into provisions that, on our reading today, are merely hortatory, and are at best ambiguous.

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

Id. at 162 (¶¶ 278, 279) (footnotes omitted).

We submit that the text and structure of the Act alone prevent § 706 from being a grant of regulatory authority to the Commission. That is essentially because § 706 “was not incorporated into the Communications Act.” *Id.* at 159 (¶ 275).

The Act is codified in Chapter 5 of Title 47 of the United States Code (“Code”). *See* 47 U.S.C. § 609 (“This chapter may be cited as the ‘Communications Act of 1934’”). Chapter 5 of Title 47 of the Code (“Chapter 5”) has seven subchapters or “titles.” The Commission has recognized that “[t]he seven titles that comprise the ... Act appear in Chapter 5.” *Open Internet Order*, 25 F.C.C.R. at 17950, n.248. However, § 706 of the 1996 Act is codified among the broadband provisions of Chapter 12 of Title 47 (“Chapter 12”). *See* 47 U.S.C. § 1302.

Congress explicitly limited the Commission’s rulemaking authority to prescribing “such rules and regulations as may be necessary in the public interest to carry out the provisions of [Chapter 5].” *Id.* § 201(b); *see id.* § 303(r) (the Commission may make “such rules and regulations ..., not inconsistent with law, as may be necessary to carry out the provisions of this [C]hapter [5]”). Thus, Congress plainly established the bounds of Chapter 5 as marking a “clear line” circumscribing the Commission’s rulemaking authority. *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013). Congress clearly placed the provisions of Chapter 12 beyond that line.

When it adopted § 706, Congress was aware that the provisions of the 1996 Act that it enacted “as an amendment to, and hence a *part of*, [the] Act,” were subject to the Commission’s authority under § 201(b) to prescribe rules to “carry out the provisions of [the] Act.” *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378 n.5 (1999) (emphasis in original). It was also aware that the Commission’s exercise of “the general grant of rulemaking authority contained within the ... Act” does not extend to a “freestanding enactment” such as § 706, which is not part of the Act. *Id.* In other words, Congress made a deliberate choice in 1996 when it did not insert § 706 into the Act: it denied the Commission the power to prescribe rules and regulations to carry out the provisions of § 706.

Congress did not expressly delegate authority to the Commission to prescribe rules and regulations to carry out the provisions either of § 706 of the 1996 Act or § 1302 of Chapter 12. The fact is that Congress delegated Chapter 12 rulemaking authority only to the Assistant Secretary of Commerce for Communications and Information (“Assistant Secretary”). See 47 U.S.C. § 1305(m) (“The Assistant Secretary shall have the authority to prescribe such rules as are necessary to carry out the purposes of this section”). Without authority to prescribe rules and regulations to carry out the provisions of § 1302 of Chapter 12, the Commission currently cannot regulate “advanced telecommunications capability” or BIAS under § 1302. 47 U.S.C. § 1302(a), (b), (d)(1).

Assuming that the Commission has the authority to interpret § 1302 of Chapter 12, a court will not defer to the Commission’s interpretation under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). There are two “preconditions” to *Chevron* deference that must be satisfied. *Arlington*, 569 U.S. at 307. First, Congress must have authorized the Commission to administer the statute it interpreted. See *Chevron*, 467 U.S. at 842 (*Chevron* applies only when “a court reviews an agency’s construction of the statute it administers”). Second, there must be “express congressional authorization” for the Commission “to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.” *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

Whenever the Commission interprets a provision of the Act, “the preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the ... Act through rulemaking and adjudication, and the agency interpretation was promulgated in the exercise of that authority.” *Arlington*, 569 U.S. at 307. However, those preconditions will not be present if the Commission reinterprets § 1302 of Chapter 12 in this rulemaking, because Congress certainly has not unambiguously vested the Commission with authority to administer § 1302, or any of the broadband provisions of Chapter 12, by rulemaking. Consequently, an interpretation of § 1302 could not be promulgated in the exercise of § 1302 rulemaking authority. Therefore, any reinterpretation of § 1302 in this proceeding will be due no *Chevron* deference.

Jurisdiction

“Jurisdiction,” Justice Scalia once observed, “is a word of many, too many, meanings.” *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)). Justice Scalia understood, as we do, that the Commission’s “jurisdiction” simply is its “statutory authority.” *Arlington v. FCC*, 569 U.S. at 296-97 (2013). The Draft Order employs the word “jurisdiction” as if the exercise of Commission’s congressionally-conferred authority is discretionary. The document speaks of “returning” jurisdiction to regulate BIAS to the FTC, or of “restoring” the FTC’s jurisdiction. See Draft Order at 103 (¶ 177), 105 (¶ 179), 117 (¶ 204). The document maintains that the Commission has the discretion to choose among “sources of authority.” *Id.* at 162 (¶ 279). However, as a creature of Congress that bears the duty to “execute and enforce the provisions of ... [C]hapter

[5],” 47 U.S.C. § 151, the Commission cannot abdicate its jurisdiction, and it must “bring to bear appropriate tools” when exercising its jurisdiction.

As we have noted, the Draft Order does not point to the specific provisions of the Act that would authorize the Commission to regulate BIAS as an information service or to repeal all but one of its Part 8 rules. By claiming to restore BIAS to “its Title I information service classification” and to formulate a “light-touch information service framework,” Draft Order at 3 (¶ 2), the document suggests that the Commission would be exercising its Title I authority. But the Draft Order constructs a new deregulatory, information service framework under the guise of reinterpreting the statutory definitions of the terms “telecommunications service” and “information service.” See *id.* at 10 (¶ 25). However, Congress did not confer the authority to regulate a “telecommunications service” or an “information service” by the definitions of those terms in § 153 of the Act. Under *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) and its progeny, authority to regulate a telecommunications or information service either must be conferred by an express delegation of regulatory authority under the Act, or be reasonably ancillary to such a delegation. See, e.g., *Comcast Corp. v. FCC*, 600 F.3d 642, 653-54 (D.C. Cir. 2010). The Draft Order does not identify the express delegation of authority that would empower the Commission to both regulate BIAS as an information service and impose a transparency rule on a BIAS provider.

We submit that § 151 of the Act contains an express delegation of regulatory authority. It states that Congress created the Commission for the express “purpose of regulating interstate and foreign commerce in communication by wire or radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.” 47 U.S.C. § 151. By stating that it created the Commission for the express purpose of regulating interstate and foreign commerce in communication by wire or radio, Congress necessarily and expressly authorized the Commission to regulate interstate “communication by wire and radio.” Even if § 151 does not constitute an express delegation of authority to regulate interstate communication by wire or radio, Congress nonetheless “subjected to regulation ‘all interstate and foreign communication by wire or radio.’” *FCC v. Midwest Video Corp.*, 440 U.S. 689, 696 (1979) (“*Midwest Video II*”) (quoting 47 U.S.C. § 152(a)).

There is no ambiguity in Congress’ delegation of authority to the Commission to regulate all interstate communication by wire or radio. Congress defined the term “communication by wire” for the purposes of the Act to mean:

[T]he *transmission* of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such *transmission*.

47 U.S.C. § 153(59) (emphasis added). Similarly, Congress defined the term “communication by radio” broadly to mean:

[T]he *transmission* by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such *transmission*.

Id. § 153(40) (emphasis added).

Congress defined “communication by wire” and “communication by radio” so broadly in § 153 of the Act that it left little room for uncertainty as to the scope of its delegation of regulatory authority over all interstate communication by wire or radio. It extends to the interstate transmission “of writing, signs, signals, pictures, and sounds of all kinds” by wire, cable or radio, including “all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.” In short, the Commission’s jurisdiction extends to the interstate transmission of all kinds of communications by wire or radio, including the receipt, forwarding, and delivery of the transmitted communications.

The Draft Order defines BIAS as “a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service.” Draft Order at 188. As the term is broadly defined in the Draft Order, BIAS will undoubtedly involve the transmission by wire or radio of writing, signs, signals, pictures, and sounds of all kinds between Internet endpoints. Moreover, BIAS was found to be a “jurisdictionally interstate service.” *Id.* at 112 (¶ 195). Consequently, BIAS will be either “communication by wire” under § 153(59) of the Act or “communication by radio” under § 153(40), and be encompassed by the statutory term interstate “communication by wire or radio.” 47 U.S.C. §§ 151, 202(a). Accordingly, BIAS is subject to regulation by the Commission under §§ 151 and 152(a) of the Act.

Regulation

Congress mandated that the Commission “*shall* execute and enforce the provisions” of the Act. *Id.* § 151 (emphasis added). Thus, the Commission must execute the provisions of §§ 151 and 152(a) that call for it to regulate BIAS as communication by wire or radio so as to achieve the policy objective of “mak[ing] available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.” *Id.* After all, Congress created for “the purpose of securing a more effective execution of this policy.” *Id.* To fulfill the § 151 mandate, the Commission may make such rules and regulations “as may be necessary in the execution of its functions” under §§ 151 and 152(a), so long as they are “not inconsistent with this [C]hapter [5].” *Id.* § 154(i).

The Draft Order includes findings that BIAS offerings “inextricably intertwine ... information processing capabilities with transmission,” Draft Order at 11 (¶ 26), and that BIAS is a “combination of information-processing and transmission.” *Id.* at 13 (¶ 30). Because BIAS transmissions are “via telecommunications,” 47 U.S.C. § 153(24), and since BIAS is “a mass-market retail service by wire or radio,” Draft Order at 188, BIAS would necessarily include an offering of a “telecommunications service.” *See* 47 U.S.C. § 153(54) (the term “telecommunications service” essentially “means the offering of telecommunications for a fee directly to the public”). That offering of telecommunications service would be subject to “mandatory common-carrier regulation under Title II.” *Brand X*, 545 U.S. at 976.

The information service component of BIAS falls subject to regulation under §§ 151 and 152(a), because the statutory term “communication by wire or radio” includes all “instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental” to the transmission via telecommunications. 47 U.S.C. §§ 153(40), 153(59). The information service component of BIAS is inextricably intertwined with the telecommunications service component, thereby making the information service incidental to the telecommunications service for the purposes of regulation.

The foregoing leads to the conclusion that BIAS would be most appropriately regulated under the Commission’s ancillary jurisdiction, because the information service component of the service could be considered incidental to the Title II telecommunication service component. The Commission’s regulation of the information service component of BIAS would appear to be “reasonably ancillary” to the effective performance of its responsibility for the Title II regulation of the telecommunications service component of BIAS. *E.g., Midwest Video II*, 440 U.S. at 698.

We submit that BIAS cannot be classified as an information service and be subjected to a Title II-based transparency requirement. Therefore, BIAS cannot be regulated under the information service framework contemplated by the Draft Order.

Predictability

Those regulated by the Commission are entitled to expect that it will execute and enforce the provisions of the Act in an evenhanded, predictable, and consistent manner. There can be no predictability when the Commission dramatically changes its interpretation of the same statutory provisions, and its implementing rules, each time there is a change in administrations. Indeed, the Commission will call into question the integrity of its rulemaking processes if it repeals rules that it promulgated just two years ago. That is especially so when the Solicitor General is still before the Supreme Court to defend the very rules that the Commission is repealing. *See* Draft Order at 7 (¶ 17). In that regard, we suggest that the Commission stay this proceeding, and inform the Court that the Part 8 rules will be revisited only after it renders its decision.

If it ultimately adopts the regulatory approach we recommend, the Commission will be able to impose essential Title II requirements on BIAS providers, and forbear from imposing those requirements that are not necessary to achieve the policy objectives set forth in § 151. *Compare*

47 U.S.C. § 151 *with id.* § 160(a). And by retaining minimal Title II authority, the Commission will have the flexibility to manage data roaming, level the playing field among carriers regarding content ownership, and administer its universal service mechanism.

Finally, rural carriers rely on universal service mechanisms to provide affordable broadband to consumers. Universal service is available under Title II and support can only be provided to common carriers providing telecommunications services. If the Commission treats BIAS as a Title II service as we suggest, it will have a regulatory framework that will support its universal service program in the coming years, when all traffic (including voice) travels through IP networks.

A copy of this letter is being filed in the above-referenced docket.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Russell D. Lukas".

Russell D. Lukas
David A. LaFuria

Counsel for
Union Telephone Company
East Kentucky Network, LLC
Pine Cellular Phones, Inc.
Pioneer Telephone Cooperative, Inc.