Date: October 3, 2014

To: Federal Communications Commission

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Re: Docket Number 09-191.

Abstract

The FCC is facing the somewhat overwhelming task of regulating the internet in the midst of a politically charged climate and unresponsive legislature. First, it is being asked protect the internet providers and allow them to function profitably by promoting the practice of paid prioritization. Next it is asked to protect the edge providers and consumers alike from predatory and monopolistic practices of those ISPs in order to maintain free speech and economic viability to business, big and small, that utilize the internet by enforcing neutral internet traffic practices. The two underlying concerns of maintaining internet openness, and keeping ISPs profitable do not present mutually exclusive solutions; both ends may be achieved by modeling the new rule after railroad regulation: specifically the Staggers Act. ISPs can be regulated as common carriers under Title II of the Communications Act, and still be allowed to charge companies that disproportionately burden their services a higher rate for the same level of service that they provide all other customers. The FCC does not need to create slow lanes to protect the providers' bottom line, or lock ISPs into unsustainable business practices by forcing them to charge the same rate to every edge provider and end user. There is therefore no need for the FCC to look to Section 706 of the Communications Act or consider paid prioritization**.** Further, Title II regulation is more likely to withstand judicial scrutiny than attempting to regulate under Title II.

I. Introduction

The term net neutrality has become ubiquitous over the past few months. Indeed, the amount of public exposure is unparalleled in the administrative law context as a direct result of the importance that the internet has to the American culture. The internet has become intrinsically a part of the American way of life. It touches the lives of the rich and poor, the liberal and the conservative, and it must be protected.

How the FCC chooses to regulate will shape a generation's opinion of administrative agencies, and it is against this backdrop that I ask the FCC to maintain a truly open internet by reclassifying internet service providers as telecommunications services in order to regulate under Title II of the Communications Act.

The only viable way to maintain a free and open internet is through neutrality. As times change, it becomes less and less practical to have a truly unfettered internet. In today's world it is nearly impossible to have both a free and open internet, and complete deregulation.[1] Because the ISP's have become a threat in and of themselves to internet openness, some level of regulation must function to stop the ISPs from closing the internet.[2]

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[1] *See* e.g. http://www.governmentisgood.com/articles.php?aid=13&print=1
[2] *See generally*, Preserving the Open Internet, 76 FR 59192-01

For example, when Netflix was negotiating a contract with Comcast, the speed which Netflix traffic was carried by Comcast servers dropped dramatically. Once an agreement was reached, speeds markedly increased.[3] Further, at issue in the *Comcast v. F.C.C* (discussed more in depth supra): was the practice of intentionally slowing of certain lawful internet traffic.[4] It seems clear that ISP's are capable and willing to intentionally slow traffic, and paid prioritization would effectively give the ISPs license to do so.

The FCC has proposed a rule by which it will regulate under Section 706 of the Communications Act. The FCC's position seems to be that the DC Circuit has laid out a roadmap for 706 regulation, and the most effective way to quickly provide regulation is to follow that roadmap. However, if the court provided a roadmap of 706 regulation, it also provided detour sign to a Title II short cut.[5] The FCC need not apply Section 706 in order to regulate effectively. A much simpler, and more efficient way for the FCC to regulate is to reclassify ISP's as telecommunications services, and then regulate under Title II.[6]

This comment addresses the most effective way to close the current gap in regulation of ISP's, and explains the most appropriate method of

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[3] http://knowmore.washingtonpost.com/2014/04/25/this-hilarious-graph-of-netflix-speeds-shows-the-importance-of-net-neutrality/
[4] I*nfra* notes 52-60 and accompanying text.
[5] *Infra* notes 52-60 and accompanying text.
[6] *Infra* notes 166-173 and accompanying text.

regulation once the FCC has promulgated the rule that will regulate. It will first discuss the FCC's original position of net neutrality. It will then explore how the *Comcast* and *Verizon* cases affect how the FCC may regulate, and then suggests that railroad regulation presents a springboard which the FCC may use to evaluate the best and most effective methods of internet regulation. It will further offer an explanation of why there is no barrier to reclassifying internet services as common carriers, and how that method of regulation makes more sense from both a legal standpoint, and as a policy matter, and will finally explain that regulation of ISP's as common carriers is a sustainable practice.

II. The Legal Problem of Net Neutrality

The internet has grown and changed immeasurably since its inception, and keeping the law up to date with the ever advancing technology has been an enormous struggle.[7] The FCC must now chose a path to take in regulating the internet. If it follows its current plan to regulate under 706 of the Telecommunications Act, the freedom and openness of the internet will be severely limited.

Allowing individual price negotiations for customized service (as is required under 706), will reward the rich, and punish the rising

[7] http://www.americanlegislator.org/fccs-latest-internet-regulation-plan/, dissenting statement of Adat Pia

entrepreneur. Start up companies may not have the capital to pay high premiums in order to grow their businesses, and end users will quickly lose patience with new services that will inevitably have significantly slower service. Further, non-profit organizations wishing to sway or educate the public will similarly have their speech limited because of lack of funding, and politicians wishing to run for office without the affiliation of a political party will not be able to get their message as effectively to the public.

However, by regulating under Title II, the FCC would maintain the current general practice of net neutrality.[8] The internet will remain a level playing field, which, according to FCC findings, is what is best for both economic and free speech concerns.[9]

A. The FCC's initial position

On September 23, 2011 the FCC promulgated the Preserving the Open Internet; Final Rule.[10] It adopted three basic principles in order to protect and preserve “freedom and openness” of the internet: *Transparency*, which was intended to require both fixed and mobile broadband providers to disclose network management practices, performance characteristics, and commercial terms of their broadband services; *No Blocking*, which disallows blocking of lawful content and

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[8] Preserving the Open Internet, 76 FR 59192-01
[9] *See* Preserving the Open Internet, 76 FR 59192-01
[10] *Id*.

applications; and *No Unreasonable Discrimination*, which required fixed broadband providers to treat all lawful network traffic neutrally.[11]

The FCC further found that the "internet has thrived because of its freedom and openness—the absence of any gatekeeper blocking lawful uses of the network or picking winners and losers online."[12] Over 100,000 commentators provided written comment, and because of the significant impact the internet has on both the economy and speech rights of the public, the FCC determined that net neutrality was the appropriate policy with which to protect internet openness.[13]

The Telecommunications Act contains two relevant sections that are implicated in the current rule making process: Title II[14], and Section 706.[15] Title II regulates common carriers, and would give the FCC authority to require net neutrality, while Section 706 regulates "advanced telecommunications incentives," and merely allows the FCC to ensure timely deployment of broadband service.[16]

Section 201 of Title II of the Telecommunications Act gives the FCC authority to regulate "every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication

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[11] *Id*.
[12] *Id*.
[13] *Id*.
[14] Telecommunications Act of 1934 Codified at 47 U.S.C.A. § 201 (West)
[15] TELECOMMUNICATIONS ACT OF 1996, PL 104–104, February 8, 1996, 110 Stat 56
[16] *Id*.

service upon reasonable request therefor." Because the language specifies that the FCC is delegated authority to specifically regulate common carriers under this Title, ISPs must necessarily be reclassified as common carriers in order to be subject to Title II regulation.[17] Section 201 of Title II provides:

> (a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.
> (b) Charges or services, whenever referred to in this Act, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.
> (c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each such offense and $300 for each and every day of the continuance of such offense.

The plain language of Section 201 clearly allows for regulation in the form of net neutrally if the FCC reclassifies information service providers as telecommunications services (which are considered common carriers).[18] However because the FCC has classified ISPs as a "single, integrated information service" through its *Cable*

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[17] *See* notes 22-31 and accompanying text.
[18] 17 F.C.C.R. at 4824 ¶ 41

Broadband Order,[19] which provides that broadband providers are not telecommunications carriers, ISPs are currently "entirely exempt from Title II regulation."[20]

Section 706 of the Telecommunications Act, unlike Title II, has a somewhat more complicated application to internet regulation. Because Section 706 did not grant the FCC independent regulatory authority until recently, it is best explored through the *Verizon* case.[21] The DC Circuit addressed the possibility of 706 regulation in *Verizon* after the FCC somewhat abruptly repealed the wireline order, which stated that the FCC did not derive independent regulatory authority from Section 706.[22]

The court in *Verizon* upheld the FCC shift in position, finding that whether Section 706 was a mere policy statement which does not have the force of law, or congressional mandate (which must be afforded Chevron deference)[23] was sufficiently ambiguous to be left to agency discretion.[24] Further, the court made clear that Chevron deference will be afforded to such ambiguities regardless of the "questionable timing" of the change in statutory interpretation, specifically, in the context of internet regulation.[25]

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[19] 17 F.C.C.R. at 4824 ¶ 41
[20] *Verizon v. F.C.C.*, 740 F.3d 623, 631 (D.C. Cir. 2014)
[21] See *Verizon v. F.C.C.*, 740 F.3d 623 (D.C. Cir. 2014).
[22] *Comcast Corp. v. F.C.C.*, 600 F.3d 642, 658 (D.C. Cir. 2010).
[23] *Verizon v. F.C.C.*, 740 F.3d 623, 635 (D.C. Cir. 2014).
[24] *Verizon v. F.C.C.*, 740 F.3d 623, 635 (D.C. Cir. 2014).
[25] *Id*. at 642.

In applying Chevron deference, the DC Circuit found that the congressional mandate of 706 is: to regularly investigate "the availability of advanced telecommunications capability," and should the Commission find that "advanced telecommunication capability" is not being timely deployed, it should take action to facilitate deployment.[26]

The language of Section 706 specifically at issue in the Verizon case was:

> The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[27]

While this language does seem to allow for the FCC to protect against some antitrust behavior, it may not regulate under 706 in a manner which would require providers to function as common carriers.[28] In order to

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[26] 47 U.S.C.. § 1302(d)(1) *Verizon v. F.C.C.*, 740 F.3d 623, 635 (D.C. Cir. 2014)
[27] TELECOMMUNICATIONS ACT OF 1996, PL 104–104, February 8, 1996, 110 Stat 56.
[28] See *Verizon v. F.C.C* 740 F.3d 623 (D.C. Cir. 2014).

regulate under Section 706, the FCC must allow for individualized bargaining, which would result in an effective end to net neutrality.[29]

The FCC currently proposes to regulate under Section 706 of the Teleommunications Act believing that such regulation will most quickly and effectively close the current gap in regulation of ISPs, and seeks comment on the ramifications of doing so.[30]

The most important ramification of Regulation under 706 simply is that it is simply unlikely to be successful. The FCC has already publicly determined that net neutrality will further congressional intent, and regulating under 706 is not only a step backwards, but one which runs contrary to FCC findings.[31]

III. Legal Background

A. Overview of Title II and Section 706

Title II of the Communications Act is applicable to telecommunications services that deliver information to the public without changing the form or content of that information.[32] For many years DSL was considered a telecommunication service without incident, but the FCC

[29] *Id*. at 657 (D.C. Cir. 2014).
[30] Preserving the Open Internet, 76 FR 59192-01
[31] *Id.*
[32] Telecommunications Act of 1934 Codified at 47 U.S.C.A. § 201 (West).

chose to reclassify DSL as an information service so to regulate it with broadband providers.[33]

The internet is designed to be a *dumb* network[34] where information is routed "without change in the form or content of the information as sent and received."[35] It is the user's computer that interprets and manipulates the information that is received. The FCC clearly has the option under *Brand X* to find that broadband providers are a telecommunications service, and should do so.

The court in *Verizon* explored the issue of net neutrality under 706, and found that the FCC had impermissibly regulated the ISPs as common carriers, and pointed out that the *Open Internet Order* does not provide a flexible standard for the term reasonable.[36] Specifically, the Order takes the position (in regards to individualized negation with edge providers) that: "it is unlikely that pay for priority would satisfy the 'no unreasonable discrimination' standard."[37]

The above makes clear that the DC Circuit will not allow regulation under 706 if that regulation does not allow for individualized bargaining and discrimination of terms.[38] It seems further evident (although it is somewhat

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[33] http://www.broadband.gov/legal-framework-glossary.html#title-ii
[34] http://technet.microsoft.com/en-us/library/cc772774%28v=ws.10%29.aspx
[35] 47 U.S.C.A. § 153 (West)
[36] *Verizon v. F.C.C.*, 740 F.3d 623, 657 (D.C. Cir. 2014).
[37] *Verizon v. F.C.C.*, 740 F.3d 623, 657 (D.C. Cir. 2014).
[38] See, *Verizon v. F.C.C.*, 740 F.3d 623, 657 (D.C. Cir. 2014).

ambiguous*) that* 706 regulation would force the FCC to allow paid prioritization as well as individual price negotiation.[39] Any paid prioritization scheme runs contrary to the FCC's prior findings that a neutral flow of traffic will create an open and free internet, and so the far safer course for the FCC to pursue is reclassification and Title II regulation.

The FCC has discretion as to whether it wishes to again reclassify DSL as telecommunications services, and likewise to classify broadband as telecommunication services which would allow the FCC to regulate ISP's under Title II as common carriers. [40] Alternatively, Section 706 of the telecommunications Act is an independent grant of regulatory authority, which would allow the FCC to regulate ISP's under their current classification of information services.[41] However, the FCC may not regulate under section 706 in such a manner that would force ISP's into a common carrier status.[42]

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[39] *Verizon v. F.C.C.*, 740 F.3d 623, 657 (D.C. Cir. 2014).
[40] Supra, Section II.
[41] See *Verizon v. F.C.C.*, 740 F.3d 623 (D.C. Cir. 2014).
[42] *Verizon v. F.C.C.*, 740 F.3d 623, 630 (D.C. Cir. 2014).

B. D.C. Circuit Interpretation

a. *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs* [43]

Brand X stands for the well known principle that *Chevron deference* will be afforded to agency determinations.[44] In *Brand X*, the court noted that neither party challenged cable modem service as being defined as an information service in laying out the relevant background before explaining the decision, but made no determination whether that is preferred definition.[45] Moreover, the Court strongly implied that defining cable modem service as a telecommunications service would have been reasonable.[46] It is important to note that as the court afforded deference to

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[43] Brand X substantially concerns the definition of "offering" as used in 47 U.S.C. § 153.

[44] *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 989 (2005).

[45] *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 987, 125 S. Ct. 2688, 2703, 162 L. Ed. 2d 820 (2005), *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694 (1984) (a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency), *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 88, 103 S. Ct. 2246, 2248, 76 L. Ed. 2d 437 (1983) (In applying arbitrary and capricious review of agency action it is the function of the court to evaluate whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made").

[46] *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 989 (2005) (We have held that where a statute's plain terms admit of *two or more reasonable ordinary usages*, the Commission's choice of one of them is entitled to deference) (emphasis added).

the FCC's definition in *Brand X*, it would also afford deference to any reasonable agency definition in the future.[47]

Further in applying Chevron Deference, the Court in *Brand X* made clear that the FCC need not classify all information service providers as telecommunications services in the event that it chooses to classify broadband providers as such.[48]

Brand X also addressed language at issue in this proceeding. In analyzing respondents argument that the statute is unambiguous, the Court found that if MCI's position was taken "all information-service providers that use telecommunications as an input to provide information service to the public" would necessarily be classified as common carriers.[49] However because there is an ambiguity, the FCC may pick and choose what to classify as an information service, and what is a telecommunication service.[50]

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[47] *Verizon v. F.C.C.*, 740 F.3d 623, 642 (D.C. Cir. 2014). Additionally because the agency is not forever bound by its determinations what was stated in the 1998 Stevens report (13 FCC Rcd 11501) to congress is not an insurmountable obstacle in reclassification.

[48] *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 994, 125 S. Ct. 2688, 2707, 162 L. Ed. 2d 820 (2005)

[49] *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 971, 125 S. Ct. 2688, 2692, 162 L. Ed. 2d 820 (2005)

[50] See generally, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

In short, Broadband Internet Access is better defined as a telecommunications service than an information service, and as evidenced by *Brand X*, the Supreme Court will find that the FCC may define ISPs as telecommunication services.[51]

a. Comcast Corp. v. F.C.C.[52]

Comcast was the first modern[53] case to discuss the FCC's authority to regulate ISP's. At issue in *Comcast* was the practice of ISP's intentionally slowing down peer-to-peer network traffic.[54] Because the FCC had determined that creating slow lanes is not consistent with an open internet, the FCC responded to the practice by issuing rules stating that discrimination of lawful traffic is not permitted.[55] Comcast challenged, and the court ultimately held that because the FCC did not show that it had ancillary authority to regulate Comcast's Internet service as tied "to any statutorily mandated responsibility" the rule must be vacated.[56] In short the FCC's attempt to claim ancillary jurisdiction failed because Congress had not given the FCC unlimited authority.[57]

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[51] *Supra* notes 1-4.
[52] *Comcast Corp. v. F.C.C.*, 600 F.3d 642 (D.C. Cir. 2010).
[53] Brand X was arguable the first in the line of cases, however, the reasoning from of that case relevant to this proceeding are addressed through *Comcast* and *Verizon*, and because Brand X was decided by the Supreme Court in 2005, the more pressing matter is how the DC Circuit will expand on *Comcast* and *Verizon*.
[54] *Comcast Corp. v. F.C.C.*, 600 F.3d 642 (D.C. Cir. 2010).
[55] *Comcast Corp. v. F.C.C.*, 600 F.3d 642, 644 (D.C. Cir. 2010).
[56] *Comcast Corp. v. F.C.C.*, 600 F.3d 642, 661 (D.C. Cir. 2010).
[57] *Comcast Corp. v. F.C.C.*, 600 F.3d 642, 654 (D.C. Cir. 2010).

Further, while the court held that there is a telecommunications (Title II) element to the internet, deference must be afforded to the FCC's determination that that the "component is functionally integrated into a single offering properly classified as an information service."[58]

The DC Circuit was clear in *Comcast* that Section 706 of the Telecommunications Act contains a congressional mandate as opposed to a policy decision, and therefore could be read as a grant of independent regulatory authority.[59] The deficiency was in the FCC issuance of a binding decision though the *Wireline Deployment Order* which unambiguously stated that 706 does not grant independent regulatory authority: the deficiency was not in which authority the FCC claimed authority.[60]

Comcast is the precursor to *Verizon*, which also challenged the FCC's authority to regulate the internet, and it is important that the cases be read together.

b. Verizon

The most recent case, and the case that prompted the current rulemaking proceeding, is *Verizon v. F.C.C*, which directly challenged the FCC's authority to require net neutrality. The DC Circuit again deferred to

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[58] *Comcast Corp. v. F.C.C.*, 600 F.3d 642, 649 (D.C. Cir. 2010) (internal quotations omitted.
[59] *Supra* notes 15-18.
[60] *Comcast Corp. v. F.C.C.*, 600 F.3d 642, 658 (D.C. Cir. 2010).

the FCC's own determination that ISP's are information service providers not telecommunications providers.[61]

However, the reasoning behind regulating ISPs as common carriers per se was upheld. The DC Circuit explicitly found that the FCC position requiring broadband providers to comply with open network practices because net neutrality will encourage reasonable deployment was supported by substantial evidence. This reasoning indicates that net neutrality would be found to further congressional intent if the FCC were to reclassify ISPs as telecommunications services.[62]

The major regulatory deficiency found in Verizon was that the FCC's open internet order constitutes common carriage per se, but ISP's were not classified as telecommunications providers, nor does 706 allow for common carrier regulation.[63] In order to regulate ISP's as common carries, the FCC must do so under Title II, which is applicable only to telecommunications services: 706 regulation exempts entities from common carrier status, and so the FCC must choose whether to regulate ISPs as telecommunications under Title II, or allow for individualized

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[61] *Verizon v. F.C.C.*, 740 F.3d 623, 631 (D.C. Cir. 2014).
[62] *Id. at* 628, infra note 73.
[63] *See Id.*

negotiation under 706.[64] As in Comcast the FCC's fatal flaw was its own definition.

The long standing principle that the FCC is bound by its own definitions, and moreover, that those definitions will be afforded *Chevron deference* by the court is explained ad nauseum by the DC Circuit. For example, in *Verizon* the deficiency was found in that the FCC had freely chosen to define broadband providers as information service providers: not that ISPs can not be regulated as common carriers.[65]

Importantly, the court addressed the argument that the FCC was regulating an area of great "economic and political significance" without authority.[66] It found that Congress had delegated that authority, and the FCC was not attempting to hide elephants in mouse holes.[67] The DC Circuit supported this finding by reasoning that Congress had articulated two limiting principles.[68] The first being that Section 706 of the Communications Act must necessarily be read together with rest of Communications Act regarding the subject matter jurisdiction limit of

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[64] See generally, *Verizon v. F.C.C.*, 740 F.3d 623, 631 (D.C. Cir. 2014), *Comcast Corp. v. F.C.C.*, 600 F.3d 642, 658 (D.C. Cir. 2010).
[65] *Verizon v. F.C.C.*, 740 F.3d 623, 652 (D.C. Cir. 2014)
[66] *Id. at* 638.
[67] *Id. at* 639.
[68] *Id. at* 640.

"interstate and foreign communication by wire and radio," which presents a significant limiting principle.[69] Second:

> "any regulations must be designed to achieve a particular purpose: to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." (internal quotes omitted).[70]

The FCC has taken this language as a roadmap to 706 regulation, and it may be.[71] However, this same reasoning can be applied to Title II regulation. It seems apparent that the FCC has the authority to reclassify ISPs as telecommunications services, and to regulate under Title II. The DC Circuit is clear that any FCC determination will be given deference in accordance with *Chevron*.[72] Further, the court expressly holds in the internet context that clear that convenient timing will not invalidate an otherwise legitimate agency finding, and so there would be no barrier to now reclassifying ISPs as telecommunications services.[73] In short, while most of the reasoning found in *Verizon* is explained in light of section 706,

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[69] *Id. at* 629.
[70] *Id. at* 640.
[71] *See generally supra* section I
[72] See, *Verizon v. F.C.C.*, 740 F.3d 623 (D.C. Cir. 2014), *Comcast Corp. v. F.C.C.*, 600 F.3d 642 (D.C. Cir. 2010)
[73] *Id. at 640.*

it is equally applicable to Title II should the FCC choose to regulate instead using a common carrier designation.[74]

The DC Circuit is clearly more concerned that the FCC regulate under a legitimate statutory mandate than which mandate it chooses. In fact, the court has now denied 706 regulation twice, both times addressing that Title II regulates common carriers, which the FCC choose not to define ISPs as.[75] If Title II regulation were disfavored by the court, it would have inevitably mentioned its preference.

In sum, the disclosure requirements of the Open Internet Order were upheld because they were found to be severable and not to impose common carrier duty on ISPs, the anti-blocking and anti-discrimination provisions were struck down, and now the FCC has implemented a notice and comment period to determine the best course of reaction.[76]

c. Implications of Verizon and Comcast

The DC circuit has now twice addressed FCC regulation of the internet.[77] The FCC has mischaracterized the DC Circuit's opinion in *Verizon* as providing one roadmap anchored in 706 regulation, when in

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[74] *See Id.*
[75] See, *Verizon v. F.C.C.*, 740 F.3d 623 (D.C. Cir. 2014), *Comcast Corp. v. F.C.C.*, 600 F.3d 642(D.C. Cir. 2010).
[76] *Verizon v. F.C.C.*, 740 F.3d 623, 659 (D.C. Cir. 2014)
[77] See, *Verizon v. F.C.C.*, 740 F.3d 623 (D.C. Cir. 2014), *Comcast Corp. v. F.C.C.*, 600 F.3d 642(D.C. Cir. 2010).

fact the court provided two roadmaps.[78] The DC Circuit has, in fact, laid out both options, and the FCC is tasked with choosing which path to take. Because the FCC claimed authority under 706, the court in *Verizon* was obligated to discuss the provision in some depth, but the court did not articulate that 706 provided the only, or even the best source of FCC authority to regulate.[79]

In fact, the court strongly inferred that reclassification was an option, and did so of its own volition.[80] The court could just have easily stated that there was no authority under Title II, and moved on, but it did not.[81] The court instead explained in some depth that the Commission had chosen to classify ISP's outside of Title II regulation by determining that they were not telecommunication services.[82]

Moreover, the court expressly stated that the Commission's determination is subject to *Chevron Deference*.[83] By this reasoning, if the commission were to reclassify ISP's as telecommunication services, that classification would be afforded deference, and the major deficiency in its original attempt to regulate would be instantly cured.

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[78] Supra notes 1-6 and accompanying text.
[79] *See*, *Verizon v. F.C.C.*, 740 F.3d 623, 631 (D.C. Cir. 2014)
[80] *Id.*
[81] *See generally id.*
[82] *Id* at 630.
[83] *Id.* at 631.

Further, the court explicitly stated that an agency is not bound by its own findings forever, and that "questionable timing, by itself, gives us no basis to reject an otherwise reasonable finding."[84] It seems clear not only that the FCC may choose to reclassify information services as telecommunications services and regulate under Title II, but that the court considered such action when it decided both *Comcast* and *Verizon*.[85]

IV. Legal Application

A. Why Title II Makes Sense Legally

There are many tangible benefits to regulating under Title II, most notably that the process of regulation is much simpler, and less legalistic.[86] Regulating ISPs as telecommunications will allow the FCC to promulgate clear, broad rules quickly, and without fear of being overturned.[87] Because Title II gives express power to the FCC to regulate ISPs, as common carriers, with little to no guesswork as to how far the authority to regulate goes it is much more certain path to successful regulation.[88] Unlike 706, under Title II the agency may allow some or no negotiation depending on what it finds to be reasonable. The flexibility stems from the general prinicple that an agency is not bound by its findings forever, and the FCC

[84] *Verizon v. F.C.C.*, 740 F.3d 623, 642 (D.C. Cir. 2014).
[85] Infra notes 43-76.
[86] Infra notes 166-173.
[87] Infra notes 89-94
[88] Infra notes 89-94.

may redefine ISP's as a telecommunications service if it so chooses.[89]

In response to FCC concern that Title II would not allow regulation in the form of net neutrally under its plan language, it should be noted that the FCC can further explicitly redefine the "unreasonable discrimination," language from Title II to mean that discrimination in price between like customers is unreasonable, which will instantly broaden the scope of authority under Title II.[90]

B. Why Title II regulation will allow the regulatory gap to be closed more quickly.

Common carrier regulation is an area all to familiar to agencies. Besides the FCC's decades of knowledge in regulating telecommunications, other various federal and state agencies are experienced in regulating airlines, utilities, and public transportation, just to name a few. Because practice makes perfect, the FCC will be able to more effectively and efficiently regulate ISP's as common carriers by employing collective agency knowledge than to start afresh with 706 regulation.

Railroads are the best example of common carrier regulation in that railroads parallel the internet almost perfectly. Every railroad company must share the same tracks in order to function, and in many cases rail

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[89] *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).
[90] Telecommunications Act of 1934 Codified at 47 U.S.C.A. § 201 (West).

cars must be shared. Most importantly, railroads are used to transport goods or people much as ISP's transport information. In essence, railroads are a physical internet.

Railroads are primarily regulated by the Staggers Act, and it is this Act that should be used as a model for internet regulation.[91] ISPs should be treated like railroads, edge providers like shipping companies, and end users like individual passengers. By employing this model, the FCC can learn from what has and has not worked in the railroad industry. For example, anticompetitive behavior should be banned. Under the Staggers Act, the U.S Surface and Transportation board may set maximum allowable rates when anticompetitive behavior is engaged in, which provides a good middle ground between complete regulation, and allowing providers free reign.[92] By allowing the FCC to set prices in situations without meaningful competition, ISPs will be incentivized to stop engaging in antitrust behavior, and specifically behavior such as agreeing which zip codes each company will service.[93] If in order to set its own prices, ISPs must participate in true competition, and the free market will provide some protection to consumers.[94]

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[91] See PL 96–448 (S 1946), PL 96–448, OCTOBER 14, 1980, 94 Stat 1895, intra notes 142-165.
[92] *Id.*
[93] http://www.newyorker.com/news/daily-comment/we-need-real-competition-not-a-cable-internet-monopoly
[94] *See generally* http://www.econlib.org/library/Enc/FreeMarket.html

a. Railroad Regulation Background

Railroads are designated as common carriers, and must "provide the transportation or service on reasonable request."[95] This common carrier designation is key to internet regulation in that it shows how ISPs may require a higher price (within reason) from companies such as Netflix, while still having a common carriage designation in order to be regulated under Title II. For example, under the Staggers Act, no rate increase may "exceed a reasonable maximum for the transportation involved."[96] It therefore follows that while edge users may be charged more for placing a higher burden on providers, even this premium must be reasonable.

While railroads are permitted to fulfill contractual obligations first, those obligations *may not interfere with the rail carriers ability to provide common carriage service*.[97] Here railroads differ slightly from the internet in that a train can only service one group of customers at a time, and so it is necessary to have the ability to prioritize slightly. However, even considering physical limitations, the prioritization may not be unreasonable or interfere with common carrier status.[98] In the case of the internet, there is no requirement that some traffic go before other traffic because

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[95] 49 U.S.C.A. § 11101 (West).
[96] PL 96–448 (S 1946), PL 96–448, OCTOBER 14, 1980, 94 Stat 1895.
[97] 49 U.S.C.A. § 11101 (West) (emphasis added).
[98] See generally, See, *Verizon v. F.C.C.*, 740 F.3d 623 (D.C. Cir. 2014), *Comcast Corp. v. F.C.C.*, 600 F.3d 642(D.C. Cir. 2010).

information can be, more or less, transmitted simultaneously, and so contractual obligations can be fulfilled without having a paid prioritization system.[99] As a matter of fact, it could be argued that in the internet context paid prioritization is inconsistent with common carrier status because the internet functions in such a way that information is transferred fluidly, and any attempt to slow certain traffic is inconsistent with common carriage.

Importantly, the Staggers Act functions to protect shippers as well as rail carriers.[100] Shippers, obviously, benefit by receiving reasonable rates on rail services, and carriers are better able to earn and maintain an adequate revenue stream.[101] The system functions by allowing latitude in situations where there is adequate competition among railroads, and substitutes greater regulation for the natural market check and balance system where there is not adequate competition.[102] As long as there is adequate competition, a rail carrier may set its own rate within the proscribed "Zone of rail carrier rate flexibility."[103] In order to determine

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[99] http://web.stanford.edu/class/msande91si/www-spr04/readings/week1/InternetWhitepaper.htm
[100] 13 C.J.S. Carriers § 139
[101] 13 C.J.S. Carriers § 139
[102] See generally *Id.*
[103] PL 96–448 (S 1946), PL 96–448, OCTOBER 14, 1980, 94 Stat 1895

what the zone of acceptable rates should be, a base rate[104] is determined, and the rail carriers may elect to deviate by up to 6% annually.[105]

The Surface Transportation Board (STB) is responsible for closely monitoring price structure in order to ensure that railroad rates are reasonable in the case of market dominance.[106] When a rail carrier has market dominance or lack of competition, reasonable rates for rail transportation are prescribed by taking into account factors such as whether revenue will pay for expenses and general operating costs, and whether and what returns on capital will be.[107]

In regulating price, the STB is charged with proscribing standards that will allow for adequate revenues "*under honest, economical, and efficient management,* to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit" to include capital used in the business.[108] In order to ensure that rail carriers are being treated fairly when complying with regulation, the STB makes annual determinations as to which rail carriers are receiving "adequate revenues."[109] Importantly, even rail carriers which are in the position of market dominance will be given assistance if the revenues are not

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[104] Specifically how base rates are determined is outside the scope of this paper, but it should be noted that the commission provides what is essentially a safe harbor pricing provision.
[105] PL 96–448 (S 1946), PL 96–448, OCTOBER 14, 1980, 94 Stat 1895
[106] PL 96–448 (S 1946), PL 96–448, OCTOBER 14, 1980, 94 Stat 1895
[107] 13 C.J.S. Carriers § 139
[108] 13 C.J.S. Carriers § 139
[109] 13 C.J.S. Carriers § 139

adequate, regardless of any inefficiency on the part of the railroad.[110] It is not necessary that the standards used to determine if revenues are adequate be codified, but the matter must have been published and notice of the decision given in the Federal Register of its issuance.[111]

It is against the above backdrop that railroad regulation functions to maintain common carrier status by disallowing unreasonable discrimination between customers.[112] Rail carriers "may not subject a person, place, port, or type of traffic to unreasonable discrimination."[113] Unreasonable discrimination is defined as charging different rates to different entities "for performing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances."[114] There are, however, several exceptions to this rule: contracts,[115] rates applied to different through routes, or discrimination against another carrier's traffic are not subject to STB scrutiny.[116] Additionally, different rates or procedures are allowable to like customers if different services are

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[110] 13 C.J.S. Carriers § 139
[111] 13 C.J.S. Carriers § 139
[112] See generally 49 U.S.C.A. § 10741 (West)
[113] 49 U.S.C.A. § 10741 (West)
[114] 49 U.S.C.A. § 10741 (West)
[115] "A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract," however, such contracts may not interfere with a rail carriers common carrier status. For example a rail carrier may not undertake contractual obligations that will harm individual shippers or ports, and cannot discriminate in which parties it will contract with. 49 U.S.C.A. § 10709 (West)
[116] 49 U.S.C.A. § 10741 (West)

provided by carriers.[117] Again in the internet context, different services are not essential as it is in the railroad industry. However, the language is worth noting in the event that the FCC chooses to regulate under 706.

b. Antitrust

Antitrust protection has been shrinking at an alarming rate in the United States beginning in the 1970's as the Warren Court was replaced by first the Burger, and subsequently the Rehnquist Court.[118] Since the Warren Court, the trend has been to apply the rule of reason[119] rather than finding that collusive behavior is a per se violation of antitrust law.[120] The Court has determined that it will presumptively apply the rule of reason, and that activity is only per se illegal in a "narrow category of activity," which allows great latitude in collusive behavior between companies.[121]

Despite this general trend in antitrust policy, the railroad industry has been amazingly successful because of the Staggers Act, which does not allow monopolistic practices or barriers to entry, which indicates that disallowing monopolistic practices are, in fact, the more economically

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[117] 49 U.S.C.A. § 10741 (West)
[118] C. Paul Rogers III, The Incredible Shrinking Antitrust Law and the Antitrust Gap, 52 U. Louisville L. Rev. 67 (2013)
[119] The rule of reason prohibits only "unreasonably restrictive of competitive conditions" when a practice restricts trade. 1 ifHolmes, Intellectual Property and Antitrust Law § 5:3
[120] C. Paul Rogers III, The Incredible Shrinking Antitrust Law and the Antitrust Gap, 52 U. Louisville L. Rev. 67 (2013)
[121] C. Paul Rogers III, The Incredible Shrinking Antitrust Law and the Antitrust Gap, 52 U. Louisville L. Rev. 67 (2013)

efficient practice.[122] In fact railroads have been more economically successful than the private domestic sector.[123] Many factors have contributed to this success under the Staggers Act including industry consolidation and flexibility in pricing.[124]

By contrast to practices in the rail industry, at least in the United States, broadband competition is lacking in any meaningful way.[125] Most Americans have only one choice of broadband providers, though in a few of the larger cities, costumers have a choice of broadband providers in that they may have a telephone provider such as Verizon or AT&T or a cable company such as Cox or Comcast available.[126] However, the telephone service and cable company rarely if ever compete in regards to price.[127] The common economic term for such an arrangement is "duopoly," and as it suggests the arrangement provides little actual competition.[128]

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[122] See http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/centers/taubman/working_papers/fagan_08_ozrail.pdf
[123] http://www.jstor.org/stable/20712927
[124] http://www.jstor.org/stable/20712927
[125] http://www.newyorker.com/news/daily-comment/we-need-real-competition-not-a-cable-internet-monopoly
[126] http://www.newyorker.com/news/daily-comment/we-need-real-competition-not-a-cable-internet-monopoly
[127] Coverage map showing number of prividers http://www.broadbandmap.gov/number-of-providers
[128] http://www.newyorker.com/news/daily-comment/we-need-real-competition-not-a-cable-internet-monopoly

Because of the monopolistic behavior of internet providers, the United States has absurdly high rates for cable and internet.[129] Triple-play packages (phone, internet, and cable) in France start at fifteen dollars a month, in Zurich the packages start at thirty.[130] Similarly, in Britain, stand alone internet starts at twenty-five dollars a month, and televisions built subsequent to 2008 are equipped with Freeview which allows the user more than sixty television, thirty radio, and twelve Internet channels for free.[131] The most plausible explanation for the sharp difference between service in the United States, and service abroad is lack of either regulation or competition.

Additionally, some commentators suggest that part of the problem is government greed in the form of regulation barriers put in place to make building infrastructure overly costly.[132] Because local governments make it difficult and expensive to build infrastructure by requiring that would-be-ISP's pay far more than cost to build on publicly owned "rights of way,"

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[129] http://www.newyorker.com/news/daily-comment/we-need-real-competition-not-a-cable-internet-monopoly
[130] http://www.newyorker.com/news/daily-comment/we-need-real-competition-not-a-cable-internet-monopoly
[131] http://www.wired.com/2013/07/we-need-to-stop-focusing-on-just-cable-companies-and-blame-local-government-for-dismal-broadband-competition/
[132] http://www.wired.com/2013/07/we-need-to-stop-focusing-on-just-cable-companies-and-blame-local-government-for-dismal-broadband-competition/

local government is preventing new competition from entering the market.[133]

However, counter to this trend, Kansas City made the decision to give Google Fiber access to rights of way at little to no cost, and the result was that a small Midwestern city became the first to receive Google Fiber.[134] After the project was completed, Google's Vice President of Access Services stated in congressional testimony relating to lessons learned from the Kansas City project that "it's clear that investment flows into areas that are less affected by regulation than areas that are dominated by it."[135]

By contrast, Provo, Utah attempted to build and run it's own fiber network. The task was beyond the means of the municipality, and it sold the network to Google for one dollar.[136] In short, streamlining rights of way are beneficial to both local government, and companies that would enter the market because the residents of such area will benefit from better service, and ISPs (unlike the cities themselves) are capable of profiting

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[133] http://www.wired.com/2013/07/we-need-to-stop-focusing-on-just-cable-companies-and-blame-local-government-for-dismal-broadband-competition/
[134] http://www.wired.com/2013/07/we-need-to-stop-focusing-on-just-cable-companies-and-blame-local-government-for-dismal-broadband-competition/
[135] http://oversight.house.gov/wp-content/uploads/2012/01/TestimonyofMiloMedin_1.pdf
[136] http://www.wired.com/2013/07/we-need-to-stop-focusing-on-just-cable-companies-and-blame-local-government-for-dismal-broadband-competition/

from new infrastructure.[137] It is for this reason that the FCC should consider whether such practices are a hindrance to timely deployment of internet service.

Despite such evidence, big player internet providers and local governments continue to engage in harmful monopolistic practices, which ultimately harm the American public. To show how absurd the monopolistic behavior has gotten one must simply track Comcast's behavior. In 2005 Comcast and Time Warner bought Adelphia Communications (then the fifth largest cable company).[138] Then in 2011, Comcast purchased fifty-one per cent of NBC Universal from G.E., and just last year the other forty-nine per cent.[139] Comcast is now attempting to purchase Time Warner Cable, which will mean that Comcast will have control of about thirty million subscribers.[140] The FCC does have one check in place, which does not allow one company to control more than thirty percent of overall market share, which will force divestment of certain pieces of Time Warner's empire.[141] However, allowing one company to control 30% is hardly in

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[137] http://www.wired.com/2013/07/we-need-to-stop-focusing-on-just-cable-companies-and-blame-local-government-for-dismal-broadband-competition/
[138] http://www.newyorker.com/news/daily-comment/we-need-real-competition-not-a-cable-internet-monopoly
[139] http://www.newyorker.com/news/daily-comment/we-need-real-competition-not-a-cable-internet-monopoly
[140] http://www.newyorker.com/news/daily-comment/we-need-real-competition-not-a-cable-internet-monopoly
[141] http://www.newyorker.com/news/daily-comment/we-need-real-competition-not-a-cable-internet-monopoly, In response to the possibility of such divestments,

check at all, as it would ultimately allow three companies to control 90% of the market share. The FCC should consider changing this to a more reasonable constriction.

V. Legal and Policy Analysis

a. Railroad Regulation as Guidance[142]

The Staggers Act was passed in 1980, and functioned to amend nearly all railroad regulations of the time. In enacting the Staggers Act, Congress found that railroads were an "essential factor in the national transportation system."[143] Action was necessary to prevent monopolistic abuse of power by rail carriers.[144] Further, it was found that without increasing rail carrier profitability "either further deterioration of the rail system or the necessity for additional Federal subsidy" would be required.[145] To that end, it was found that in order to achieve "maximum utilization," railroads must be regulated based on marketplace reliance."[146]

These finding are consistent with the FCC's findings that the internet

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The Daily Show launched a crowd fund campaign to buy CNN. http://thedailyshow.cc.com/letsbuycnn

[142] It should be noted that although the issues of transparence, deployment to rural areas, and rate discrimination between ISPs are outside of the scope of this comment the Staggers Act addresses each of these issues.
[143] PL 96–448 (S 1946), PL 96–448, OCTOBER 14, 1980, 94 Stat 1895
[144] *Id.*
[145] *Id.*
[146] *Id.*

is a “general purpose technology, and one which like electricity, enables new methods of production “that have a major impact on the entire economy.”[147] It is further consistent with FCC findings that internet openness creates a “virtuous cycle” of innovation and reinvestment.[148] The internet is still a relatively new technology, but like railroads, the monopolistic behavior could harm internet providers economically if left unchecked.[149]

It is true that during the time the Staggers Act was passed, railroads were failing, and ISPs are currently thriving. However, otherwise the milieus are substantially the same.[150] The Staggers Act was passed during a time of mergers and buy outs, as well as bankruptcy, and the decreasing number of rail companies was causing an almost unsustainable level of rail traffic density.[151] The Staggers Act was passed in response, and under the Act profit to rail companies (analogous to ISPs) has increased, while cost to shippers has decreased by about 40%.[152] Similar regulation would likely cause the same virtuous cycle with ISPs,

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[147] Preserving the Open Internet, 76 FR 59192-01
[148] *Id*.
[149] The FCC finding on the matter would likely be afforded Chevron deference.
[150] https://www.aar.org/keyissues/Pages/Balanced-Regulation.aspx#.U4U0yC8WcRs
[151] http://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=2398&context=vlr
[152] https://www.aar.org/keyissues/Pages/Balanced-Regulation.aspx#.U4U0yC8WcRs

and create a profitable and sustainable internet environment.[153]

By modeling internet regulation after railroad regulation, the FCC would be using proven methods to increase profitability, protecting against an economic crash similar to the one seen by the rail carriers prior to the Staggers Act, and promoting internet openness. The Staggers Act of 1980 has been remarkably successful in regulating railroads as common carriers, and has accomplished many of the goals the FCC seeks to accomplish in the context of broadband providers.[154] By using the Staggers Act as guidance as to how ISP's should be regulated, the FCC would be able to make a showing that substantial evidence supported its decisions.[155]

The FCC may rely on railroads because, again, the rail industry operates much as a network functions. The cars travel on tracks which must be built and maintained; rail companies regularly share rail cars, and must coordinate with each other in order to remain functional. Because of the striking similarities between railroads and ISPs, the business models of ISP's and rail companies are analogous, and give the FCC a springboard to evaluate methods of regulation that will be the most successful.

Further, between 1980 and 2012 railroads have invested more than

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[153] https://www.aar.org/keyissues/Pages/Balanced-Regulation.aspx#.U4U0yC8WcRs
[154] *Id*.
[155] *Id*.

525 billion dollars back into operations.[156] Railroads have seen a stable increase in profits since the implementation of the Act, and are now self sustaining.[157] This is an example of the virtues cycle in practice. It is also important to note that the Staggers Act functioned to substantially deregulate railroads, which is consistent with congressional intent of an unfettered internet, while still providing enough regulation to discourage private companies from harming the openness of the internet.[158] The Staggers Act was adopted to facilitate railroad reorganization, which parallels what will essentially be an initial organization of ISPs.

The United States has articulated its policy in regulating railroads by providing 15 enumerated statements, most of which are consistent with the policy the FCC has articulated in regulating the internet.[159] The United States policy is to: promote competition and demand for railroad services, while establishing reasonable rates for rail transportation, and minimizing Federal control to facilitate carriers in earning "adequate revenues, as determined by the Board;" development while maintaining competition among rail carriers in order to meet public and national defense needs to maintain, in the absence of competition, reasonable rates; the reduction of

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[156] https://www.aar.org/keyissues/Pages/Balanced-Regulation.aspx#.U4U0yC8WcRs
[157] https://www.aar.org/keyissues/Pages/Balanced-Regulation.aspx#.U4U0yC8WcRs
[158]http://object.cato.org/sites/cato.org/files/serials/files/regulation/2010/12/regv33n4-6.pdf
[159] Id.

regulatory barriers allowing effective entry and exit from the rail industry; "to encourage honest and efficient management of railroads;" and to quash "predatory pricing and practices" which includs unlawful discrimination and "undue concentrations of market power."[160]

In order to further these policies Congress has mandated that: through routes must be reasonable, there may be no discrimination against connecting lines of another carrier unless the route is specified by the shipper, and that reasonableness of price will be determined in part by "the carrier's mix of rail traffic to determine whether one commodity is paying an unreasonable share of the carrier's overall revenues"[161]

Because the similarities are striking in both policy, and functionality, the FCC may look to the above policies as a guidepost, and apply them to internet regulation. For example, if one edge provider is paying an unreasonable share of the ISP's overall revenues in light of the burden they place on the ISPs service, the FCC should consider the contract unreasonable. Further, mandating honest and efficient management practices will increase consumer trust, and should, as a matter of common sense, be required of such an important industry. In short the FCC does not need to reinvent the wheel because railroad regulation serves a

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[160] *Id*.
[161] 49 U.S.C.A. § 10701 (West)

substantially similar purpose as internet regulation, and has proven to be immensely successful.

b. The Staggers Act and 706

Even though railroads are regulated as common carriers, because the primary purpose of the Staggers Act was to rid the rail carriers of monopolistic practices, most of the logic could apply to 706 regulation. If the FCC follows its proposed course of action and unwisely[162] regulates under Section 706, it is still recommended that Staggers is considered as a guide. Many of the edge provider and end user concerns stem from having no meaningful choice of providers or any sort of competitive check on the ISPs.[163] These concerns are mitigated specifically in that Staggers does not allow for anti-competitive behavior. Like railroads, anticompetitive behavior is harmful to all parties involved in the internet context, and quashing such practices would mitigate the harm to internet openness by providing edge providers and end users a meaningful choice as to which

[162] Even if the FCC promulgates essentially the same rule it has proposed, it should do so under Title II. If paid prioritization becomes unworkable in practice, the FCC will find it easier to regulate some form of net neutrality if it derives its authority from Title II. Further, the FCC's ability to do just that, may motivate the ISP's to work toward a system which is as fair as possible. Section 706 does provide a similar incentive for ISPs to operate in good faith.

[163] http://www.reuters.com/article/2014/05/21/us-eu-internet-idUSBREA4K10X20140521

service they will use.[164]

If the FCC chooses to regulate under 706, it should abolish all anticompetitive behavior, but should still allow ISPs to engage in individual price negotiations for a single level of service as long as there is true competition. This would force providers to stop agreeing to only serve certain geographic areas and provide meaningful choice end users, which would allow the free market to function as a check on unreasonable behavior.

While I would ask the FCC to try to come up with a reasonable rule if it chooses 706 regulation, The far safer tact is to claim authority under Title II. The hurdle the FCC will face in regulating in this way is the "discrimination in terms" language in Verizon. It could be that allowing concierge service or the like is enough to allow for discrimination in terms, but the more reasonable interpretation is that some level of paid prioritization is necessary. Internet providers have proven themselves greedy and not trustworthy, so while limiting the level of paid prioritization to a negligible amount seems plausible, the ISPs will almost certainly either cheat or challenge the rules *ad nauseum.*

In order to allow individual negotiation, as required by 706, larger edge providers like Netflix could be charged a premium, but would be free to negotiate contract terms with individual ISP's. This is more or less

[164] Supra section IV.B

consistent with current practice, as such edge providers commonly contribute money to backbone infrastructure.[165] However, as long as there is true competition, edge providers would have the added leverage of being able to publish unfair practices to consumers who have a meaningful choice in provider. The end users could put pressure on ISP's who do not negotiate in good faith by taking their business elsewhere.

It would be necessary under this plan for the FCC to define true competition. By defining true completion as the availability of more than one provider offering the same level of service, and further affording Antitrust protection against company price fixing, regulation under 706 could break up the current monopoly like state of ISPs. Forcing true competition will create a safety net requiring ISPs to keep prices and levels of service relatively fair while still allowing for individual price negotiation. While 706 regulation is not ideal, reducing antitrust behavior will substantially mitigate the damage done to internet openness, and the Staggers Act provides a good model as to how that should be done.

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[165] See e.g http://online.wsj.com/news/articles/SB10001424052702304834704579401071892041790?mod=djemalertTECH

C. How Title II Regulation is more Efficient

The FCC expressly requested comment on how to close the current regulatory gap in internet regulation in order to stop broadband providers from limiting internet openness *as quickly as possible*.[166] The most efficient way to do this is to regulate under Title II.

It is important to first address that 706 is prima facia inconsistent with an open and free internet, as is its congressional mandate. The DC Circuit was clear that in order for the FCC to regulate under 706, it could not do so in a manner that forced ISP's into common carrier per se statuses.[167] Regulation under 706, therefore, necessarily leads to paid prioritization, and the rule the FCC has proposed will, in fact, expressly allow paid prioritization.[168] It is this paid prioritization that would, by its very definition, harm internet openness because fast lanes create slow lanes, and having sub par service afforded to those who can not or will not pay a premium is inconsistent with internet openness.[169] The providers will be incentivized to make the discrepancy in speed as large as possible, so that the edge providers will be incentivized to pay for the priority service. It would be bad business for them to provide speeds that are not noticeably different at a much cheaper rate.

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[166] Preserving the Open Internet, 76 FR 59192-01
[167] Supra notes 62-65 and accompanying text.
[168] http://apps.fcc.gov/ecfs/document/view?id=7521129942
[169] Supra Section III.A

Further, ISPs will be incentivized to “cheat” traffic that isn’t paying a premium by dropping such edge providers below the minimum level of service especially during peak traffic times.[170] Regulating under Title II is the only option that allows the FCC to require true net neutrality, and by extension, an open internet because in order for the internet to be open, it must be accessible to all.[171]

Additionally, Title II regulation will more likely stand or fall uniformly. When regulation under Title II is challenged, it will be considerably harder to do so piecemeal because of the broad scope of authority that Title II grants.[172] The primary issue when challenged will almost certainly be whether providers may be regulated as common carriers. It therefore is likely that the FCC’s rule will be upheld *in toto* through a single decision.[173]

By contrast regulating under 706 will be more complicated, and involve many subtle components that can each be challenged both prima facia, and as applied. Creative attorneys will likely challenge each and every regulation the FCC attempts as forcing common carriage status on the ISPs, which is impermissible under *Verizon*.

These challenges will take more time, and present more risk that yet another notice and comment proceeding will be necessary. Section 706

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[170] Infra section V.E.
[171] See generally, FCC Open Internet Order (2010), Supra sections I-IV.
[172] Supra section III-IV.
[173] See supra section V.E

did not, by the FCC's own interpretation, grant independent regulatory authority until recently, and determining how far that authority goes, along with how much individualized negotiation is required under *Verizon* will be a painful process.

In order to provide certainty to the regulatory process, the FCC should reclassify and regulate ISPs as telecommunications services. There is substantive data and case law to provide the FCC with the information it needs, not only to regulate successfully, but to avoid overstepping its legal authority. Moreover, it will likely take years to sort out what the minimum level of service should be under 706, and that minimum level of service will be in flux as the technology changes. The FCC will be constantly chasing the definition of *reasonable* based on what new technology has developed, and the FCC may never be able to find or keep the balance long term.

D. FCC's Belief That 706 is Preferred by the DC Circuit

Comcast and *Verizon* should be read together to firmly establish that the FCC has authority to regulate the internet, under either 706 or Title II of the Telecommunications Act.[174] However, regulating under 706 will be a complicated, legalistic, and bureaucratic nightmare.[175] Conversely Title II

[174] Supra sections II-IV.
[175] *Supra* section V.A

regulation will be a mere matter of changing the definition of information service providers to telecommunication provider.[176]

Under Section 706, the FCC will be responsible for allowing ISPs to negotiate prices and levels of service, while still maintaining an open internet.[177] The task seems daunting if not impossible when the rate at which technology is evolving is taken into account.[178] Further the FCC faces no significant obstacles other than reclassification under Title II.[179] The court has made clear that common carriers are to be regulated under Title II, and that the FCC's determination of what an ISP is will be deferred to.[180] The DC circuit's assertion in *Verizon* that an agency is not forever bound by its findings is not a new principle in administrative law.[181] The Supreme Court has consistently held that an agency may make reasoned recalculations.[182] *State Farm* was decided in 1983; the Court found that the agency's actions were arbitrary and capricious not because it changed course, but because:

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[176] *Supra* section V.A
[177] Supra sections II-IV.
[178] *Infra* section IV.e.
[179] *Infra* notes 181-185 and accompanying text.
[180] See generally, See, *Verizon v. F.C.C.*, 740 F.3d 623 (D.C. Cir. 2014), *Comcast Corp. v. F.C.C.*, 600 F.3d 642(D.C. Cir. 2010).
[181] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 103 S. Ct. 2856 77 L. Ed. 2d 443 (1983), *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).
[182] See e.g. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 103 S. Ct. 2856 77 L. Ed. 2d 443 (1983)

> "the agency failed to present an adequate basis and explanation for rescinding the requirement and must either consider the matter further or adhere to or amend the Standard along lines which its analysis supports."[183]

More recently, the Supreme Court interpreted *State Farm* more explicitly. In *Fox*, the Court clarified its earlier opinion in *State Farm* by articulating that State Farm did not hold or imply that every agency action which reflected a change in policy need be "justified by reasons more substantial than those required to adopt a policy in the first instance."[184]

Here the FCC has already found that net neutrality protects and promotes an open internet, which is in accordance with its congressional mandate.[185] Moreover the FCC has adequate justification, as expressly found in *Comcast*, to assert that net neutrality is necessary in order to effectively regulate the internet.[186] The FCC determined and sanctioned net neutrality through its *Open Internet Order*, and by sharply changing in tact to allow paid prioritization without adequate justification as to why or how it will promote internet openness is less likely to survive *State Farm* analysis than simple reclassification.[187]

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[183] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30, 103 S. Ct. 2856, 2860, 77 L. Ed. 2d 443 (1983)
[184] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 514, 129 S. Ct. 1800, 1810, 173 L. Ed. 2d 738 (2009).
[185] Preserving the Open Internet, 76 FR 59192-01
[186] See *Comcast Corp. v. F.C.C.*, 600 F.3d 642(D.C. Cir. 2010).
[187] Supra notes 183-185 and accompanying text.

Fox should be read to give the FCC a clean slate to evaluate whether ISPs should be classified as telecommunications services, and regulated as common carriers under Title II. The DC Circuit, in effect, made it necessary for the FCC to reevaluate its regulation methods by vacating the FCC's previous order. The court could not reasonably expect the FCC to attempt to regulate using the same methods as before, however, the FCC must regulate in order to ensure internet openness as mandated by Congress.

As long as the FCC justifies its actions, regulation under Title II is far less likely to be vacated than new regulation under 706.[188] The FCC has found that net neutrality promotes a virtuous cycle which is an effective way to promote growth and development of the internet.[189] Without subsequent findings that paid prioritization will effectively protect an open internet, it would seem that 706 regulation is flatly inconsistent with the substantial evidence.[190] Because the FCC has not taken the time to make a reasoned evaluation of how 706 regulation will effect internet openness,

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[188] Preserving the Open Internet, 76 FR 59192-01
[189] Preserving the Open Internet, 76 FR 59192-01
[190] 5 U.S.C.A. § 556 (West) (A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence), *N.L.R.B. v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300, 59 S. Ct. 501, 505, 83 L. Ed. 660 (1939) (*Reasoning*, substantial evidence "must do more than create a suspicion of the existence of the fact to be established." In order for there to be substantial evidence a reasonable mind would accept the conclusion as adequately based on the evidence.)

such regulation will likely be vacated for lack of substantial evidence; while regulation under Title II is supported by the agencies findings.[191]

E. Enforcement

Once the FCC reclassifies ISP's as common carriers, it should also carefully consider how it will enforce regulation in order to avoid arbitrary and capricious enforcement. The FCC has expressed some concern as to how Title II regulation would be enforced, but the task is not as daunting as it appears.

One way to promote efficient enforcement is though a carefully thought out complaint process. Preventing and punishing practices that threaten the open internet will certainly require user accessible complaint systems because it will be nearly impossible for the FCC to monitor all ISP behavior.[192] Informal and formal complaint processes alike should be utilized. Both end users and edge providers can further enforcement efforts though this process, and substantially lighten the FCC's enforcement burden.

In order to ensure that customers know about grievance procedures, transparency requirements should mandate that ISPs will print information on how to file a complaint with the FCC.

There are many websites which will test internet connection speed

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[191] *Id,* supra section III
[192] *See* http://www.census.gov/hhes/computer/

for free, which indicates that it is not commercially unreasonable to require ISP's to offer speed tests on their homepage.[193] Even Google is currently offering reports on ISP speed.[194] However, if providers are not required to offer this service, the information is readily available to end users through third parties, which will provide an easy way for customers to check for compliance breeches.[195]

Further, informal complaints should have the option to be filed anonymously, so that people of little means will not fear repercussions by ISP's. Formal complaints, however, are equally important to the enforcement process as they will allow more sophisticated edge providers the ability to challenge ISP practice outside of court.

The Internet Corporation for Assigned Names and Numbers (ICANN) presents a good example of how complaints could be handled with respect to formal or non-anonymous informal complaints.[196] Allowing a board to adjudicate low level disputes based on complaints and simple supporting information would allow an effective, and relatively low cost system to enforce minor infractions by the ISPs.[197]

The efficient enforcement is key to meaningful regulation. If swift

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[193] http://www.speedtest.net/, http://www.speakeasy.net/speedtest/ It is of note that AT&T and Xfinity already offer this service http://www.att.com/speedtest/, http://speedtest.comcast.net/
[194]https://www.google.com/get/videoqualityreport/?v=9bZkp7q19f0#methodology
[195] *Supra* note 193
[196] https://www.icann.org/resources/pages/approach-processes-2012-02-25-en
[197] https://www.icann.org/resources/pages/effect-2012-02-25-en

enforcement action is taken against minor infractions, it is less likely that the ISPs will commit substantial infractions. The ISPs are again businesses, and it will not be cost effective to face substantial fines almost immediately after the infraction is committed. Further, the enforcement of less serious infractions will protect against any sense of security that may lead ISPs to progressively commit larger infractions.

VI. Conclusion

The FCC is faced with the difficult and politically charged task of regulating the internet. For the reasons stated above, I would ask the FCC to reclassify ISP's as telecommunications providers, and regulate them as common carriers under Title II of the Communications Act. In order to maintain a free and open internet, I would ask the FCC to abandon the notion of paid prioritization, and instead allow ISPs to maintain economic viability by charging edge providers which disproportionately burden their services a reasonable premium, and to further disallow antitrust behavior in order to give edge providers and end users alike meaningful choice of providers.

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