

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Framework for Broadband Internet Service)	GN Docket No. 10-127
)	
Protecting and Promoting the Open Internet)	GN Docket No. 14-28

REPLY COMMENTS OF EARL COMSTOCK

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Earl Comstock submits these reply comments in the above referenced dockets. Mr. Comstock has a direct interest in the outcome of these proceedings as a user of broadband Internet access service. He is an attorney and was one of the principal Senate staff involved in drafting the Telecommunications Act of 1996. The views expressed here are his own.

EXECUTIVE SUMMARY

Section 706 of the Telecommunications Act of 1996, 47 U.S.C. 1302, does not grant independent authority to the Federal Communications Commission to issue regulations or take enforcement action. The Full Service Network Comments dated March 21, 2014 and the Tech Freedom and International Center for Law & Economics Legal Comments dated July 17, 2014 provide clear statutory and legal analysis in support of this conclusion. These reply comments expand on that analysis and provide significant new statutory evidence that no authority was granted. These reply comments also demonstrate that reclassification of the transmission

component of broadband Internet access is clearly consistent with the statutory scheme. The reply comments are broken into three parts: *Chevron* step 1, *Chevron* step 2, and Title II.

Part I shows how the plain language, structure, and legislative history of the Telecommunications Act demonstrate that section 706 does not apply to “information services” or grant rulemaking authority. **Part I(A)** looks first at how the plain language of sections 3(b) and 706 of the Telecommunications Act demonstrate that Congress excluded “information services” from section 706. **Section I(A)(1)** discusses how section 3(b) demonstrates that Congress adopted a comprehensive statutory scheme in the Telecommunications Act. **Section I(A)(2)** shows how the terms Congress used in section 706(a) affirmatively exclude “information service” from being regulated under that section. **Section I(A)(3)** discusses the definition of “advanced telecommunications capability” and how Congressional use of the defined term “telecommunications” limits the scope of section 706 to exclude “information services.”

Part I(B) examines how the plain language of section 706 demonstrates that Congress did not grant rulemaking or enforcement authority to the Commission. **Section I(B)(1)** discusses how the phrase “shall encourage” in section 706(a) demonstrates that no rulemaking authority was granted. **Section I(B)(2)** discusses the fact that the Commission’s own regulations define “notice of inquiry” to mean proceedings that “do not result in the adoption of rules” and Congress’ use of that defined term demonstrates clear intent not to grant independent authority. **Section I(B)(3)** shows how the addition of section 706(c) reaffirmed Congress’ understanding that section 706 did not grant regulatory authority.

Part I(C) shows how the structure of the Telecommunications Act demonstrates that no rulemaking or enforcement authority was granted in section 706. **Section I(C)(1)** discusses how

Congress' decision to leave section 706 outside the Communications Act means that the Commission may not use provisions of the Communications Act to implement section 706.

Section I(C)(2) uses three other provisions of the Telecommunications Act to demonstrate that Congress uses express language when it intends to grant authority or include "information services." In two of the three sections cited the courts have expressly rejected Commission attempts to use Congressional direction to conduct an "inquiry" to support rulemaking. **Section I(C)(2)(a)** discusses another free-standing provision of the Telecommunications Act, section 207, which explicitly directs the Commission to adopt rules under the Communications Act to implement that section. **Section I(C)(2)(b)** discusses how section 257 of the Communications Act, which was added by section 101 of the Telecommunications Act, expressly grants authority to issue regulations and addresses information services, in stark contrast to section 706. **Section I(C)(2)(c)** discusses section 713 of the Communications Act, which was added by section 305 of the Telecommunications Act, that shows clearly that Congress was deliberate in distinguishing between rulemaking and inquiry.

Part I(D) discusses how the legislative history of section 706 shows that the "fail-safe" language relied on by the Commission and the *Verizon* court was deleted, and also how the subsequent enactment of the Broadband Data Improvement Act reaffirms that Congress did not see section 706 as an independent grant of rulemaking authority.

Part II demonstrates how the Commission's interpretation that section 706 grants rulemaking authority to regulate broadband Internet access services is unreasonable even under *Chevron* step 2. **Part II(A)** discusses how the Congress did not mention access to rights of way or poles, ducts and conduits in section 706, nor did Congress provide the Commission with

any authority under the Communications Act to grant “information service providers” access to rights of way or poles, ducts and conduits. Given that the express objective of section 706 is deployment of “advanced telecommunications capability” the inability of the Commission to grant access to these essential inputs except through the “silent” delegation of authority under section 706 demonstrates the unreasonableness of the Commission’s interpretation. **Part II(B)** examines how it is unreasonable to presume that Congress would adopt a “regulatory trigger” in section 706(b) that would provide the Commission a direct incentive to skew the results of the mandated inquiry. **Part II(C)** uses the questions asked by the Commission in its *Tenth Broadband Progress Notice* to illustrate how the Commission’s interpretation of section 706 results in an unreasonable delegation of authority.

Part III recites several clear examples in the legislative history which show that Congress was anticipating digital convergence and intended the Telecommunications Act to ensure that all Americans could continue to communicate and access information services using “telecommunications services” regulated under Title II of the Communications Act. As a result, the decision by Congress not to grant access to rights of way, poles, ducts and conduits, interconnection, and universal service support to “information service providers” means that the Commission and the courts cannot infer such authority from section 706. As the Supreme Court has stated “[i]n a comprehensive regulatory scheme ... such omissions are significant ones.” *Mackey v. Lanier Collection Agency*, 486 U.S. 825 (1988) at 837. As a result the Commission should reclassify the transmission component of broadband Internet access service as a “telecommunications service” subject to regulation under Title II.

INTRODUCTION

The comments submitted in response to the *NPRM*¹ illustrate the simple truth in the Hans Christen Andersen fairy tale *The Emperor's New Clothes*,² namely that all of the “adults” are afraid to say that the FCC is wearing no clothes when it comes to its assertion of authority to issue rules under section 706.³ Just like the two swindlers in the fairy tale, the incumbent broadband Internet access service providers are all too happy to tell the FCC that its authority is real when in fact they know – and will happily let someone argue in court later – that there really is no authority there.⁴

There are two “children” who have pointed out that there is nothing there, and the FCC would be wise to listen. In particular, careful attention should be paid to the March 21, 2014 comments by Full Service Network⁵ and pages 62 to 90 of the July 17, 2014 legal comments by

¹ *In the Matter of Protecting and Promoting the Open Internet*, GN Docket 14-28, Notice of Proposed Rulemaking (FCC 14-61, rel. May 15, 2014) (*NPRM*).

² See http://en.wikipedia.org/wiki/The_Emperor%27s_New_Clothes (accessed August 26, 2014).

³ Section 706 of the Telecommunications Act of 1996 (47 U.S.C. 1302)(2014).

⁴ It should not go unnoticed that Verizon, the protagonist in the court case that led to the *NPRM* in this docket, filed 184 pages of comments that did not offer any argument or analysis for or against the FCC's claimed authority under section 706. See Comments of Verizon and Verizon Wireless in GN Dockets 10-127 and 14-28 (July 15, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521486628> (accessed August 26, 2014).

⁵ Full Service Network Comments in GN Docket 14-28 (March 21, 2014)(*FSN Comments*), available at <http://apps.fcc.gov/ecfs/document/view?id=7521094787> (accessed August 26, 2014).

Tech Freedom and the International Center for Law & Economics.⁶ While these comments argue for different outcomes with respect to whether the FCC should exercise authority over broadband Internet access service, they both provide cogent analysis as to why section 706 is not an independent grant of authority to the FCC.

Interestingly, neither the FCC in the *NPRM* nor any of the other comments filed in this docket to date address the specific and credible legal arguments raised by these two sets of comments. This silence illustrates not only the truth of the fairy tale, but also the observation in the *Tech Freedom and ICLC Legal Comments* that “the Commission will be *seen* to possess this power [to regulate all forms of communications under section 706], and may therefore be able to coerce ‘voluntary’ concessions from companies eager to avoid having that power brought down to bear on them.”⁷

These reply comments are being filed to highlight and supplement the *FSN Comments* and *Tech Freedom and ICLS Legal Comments*. **Collectively the legal arguments in those comments and these reply comments demonstrate in considerable detail that section 706 is not an independent grant of authority.** Because section 706 does not support the regulations proposed in the *NPRM*, the FCC must act to reclassify the telecommunications component of

⁶ Tech Freedom and International Center for Law & Economics Legal Comments in GN Dockets 14-28, 10-127, 09-191 and 07-52 (July 17, 2014)(*Tech Freedom and ICLS Legal Comments*), available at <http://apps.fcc.gov/ecfs/document/view?id=7521706235> (accessed August 26, 2014).

⁷ *Id.* at 85 (emphasis in original; bracketed text added).

broadband Internet access service as a “telecommunications service” or else abandon its efforts to impose regulations on broadband Internet access service providers.

I. UNDER *CHEVRON* STEP 1, THE PLAIN LANGUAGE, STRUCTURE AND LEGISLATIVE HISTORY OF THE TELECOMMUNICATIONS ACT DEMONSTRATE THAT SECTION 706 DOES NOT APPLY TO INFORMATION SERVICES OR GRANT RULEMAKING AUTHORITY.

There are two sections of the Telecommunications Act of 1996⁸ that are relevant to this analysis:

Section 3(b) states:

(b) **Common Terminology.** Except as otherwise provided in this Act, the terms used in this Act have the meanings provided in section 3 of the Communications Act of 1934 (47 U.S.C. 153), as amended by this section.

47 U.S.C. 153 note (2014).

Section 706 reads as follows:

(a) **In general.** 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.

(b) **Inquiry.** The Commission shall, within 30 months after February 8, 1996, and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission’s determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers

⁸ Pub. Law 104-104, 110 Stat. 56 (1996), available at <https://beta.congress.gov/104/bills/s652/BILLS-104s652enr.pdf> (viewed Sep. 9, 2014).

to infrastructure investment and by promoting competition in the telecommunications market.

(c) **Demographic information for unserved areas.** As part of the inquiry required by subsection (b), the Commission shall compile a list of geographical areas that are not served by any provider of advanced telecommunications capability (as defined by subsection (d)(1)) and to the extent that data from the Census Bureau is available, determine, for each such unserved area—

- (1) the population;
- (2) the population density; and
- (3) the average per capita income.

(d) **Definitions.** For purposes of this subsection:

(1) **Advanced telecommunications capability.** The term “advanced telecommunications capability” is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

(2) **Elementary and secondary schools.** The term “elementary and secondary schools” means elementary and secondary schools, as defined in section 7801 of title 20.

47 U.S.C. 1302 (2014).

The best place to begin any analysis of Congressional intent and any claimed ambiguity is with the text of the statute itself. This is precisely the analysis that the Commission and courts have not done for the FCC’s present interpretation that section 706 grants independent rulemaking authority to regulate broadband Internet access service.⁹

⁹ See *NPRM* at paras. 143 and 145 (stating FCC has independent authority under 706(a) and 706(b) and that broadband Internet access service is an “advanced telecommunications capability.”). See also *In the Matter of Preserving the Open Internet*, GN Docket 09-191, Report and Order (FCC 10-201, rel. Dec. 23, 2010) (*2010 Open Internet Order*) at paras. 117-123 for the Commission’s discussion of the statutory text. See further *Verizon v. F.C.C.*, 740 F. 3d 623 (D.C. Cir. 2014) (*Verizon*) at 638 – 639 and 641 (discussing language and legislative history of sections 706(a) and (b)) and *In re F.C.C. 11-161*, 735 F.3d 1015 (10th Cir. 2014) at 1053 – 1054 (agreeing that section 706(a) does not grant authority but section 706(b) does).

A. The Plain Language of Sections 3(b) and 706 Show That Congress Excluded Information Services from Section 706.

1. Section 3(b) Demonstrates That Congress Adopted a Comprehensive Scheme in the Telecommunications Act.

The Telecommunications Act of 1996 was the result of more than four years of continuous hearings and extensive debate by Congress.¹⁰ The bulk of the Telecommunications Act was devoted to amending the Communications Act of 1934 to enable the Communications Act to continue to function as the primary statute for regulating communications in the 21st Century. In section 3(a) of the Telecommunications Act Congress added 19 new definitions to section 3 of the Communications Act, including “telecommunications,” “telecommunications service” and “information service.”¹¹

The entire first title of the Telecommunications Act is devoted to amendments to Title II of the Communications Act regarding the provision of “telecommunications” to the public for a fee (“telecommunications service” provided by “telecommunications carriers”¹²). Congress refers to “telecommunications service” and “telecommunications carriers” more than 218

¹⁰ See *S. Rep. 104-23* (1995) at 10 (“Legislative History”); *H.R. Rep. 104-204 Part 1* (1995) at 55 (“Hearings”); *S. Rep. 103-367* (1994) at 13 (“Legislative History”); and *H.R. Rep. 103-559 (Part 1)* (1994) at 35 (“Hearings”) for a summary of Congressional hearings that preceded the Telecommunications Act of 1996. The committee reports are available at <https://beta.congress.gov/> You need to select “All Legislation” for the search and then type in either “S. Rept.” or “H. Rept.” followed by the report number listed (*i.e.*, to search for the report *S. Rep. 104-23* (1995) listed first above you would type “S. Rept. 104-23”).

¹¹ 47 U.S.C. 153(50), (53) and (24), respectively (2014).

¹² “Telecommunications carrier” is defined at 47 U.S.C. 153(51) (2014).

times and to “information service” only 23 times in the Telecommunications Act.¹³ All but one of the references to “information service” in the Telecommunications Act (other than the addition of the definition of the term in section 3 of the Communications Act) were made in amendments to Title II of the Communications Act, which deals with regulation of telecommunications service and telecommunications carriers. The single reference to “information service” in the Telecommunications Act that was left as a free-standing provision of law is found in section 601(d) and allows joint marketing of information service and commercial mobile service (which is also regulated under Title II of the Communications Act).¹⁴

Congress was focused on “telecommunications” when it adopted the Telecommunications Act and was deliberate in its use of terms that it took pains to define. By including section 3(b) of Telecommunications Act Congress expressed its unambiguous intent that free-standing provisions of the Telecommunications Act must be interpreted using the definitions Congress included in the Communications Act.

As a result the Commission has been explicitly instructed by Congress to apply the same definition of the terms “telecommunications” and “telecommunications service” to section 706 as it has under the Communications Act. And herein lies the Commission’s problem. As the Commission noted in the *NPRM*, “the Commission has classified broadband Internet access... as an information service...” and has to date rejected arguments that broadband Internet access

¹³ See Pub. L. 104-104, 110 Stat. 56 (1996), available at <https://beta.congress.gov/104/plaws/publ104/PLAW-104publ104.pdf> (viewed Sep. 10, 2014).

¹⁴ Section 610(d) can be found reprinted in the notes to 47 U.S.C. 152 (2014).

includes a severable “telecommunications” component or a “telecommunications service.”¹⁵ Because Congress unambiguously linked the definitions in the Communications Act and Telecommunications Act, a service that is an “information service” for purposes of the Communications Act cannot be “telecommunications” for purposes of section 706 of the Telecommunications Act.

As a result the Commission must live with the unfortunate results of its “indivisible” classification¹⁶ when considering broadband Internet access service under section 706. As the Supreme Court recently observed “[a]gencies are not free to ‘adopt... unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness.’”¹⁷ That is precisely what the FCC is attempting to do here.

2. The State Commission Limitation in Section 706(a) Shows that Congress Excluded Information Service.

In the context of the Commission’s attempt to use section 706 to impose regulations on broadband Internet access service providers, the explicit reference in section 706(a) to “each

¹⁵ See *NPRM* at para. 149 and accompanying footnote citations (listing FCC decisions classifying broadband Internet access as an “information service” that does not include stand alone “telecommunications” or “telecommunications service.”). See also *In the Matter of Framework for Broadband Internet Service*, GN Docket 10-127, Notice of Inquiry (FCC 10-114, rel. Jun. 17, 2010) (*Broadband Framework NOI*) at para. 17 (“... its components were best viewed as a ‘single integrated service that enables users to utilize Internet access service,’ with a telecommunications component that was not separable from the data processing capabilities of the service.”).

¹⁶ *Broadband Framework NOI* at para. 7 (The Commission “reclassified telephone companies’ broadband Internet service offerings as indivisible ‘information services’ subject only to potential regulation under Title I of the Communications Act...”).

¹⁷ *Utility Air Regulatory Group v. EPA et al*, 134 S.Ct. 2427 (2014) at 2446.

State commission with authority over telecommunications services” should immediately raise a red flag. The FCC has repeatedly determined that broadband Internet access services are “information services” and not “telecommunications services.”¹⁸ As noted above, Congress adopted the definitions of “information service,” “telecommunications,” and “telecommunications service” in the same legislation that included section 706. Why would Congress refer in section 706(a) to “State commissions with jurisdiction over telecommunications service” and taking measures “to promote competition in the local telecommunications market” if – as the FCC now asserts – Congress intended section 706(a) to grant authority to the FCC and State commissions to regulate “information service”? Clearly Congress would not do so, particularly in light of the Congressional policy statement adopted in the Telecommunications Act that the Internet should be “unfettered by Federal and State regulation.”¹⁹ Neither the FCC nor the courts have explained this glaring inconsistency created by the FCC’s present interpretation.²⁰

Another clear expression of Congressional intent is the terms used by Congress in section 706(a) to describe the actions the Commission and State commissions are to take to address a lack of deployment of advanced telecommunications: “price cap regulation,

¹⁸ See *supra*, footnote 15 and accompanying text.

¹⁹ See 47 U.S.C. 230(b)(2) (2014). It is also unlikely that Congress would have given State commissions jurisdiction over information services in 1996 given the fact that in 1994 the Ninth Circuit Court of Appeals had upheld an FCC order that effectively preempted State regulation of information services (then called “enhanced services”). See *People of California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*cert. den.* 514 U.S. 1050 (1995)) at 933.

²⁰ See also *Tech Freedom and ICLS Legal Comments* at 78 and footnote 262 discussing in detail how the Commission’s present interpretation runs afoul of the canon against surplusage.

regulatory forbearance, measures to promote competition, or other regulating methods” are all *regulatory* actions that the Commission and State commissions have historically taken with respect to common carrier “telecommunications services” under Title II of the Communications Act (in the case of the Commission) or state laws regulating public utilities or common carriers (in the case of State commissions). The terms strongly imply that Congress believed the entities that the Commission and State commissions would be encouraging to deploy “advanced telecommunications capability” were presently being regulated. But “information services” – then known as “enhanced services” – were not generally being regulated in 1996, and none of the provisions in the Telecommunications Act expressly provide for regulation of “information services.” How does the FCC expect to use “regulatory forbearance” with respect to services which are unregulated? “Regulatory Forbearance” is the title of section 401 of the Telecommunications Act, which added new section 10 to the Communications Act²¹ to allow forbearance in the regulation of “telecommunications carriers” and “telecommunications services” so it seems highly likely that Congress was speaking about section 10 authority when it included the phrase in section 706. Likewise, Part II of Title II of the Communications Act, which was added by section 101 of the Telecommunications Act, is labeled “Development of Competitive Markets” and contains measures Congress thought necessary to open local telecommunications markets to competition. It seems implausible that Congress would have used terms only oriented toward regulated “telecommunications services” if it intended to grant rulemaking authority over unregulated “information services.”

²¹ 47 U.S.C. 160 (2014).

To provide yet another example, Congress used the term “public interest, convenience, and necessity” twenty three times in the Telecommunications Act – once in section 706, and twenty two other times in sections that amended the Communications Act to add sections 214(e), 251, 252, 254, 257, 271, 272 and 332(c)(8),²² all of which apply to common carriers or telecommunications carriers regulated under Title II, and in several sections of Title III with respect to broadcast and spectrum licenses.²³ Not once did Congress use the phrase in connection with regulation of “information services.” The Commission must explain this discrepancy.²⁴

3. Congress Unambiguously Limited the Scope of Section 706 to “Telecommunications” and “Telecommunications Service” – Defined Terms that are Distinct from “Information Service.”

The final piece of the plain language of section 706 that the FCC fails to address is the definition of “advanced telecommunications capability” in section 706(d)(1). 47 U.S.C. 1302(d)(1). The definition defines a “high-speed, switched, broadband *telecommunications* capability that enables *users* to originate and receive high quality voice, data, graphics, and

²² 47 U.S.C. 214(e), 251, 252, 254, 257, 271, 272, and 332(c)(8), respectively (2014).

²³ See 47 U.S.C. 307(c), 309(k), and 336 (2014).

²⁴ Congress’ use of language in section 706 associated with common carrier regulation also calls into question the Court of Appeals conclusion in *Verizon* that the Commission’s use of section 706 “would violate the Communications Act were it to regulate broadband providers as common carriers.” *Verizon*, 740 F. 3d at 650. The prohibition in the definition of “telecommunications carrier” does not speak to the regulatory treatment of information service providers who are not also providers of “telecommunications services.” 47 U.S.C. 153(53) (2014). Further, as discussed in the *FSN Comments* at 10, limitations Congress adopts in one Act do not necessarily apply to other Acts.

video *telecommunications* using any technology.” (emphasis added). As noted earlier, section 3(b) of the Telecommunications Act states that “the terms used in this Act have the meanings provided in section 3 of the Communications Act of 1934...”²⁵ “Telecommunications” is defined in section 3 of the Communications Act as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. 153(50). The repeated use of the defined term makes it clear that Congress was interested in the ability of *users* to be able to transmit information of their own design and choosing without change in the form or content of that information. Of course that is precisely what the Commission currently insists users cannot do when they purchase broadband Internet access service.²⁶

Amazingly, in the course of more than 10 notices of inquiry, eight reports, a National Broadband Plan and its 2010 *Open Internet Order* relying on section 706, the FCC has never acknowledged that Congress used the defined term “telecommunications” or analyzed how it was used in the section 706(d) definition and the rest of section 706. Sections 706(a) and 706(b) both focus on the deployment “to all Americans” of “advanced telecommunications capability.” Deployment to “all Americans” is another way of saying “offered to the public.”

²⁵ 47 U.S.C. 153 note (2014).

²⁶ See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, CC Docket 02-33, Report and Order and Notice of Proposed Rulemaking (FCC 05-150, rel. Sep. 23, 2005) at para. 15 (“broadband Internet access service inextricably combines the offering of powerful computer capabilities with telecommunications, we conclude that it falls within the class of services identified in the Act as ‘information services’ ... [and] the end user therefore receives more than transparent transmission whenever he or she access the Internet.”).

“Telecommunications” offered to the public for a fee is a “telecommunications service”²⁷ subject to regulation by the FCC and State commissions under Title II of the Communications Act – precisely the two entities that are referred to in the opening sentence of section 706(a).

The FCC has simply asserted that “advanced telecommunications capability” includes broadband Internet access service,²⁸ which the FCC defines as an “information service” for regulatory purposes.²⁹ In fact, the definition of “broadband Internet access service” in the Commission’s regulations does not even mention “telecommunications” and refers to it instead as a “communications service,”³⁰ a term also not included in the definition in section 706.

The FCC has not explained how it can assert regulatory authority over a “mass market”³¹ transmission service, defined in the Commission’s regulations as a “communications service,”

²⁷ 47 U.S.C. 153(53) (2014).

²⁸ See *2010 Open Internet Order* at para. 117 and footnote 359 (“‘[A]dvanced telecommunications capability’ as defined in the statute, includes broadband Internet access.”) (bracket in original; footnote 359, omitted, references a series of similar assertions without analysis).

²⁹ See *supra*, note 26.

³⁰ See 47 C.F.R. 8.11(a) (2013) (“Broadband Internet access service is 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.”). See also *NPRM* at para. 54 and footnote 123.

³¹ *NPRM* at 54 (“mass market” means “a service marketed and sold on a standardized basis to residential customers...”). The definition Congress used for “telecommunications service” is the “offering of telecommunications for a fee directly to the public...” 47 U.S.C. 153(53)(2014). The FCC’s choice of different terminology to describe “broadband Internet access service” is nothing more than a naked attempt to avoid any overlap with the statutory definition of “telecommunications service” and illustrates well the parallel to the fairy tale.

that the Commission has determined is an “information service” not subject to the regulatory provisions applicable to “telecommunications” under the Communications Act, when section 706 applies only to “advanced telecommunications capability.”³² The *Telecommunications Act* of 1996 was focused on creating the regulatory framework to promote competition in mass market “telecommunications” and Congress decided to use the same term in section 706.

As noted *supra* in section I(A)(1), Congress included “information service” in section 601(d) of the Telecommunications Act (47 U.S.C. 152 note), which like section 706 was not incorporated into the Communications Act. Further, as discussed *infra* in section I(C)(2)(b), Congress also included “information service” in an amendment made by the Telecommunications Act that is similar in form and intent to section 706. Congress was very deliberate in its use of the term “information service” in the Telecommunications Act. These two examples from the same legislation demonstrate that the omission of the term “information service” was not an oversight in section 706.

Congress unambiguously chose not to use the term “information service” in section 706. The Supreme Court in *Mackey v. Lanier Collection Agency* addressed a comprehensive statute like the Telecommunications Act. What they said in that case applies here – namely “[i]n a comprehensive regulatory scheme ... such omissions are significant ones.”³³ Congress has spoken and the FCC and the courts must give effect to that decision, as the Supreme Court

³² See also *FSN Comments* at 7-8 (discussing the definitions and how the Commission cannot have it both ways).

³³ *Mackey v. Lanier Collection Agency*, 486 U.S. 825 (1988) at 837.

recently reiterated in *Utility Air Regulatory Group v. EPA* when they said “[a]n agency has no power to ‘tailor’ legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.”³⁴

B. The Plain Language of Section 706 Demonstrates that No Rulemaking Authority Was Granted.

1. The phrase “shall encourage” in section 706(a) does not delegate regulatory authority.

The only Congressional directive contained in section 706(a) is that the FCC and State commissions “shall encourage” the reasonable and timely deployment of advanced telecommunications capability. The word “encourage” means “to inspire; to attempt to persuade; to spur on.”³⁵ An “attempt to persuade” is not synonymous with “regulate” or “require.”³⁶ The word “encourage” modifies the command “shall” and Congress did not use the same phrase anywhere else in the Telecommunications Act, either with respect to the Commission or State Commissions.

Had Congress intended to mandate action, it would have said “shall require” or “shall ensure” rather than “shall encourage.” Congress did so in other provisions of the

³⁴ *Utility Air Regulatory Group v. EPA et al*, 134 S. Ct. 2427 (2014) at 2445.

³⁵ Merriam Webster Free Online Dictionary, available at <http://www.merriam-webster.com/dictionary/encourage> (accessed August 27, 2014).

³⁶ See also *Tech Freedom and ICLS Legal Comments* at 80-81, which outline important Federalism reasons why Congress would only “encourage” action by State commissions. Where Congress did command action by State commissions in section 252 of the Communications Act (which was added by the Telecommunications Act), Congress instructed the FCC to act in the role of the State commission if the State commission did not carry out Congress’ instruction. See 47 U.S.C. 252(e)(5) (2014). There is no such parallel safeguard in section 706.

Telecommunications Act that applied to State commissions, the Commission, and private entities – see 47 U.S.C. 214(e)(6) (State commission “shall require”), 47 U.S.C. 255(b) and (c) (private entities “shall ensure”), and 47 U.S.C. 271(h) (Commission “shall ensure”). Further, as discussed *infra* in section I(C)(2), Congress would have also included explicit rulemaking and enforcement authority.

2. In Section 706(b) Congress Directs the FCC to Conduct an Inquiry that Under FCC Regulations Cannot Result in Rules.

Turning to section 706(b), again the plain language should be striking to anyone who chooses to read it. The operative instruction to which Congress devotes two of the three sentences of section 706(b) is an instruction to conduct annually a notice of inquiry. The term “notice of inquiry” is not some term selected at random. In fact it has been defined in the Commission’s rules since at least 1986 to mean proceedings that “do not result in the adoption of rules, and ... are not required to be published in the Federal Register.” 47 C.F.R. 1.430 (2013). Congress is presumed to be knowledgeable of the Commission’s rules, and in any event the Commission is bound by them. It is beyond illogical to assert that Congress would explicitly direct the FCC to engage annually in an inquiry that by the Commission’s own rules cannot result in a rulemaking, and specifically to complete such inquiry in 180 days, and then in a final single sentence delegate broad and undefined rulemaking authority to the Commission.

Because Congress limited the FCC to a notice of inquiry in the first sentence of section 706(b), then the Commission must explain why Congress would require the FCC to have to start a whole new proceeding to take the “immediate action” referred to in the last sentence. Such a requirement makes sense if the “immediate action” is to be taken under authority provided in

other statutes, for example the Communications Act as amended by the rest of the Telecommunications Act.³⁷ Such delay and repetition makes no sense if Congress is delegating the authority to enact rules *under that same subsection* to address the problems found in the inquiry.³⁸

3. Section 706(c) was Added in 2008 and is Further Proof That Section 706(b) Grants No Regulatory Authority.

Section 706(c) was added in 2008 by the Broadband Data Improvement Act (BDIA).³⁹ Again the FCC has avoided any analysis of this amendment, which provides greater specificity regarding what information Congress expects to be reviewed as part of the annual inquiry required under section 706(b). Congress' obvious concern in the BDIA was the slow pace of deployment of advanced telecommunications capability.⁴⁰ The BDIA amended section 706 and

³⁷ It should be noted that the phrase "immediate action" is not defined, and Congress did not use the phrase anywhere else in the Telecommunications Act, despite the fact that throughout that Act Congress was instructing the Commission to take action by promulgating regulations, amending regulations, or conducting inquiries literally dozens of times.

³⁸ See also *FSN Comments* at 4 ("Given the explicit directions on rulemaking and procedure that Congress provided the Commission and State commissions in other provisions of the Telecommunications Act – both in free-standing provisions and in the numerous amendments to the Communications Act made by the Telecommunications Act – the lack of specificity is more than strange.").

³⁹ 47 U.S.C. 1302(c) (2014). The Broadband Data Improvement Act is Pub. L. 110-385, 122 Stat. 4096 (2008).

⁴⁰ See 47 U.S.C. 1301(2) ("Continued progress in the deployment and adoption of broadband technology is vital to ensuring our Nation remains competitive and continues to create jobs and growth.") and the accompanying *S. Rep. 110 – 204* (2007), available at <https://beta.congress.gov/110/crpt/srpt204/CRPT-110srpt204.pdf> (viewed Sep. 2, 2014), at 1 ("For too many Americans, robust broadband technology is either not available or too expensive.")

also created a two billion dollar grant fund for another agency to provide Federal money to States to speed broadband data gathering.⁴¹ The fact that the only amendments Congress made to section 706 were addressed to the inquiry and were silent regarding any rulemaking authority for the FCC is yet further proof that Congress did not see section 706 as a grant of rulemaking authority.

C. The Structure of the Telecommunications Act Demonstrates Unambiguously That No Rulemaking Authority Was Granted in Section 706.

1. Congress Did Not Include Section 706 in the Communications Act, Which Means the Communications Act Cannot Be Used for Regulations or Enforcement.

The *Tech Freedom and ICLS Legal Comments* summed up this point with the statement “[t]he fact that Congress chose not to put Section 706 in the Communications Act must, under the whole act rule, mean *something*.”⁴² And it does mean something very important that the FCC has conveniently ignored. It means that the FCC may not use the rulemaking or enforcement authority granted by the Communications Act to implement section 706. The generic rulemaking provisions of the Communications Act, sections 201(b) and 303(r), are both explicitly limited by Congress to prescribing rules and regulations necessary “to carry out the provisions of this Act” – meaning the Communications Act.⁴³ The same limitation applies to the

⁴¹ It is worth noting that Congress chose to entitle the section creating the grant program “Encouraging State Initiatives to Improve Broadband.” 47 U.S.C. 1306 (2014). The parallel to the use of the word “encourage” in section 706(a) is obvious.

⁴² *Tech Freedom and ICLS Legal Comments* at 73. See also *id.* at 72, footnote 256.

⁴³ See 47 U.S.C. 201(b) and 47 U.S.C. 303(r) (2014). Note that the U.S. Code refers to “this chapter” instead of “this Act.” Chapter Five of Title 47, United States Code, contains the Communications Act of 1934 as amended over the years. See “References in Text” section of

enforcement provisions.⁴⁴ Unless the Commission can identify some Congressional grant of rulemaking authority and enforcement authority in another Act of Congress that explicitly allows that Act to be used by the Commission to adopt rules and enforce any other statute, the Commission is without authority under section 706 to promulgate or enforce the rules proposed in the *NPRM*. Indeed, the Commission’s own regulations regarding forfeitures, which the Commission suggests in the *NPRM* would be its preferred enforcement tool,⁴⁵ make this point clearly. Those regulations at 47 C.F.R. 1.80 (2013) list the violations of specific Acts to which forfeitures apply and section 706 of the Telecommunications Act is not one of them.

The Commission’s confusion with respect to its ability to use authority granted in one Act of Congress to enforce another Act of Congress leads it to make assertions in the *NPRM* that are clearly not correct. For example, in paragraph 118 and footnote 248 of the *NPRM*, the Commission suggests that it could adopt the “commercially reasonable” standard it applied to data roaming agreements between private mobile service providers and be insulated from a legal challenge to its authority to adopt such a standard since that standard had been upheld in *Cellco Partnership v. F.C.C.*, 700 F.3d 534 (D.C. Cir. 2012). Nothing could be further from the

the U.S. Code notes following both 47 U.S.C. 201 and 47 U.S.C. 303. In contrast, section 706 of the Telecommunications Act of 1996 is found in Chapter 12 of Title 47, United States Code, because provisions of the Telecommunications Act that were not incorporated in the Communications Act are entirely separate provisions of law.

⁴⁴ See *FSN Comments* at 5 – 6 (examining the enforcement sections of the Communications Act).

⁴⁵ *NPRM* at para. 173 (“We also tentatively conclude that violations of the rules would subject to forfeiture penalties, as appropriate, under the Act.”). Because the FCC cannot adopt rules under the Communications Act to implement or enforce the Telecommunications Act, this tentative conclusion is clearly incorrect.

truth. That standard was adopted pursuant the Commission’s authority to regulate spectrum licenses under Title III of the Communications Act. *Cellco*, 700 F.3d at 543 (“...we think it clear that the data roaming rule falls well within the Commission’s Title III authority.”). Title III grants no authority to regulate information service providers who are not using licensed spectrum to provide broadband Internet access service. The *Cellco* court did not consider the Commission’s claim that it could adopt the commercially reasonable standard under section 706,⁴⁶ so any attempt to do so could – and mostly likely would – be subject to a facial challenge.

2. Three Other Provisions of the Telecommunications Act Demonstrate Clearly That Congress Would Have Provided Explicit Rulemaking Authority.

One other free-standing provision of the Telecommunications Act illustrates that Congress provides express authorization to issue rules under the Communications Act if that is its intent. Two other provisions that were added to the Communications Act by the Telecommunications Act provide unambiguous evidence that Congress knew the distinction between an inquiry and rulemaking and between information service and telecommunications. Given the similar structure and the fact that that both were enacted as part of the same statute as section 706, it is difficult to see how the D.C. Circuit in *Verizon* and the Tenth Circuit in *In re FCC 11-161* did not analyze those provisions or address the prior appellate court decisions striking down Commission attempts to assert rulemaking authority using legislative provisions granting authority very similar to that claimed under section 706.

⁴⁶ *Cellco*, 700 F.3d at 541 (“In deciding whether the Commission acted pursuant to delegated authority, we begin – and end – with Title III.”).

a. Section 207 of the Telecommunications Act Demonstrates How Congress Provides Express Rulemaking Authority in Direct Contrast to Section 706.

Section 207 of the Telecommunications Act is a single sentence, just like the single sentences in section 706(a) and 706(b) that the Commission now claims grant rulemaking authority. However, the contrast between the three sentences of free-standing law could not be more striking. Section 207 provides “[w]ithin 180 days after the date of enactment of this Act, the Commission *shall, pursuant to section 303 of the Communications Act of 1934, promulgate regulations* to prohibit restrictions that impair a viewer’s ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.”⁴⁷

Section 207 not only says that the FCC “shall... promulgate regulations” it also says under what authority and is very specific about what the FCC shall do. In contrast, section 706(a) says “shall encourage” and makes no reference to regulations, and section 706(b) says “shall take immediate action” and again makes no reference to regulations. And neither section 706(a) nor section 706(b) is specific about what actions the FCC should take to accomplish the broad directive. Given the detailed instructions Congress provided in virtually every other provision of the Telecommunications Act, the lack of Congressional guidance to the FCC and State commissions in section 706 is further concrete evidence that Congress did not intend section 706 as a grant of independent authority.

⁴⁷ 47 U.S.C. 303 note (“Restrictions on Over-the-Air Reception Devices”) (2014) (emphasis added).

b. Section 257 of the Communications Act, added by Section 101 of the Telecommunications Act, Provides An Example of Congressional Drafting that Grants Rulemaking Authority and Addresses Information Service, in Contrast to Section 706.

Section 101 of the Telecommunications Act established Part II of Title II of the Communications Act. Entitled “Development of Competitive Markets” Part II added sections 251 to 260 of the Communications Act. 47 U.S.C. 251 -260. Among those provisions was section 257, which was entitled “Market Entry Barriers Proceeding.” 47 U.S.C. 257. Section 257(a) directed that “the Commission shall complete a proceeding for the purpose of identifying and eliminating, *by regulations pursuant to its authority under this Act (other than this section)*, market entry barriers for entrepreneurs and other small businesses in the provision and ownership of *telecommunications services and information services...*” 47 U.S.C. 257(a) (2014) (emphasis added). Section 257(b) provides general guidance on policy that the Commission “shall seek to promote” and section 257(c) requires a review and report to Congress by the Commission every three years.

Like section 706, section 257 is specifically focused on market entry barriers. As the italicized text from section 257(a) shows, Congress was explicit in describing when rulemaking could occur and under what authority, and also included specific reference to “information services” when it intended a provision to apply to them.

The Court of Appeals for the D.C. Circuit has considered the Commission’s authority under section 257 in an earlier attempt by the Commission to regulate broadband Internet access service. In striking contrast to its decision in *Verizon*, the court in *Comcast* said “the

Commission’s attempt to dictate the operation of an otherwise unregulated service based on nothing more than its obligation to report defies any plausible notion of ‘ancillarity.’”⁴⁸

c. Section 305 of the Telecommunications Act Again Demonstrates How Congress Distinguishes Between Inquiries and Rulemaking.

Section 305 of the Telecommunications Act added section 713 to the Communications Act (47 U.S.C. 613).⁴⁹ Though significantly amended in 2010, as enacted in 1996 section 713(a) was entitled “Commission Inquiry” and directed the Commission to complete an inquiry on closed captioning of video within 180 days. Section 713(b), in contrast, directed the Commission to “prescribe such regulations as are necessary to implement this section.” Sections 713(c), (d), and (e) provided instructions to the Commission regarding deadlines, exceptions, and the definition of a key term used in the exception authority. Section 713(f) was entitled “Video Description Inquiry” and directed the Commission to examine a number of aspects of video description, including standards, a definition of covered programming, and “other technical and legal issues that the Commission deems appropriate.” Section 713(g) provided a definition of “video description” and section 713(h) prohibited private rights of

⁴⁸ *Comcast Corp. v F.C.C.*, 600 F.3d 642 (D.C. Cir. 2010) (*Comcast*) at 659 - 660. The court held that the specific rulemaking authority granted in section 257(a) was time limited and rejected the Commission’s attempt to use its ancillary authority under section 4(i) in combination with the reporting requirement in section 257(c). *Id.*

⁴⁹ Section 305 of the Telecommunications Act, 47 U.S.C. 613, should not be confused with section 305 of S. 652 as reported by the Senate Committee on Commerce, Science and Transportation in 1995, which is discussed in the *Tech Freedom and ICLS Legal Comments* on pages 81 – 83. The point made in those comments regarding the reported section 305 simply reinforces the points made in this section using enacted language.

action and gave the Commission exclusive jurisdiction over complaints arising under section 713.

Notwithstanding the fact that section 713(b) clearly provided authority to prescribe rules based on the information gained from the inquiry required under section 713(a) and that Congress provided no such similar authority to prescribe rules for video description based on the inquiry under section 713(f), the FCC nonetheless attempted to issue rules on video description under that section. In striking down the Commission's video description order the Court of Appeals for the D.C. Circuit said "[t]he difference in the language employed in these sections makes it clear that subsection (f) is not intended to provide a mandate for video description requirements... nor suggests that Congress provided the FCC with discretionary authority to adopt video description rules."⁵⁰ Eight years later Congress amended section 713 to require video description regulations and provided express rulemaking authority.⁵¹ The inclusion of such express authorization⁵² further illustrates that Congress does not grant rulemaking authority to the Commission through vague, single sentences that fail to even mention rules or regulations.

⁵⁰ *Motion Picture Association of America v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) at 802.

⁵¹ 47 U.S.C. 613 notes (2014). The amendments were made by section 202 of the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. 111-260, 124 Stat. 2751 (2010), available at <https://beta.congress.gov/111/plaws/publ260/PLAW-111publ260.pdf> (viewed Sep. 9, 2014).

⁵² See 47 U.S.C. 613(f) (2014).

D. The Legislative History Shows that the “Fail-safe” Language Was Deleted in Conference and Congress Only Viewed Section 706 as a Requirement to Collect Data.

The *FSN Comments* on pages 6 and 7 discuss in detail how the Commission and the *Verizon* court relied on legislative history that does not support their position. As noted in that discussion, Congress deleted the “fail-safe” language providing regulatory authority and preempting State commissions in conference.

Subsequent legislation also confirms that Congress did not view section 706 as a grant of authority. In fact, Congress did specifically provide in the BDIA that applications for grants shall be submitted “at such time, in such manner, and containing such information as the Secretary may require” and that the Secretary “shall by regulation” require peer review. 47 U.S.C. 1304(c) and (d). Yet Congress provided no such express authorization to issue regulations in the amendments it made to section 706.

As discussed in detail in the *FSN Comments* on pages 2 through 5, Congress provides explicit authority for regulations and enforcement in each Act. In addition, the detail with which Congress spelled out the specifics of the data collection and grant program in the BDIA⁵³ – like the detailed instructions to the FCC and the States provided in the rest of the Telecommunications Act – stand in stark contrast to the hortatory terminology and scant detail provided in section 706(a) and section 706(b).

Neither the BDIA nor its accompanying Congressional report suggest that Congress’ concern with broadband deployment could be addressed by the FCC promulgating rules under

⁵³ See 47 U.S.C. 1302(c) (unserved areas), 1303 (international comparison), and 1304 (State initiatives).

section 706. This is not surprising since at the time the BDIA was adopted the FCC was on record for 10 years – since 1998 – expressing (after detailed analysis) its view that section 706 was not an independent grant of regulatory authority.⁵⁴ Despite commentators urging to the contrary, the FCC was resolute in its earlier interpretation of the statute that section 706 was simply an instruction from Congress to promote broadband deployment when making other regulatory decisions.⁵⁵ Indeed, this interpretation was relied upon by the Court of Appeals for the D.C. Circuit at least twice before the BDIA was enacted to uphold other Commission orders.⁵⁶ Contrary to its 2010 interpretation, in the 1998 decision the FCC looked carefully at the statutory structure and Congressional intent.

II. UNDER *CHEVRON* STEP 2 THE COMMISSION’S INTERPRETATION IS UNREASONABLE.

A. The Fact that Congress Did not Grant The Commission Authority to Grant Rights of Way or Pole Attachment For Information Service Providers Demonstrates the Commission’s Interpretation of Section 706 Is Not Reasonable Under the Statute.

Even assuming, *arguendo*, that section 706 is ambiguous, the Commission’s interpretation that section 706 delegates independent authority to regulate information

⁵⁴ See *In the Matter of Deployment of Deployment of Facilities Offering Advanced Telecommunications Capability*, CC Docket 98-147, Memorandum Opinion and Order, and NPRM (FCC 98-188, rel. Aug. 7, 1998) at paras. 69 – 77.

⁵⁵ *Id.* at paras. 76 and 77 (“We find that this conclusion that section 706 does not provide the statutory authority to forbear from sections 251(c) and 271 [of the Communications Act] will better promote Congress’ policy objectives in the Act. For the foregoing reasons, we conclude that, in light of the statutory language, the framework of the 96 Act, its legislative history, and Congress’ policy objectives, the most logical statutory interpretation is that section 706 does not constitute an independent grant of authority.”) (bracketed text added).

⁵⁶ See *U.S. Telecom. Ass’n. v. F.C.C.*, 359 F. 3d 554 (D.C. Cir. 2004) at 579 -584 and *EarthLink, Inc. v. F.C.C.*, 462 F. 3d 1 (D.C. Cir. 2006) at 7-8.

services is not a reasonable interpretation under *Chevron* because the Commission's interpretation deprives the Commission of authority to provide the most essential legal element needed to enable deployment of "advanced telecommunications capability." Deployment of wired "advanced telecommunications capability" to "all Americans" as directed under section 706 necessarily requires access to rights of way and poles, ducts and conduits, and wireless deployment requires access to tower sites. Section 706 makes no mention of rights of way, pole attachment or wireless tower siting, a fatal oversight if Congress did in fact intend section 706 to be a "fail safe" grant of authority to enable broadband deployment by information service providers. Nothing in the language Congress used – "price cap regulation, regulatory forbearance, measures to promote competition in the local telecommunications market, or other regulating methods" in section 706(a) or "removing barriers to infrastructure investment and by promoting competition in the telecommunications market" in section 706(b) remotely suggest that Congress intended the Commission to be able to grant access to public rights of way or provide access to private property like utility poles, ducts and conduits.

Congress provided ample authority to the Commission to provide access to rights of way, poles, ducts and conduits, and to enable deployment of wireless towers in the Communications Act. However, that authority is limited to entities providing services regulated under Title II of the Communications Act. The Commission's "information service" classification of broadband Internet access service deprives the Commission of authority under the Communications Act to grant access to rights of way under section 214,⁵⁷ pole attachments

⁵⁷ 47 U.S.C. 214 (2014).

under section 224,⁵⁸ to preempt State laws under section 253⁵⁹ or regulate State and local zoning of tower facilities under section 332(c)(7).⁶⁰ The information service classification also places broadband Internet access service outside the ambit of explicit universal service support under section 254 of the Communications Act and the Congressional direction to the President in section 704 of the Telecommunications Act to allow access to Federal property to expedite the deployment of “telecommunications services.” As a result, the Commission’s interpretation frustrates the explicit intent of section 706, which is to “accelerate deployment” of advanced telecommunications capability.

That the omission of any reference to rights of way, poles, ducts or conduits in section 706 was not accidental is especially apparent when one considers that in sections 703 and 704 of the Telecommunications Act Congress addressed precisely this issue in considerable detail. Section 703 amended section 224 of the Communications Act to provide access to utility poles, ducts and conduits, but only added authority for the provision of “telecommunications services” and explicitly did not include “information services.”⁶¹ Likewise, in section 704(a), Congress amended section 332(c) of the Communications Act to limit state and local authority over the placement of “personal wireless service facilities” and defined “personal wireless

⁵⁸ 47 U.S.C. 224 (2014).

⁵⁹ 47 U.S.C. 253 (2014).

⁶⁰ 47 U.S.C. 332(c)(7) (2014).

⁶¹ *See* 47 U.S.C. 224 (2014).

services” to include only common carrier services.⁶² In section 704(c) of the Telecommunications Act Congress addressed, in detail, access to rights of way and poles, ducts or conduits on Federal government property for the provision of “telecommunications services” but not “information services.”⁶³ Given that nowhere in the Telecommunications Act did Congress extend the Commission’s authority to grant access to essential rights of way and property to “information services” or “information service providers,” it would be unreasonable to conclude that Congress intended to silently grant such essential authority to the Commission in section 706.

B. Congress Would Not Adopt a Regulatory “Trigger” That Gives the FCC an Incentive to Skew the Outcome of the Inquiry.

Another contradiction raised by the FCC’s interpretation that section 706(b) delegates regulatory authority is that the statutory “trigger” for action in section 706(b) – a determination by the agency regarding the status of broadband deployment – provides a very strong incentive for the Commission to bias the outcome of the mandated inquiry depending on whatever regulatory or deregulatory goals the Commission might want to achieve. If the FCC wants to regulate, then they must find that deployment is not occurring in a reasonable and timely fashion, and vice versa if they don’t want to regulate. It is completely out of keeping with the rest of the Telecommunications Act, not to mention more recent Congressional legislation on this same topic, to assert that Congress has chosen to delegate such complete discretion to the

⁶² See 47 U.S.C. 332(c)(7) (2014).

⁶³ See 47 U.S.C. 332 (2014) notes.

agency. Further, such discretion works against Congress receiving an accurate assessment of what is clearly a core concern of section 706, namely the status of the reasonable and timely deployment of advanced telecommunications capability to all Americans. This concern was so important that Congress adopted the BDIA⁶⁴ in 2008 to amend section 706(b) to require annual inquiries and to add section 706(c) to further refine the inquiry.

C. The Questions Asked by the Commission in the *Tenth Broadband Progress Notice of Inquiry* Demonstrate the Unlimited Nature of the Claimed Delegation of Authority.

As the *Tech Freedom and ICLS Legal Comments* cogently observe on page 70, “the FCC’s interpretation of Section 706, approved by the court, would allow the FCC not merely to regulate broadband providers, but *any* form of communications.” The comments continue “while the FCC might begin by using section 706 to support net neutrality or Universal Service regulations, there is nothing in its interpretation of Section 706 nor in the D.C. Circuit’s decision... that would prevent the FCC from regulating any other ‘communications’ company in America.” The *Tech Freedom and ICLS Legal Comments* are correct because, as discussed in the *FSN Comments* at 10, “the *Verizon* court erred when it asserted that section 2 of the Communications Act acts as a limit on the Commission’s claimed authority under section 706 of the Telecommunications Act.” The *FSN Comments* continue to explain that section 2 of the Communications Act *by its own terms* applies only to the Communications Act; therefore it says nothing about the limits on Commission authority established by Congress in section 706.

⁶⁴ Public Law 110-385, 122 Stat. 4096 (2008), codified generally at 47 U.S.C. 1301 *et seq.* Section 103(a) of the Broadband Data Improvement Act amended section 706. See note entitled “Codifications” under 47 U.S.C. 1303 (2014).

The FCC itself has recently confirmed the truth of both comments by illustrating just how broad it views the boundaries of section 706 to be. In the *10th Broadband Progress Notice of Inquiry*⁶⁵ the Commission observed that they have “previously identified numerous barriers to infrastructure investment”⁶⁶ and said “we seek comment on the following: (1) costs and delays in building out networks; (2) broadband service quality; (3) lack of affordable broadband Internet access services; (4) lack of trust in broadband and Internet content and services, including concerns about inadequate privacy protections; and (5) lack of access to devices and other broadband capable equipment.”⁶⁷ Combined with the flexibility the Commission claims for itself in the *NPRM* for crafting an enforcement regime that appears to have no foundation in any Act of Congress,⁶⁸ it is evident from these questions and the *NPRM* that the Commission believes section 706 is essentially a grant of authority to build “an alternative Communications

⁶⁵ *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, GN Docket 14-126 (FCC 14-113, rel. Aug. 5, 2014) (*10th Broadband Progress NOI*).

⁶⁶ *Id.* at para. 49.

⁶⁷ *Id.* at para. 50.

⁶⁸ See *NPRM* at paras. 161 – 176 (which provides no cites to any statutory authority and simply asserts in paragraph 173 “[w]e also tentatively conclude that violations of these rules would be subject to forfeiture penalties, as appropriate, under the Act.”). It is not a given that the authority in the Communications Act could be applied – section 706 does not authorize the FCC to impose a “license, permit, certificate or other authorization” on broadband Internet access service providers, which is a prerequisite for forfeiture under the plain language of section 503 (47 U.S.C. 503).

Act.”⁶⁹ That is precisely the grant of power that the Congress deliberately precluded by not including section 706 as part of the Communications Act.⁷⁰

The *Tech Freedom and ICLS Legal Comments* on pages 67-69 also look at the plain language and discuss in detail how the FCC’s 1998 interpretation of section 706(a) is the only plausible one under the statute for both section 706(a) and 706(b). As they noted on page 66, the court in *Verizon* “seemingly skipped any analysis of whether Section 706(a) was ambiguous...” In the case of the 10th Circuit, the analysis in *In re FCC 11-161* consisted almost entirely of reprinting paragraphs from the FCC order at issue – which also failed to discuss the relevant statutory language.⁷¹ It is incumbent upon the FCC in this proceeding to conduct such an analysis, and to do so using the proper legislative sources and tools of statutory construction.⁷²

⁶⁹ *Tech Freedom and ICLS Comments* at 89 (“... the FCC’s interpretation of Section 706 really is: a power to do anything that is not specifically, clearly prohibited by the Communications Act. It is in this sense that the FCC would most truly be building an alternative Communications Act”).

⁷⁰ Had Congress included section 706 in the Communications Act, then the Commission could have attempted to use its ancillary authority under section (4)(i), 47 U.S.C. 154(i). However, as the court in *Comcast* found with respect to the Commission’s attempt to use section 230(b) and section 1 of the Communications Act as justification for rulemaking under section 4(i), the Commission cannot use its ancillary authority to “pursue a stand-alone policy objective, rather than to support its exercise of a specifically delegated power.” *Comcast*, 600 F.3d at 659. As discussed in these reply comments, section 706 does not contain any “specifically delegated power.”

⁷¹ See *In re FCC 11-61* at 1049 – 1054.

⁷² See *FSN Comments* at 6 – 7 (discussing the legislative history and the fact that both the FCC and the courts have improperly relied on report language describing legislative text that was deleted in conference).

III. CONGRESS CLEARLY INTENDED BROADBAND INTERNET ACCESS SERVICE AND ADVANCED TELECOMMUNICATIONS CAPABILITY TO BE REGULATED UNDER TITLE II OF THE COMMUNICATIONS ACT.

The Commission asks in the *NPRM* if it should reclassify broadband Internet access service.⁷³ Congress was well aware in 1996 of the fact that digital technology would lead to new means of delivering information to consumers over a variety of platforms that had until then been regulated separately. In fact, this digital convergence was one of the driving factors behind the Telecommunications Act. Two quotes from the House and Senate reports discussing the 1994 bills, H.R. 3636 and S. 1822, that were the predecessors to the Telecommunications Act illustrate this clearly:

“g. Universal service in an age of digital technology

“Any new plan to reform the funding system for universal service will have to take into consideration the effect of the proliferation of digital technologies and the creation of the so-called “information superhighway” on the definition of universal service. Digital technologies allow information to be sent in the language of computers via various conduits (some more efficient than others), which the information superhighway refers to the creation of a seamless network of networks that will develop from the impending and unavoidable convergence of telecommunications, broadcast, cable, information services, and other communications technology. The information superhighway will serve as a platform that will be able to deliver this digitized information to schools, libraries, health care facilities, businesses, and homes throughout the United States...”

H.R. Rep. 103-560 (1994) at 35-36.

⁷³ *NPRM* at paras 148 – 155.

“The National information infrastructure (NII), a term used to describe the future system of networks, computers, and data bases, and accompanying technological advances, are expected to revolutionize the way citizens communicate with and serve the American public. Indeed, telecommunications services will likely become the main source of information for a large percentage of Americans. With the advent of digital compression and the development of new and emerging technologies, telecommunications facilities are now capable of transmitting and carrying more information than ever before. As the amount of telecommunications technology expands, it will be essential to ensure that the public has access to these emerging technologies.”

S. Rep. 103-367 (1994) at 15.

The 104th Congress was likewise focused on digital convergence, as the quote below from the Senate Report on S. 652, the bill that became the Telecommunications Act, illustrates:

“Put another way, the Committee intends the definition of universal service to ensure that the conduit, whether it is a twisted pair wire, coaxial cable, fiber optic cable, wireless, or satellite system, has sufficient capacity and technological capability to enable consumers to use whatever consumer goods that they have purchased, such as a telephone, personal computer, video player, or television, to interconnect to services that are available over the telecommunications network.”

S. Rep. 104-23 (1995) at 27.

These quotes demonstrate that Congress was focused on ensuring that all Americans had access to the new services that Congress expected technology and digital convergence would make available over the Nation’s telecommunications networks. And Congress in the Telecommunications Act not only defined universal service as “an evolving level of telecommunications service that the Commission shall establish periodically, taking into account advances in telecommunications and information technologies and services,” they also limited the new grants of authority to the Commission to provide access to rights of way and poles, ducts and conduits, order interconnection, and pre-empt State and local authority to “telecommunications services.”

As discussed *supra* in section I(A)(3), the Commission has defined “broadband Internet access service” in its regulations 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...” 47 C.F.R. 8.11(a) (2013). Other than the fact that the FCC has chosen to use different words, there is no substantive distinction between the Commission’s description and the Congressionally defined term “telecommunications service,” which is a service that provides “the transmission, between or among points specified by the user, of information of the user’s choosing” that is offered “for a fee directly to the public.” 47 U.S.C. 153(50) and 153(53), respectively (2014).

That the two definitions are essentially identical is evidenced by the Commission’s own observation in the *2010 Broadband Progress NOI* that “the Commission nevertheless allowed [broadband Internet access service] providers, at their discretion, to offer the broadband transmission component of their Internet service as a separate telecommunications service. Exercising that flexibility, providers – including more than 840 incumbent local telephone companies – currently offer broadband transmission as a telecommunications service expressly separate from their Internet information service.”⁷⁴ But at the same time the Commission maintains that “broadband Internet access service” is an “information service” that is

⁷⁴ *2010 Broadband Progress NOI* at para. 21 (bracketed text added).

“indivisible”⁷⁵ when offered to the consumer and therefore exempt from the detailed regulatory scheme enacted by Congress in the Telecommunications Act of 1996.

Congress was clearly aware of “information services” and the Internet when they adopted the Telecommunications Act. In the Telecommunications Act Congress expressly protected “interactive computer service” providers and users from civil liability. 47 U.S.C. 230(c) (2014). Further, Congress even defined “information content provider” and “access software provider.” 47 U.S.C. 230(f) (2014). Congress explicitly protected the existing rights of “information service providers” to exchange access and information access under tariffs, Commission orders, and court orders in effect when the Telecommunications Act was adopted. 47 U.S.C. 251(g) (2014). Congress also required that “information service providers” include a specific introductory message if the provider wanted their charge to be included on a telephone bill. 47 U.S.C. 228(c)(9) (2014). And Congress was very explicit with respect to how information service provided by Bell Operating Companies was to be treated. See 47 U.S.C. 271 to 274 (2014) (detailing special provisions for Bell Operating Companies).

But Congress did not include a definition of “information service provider” or “broadband Internet access service” and did not grant the Commission any authority to provide the essential elements needed to deploy facilities or promote competition among providers of such services. As the Supreme Court has observed, “[i]n a comprehensive regulatory scheme ...

⁷⁵ See *supra*, footnotes 15 and 16 for Commission decisions classifying broadband Internet access as an “information service” that is “indivisible” when offered to users.

such omissions are significant ones.”⁷⁶ The courts cannot continue to condone the Commission’s blatant efforts to “tailor” isolated provisions of the Telecommunications Act to create an “alternative” Communications Act.⁷⁷

Congress enacted the Telecommunications Act against the backdrop of the Commission’s *Computer Inquiries* and Judge Greene’s court orders regarding the Bell Operating Companies provision of “information services.” The Commission’s basic/enhanced regime had been in place for 16 years when the Telecommunications Act was enacted and the choices Congress made in the Telecommunications Act show that Congress clearly endorsed the *Computer Inquiries* regime. In fact, the Commission adopted its *Frame Relay Order*⁷⁸ right in the middle of the Congressional deliberations on the Telecommunications Act. The *Frame Relay Order* reaffirmed that all facilities based providers of information services must offer the transmission component of an enhanced service on a common carrier basis and that the contamination rule only applied to non-facilities based enhanced service providers.⁷⁹ A non-facilities based enhanced service provider does not have its own transmission facilities, and therefore does not need access to rights of way, poles, ducts or conduits or interconnection with another provider’s facilities. A non-facilities based provider obtains those crucial inputs

⁷⁶ *Mackey v. Lanier Collection Agency*, 486 U.S. 825 (1988) at 837.

⁷⁷ See *Tech Freedom and ICLS Legal Comments* at 89 (“...the FCC would most truly be building an alternative Communications Act.”).

⁷⁸ See *In the Matter of Independent Data Communications Manufacturers Association*, Petition for Declaratory Ruling, D.A. 95-2190, 10 F.C.C.R. 13717 (1995).

⁷⁹ *Id.* at paras 44, 45, and 59.

needed to offer its information service to the public by purchasing transmission services from a facilities based provider. As a result Congress in the Telecommunications Act did not make any provision for “information service providers” to be given access to rights of way, poles, ducts or conduits, or granted interconnection rights. Congress provided those rights instead to providers of “telecommunications services” that are subject to regulation as common carriers under Title II of the Communications Act. Importantly, Congress left unchanged the tariffing requirements of section 203 that the Commission had used to enact the basic/enhanced regime,⁸⁰ and explicitly endorsed that regime by including language in the definition of “telecommunications carrier” that said such carriers shall be treated as common carriers “only to the extent it is engaged in the providing telecommunications services.”⁸¹

The Supreme Court and the DC Circuit Court of Appeals have both observed that the Telecommunications Act clearly embraced the Commission’s *Computer Inquiries* regime.⁸² It is only the Commission’s misplaced refusal to treat the transmission component of information services separately for regulatory purposes that has created the present situation that the Commission is attempting to address through its unsupportable interpretation of section 706. As illustrated daily by the 840 local phone companies currently providing broadband Internet access services to the public over “telecommunications services,”⁸³ there are no

⁸⁰ *Id.* at 13 and 28.

⁸¹ 47 U.S.C. 153(53) (2014).

⁸² See *National Cable & Telecommunications Assoc. v Brand X Internet Services*, 545 U.S. 967 (2005) at 976 and *Verizon v. FCC*, 740 F. 3d 623 (DC Cir. 2014) at 630.

⁸³ 2010 *Broadband Progress NOI* at para. 21.

insurmountable legal, technical, or policy problems with classifying the transmission component of broadband Internet access service and other information services as a “telecommunications service” when such component is used to offer “information services” to the public for a fee. Congress provided express authority in section 10 of the Communications Act to enable the Commission to limit its reclassification to facilities based providers of that transmission component.⁸⁴

CONCLUSION

The plain language of the Telecommunications Act demonstrates repeatedly that Congress did not intend section 706 to be an independent grant of regulatory or enforcement authority to the Commission. Further, that plain language also demonstrates that Congress did not intend section 706 to grant authority for the Commission to regulate “information services.” Section 706 is a clear statement of Congressional policy, and that policy is focused, like the rest of the Telecommunications Act, on ensuring the deployment of competitive telecommunications services to all Americans so that they can continue to communicate with each other and access information services and video content in the 21st century. The

⁸⁴ 47 U.S.C. 160 (2014). This explicit authority would allow the Commission to address the concern raised by the Supreme Court in *Brand X*, 545 U.S. at 996 – 997 (“In sum, if the Act fails unambiguously to classify non-facilities-based information-service providers that use telecommunications inputs to provide an information service as “offer[ors]” of “telecommunications,” then it also fails unambiguously to classify facilities-based information-service providers as telecommunications-service offerors; the relevant definitions do not distinguish facilities-based and non-facilities-based carriers. That silence suggests, instead, that the Commission has the discretion to fill the consequent statutory gap.”). What the Supreme Court failed to do in *Brand X* is analyze how the Commission’s “indivisible” classification conflicts with the rest of the statutory scheme Congress enacted in the Telecommunications Act.

Commission's present definition of "broadband Internet access service" illustrates clearly that transmission of the user's data is a core function of that service; it is "telecommunications" under the Congressional definition, and the Commission should reclassify that transmission component as a "telecommunications service" subject to Title II of the Communications Act.

Respectfully submitted,

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