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Regulating the Most Powerful Network Ever

by

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Introduction

At multiple recent events, FCC Chairman Tom Wheeler has emphatically described the Internet as "the most powerful network in the history of mankind."[1] He did so in the context of defending the FCC's myriad regulatory efforts in the broadband space – from redefining "broadband" in the Section 706 Report, to the pending Open Internet order, and the planned pre-emption of state municipal broadband regulations. Speaking about the Open Internet rules, Chairman Wheeler has explained that he "will modernize Title II, tailoring it for the 21st century,"[2] by "taking the legal construct that was once used for phone companies and paring it back."[3]

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[1] Remarks of FCC Chairman Tom Wheeler, Silicon Flatirons Center (Feb. 9, 2015), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0209/DOC-331943A1.pdf; *see also* of same, *available at* https://www.youtube.com/watch?v=vHsHkKpxVkQ (in which Chairman Wheeler was more emphatic than in his prepared remarks); Brian Fung, *FCC chairman warns: The GOP's net neutrality bill could jeopardize broadband's 'vast future'*, WASHINGTON POST (Jan. 29, 2015), *available at* http://www.washingtonpost.com/blogs/the-switch/wp/2015/01/29/fcc-chairman-warns-that-republican-bill-could-jeopardize-broadbands-vast-future/.

[2] Tom Wheeler, *FCC Chairman Tom Wheeler: This Is How We Will Ensure Net Neutrality*, WIRED (Feb. 4, 2015), *available at* http://www.wired.com/2015/02/fcc-chairman-wheeler-net-neutrality/.

[3] PBS Newshour: FCC proposes treating all Internet traffic equally (PBS Television broadcast, Feb. 4, 2015), *available at* http://www.pbs.org/newshour/bb/fcc-proposes-treating-all-internet-traffic-equally/.

With the Commission apparently set upon its regulatory course, attention is turning to whether these regulations will stand up in court. In this *Perspectives*, I lay out some of the judicial challenges the Commission's efforts to regulate the Internet will face, focusing on challenges to regulations under Section 706 and under Title II. To my mind, the legal pitfalls I discuss are serious ones that may well lead to another judicial reversal of the FCC's efforts to adopt net neutrality regulations. And, separate and apart from the ultimate success or failure of these claims, they make clear the rocky road ahead for the Commission – and the uncertainty Chairman Wheeler's path imposes as the Commission "embarks on this multiyear voyage of discovery."[4]

The central question in any challenge is going to be whether the FCC has legal authority to regulate broadband Internet access services – be it in whole or part, under Section 706 or Title II. The FCC is likely to point to *Brand-X*,[5] arguing that the Supreme Court made clear there that the Commission has broad discretion under *Chevron* in how it classifies broadband; and to *Fox I*, in which the Court affirmed agencies' broad discretion to change prior interpretations of the statutes they administer.[6] But while these cases do afford substantial discretion, it is not without limit. Indeed, the Commission's "triple bank shot" theory for justifying regulation under section 706 is just the sort of "Möbius-strip reasoning" that Justice Scalia's *Brand-X* dissent warns "mocks the principle that the statute constrains the agency in any meaningful way." And, more recently Justice Scalia, writing for the Court in *Utility Air Regulatory Group*, reminds us that "agencies are not free to adopt unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness."[7] Yet this is just what Chairman Wheeler plans to do – not just reclassifying broadband, but "modernizing" and "tailoring" Title II in the process.

It is hard to square the application of Title II – even if edited and modernized by the Chairman's forbearing pen – to the Internet, or even to just broadband Internet access services. This is particularly hard to justify following the 1996 Act, which was enacted "to promote competition and reduce regulation,"[8] and which asserts that "It is the policy of the United States … to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[9] But rather than following the 1996 Act's deregulatory path, the Chairman has assured us that under his plan "there will be ongoing rules in perpetuity."[10]

Litigation over the Chairman's proposal will focus on a number of specific arguments, such as those considered below. But the FCC should lose on this general argument alone: the Internet indeed is, as Chairman Wheeler says, the most powerful network in the history of humankind –

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[4] *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) (*UARG*).
[5] National cable & Telecommunications Assn. v. Brand-X Internet Services, 545 U.S. 967 (2005) (*Brand-X*).
[6] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (*Fox I*)
[7] *UARG* at 2446. (quoting Judge Kavanaugh, "Allowing agencies to exercise that kind of statutory re-writing authority could significantly enhance the Executive Branch's power at the expense of Congress's and thereby alter the relative balance of powers in the administrative process. I would not go down that road.")
[8] Pub. L. 104-104 (Feb. 8, 1996)
[9] 47 USC 230.
[10] PBS Newshour, *supra* note 3.

and we expect Congress to speak clearly if it wishes to assign an agency to regulate things of such vast economic and political significance.[11] The contortions of "triple bank shots" and "modernizing" Title II and "tailoring it to the 21st century" demonstrate the illegitimacy of the Chairman's chosen path. Even if forbearance allows the Commission to step back parts of Title II, the need to "rewrite clear provisions of the statute should have alerted [the FCC] that it had taken a wrong interpretive turn."[12] This is just another example of Justice Scalia's recent lament: "Too many important decisions of the Federal Government [that] are made nowadays by unelected agency officials exercising broad lawmaking authority, rather than by the people's representatives in Congress."[13]

The rest of this *Perspectives* considers in more specific detail the Commission's claims of authority under Section 706 and Title II.

A few notes at the outset. First, I will necessarily address these challenges holistically. Key portions of the FCC's regulations have yet to be released; more important, all these efforts are intertwined. Second, a number of likely challenges are not considered here, including procedural challenges (e.g., whether the proposed Open Internet rules are a logical outgrowth of, or otherwise were sufficiently noticed by, the May 2014 NPRM); preemption challenges (i.e., whether the FCC can preempt state broadband regulations under *Nixon*); the legal basis for the Commission's regulation of CDNs and interconnection agreements, and generally of those to whom the services are not being provided "for a fee"; the classification of mobile data services under Title II; as well as constitutional arguments (takings and First Amendment) – among other possible challenges. The Commission's many attempts to regulate broadband will face a truly staggering number of legal challenges. And third, speculating on legal outcomes is a risky business. I expect that the FCC faces likely, and substantial, losses as these regulations move to and through the courts – but it is entirely possible that the FCC could prevail on any or all of these claims. Of course, this litigation uncertainty nevertheless gives lie to Chairman's Wheeler's assertion that certainty is the great virtue of the proposed rules.[14]

The Section 706 Arguments

The natural starting place is Section 706. Since the FCC's initial classification of cable modem services, and subsequent classification of DSL, under Title I, Section 706 has been the front line in the FCC's efforts to regulate Internet access. The FCC's 2010 re-interpretation of Section 706 as an independent grant of authority is a monumentally important jurisdictional claim that runs through all of the FCC's current efforts. And it is already before the courts, with US Cellular's *cert* petition in its challenge to the USF/ICC order currently pending before the Supreme Court.

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[11] Paraphrasing Justice Scalia in *UARG*.
[12] *UARG* at 2446.
[13] E.P.A. v. EME Homer City Generation, L.P., 134 S.Ct 1584, 1610 (2014) (Justice Scalia dissenting).
[14] *See, e.g.*, C-SPAN Communicators: Communicators with Gigi Sohn (C-SPAN, Feb. 6, 2015), *available at* http://www.c-span.org/video/?324180-1/communicators-gigi-sohn ("Peter Slen: What's the advantage to a Comcast, an AT&T, a Verizon in your view, if this proposal goes through? Gigi Sohn: Certainty.")

Jurisdiction under Section 706

The first question is whether Section 706 grants the Commission affirmative authority to adopt regulations pertaining to the Internet. This is primarily a question of *Chevron* deference: the language of Section706 does not speak directly to the Internet, but the FCC has adopted a construction of the section that brings the Internet under its ambit. The question is whether this is a permissible reading of the statute. In January and May of last year, the DC Circuit and 10th Circuit, respectively, found that this is a permissible construction.

At the time of these cases both courts had sound basis for their decisions. The Supreme Court's recent *Chevron* jurisprudence has been as deferential as ever to agency constructions of their ambiguous statutes. Indeed, the FCC has been at the forefront of the cases establishing the low bar for deference. For instance, in *Fox I*, the Court held that agencies are largely free to change their prior constructions of an ambiguous statute, even where the new construction directly contradicts the prior one.[15] And in *City of Arlington* the Court held that agencies receive the same deference over jurisdictional questions as over substantive questions.[16]

Neither of these opinions was unanimous, however, with different coalitions of Justices dissenting in each.[17] And, while they provide a basis for the DC and 10th Circuit's decisions relating to Section 706, the Court's latest relevant case – *Utility Air Regulatory Group* (*UARG*), decided just one month after the 10th Circuit's ICC/USF decision – suggests the Commission is facing a gusty wind of change.

In *UARG*, the Court rejected an otherwise permissible construction of one statutory provision that was only feasible when taken in conjunction with a separate, problematic, construction of another statutory provision. This case will be discussed in more detail below. For the purposes of Section 706, what is important is the Court's strong reaffirmation of its holding in *Brown & Williamson.*[18] The Court reminds us that it "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[19] It also reminds us that it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[20]

This language speaks clearly as a limitation on the use of Section 706 as an affirmative grant of authority to regulate the Internet – more clearly than the use of general principles of *Chevron* deference to support such a use. A decision to regulate the Internet is, without question, one of "vast economic and political significance." In the Chairman's own words, after all, it is "*The*. Most. Powerful. Network in the history of mankind." It is "America's most important platform for economic growth, innovation, competition, [and] free expression … [and] has been, and remains to date, the preeminent 21st century engine for innovation and the economic and social

[15] *Fox I*.
[16] *City of Arlington v. FCC*, 133 S.Ct. 1863 (2013).
[17] Justice Scalia wrote for the majority in both opinions. Justices Stevens, Ginsburg, Breyer, and Souter dissented in *Fox I*; Chief Justice Roberts and Justices Kennedy and Alito dissented in *City of Arlington*.
[18] *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120 (2000).
[19] *Id*. at 133.
[20] *UARG* at 2441.

benefits that follow."[21] Congress has never given the FCC, or any agency, such power over something of such "vast economic and political significance" – and, to the extent that one can claim that the Commission's authority over telephone networks bootstraps such authority, such a basis is not Congress speaking clearly. To the contrary, Section 706 is more naturally read as being deregulatory; it is part of a statute with an affirmative deregulatory goal; and, to the extent the statute does state a policy with respect to the Internet, that policy is to preserve an Internet "unfettered by Federal or State regulation."[22]

The FCC's "triple bank shot" theory gives lie to the absurdity of its jurisdictional claim. While perhaps a permissible construction in a world of loose deference, it is the very sort of "Möbius-strip reasoning" that Justice Scalia warns in *Brand-X* "mocks the principle that the statute constrains the agency in any meaningful way." The statute requires deregulation, and the agency responds that deregulating requires more regulation. Up, suddenly, is down; the floor is on the ceiling; and words have no meaning. Again, as Justice Scalia says, "This is a wonderful illustration of how an experienced agency can (with some assistance from credulous courts) turn statutory constraints into bureaucratic discretions," and proves Justice Scalia's concern that "Too many important decisions of the Federal Government are made nowadays by unelected agency officials exercising broad lawmaking authority, rather than by the people's representatives in Congress."

Substance of Rules under Section 706

Although most attention has been paid to the FCC's use of Section 706 as an affirmative grant of regulatory authority, any application of that authority is also subject to challenge. Here, too, the Commission faces likely trouble.

The Commission's Open Internet rules, for instance, will surely be challenged as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (more simply referred to as "arbitrary and capricious"). The basic test the courts use is laid out in *State Farm*, which directs the courts to consider whether, in making its decision, the agency relied on improper factors, failed to consider factors required by its statute, adopted rules contrary to the supporting facts, or otherwise adopted a decision so implausible that it cannot be ascribed to mere difference in views or agency expertise.[23]

While we don't yet know the details of the FCC's Open Internet rules, there is substantial reason to believe that they will fail this test. We can see this, for instance, in the announced ban on paid prioritization. There is substantial economic and technical literature that makes clear both that paid prioritization can be beneficial to consumers and otherwise support to goals of Section 706, and, conversely, b) that banning paid prioritization can be harmful to consumers and detrimental to the goals of Section 706. It is hard to see how an absolute ban on paid prioritization can be anything other than arbitrary and capricious. Indeed, discovery could well demonstrate the extent

[21] NPRM, *In the matter of Protecting and Promoting the Open Internet* (May 15, 2015), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-61A1.pdf.
[22] 47 USC 230.
[23] *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

to which such a decision is based on political concerns – the ideological beliefs of FCC officials or support of the President's efforts to establish his legacy[24] – concerns that are clearly "improper factors."

Application of Section 706

We can see more clearly the challenges that the Commission is likely to face by looking at the recent Section 706 Report.[25] This report, in which the Commission changed its definition of "broadband Internet" from 4Mbps/1Mbps (down/up) to 25Mbps/3Mbps, will likely be the basis for various regulatory efforts that the Commission plans to undertake.[26] Such efforts already include, for instance, the Commission's ICC/USF order (which is based on the extension of Section 706 as a grant of regulatory authority) and planned preemption of state regulation of municipal broadband (the need for which will be based on allegedly insufficient deployment of broadband Internet access under the 706 Report's definition).

The 706 Report has a number of glaring problems, which will poison any decisions made based upon it. For instance, in adopting its 25Mbps/3Mbps broadband definition, the Commission considered, and chose between, only two data points: 10 Mbps and 25 Mbps (both downstream). As explained by the Commission, "We have data for 10 Mbps downstream and 25 Mbps downstream but nothing between those speeds."[27] This recalls the joke about the economist searching for his keys under the streetlight – but, sadly, this is not a joke. A lack of available data does not justify making what is an exceptionally aggressive determination based upon sparsely available facts.

More problematic is the 706 Report's failure to consider prices – or anything other than speed. Consider, the Report explains that it "*must* look at a variety of factors that affect access to broadband" (emphasis added), "includ[ing] an assessment of a variety of factors indicative of broadband availability, such as price"[28] – and, in fact, the Report says that "For purposes of evaluating broadband availability, we examine not only physical deployment and adoption, as presented above, but also quality and price."[29] Yet, despite these assertions that the Report both *must* and *does* consider price, the Commission is "unable to provide any rigorous analysis regarding price"[30] so instead "measure[s] advanced telecommunications capability in terms of speed only."[31] This is, by definition, arbitrary and capricious: the FCC finds that it *must* consider a factor, but then makes a decision that expressly does *not* consider that factor.

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[24] Gautham Nagesh & Brody Mullins, *Net Neutrality: How White House Thwarted FCC Chief*, WALL ST. JOURNAL (Feb. 4, 2015), *available at* http://www.wsj.com/articles/how-white-house-thwarted-fcc-chief-on-internet-rules-1423097522.
[25] 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerated Deployment, GN Dkt. No 14-126 (Jan 29, 2015) (hereafter *706 Report*)
[26] *See id*, paras. 153–163.
[27] *Id*. para 48.
[28] *Id*. para 65.
[29] *Id*. para 100.
[30] *Id*. para 100.
[31] *Id*. para 25.

But there is an even deeper problem with the Commission's 706 Report: its focus on "high-quality" services at the exclusion of considering the "availability" and "deployment" of those services. The problem can be stated intuitively: because the Commission considers only two different speed tiers and does not consider prices, it implicitly expresses a preference for a world in which, for example, 40% of rural Americans have access to 25 Mbps Internet service for $80/mo over a world in which 80% of rural Americans actually purchase 10 Mbps Internet service at $40/mo. Most, I would posit, would find the latter a better world – and, for the purposes of the statute, one in which high-quality broadband services were available and deployed to more Americans. But whether that is the case or not, the fundamental problem is that the FCC does not even consider it as an option. This is particularly troubling given that the statute is clear that its focus is on the deployment of high-quality service to "all Americans," not on the deployment of highest-quality services to those willing or able to pay for it.

This, despite the FCC's own data suggesting the importance of and variation in prices. The 706 Report notes multiple times that price is an important factor cited by consumers in their decisions whether to adopt broadband. Making 25 Mbps broadband available at a high price does nothing to promote uptake of that service; it may well be far better to promote the availability of lower-speed, much lower-cost, broadband. Indeed, the International Bureau's International Broadband Data Report (IBDR),[32] adopted on the same day as the 706 Report, contains important relevant data – which the Commission did not consider in its 706 Report. The IBDR data shows, for instance, that the United States has among the lowest priced broadband availability when measured in terms of cost per gigabyte.[33] And compared to the EU27+4, the US has significantly better high-speed rural coverage: 44.6% vs. 13.2% in 2012. These numbers are likely related: consumers' price sensitivity suggests that promoting low-cost, moderate-speed broadband promotes adoption that, in turn promotes deployment of higher-speed services. Troublingly, the FCC did not consider any of these factors – it did, however, cherry-pick data from the IBDR that buttress its 706 Report conclusions.[34]

The Title II Arguments

While past and currently pending challenges have focused on the Commission's authority under Section 706, the Chairman's expected reclassification of broadband Internet access services as telecommunications under Title II will raise a slew of additional challenges. The first question is whether the Commission, having previously determined that these services do not fall under Title II, can *change* that classification. The second question is whether the FCC has the authority to subject these services to Title II regulation. And the third question considers the substance of the specific regulations that the Chairman's plan would impose.

Reclassification

The most familiar question relating to Title II is whether the FCC, having previously classified Internet access as a Title I "information service" can now reclassify it as a Title II "telecommunications service." Proponents of Chairman Wheeler's plan have made clear their

[32] Fourth International Broadband Data Report, GN Dkt. No 14-126 (Jan 29, 2015).
[33] *See id.*, tables 4o, 4p.
[34] *706 Report*, paras. 8, 130-132.

confidence that the courts will uphold such reclassification. They point to *Fox I*, in which the Court held that an agency's prior construction of its statute generally does not create obstacles to a changed construction of that statute so long the changed construction is otherwise permissible. And they point to *Brand-X*, in which all nine justices seemed amenable to classifying Internet access as a telecommunication service.

This is not an unreasonable understanding of the law – but it is also not complete, and the outcome is not as certain as its proponents suggest. While agencies' discretion to change between otherwise-permissible constructions of the law is broad, it is not unbounded. As explained in *Fox I*, for instance, reliance interests may create a heightened bar to a changed interpretation.[35] The meaning of this limitation has not been developed by the courts, but there is a sound argument that an industry that has invested hundreds of billions of dollars in private capital based on the prior classification has an established reliance interest. Similarly, changing the classification raises serious constitutional due process and takings concerns.

Fox I also explains that an agency changing its evaluation of facts may justify greater scrutiny of the new policy.[36] In the case of reclassification, the Commission will need to explain why its prior determination regarding incorporation of features such as DNS service does not preclude classification as a telecommunications service. The may be difficult given that ISPs today have become far *more* involved in managing the traffic flowing to and from users' computers – including, for instance, filtering harmful traffic. As a result of these (overwhelmingly pro-consumer) services, users have less ability to control what information is sent from or received by points of their specification – the basic requirement for a service to be a "telecommunications service."

The Commission will also have to address the criticism that its existing policy has been overwhelmingly successful, and the changed policy is not in response to any manifest harms. The Internet economy has thrived under the Title I model, especially in the United States. Indeed, it is well documented that investment in the US has substantially outpaced that in Europe and the rest of the world. In response to capital flight from Europe to the US, European leaders are consistently calling for a more deregulatory approach to the Internet – including a growing skepticism towards the sort of rules that Chairman Wheeler is proposing here. Had there been examples of clear problems under the Commission's Title I approach to the Internet, it would be much easier to meet *Fox I*'s requirement to justify its changed assessment of the facts – instead, given the overwhelming success of its prior approach the Commission is likely to face at least some resistance in these efforts.

Neither of these arguments is dispositive – and, importantly, the contours of the relevant legal standards have not been meaningfully developed through litigation. While it is not unreasonable

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[35] *Fox I*, at 515 (the agency may need to "provide a more detailed justification than what would suffice for a new policy created on a blank slate … when its prior policy has engendered serious reliance interests that must be taken into account.").

[36] *Id.* (the agency may need to "provide a more detailed justification than what would suffice for a new policy created on a blank slate … when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy. … In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.").

to think that the Court will uphold the Commission's changed classification of broadband Internet access from an "information service" to a "telecommunications service," it also is not as foregone a conclusion as Open Internet advocates assert.

Application of Title II to Broadband Internet Access

Separate from whether the Commission can *change* its prior classification of broadband Internet access services is whether classifying such services under Title II is appropriate at all. Proponents of the Chairman's proposal take for granted that such classification is appropriate. This stems largely from the apparent support that all nine Justices expressed for such a classification in *Brand-X*. That confidence is misplaced. Whether it is appropriate to classify broadband Internet access as a telecommunications service was not a question at issue in *Brand-X*, such that the Court did not inquire deeply into, let alone decide, the matter. Even if it had, the Internet today – both in terms of how it is accessed and its importance as a social, economic, and political platform – is different today than it was a decade ago. And, perhaps most important, the framing of the question, as presented by the Chairman, is different today than it was previously.

As with Section 706 and reclassification, the Commission will receive the benefit of strong deference. But deference is not unlimited. *Chevron*'s basic inquiry is into Congressional intent: did Congress intend for the Commission to exert the authority that it is claiming? Statutory ambiguity, such as exists in the Communications Act's definitions, is an important condition for an agency to claim deference – lacking such ambiguity, the intent of Congress is generally clear, and "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[37] But ambiguity is only the start of the matter – ambiguous terms alone do not render Congressional intent unclear; nor does it give the agency carte blanche in resolving the ambiguity. As explained by the Court in *UARG*:

> [R]easonable statutory interpretation must account for both "the specific context in which . . . language is used" and "the broader context of the statute as a whole." A statutory "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." Thus, an agency interpretation that is "inconsisten[t] with the design and structure of the statute as a whole" does not merit deference.[38]

UARG frames the basic challenge to classification of broadband Internet access services as telecommunications services. The Chairman's plan involves not just classifying these services under Title II, but "modernizing Title II, tailoring it for the 21st century," by "taking the legal construct used for phone companies and paring it back to modernize it." In effect, the Chairman means to create a new legal regime for the regulation of broadband Internet access. Indeed, it almost necessarily *must* create a new legal regime, because applying some portions of Title II does not make sense in the context of the modern Internet. The Court is likely to view efforts to

[37] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
[38] *UARG*, at 2442.

rewrite the statute in this way with substantial skepticism, because the need to "modernize" the statute suggests that the Chairman's proposal is incompatible with the Congressionally-designed statutory structure.

In *UARG*, the EPA's decision to regulate greenhouse emissions for motor vehicles triggered statutory permitting requirements for stationary sources of greenhouse gasses as well. The statute requires permitting of any stationary source emitting more than 250- (or in some cases 100) tons of air pollutants per year. Classifying greenhouse gasses as air pollutants substantially increases the number of stationary sources subject to this permitting requirement – a burden that neither the EPA nor those subject to its regulations could reasonably be expected to meet. In order to avoid this absurd result, the EPA adopted a "tailoring" rule, under which it would only enforce the permitting requirement for stationary sources emitting 100,000 tons of greenhouse gasses per year.

The Court found fault with, and rejected, this approach on several grounds. First, as explained by Justice Scalia, entirely separate from the need to "tailor" the statute the fact that the EPA's adopted approach "would place plainly excessive demands on limited governmental resources is alone a good reason for rejecting it."[39] We do not expect that Congress intended to place implausible burdens on an agency (or, for that matter, those it regulates), especially if alternative readings of the statute are possible. Second, the Court finds that the "EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[40] Both of these concerns reflect the basic premise that the Court "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"

There is no question that applying the full force of Title II – a statute designed to regulate an industry that effectively consisted of a single firm – to an industry that today comprises literally thousands of firms[41] would impose excessive burdens on both the FCC (and state regulators) and the industry. Title II, for instance, *requires* the Commission to examine every detail of a telecommunications carrier's business, including all transactions that relate to "the furnishing of equipment, supplies, research, services, finances, credit, or personnel." Title II gives the Commission authority over, and requires in the first instance that it exercise authority over, every aspect of a regulated carrier's business. This may have made sense in the era of a telephone monopoly, especially one using relatively simple technology deployed in a static manner to provide a small number of services to homogeneous customers. In makes absolutely no sense in the context of today's market – a market in which thousands of firms offer service using myriad technologies via networks that are effectively rebuilt every 18-24 months to support a vast array of consumer uses under many different business models. The burden of applying Title II would clearly be excessive and would clearly amount to an "enormous and transformative expansion" of the Commission's authority.

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[39] *UARG* at 2444

[40] *Id*.

[41] For instance, WISPA (which opposes Chairman Wheeler's plan) has nearly 800 Wireless ISP members, the American Cable Association (which also opposes Chairman Wheeler's plan) represents over 800 small and medium cable-based ISPs, and there are at least another 700 LECs offering broadband Internet access.

That the Chairman's proposal would be an "enormous and transformative expansion" in the Commission's authority can be seen in other ways, as well. Despite his strenuous efforts to maintain the contrary, the Chairman is proposing to regulate what he has called on several recent occasions "the most powerful network in the history of mankind."[42] And, as the first sentences of last May's NPRM tell us, "The Internet is America's most important platform for economic growth, innovation, competition, [and] free expression … [It] has been, and remains to date, the preeminent 21st century engine for innovation and the economic and social benefits that follow."[43] The telephone network, which Title II was designed to regulate, is an important social and economic tool – but it would be a far stretch indeed to call it "the most important network in the history of mankind," or to call it "America's most important platform for economic growth, innovation, competition, [and] free expression." The Communications Act authorized the Commission to regulate the former, not the latter.

The proposal is also contrary to the regulatory structure and approach that Congress has laid out for the Internet. While the Communications Act, as amended by the 1996 Telecom Act, is almost silent with respect to the Internet, it is not entirely silent. Section 230 asserts very plainly that "It is the policy of the United States … to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*."[44] This is in line with the overall structure and purpose of the Telecom Act, which was enacted "to promote competition and *reduce* regulation."[45] The FCC's approach to the Internet has followed this deregulatory path – and over the past 20 years Congress has not seen a need to change either the statute or the Commission's path. Indeed, one of the most important things that Congress has done legislatively with respect to the Internet is to consistently prohibit federal or state taxation of Internet access. Yet the Chairman has expressly acknowledged that his proposal would permit collection of Universal Service fees on broadband Internet access. While the mechanism is different from taxation, the effect is the same – an incremental increase in costs imposed by the state – and that effect is contrary to nearly two decades of clear Congressional policy.

This brings us to the EPA's "tailoring rule" and its relation to the Commission's forbearance authority. In *UARG* the Court found that the EPA's efforts to avoid the excessive burdens resulting from its statutory construction by "tailoring" the permitting requirements were problematic for two reasons. First, the tailoring effort was itself problematic; and second, the need to tailor the rules demonstrated that its interpretation was contrary to the statutory scheme designed by Congress. In discussing these concerns, the Court explained:

> An agency has no power to "tailor" legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. … Were we to recognize the authority claimed by EPA in the Tailoring Rule, we would deal a severe blow to the Constitution's separation of powers. … The power of executing the laws necessarily includes both authority and responsibility to resolve some questions

[42] *See supra* note 1.
[43] NPRM, *In the matter of Protecting and Promoting the Open Internet* (May 15, 2015), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-61A1.pdf.
[44] 47 USC 230 (emphasis added).
[45] Pub. L. 104-104 (Feb. 8, 1996) (emphasis added).

> left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice. …
>
> We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate. … Instead, the need to rewrite clear provisions of the statute should have alerted EPA that it had taken a wrong interpretive turn. … Because the Tailoring Rule cannot save EPA's interpretation of the triggers, that interpretation was impermissible under *Chevron*.

The Chairman's proposed "modernization" of Title II is clearly an effort to "revise clear statutory terms that turn out not to work in practice" and to "rewrite clear statutory terms to suit its own sense of how the statute should operate." This suggests the Commission has "taken a wrong interpretive turn," and that its "interpretation [is] impermissible under *Chevron*."

The obvious response to these concerns is that, unlike the EPA, the Communications Act gives the FCC express power to forbear from enforcing unnecessary provisions of the Act (including portions of Title II).[46] As such, the Commission is Congressionally-authorized to forbear from applying those portions of Title II that would cause the statute "not to work out in practice." The Chairman's proposed approach would therefore be in line with Congressional design, Congress having expressly granted forbearance authority. This is a legitimate and important difference between the EPA's and FCC's tailoring efforts. But the Commission's forbearance authority is not unlimited, and reliance on forbearance to save the proposed rules is arguably subject to same infirmities as the EPA's approach.

There are at least two reasons why forbearance does not save the FCC's tailoring approach. First, and simplest, it is likely the case that forbearance is not permanent – should the Commission find at a later date that the conditions giving rise to forbearance have changed (including simply that it is, in the (current or future) Commission's view, in the public interest to discontinue its forbearance) any provision of Title II could come back into force. Thus the argument that forbearance pares back the most onerous provisions of Title II, thereby easing concerns about the burdens Title II regulation imposes and the expansion in scope of the FCC's power, is illusory. These problems are only avoided by the grace of the Commission's own beneficence. Forbearance, in other words, is no cure to the previous concerns expressed by the Court in *UARG* – concerns which Justice Scalia explained provided sufficient basis on their own (*i.e.*, independent of the EPA's tailoring efforts) to reject the EPA's rules.

Second, and more nuanced: the FCC's forbearance power is limited, such that forbearance can only be granted under certain circumstances. This means that forbearance may not be sufficient to address concerns of excessive burden and statutory structure. Section 10 requires that the Commission forbear from enforcing provisions of the Communications Act subject to three conjunctive conditions: enforcement is not necessary to ensure just and reasonable prices and practices, enforcement is not necessary for the protection of consumers, and forbearing from

[46] Section 10 of the Communications Act of 1934, as amended, codified at 47 USC 160.

enforcement is in the public interest.[47] None of these factors considers whether forbearance is necessary to make the Commission's preferred construction of the statute work in practice; and the fact that forbearance may be necessary in order to make the statute work is not on its own sufficient to trigger forbearance. As a result, it is entirely possible that the Commission's classification of broadband Internet access under Title II could yield burdensome, or otherwise problematic, results sufficient to render the classification impermissible.

Chairman Wheeler's proposed "modernization" of Title II is therefore based on authority just as weak as that upon which the EPA based its "tailoring rule." The FCC does have authority to forbear from enforcing portions of the Communications Act – and the EPA, like every agency, has some discretion to determine how it exercises its authority. But the FCC's power is not discretionary: Section 10 is written in the imperative requiring that "the Commission shall forbear" if certain conditions are met. The statutory design therefore serves to *constrain* the Commission's discretion over what provisions of the Communications Act it enforces. It is not a mechanism to allow the Commission to "rewrite clear statutory terms to suit its own sense of how the statute should operate."[48] It allows the Commission to trim the fat of the statute, not to excise tumors threatening to consume it. As such, like any other agency, the FCC cannot "adopt . . . unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness."

The Chairman's approach is made even more egregious because it is not compelled. The DC Circuit made clear – at a time prior to the Court's decision in *UARG* – that Section 706 presented a reasonable means to the Chairman's desired ends. Had the Chairman opted to follow the path set forth by the DC Circuit, we would not find ourselves in the present situation, and the Commission would be on much firmer legal grounds. Rather, the Chairman has elected to pursue the more aggressive path. The dangers of this discretionary path are substantial. As explained in the EPA context, "Since, as we hold above, the statute does not compel EPA's interpretation, it would be patently unreasonable – not to say outrageous – for EPA to insist on seizing expansive power that it admits the statute is not designed to grant." The Chairman's chosen path is similarly unreasonable – and equally outrageous.

This is particularly the case given how little sense the Chairman's explanation for his sudden embrace of Title II makes. He has explained that at some point (roughly contemporaneous with the President urging him to take a Title II-based approach), he "became concerned that the relatively untested [Section 706-based] 'commercially reasonable' standard might be subsequently interpreted to mean what was reasonable for the ISP's commercial arrangements." In his words, that "was a possibility that was unacceptable," and this led him to embrace Title II. This explanation, however, simply make no sense. First, the DC Circuit had made clear that Section 706, at least in its view, provides the Commission with the necessary authority. And second, the concern that the "commercially reasonable" standard proposed in the May NPRM would be interpreted to protecting ISP's commercial interests could be trivially addressed with a

[47] *See* 47 USC 160(a). The statement of the first requirement is a paraphrase.
[48] *UARG* at 2446 ("We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.").

single sentence, along the lines of "Determinations of 'commercial reasonableness' shall give substantial weight to the effects of those agreements upon consumers, and no agreement shall be deemed commercially reasonable that is not also substantially in the consumer interest."

Substance of rules under Title II

Finally, just as with rules adopted under Section 706, there is reason to expect that any rules adopted under Title II will be rejected as arbitrary and capricious. As explained previously, an outright ban on paid prioritization, in particular, runs afoul of the overwhelming weight of evidence in the economic and technical literature. This literature consistently shows that paid prioritization can be either beneficial or harmful to consumers – the specific effects in any case are fact-specific. Any ban on paid prioritization necessarily forecloses potential consumer benefits in exchange for uncertain gains.

Counterintuitively, the case for such a ban may be even weaker under Title II than under Section 706. This is because Section 202 prohibits only "unjust or unreasonable discrimination in charges." Indeed, Chairman Wheeler has testified before Congress that Title II does not prohibit paid prioritization.[49] The statutory language – "unjust or unreasonable" – must be given meaning, and the overwhelming weight of the academic literature makes clear that paid prioritization can in many cases be both just *and* reasonable. Given the weight of the relevant literature showing that such treatment can be pro-consumer – especially without any serious evidence of actual consumer harm resulting from prioritization, paid or otherwise – it is not hard to expect the courts to reject the Commission's substantive rules both as lacking and contrary to factual support.

Conclusion

The FCC has embarked on one of the most aggressive expansions of authority of any agency in our nation's history. Clothing its efforts in the statutory ambiguity of the Communications Act's dated and circular definitions and taking comfort in dicta from *Brand-X* does not change this fact. As Chairman Wheeler has made very clear, the Internet is different in kind – in scale, scope, and nature – from what the Commission was granted authority to regulate. It really is "the most powerful network in the history of mankind," central to our modern economy. And, in giving the Commission authority in 1934 to regulate the telephone monopoly, and again in 1996 to unwind and eventually deregulate that monopoly, Congress did not give the Commission authority to regulate the Internet.

In this *Perspectives*, I have sought to map out parts of the road that lies ahead. It is, of course, entirely possible that the arguments I highlight will fail in practice – but, I believe, they also have a good chance of carrying the day. This means that we can say, with great certainty, that the road ahead is uncertain for the Commission and the industry. And, most tragically, it will be rocky for consumers – consumers who have already been subjected to years of discord as net neutrality

[49] House Energy and Commerce Committee Hearing on FCC Oversight (May 20, 2014), *recording available at* http://www.c-span.org/video/?319457-1/fcc-chair-testifies-net-neutrality ("As you know, Title II, there is nothing in Title II that prohibits paid prioritization. As a matter of fact, we have all kinds of paid prioritization...").

proponents have sought sweeping new power for the FCC to regulate the Internet. It is all the more a pity given the many opportunities the Commission has had (and, indeed, still has) to avoid the whole mess. But instead: It almost certainly looks like "hi ho hi ho it's off to court we go!"

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