

ORAL ARGUMENT SCHEDULED FOR DECEMBER 4, 2015

No. 15-1063 (and consolidated cases)

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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UNITED STATES TELECOM ASSOCIATION, *et al.*,  
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,  
Respondents.

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ON PETITION FOR REVIEW FROM THE  
FEDERAL COMMUNICATIONS COMMISSION

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***AMICUS CURIAE* BRIEF OF INTERNATIONAL CENTER FOR LAW &  
ECONOMICS AND ADMINISTRATIVE LAW SCHOLARS IN SUPPORT OF  
PETITIONERS UNITED STATES TELECOM ASSOCIATION, NATIONAL  
CABLE & TELECOMMUNICATIONS ASSOCIATION, CTI –THE WIRE-  
LESS ASSOCIATION®, AMERICAN CABLE ASSOCIATION, WIRELESS  
INTERNET SERVICE PROVIDERS ASSOCIATION, AT&T INC., CENTU-  
RYLINK, ALAMO BROADBAND INC., AND DANIEL BERNINGER.**

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), *amici curiae* International Center for Law and Economics and Administrative Law Scholars (“ICLE”) certify that:

**(A) Parties and Amici**

All parties, intervenors, and amici appearing before the FCC and this court are listed in the Joint Brief for United States Telecom Association *et al.*

**(B) Rulings Under Review**

The ruling under review is the FCC’s Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015).

**(C) Related Cases**

This case has been consolidated with Case Nos. 15-1078, 15-1086, 15-1090, 15-1091, 15-1092, 15-1095, 15-1099, 15-1117, 15-1128, 15-1151, and 15-1164. There are no other related cases.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rules 26.1 and 29(b), ICLE hereby states that:

1. ICLE is a nonprofit corporation incorporated under the laws of Oregon.

ICLE is a nonprofit, non-partisan global research and policy center.

2. ICLE has no parent corporation and there is no publicly held corporation that owns 10% or more of the stock of ICLE.

Respectfully submitted,

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## GLOSSARY

<b>1996 Act</b>	Telecommunications Act of 1996
<b>1934 Act</b>	Communications Act of 1934
<b>2010 Order</b>	FCC's Report and Order, Preserving the Open Internet, 25 FCC Rcd 17905 (2010)
<b>Act/Acts</b>	The Communications Act of 1934 as updated by the Telecommunications Act of 1996
<b><i>Brown &amp; Williamson</i></b>	<i>Brown &amp; Williamson v. Food &amp; Drug Admin.</i> , 529 U.S. 120 (2000)
<b>Commission/FCC</b>	Federal Communications Commission
<b><i>MCI</i></b>	<i>MCI Telecomms. Corp. v. American Telephone &amp; Telegraph Co.</i> , 512 U. S. 218 (1994)
<b>NPRM</b>	Notice of Proposed Rulemaking, Protecting and Promoting the Open Internet, 29 FCC Rcd 5561 (2014)
<b>Order/2015 Order</b>	FCC's Report and Order on Remand, Declaratory Ruling, and Order, Protecting and Promoting the Open Internet, 30 FCC Rcd 5601 (2015)
<b><i>UARG</i></b>	<i>Utility Air Regulatory Group v. Env'tl. Prot. Agency</i> , 134 S. Ct. 2427 (2014)



***Verizon***

*Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014)

## **STATUTES AND REGULATIONS**

All applicable statutes and regulations are listed in the Joint Brief for United States Telecom Association *et al.*

## STATEMENT OF INTEREST

ICLE is a nonprofit, non-partisan global research and policy center. ICLE works with more than fifty affiliated scholars and research centers around the world to promote the use of evidence-based methodologies in developing sensible, economically grounded policies that will enable businesses and innovation to flourish. ICLE is joined as *amici curiae* by ten scholars, who are professors of administrative law, communications law and/or economics at leading U.S. universities or scholars of administrative law, communications law and/or economics at leading U.S. research centers: Justin (Gus) Hurwitz and Geoffrey A. Manne (primary authors), and Richard A. Epstein, James Huffman, Thomas A. Lambert, Daniel Lyons, Randolph J. May, Jeremy A. Rabkin, Ronald D. Rotunda, and Ilya Somin. Their titles and affiliations are listed in Appendix A. *Amici's* interests in this case are set forth in ICLE's motion for leave to file.

On August 4, 2015, the court granted ICLE's motion for leave to file this *amici curiae* brief in support of petitioners United States Telecom Association, National Cable & Telecommunications Association, CTIA–The Wireless Association®, AT&T Inc., American Cable Association, CenturyLink, Wireless Internet Service Providers Association, Alamo Broadband Inc., and Daniel

Berninger, but not in support of petitioner Full Service Network in case No. 15-1151.

#### **STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS**

Under Federal Rule of Appellate Procedure 29(c), ICLE states that no party's counsel authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel contributed money that was intended to fund preparing or submitting the brief.

## SUMMARY OF ARGUMENT

The Order represents a substantial and unprecedented expansion of the FCC's claimed authority. The Commission asserts authority to implement agency-defined policy by any means over the entire broadband communications infrastructure of the United States—in the words of FCC Chairman Wheeler, “[t]he most powerful network ever known to Man”<sup>1</sup>—under the auspices of FCC regulation; and it assumes the ability to regulate even beyond this already incredibly broad scope on an “ancillary” or “secondary” basis so long as such regulation has at least a Rube-Goldberg-like connection to broadband deployment. In the Order, the Commission claims authority that it has consistently disclaimed; it ignores this court's holding in *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (“*Verizon*”); and it bends to the point of breaking the statutory structure and purpose of the Communications and Telecommunications Acts. For all of these reasons, the Order should be rejected as exceeding the Commission's statutory authority and as presenting and addressing major questions—questions of “deep economic and political significance,” *see, e.g., King v.*

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<sup>1</sup> *See* Remarks of FCC Chairman Tom Wheeler, Silicon Flatirons Center (Feb. 9, 2015) at 5, *available at* <https://www.fcc.gov/document/chairman-wheeler-silicon-flatirons-center-boulder-colorado>.

*Burwell*, No. 14-114, slip op. at 8 (2015)—that can only be addressed by Congress. See Randolph May, *Chevron Decision's Domain May Be Shrinking*, THE HILL (Jul. 7, 2015), <http://thehill.com/blogs/pundits-blog/the-judiciary/247015-chevron-decisions-domain-may-be-shrinking>.

The Commission's authority is based in the 1934 Act, as modified by the 1996 Act. The general purpose of the 1934 Act was to establish and maintain a pervasively-regulated federal telephone monopoly built upon a relatively simple and static technology. This was the *status quo* for most of the 20th century, during which time the FCC had authority to regulate every aspect of the telecommunications industry—down to investment decisions, pricing, business plans, and even employment decisions. As technology progressed, however, competition found its way into various parts of the industry, upsetting the regulated monopoly structure. This ultimately led to passage of the 1996 Act, the general purpose of which was to deregulate the telecommunications industry—that is, to get the FCC out of the business of pervasive regulation and to rely, instead, on competition.<sup>2</sup> This objective has proven effective: Over

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<sup>2</sup> See, e.g., FCC Chairman William Kennard, *A New Federal Communications Commission for the 21st Century*, I-A (1999), available at <http://transition.fcc.gov/Reports/fcc21.html>. (“With the passage of the Telecommunications

the past two decades, competition has driven hundreds of billions of dollars of private investment, the telecommunications capabilities available to all Americans have expanded dramatically, and competition—while still developing—has increased substantially. The range of technologies available to every American has exceeded expectations, at costs and in a timeframe previously unimagined, and at a pace that leads the world.

The Order changes this *status quo*. It uses tools from the 1934 Act, designed for a now-vanished monopoly, to regulate *several* incredibly dynamic competitive industries. And it perversely twists the *deregulatory* authority conferred by the 1996 Act—which was intended by Congress to be the basis for an ongoing deregulatory approach to burgeoning technologies, like the Internet—to be the basis for extensive new regulation.<sup>3</sup>

Today, many Americans are continuously engaged in online interactions. The Internet is the locus of significant political and educational activity;

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Act of 1996, Congress recognized that competition should be the organizing principle of our communications law and policy and should replace micromanagement and monopoly regulation.”).

<sup>3</sup> *See id.* (“[A]s competition develops across what had been distinct industries, we should level... regulation down to the least burdensome level necessary to protect the public interest. Our guiding principle should be to presume that new entrants and competitors should not be subjected to legacy regulation.”)

it is an indispensable source of basic and emergency news and information; it is a central hub for social interaction and organization; it is where people go to conduct business and find work; it is how many Americans engage with their communities and leaders; and it has generated hundreds of billions of dollars of annual economic activity.

Regulation of the Internet, in other words, presents questions of “vast ‘economic and political significance,’” *Utility Air Regulatory Group v. Env’tl. Prot. Agency*, 134 S. Ct. 2427, 2444 (2014) (“*UARG*”), as substantial as any ever considered by a federal agency.

While the Commission disclaims authority to regulate significant swaths of the Internet ecosystem, the Order is nonetheless premised on interpretations of the 1934 Act that *do* give it authority over that ecosystem. This court should greet the Commission’s claimed authority with substantial skepticism. *See UARG*, 134 S. Ct. at 2444 (“When an agency claims to discover in a long-ex-tant statute an unheralded power to regulate ‘a significant portion of the American economy,’ we typically greet its announcement with a *measure of skepticism.*”) (emphasis added) (quoting *Brown & Williamson v. Food & Drug Admin.*, 529 U.S. 120, 159 (2000) (“*Brown & Williamson*”). This is especially true given the statutory structure and purpose of the 1996 Act and the Commission’s historical, hands-off approach to the Internet. *See King v. Burwell*,



slip op. at 15 (courts “must turn to the broader structure of the Act to determine the meaning” of language within a statute). Although this court addressed and rejected a challenge to the 2010 Order on these grounds, the Supreme Court has in the intervening months decided two cases—*UARG* and *King v. Burwell*—that revitalize the challenge, especially given the 2015 Order’s more aggressive posture.

The FCC claims that new rules were needed to prevent blocking, throttling, and discrimination on the Internet. But the poor fit between the Commission’s preferred regulatory regime and the statutory authority upon which it rests is manifest. This disconnect is made clear by the numerous effects of the regulations that the Commission must describe as “ancillary” or “secondary,” and the numerous statutory provisions that must be forborne from or otherwise ignored in order to make the Order feasible.

In short, the Order rests upon a confusing patchwork of individual clauses from scattered sections of the Act, sewn together without regard to the context, structure, purpose, or limitations of the Act, in order to “find” a statutory basis for the Commission’s preferred approach to regulating the Internet. As such, it fails to “bear[] in mind the ‘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.” *UARG*, 134 S. Ct. at 2441 (quoting *Brown & Williamson*, 529 U.S. at 133).

Accordingly, the court should vacate the Order.

## ARGUMENT

### I. THE COMMISSION’S PIECEMEAL REGULATORY APPROACH ATTEMPTS TO MANUFACTURE AUTHORITY THAT CONGRESS HAS NOT AUTHORIZED

Respondents frame this case as being about deference to the Commission’s interpretation of the Acts and the reasonableness of that interpretation. It is better understood, however, as about the pervasive authority that the Commission has unlawfully assumed for itself.

#### A. The Commission’s Claimed Authority over the Internet Exceeds What Is Authorized by Its Statutes

The first words of the Order identifies its immense regulatory scope: “The open Internet drives the American economy and serves, every day, as a critical tool for America’s citizens to conduct commerce, communicate, educate, entertain, and engage in the world around them.” Order ¶ 1.

It is implausible that the *explicit* statement that the Internet should remain “unfettered by Federal... regulation” also somehow contemplates an *implicit* delegation to the FCC of the authority to regulate the Internet under the Acts’ most onerous common-carrier provisions in Title II.

The Order attempts to overcome this limitation by stitching together various discrete statutory provisions—taken out of context from their broader statutory structure, ignoring statutory limitations on their use, and disclaiming their problematic effects—into a regulatory hodge-podge that it calls clear authority. But the lengths to which the Commission must go in order to demonstrate its statutory authority in fact better demonstrate its *lack* of authority.

If it were true, as the Commission claims, that these provisions are “complementary,” Order ¶ 274, one must wonder why Congress wrote so redundant a statute. On the other hand, were its authority as clear as it claims, the Commission would not need to rely on so scattered a selection of seemingly inapt statutory provisions, nor to disclaim so many others.

The scope of authority claimed by the Commission is staggering. Despite repeated creative efforts to minimize the reach of its claimed authority, the Order would give the Commission authority over last-mile connections to consumers, the interconnection points that make up the core of the Internet, and

the connections from there to the edge—that is, *authority over the entire Internet*. The Commission repeatedly employs rhetoric in the Order to make it seem as though it asserts only modest authority over last-mile connections. But the Order actually makes clear the Commission’s position that it *does* have authority over interconnection, *see, e.g.*, Order ¶ 187, n.725, and that it *does* subject edge connections to common carrier rules, *see e.g.*, Order ¶¶ 308, 338.

**B. The Commission’s Lack of Statutory Authority Obviates Any Need for *Chevron* Analysis**

Despite longstanding judicial attention paid to ambiguities in certain provisions of the Acts, and the concomitant permissibility of the FCC’s construction of those provisions in implementing its orders, evaluation of the present Order is emphatically *not* a *Chevron* question. There is *no* interpretation of the Acts that authorizes the Order because, as made clear by recent Supreme Court precedent, it is unambiguous that the Acts cannot and do not give the Commission such unbounded power. *See UARG*, 134 S. Ct. at 2444 (“[I]t 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.”); *see also Brown & Williamson*, 529 U.S. at 161 (“We are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”).

Whatever regulatory regime Congress may have intended for the Internet under the 1996 Act, it clearly did not contemplate delegating to the FCC authority to undertake wholesale regulation of the entire Internet ecosystem using the common carrier provisions of Title II of the 1934 Act. This is not to say that some provisions in the Acts are not ambiguous, or that the Commission lacks authority to implement *any* rules relevant to its Open Internet principles. But any order applying common carrier requirements beyond the last mile, or that otherwise ignores the limitations that Congress has placed on the Commission's authority, is plainly beyond the scope of the Commission's mandate. *Chevron* cannot be invoked to allow agencies to expand the scope of their authority contrary to Congressional design. *See Aid Ass'n for Lutherans v. United States Postal Serv.*, 321 F.3d 1166, 1174 (D.C. Cir. 2003) ("An agency construction of a statute cannot survive judicial review if a contested regulation reflects an action that exceeds the agency's authority. It does not matter whether the unlawful action arises because the disputed regulation defies the plain language of a statute or because the agency's construction is utterly unreasonable and thus impermissible.").

In fact, recent Supreme Court decisions in *UARG* and *King v. Burwell* arguably evidence a trend at the Court to rein in *Chevron's* “political accountability” justification for judicial deference to agency decision-making.<sup>4</sup> Instead, at least for questions of great economic or political significance, these decisions view the *judiciary* as the better guarantor of political accountability, particularly in the face of the intense interest group pressure and incentives for agency self-aggrandizement such questions may engender.<sup>5</sup>

**C. Recent Supreme Court Precedent Requires Reconsideration of the Verizon Court’s Analysis of *Brown & Williamson***

In *Verizon* this court rejected the argument that the major questions doctrine announced in *Brown & Williamson* precluded the Commission’s 2010 Order. That holding does not control review of the present Order, however, which presents questions of such “deep economic and political significance” that fall outside of the Commission’s statutory authority where, in the matter

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<sup>4</sup> See Jody Freeman & Adrian Vermeule, *Massachusetts v EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 108 (2007) (“The Court is concerned at the moment to insulate expert agencies from political influence.”). Cf. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 865 (1984) (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices.”)

<sup>5</sup> See *id.*. See also Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 233-4 (2006).

of key grants of authority, “had Congress wished to assign that question to an agency, it surely would have done so expressly.” *See King v. Burwell*, slip op. at 2.

There are at least two reasons that this court’s prior rejection of the *Brown & Williamson* argument in *Verizon* does not control.

First, the Commission’s 2015 Order substantially exceeds the 2010 Order’s already-substantial claims of authority. It does so through Title II reclassification, assertion of authority under Section 706 (including to ban paid prioritization) beyond the bounds of *Verizon*, and its application of common carrier restrictions beyond the last mile. If the 2010 Order was a limited incursion into neighboring territory, the 2015 Order represents the outright colonization of a foreign land, extending FCC control over the Internet far beyond what was contemplated in the 2010 Order.

Second, prior to *Verizon*, the “major questions” doctrine of *Brown & Williamson* had not recently been invoked by the Supreme Court, and the case itself suggested the doctrine was of limited applicability. But the Supreme Court has since affirmatively cited *Brown & Williamson* in two major opinions, urging far more scrutiny and skepticism of agency claims of authority over questions of “deep economic and political significance” that require careful readings of an agency’s authorizing statute. *See King v. Burwell*, slip op. at

8; *UARG*, 134 S. Ct. at 2444. Moreover, these cases suggest that the particular circumstances of the regulation at issue in *Brown & Williamson* should no longer be read to limit the doctrine's applicability.

And to the extent that *Brown & Williamson* is of limited applicability, it is hard to imagine a context more similar to *Brown & Williamson's* than the one before the court. Both cases involve agencies suddenly changing course regarding regulation of a significant industry. Like the FDA, the FCC asserts authority under an earlier statute (Sections 201 and 202 of Title II from the 1934 Act) in a manner that it had both previously disclaimed, and for which there was no direct evidence of Congressional intent. Here, as there, Congress has rejected efforts to introduce heavy-handed legislation similar to the adopted regulatory scheme, and has considered or enacted several pieces of legislation regulating aspects of the industry in question. *See, e.g.*, Digital Millennium Copyright Act, 17 U.S.C. §§ 512, *et seq.* and Children's Online Privacy Protection Act, 47 U.S.C. § 231.

Moreover, in rejecting concerns that the Commission's 2010 Order posed major questions outside of the Commission's authority, the *Verizon* court explained that



when Congress passed section 706(a) in 1996, it did so against the backdrop of the Commission's long history of subjecting to common carrier regulation the entities that controlled the last-mile facilities over which end users accessed the Internet.

*Verizon*, 740 F.3d at 638. The present Order's construction of Section 706(a) would subject *non-last-mile* facilities (e.g., connections to the edge) to common carrier regulation.

Thus, in light of the recent Supreme Court decisions and the changed circumstances surrounding the Commission's latest effort to regulate the Internet, the *Verizon* court's rejection of *Brown & Williamson* is inapposite.

## **II. THE ORDER IMPERMISSIBLY CLAIMS EXPANSIVE AUTHORITY OVER THE INTERNET ECOSYSTEM, INCLUDING OVER CONNECTIONS TO THE EDGE**

Although the Commission attempts to cabin its claimed authority to consumer-facing, last-mile services, both the Order's own rhetoric, as well as technological reality, make such a limitation impossible to sustain.

### **A. Despite Claims to the Contrary, The Commission's Focus on Edge and Last Mile Amounts to a Full Regulation of the Entire Internet**

Throughout the Order the Commission asserts that its objective is protection of edge services, even as it claims to provide this protection solely through regulation of last-mile Internet access.

Similarly, while the Commission claims to eschew rate regulation, it nevertheless implements it in various forms. The “No Paid Prioritization” rule, for example, is a zero-price rate regulation imposed upon the edge side of the market, not the retail side. Similarly, the Commission’s asserted authority over interconnection contemplates a possible zero-price mandate—again not directed at consumer-facing service.

The Commission goes to great pains to assert that its rules do not apply to the Internet at large. Before doing so, however, the Commission frames the Order in such a way as to make clear its true focus on edge applications and business models.

The first paragraphs of the Order repeatedly highlight the importance of edge applications made available on the Internet, and the Commission’s belief that the Order is important to promoting these applications. *See* Order ¶ 1 (stating that the Internet is a “critical tool...to conduct commerce, communicate, educate, entertain, and engage...the world.”). The Commission’s gaze is thus cast at the outset upon services and content provided at the edge, *not* the means by which those services are accessed.

At the same time, the “virtuous cycle” necessarily draws attention to investment at the edge and the “broadband marketplace” broadly defined. Order ¶ 2. And, remarkably, the Order focuses extensively on the Internet as a means

of mass-market video distribution—traditionally regulated under Title VI and therefore entirely outside the scope of either Title II or Section 706. *See, e.g.,* Order ¶ 3. This emphasis on the edge continues throughout the Order.

When the Order turns to discuss legal authority, its focus is again on the edge—*not* on the last-mile connection to the consumer. *See* Order ¶ 273 (stating that the goal of the Order is “to protect and promote Internet openness *as a platform for competition, free expression and innovation; a driver of economic growth; and an engine of the virtuous cycle of broadband deployment.*”) (emphasis added).

#### **B. Technological Reality Necessarily Expands the Order’s Regulatory Scope Beyond What the Commission Claims**

Even if the Order could legitimately describe a formalistic regulatory separation between last-mile broadband access and the rest of the Internet, it can’t do so as a matter of technological reality.

The problem is that that such distinctions are nonsensical when, as with the modern Internet, the “layers” increasingly blur together: the more complicated the applications and services “on top” become, the more management of the underlying network affects and is affected by the applications and services being carried.

It is true that only broadband ISPs are directly consumer-facing, and that, as a definitional matter, a service is not a “telecommunications service” unless it is offered “for a fee directly to the public.” 47 U.S.C. § 153(53). But, while it may be logically sustainable to “reclassify” the last mile transmission services offered by ISPs as telecommunications services, there is no way to prevent the same logic from extending beyond the last mile.

**C. The Reach of Title II Must Be Considered Without Forbearance Which Necessarily Expands the Order’s Scope**

Although the Order recognizes that its effects necessarily bear upon the connection from ISPs to the edge, the Commission asks that this dramatic increase in its authority be forgiven because regulation of “service to edge providers is subsumed within” its last-mile regulation, Order at ¶ 338; because it is “always a part of, and subsidiary to,” regulation of the last-mile, *id.*; and because such regulation is “secondary, and in support of,” its regulation of the last-mile, *id.* at ¶ 339.

This is a distinction without difference. The fact that regulation to the edge may be “subsumed within,” the Commission’s proper statutory authority does not change the fact that it is regulation nonetheless. This is particularly the case where, as here, the very effects and purposes of the regulation are *at least* as focused on the edge as they are on the last mile.

Lest there be any doubt that the Order applies beyond the last mile, the Commission has already convened public forums to discuss the applicability of Title II to non-last-mile services.<sup>6</sup> And lest there be any doubt about the potential scope of Title II, Section 215, for example, begins:

The Commission shall examine into transactions entered into by any common carrier which relate to the furnishing of equipment, supplies, research, services, finances, credit, or personnel to such carrier and/or which may affect the changes made or to be made and/or the services rendered or to be rendered by such carrier....

47 U.S.C. § 215. The Commission argues that such provisions are inapposite to its claimed authority because it has forbore from their enforcement.

But Section 10 does not provide the Commission *carte blanche* to forbear from sections of its statute; rather, forbearance is subject to certain statutorily defined requirements—including that the Commission finds that forbearance is in the public interest. This effectively means that the decision *not to forbear* is committed to agency discretion. In other words, if the Commission were to decide that it is in the public interest to investigate every detail of any Internet-connected company's business, including on an ongoing

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<sup>6</sup> See Public Workshop on Broadband Consumer Privacy (Apr. 18, 2015), available at <https://www.fcc.gov/events/wcb-and-cgb-public-workshop-broadband-consumer-privacy>.

basis, it could find that Section 215 applies. As a result, the extent of the Commission's claimed authority under the Order must be assessed as though Title II applies in full force.

Moreover, while the Commission asserts forbearance, it also immediately stiches together forbearance from Section 215 with "section 706 of the 1996 Act, along with other statutory provisions, [that] give the Commission authority to collect necessary information." Order ¶ 508. As Commissioner Pai points out in his Statement, this pattern continues throughout the Order's forbearance section. Dissenting Statement of Commissioner Pai, Order at 396-97.

Similarly, the Commission asserts that application of Sections 201 and 202 of the Act is "necessary," Order ¶ 446, while *simultaneously* asserting that those provisions are redundant given the Commission's assertion of authority under Section 706, Order ¶ 448.

If application of the core provisions of Title II can be asserted as "necessary" to effect the purpose of the Order even though it is characterized as merely "appropriate to remove [] ambiguity," *id.*, it is difficult to conceive of any intelligible limitation on the scope of Title II under the Order, regardless of claimed forbearance. This is particularly true given that there is no "regulatory ambiguity" exception to Section 10's enumerated requirements for forbearance.

And lest there be any remaining doubt that the full extent of Title II is implicated by the Order, the Commission goes on to reserve the authority to apply Sections 201 and 202 even for (unspecified) purposes *beyond* the Order. *See* Order ¶ 449 (“We reject calls to entirely forbear from applying sections 201 and 202 outside [the open Internet] context.”).

None of this means that forbearance is problematic in and of itself; quite the contrary: Forbearance, as expressly delimited in Section 10, is wholly appropriate and intelligible. Rather, forbearance *employed to rewrite the Act* in order to make it comport with the FCC’s preferred, but unauthorized, regulation renders *reclassification* impermissible because it reveals the disconnect between what the Order does and what Congress can reasonably be understood to have intended. *See UARG*, 134 S. Ct. at 2246, 2450-51.

### **III. THE ORDER’S CLAIMED AUTHORITY EXCEEDS THE COMMISSION’S CONGRESSIONALLY AUTHORIZED SCOPE**

In crafting its Order, the Commission bends the Acts’ statutory structure to the point of breaking, picking and choosing among individual clauses, ignoring others, forbearing from enforcement of substantial portions of the statute, reading exceptions into statutory definitions, and sweeping the most

substantial effects of the Order under the rug by casting them as merely “secondary”—all in an effort to justify its un-authorized venture into an area of “deep economic and political significance.”

These machinations demonstrate that the Order exceeds the Commission’s Congressionally authorized authority. *See, e.g., UARG*, 134 S. Ct. at 2446 (“the need to rewrite clear provisions of the statute should have alerted EPA that it had taken a wrong interpretive turn”). Moreover, the Order exceeds the Commission’s authority by bringing vast new swaths of the economy under the auspices of FCC regulation. *Cf. UARG*, 134 S. Ct. at 2446 (“In the Tailoring Rule, EPA asserts newfound authority to regulate millions of small sources... and to decide, on an ongoing basis and without regard for the thresholds prescribed by Congress, how many of those sources to regulate. We are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery.”).

**A. The Need to Disclaim So Many of the Order’s Effects Should Have Alerted the Commission that It Was on the Wrong Path**

The Commission goes to great pains to minimize or disclaim the effects of its regulation on all but the last mile. *See, e.g.,* ¶ 187, n. 725 (asserting it has the authority, but rejecting “calls... to exercise [it] to adopt open Internet regulations for edge providers.”); ¶¶ 308, 338, 339 (explaining that the Order *does*



*impose common carrier obligations on edge connections* but dismissing these obligations as “encompass[ed by],” “subsumed within,” “subsidiary to,” or “secondary, and in support of,” its regulation of the last mile. Such maneuvering violates “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.... *UARG*, 134 S. Ct. at 2446.

The Commission’s efforts to disclaim the effects that the Order has on the edge are particularly egregious in light of *Verizon*. The Commission makes no effort to reconcile the Order with this court’s *Verizon* opinion, but rather asserts that the defect in the 2010 Order was with this court’s understanding. Order ¶ 338 (“the failure of the Commission’s analysis was a failure to explain”). But this court’s understanding was sound.

As discussed *supra*, Section II.B, reclassification continues to impose common-carrier obligations upon the edge—a fact that the Commission acknowledges, but justifies as “subsumed,” “subsidiary,” or “secondary.” Order ¶¶ 308, 338, 339. The definition of telecommunications service that animated the court’s objection in *Verizon*, however, doesn’t include an exception for “secondary” regulation; it bars *any* imposition of common carrier obligations on non-Title II services. The Commission’s assertions that the Order complies with the *Verizon* opinion, *see* Order ¶¶ 274, 288, are therefore misleading, as

the Order impermissibly ignores or rewrites the statutory language in order to circumvent the crux of the *Verizon* holding and to suit the Commission's preferred policy. *See UARG*, 134 S. Ct. at 2446 ("The power of executing the laws... does not include a power to revise clear statutory terms that turn out not to work in practice.").

**B. The Need to Forbear from so Much of Title II Should Have Alerted the Commission that It Had Taken a Wrong Turn**

In *UARG*, the Supreme Court considered an EPA rule that subjected sources of greenhouse-gas emissions to statutory permitting requirements. The statute was designed to regulate emissions from, most notably, factories and power plants, but EPA's reinterpretation dramatically expanded its scope to potentially include "millions of small sources—including retail stores, offices, apartment buildings, shopping centers, schools, and churches." *UARG*, 134 S. Ct. at 2446. To avoid placing this impracticable burden on both the agency and those subject to its regulations, EPA adopted a "Tailoring Rule" that, contrary to statutory language, applied the greenhouse-gas regulations only to major emitters. *Id.*

The Supreme Court rejected EPA's approach. Invoking *Brown & Williamson*, the Court first found EPA's statutory construction impermissible because it placed plainly excessive burdens on the agency and those subject to

its rules. The Court then found further flaw in EPA's attempt to avoid those burdens by "tailoring" its statutory obligations. *Id.*

The Order is subject to the same critiques. As in *UARG*, it would place impracticable burdens on both the Commission and those whom it regulates. And, as in *UARG*, the Commission attempts to avoid these impracticable burdens by impermissibly rewriting its statute to avoid them.

### **C. The Impracticability of Implementing Title II even Without Forbearance Justifies the Order's Rejection**

In just the first month after the Order went into effect, the FCC received 2,000 complaints alleging violations of the its rules.<sup>7</sup> Because of the potential demands placed on the agency, the Order will place excessive requirements on regulated entities, as well. Reclassification along with the accompanying "Internet conduct rule," 47 C.F.R. § 8.11, and the Commission's interconnection authority, 47 U.S.C. § 251(c)(2), would require applying Title II to exponentially more companies than it was designed to regulate. As with EPA's rule, which was designed to regulate "thousands, not millions" of major sources, *UARG*, 134 S. Ct. at 2444, but applied to "millions of small sources[.]" *id.* at

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<sup>7</sup> Brendan Sasso, *Thousands Beg FCC for Net Neutrality Crackdown*, NAT'L J. (Jul. 30, 2015), <http://www.nationaljournal.com/article/548140>.

2446, Title II was designed to regulate hundreds of telephone exchanges, not the thousands of entities that interconnect with them or the millions of edge companies whose technical and business plans are now potentially subject to FCC review. And these companies employ a wider range of technologies and business models to offer a wider range of services, as well. Compliance costs and the inevitable error costs borne out of the FCC's relative unfamiliarity with these companies will be enormous.

In short, the Order's implementation of Title II places "plainly excessive demands on limited governmental resources[, which] is alone a good reason for rejecting it." *UARG*, 134 S. Ct. at 2444.

Faced with the Order's impracticability, and just like the Tailoring Rule at issue in *UARG*, the Order forbears from full application of Title II in an effort to avoid such "calamitous consequences." *UARG*, 134 S. Ct. at 2442. But, like the EPA, in doing so, the Commission "asserts newfound authority to regulate... and to decide on an ongoing basis and without regard for the thresholds prescribed by Congress." *See id.* at 2446.

As such, the FCC impermissibly rewrites the statute in order to make Title II workable for its preferred regulatory regime—rather than ensuring that its preferred approach comports with the statute that Congress actually gave it. *See UARG*, 134 S. Ct. at 2443 ("[EPA's rule] would be 'incompatible' with

‘the substance of Congress’ regulatory scheme.’”) (quoting *Brown & Williamson*, 529 U.S. at 156). Indeed, this is the *second* time that the Order rewrites statutory text, having implicitly added an exemption for imposing “secondary” or “subsidiary” common carrier regulations on connection to the edge to the definition of “telecommunications carrier.” *See supra* III.B.

It is insufficient to note in response that that the FCC—unlike the EPA—has authority under Section 10 to forbear from (that is, to tailor) problematic aspects of Title II. But forbearance is not *carte blanche* to rewrite Title II to suit the Commission’s preferred policy goals. Rather, it is meant to be triggered subject to certain statutorily-defined factual findings. The Commission’s use of forbearance to bring about “an enormous and transformative expansion in [the FCC’s] regulatory authority without clear congressional authorization,” *UARG*, 154 S. Ct. at 2444, is a clear perversion of the statutory design and Congressional intent.

The Commission can’t have it both ways: It can’t simultaneously argue that Title II gives it authority to impose sweeping new regulations, but also that doing so requires substantial revisions to Title II. Either its rules fit within the Congressionally-designed statutory regime (assessed without forbearance) or they don’t—and if they don’t, that means the Order is impermissible, not that the Commission can revise the statute through forbearance. *See*

*UARG*, 134 S. Ct. at 2446. (“Agencies are not free to ‘adopt...unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness.’”).

**D. The Commission’s Overreaching Is Highlighted by Its Treatment of the Order’s Factual Basis**

In order to justify its Order, the Commission makes questionable use of important facts. For instance, the Order’s ban on paid prioritization ignores and mischaracterizes relevant record evidence and relies on irrelevant evidence. The Order also omits any substantial consideration of costs. The apparent necessity of the Commission’s aggressive treatment of the Order’s factual basis demonstrates the lengths to which the Commission must go in its attempt to fit the Order within its statutory authority.

**1. The Order’s Ban on Paid Prioritization Ignores and Mischaracterizes Important Facts**

One of the central, and most controversial, aspects of the Order is its “No Paid Prioritization” rule. Order ¶ 18. The Commission asserts that “[t]he record reflects the view that paid arrangements for priority... likely damage the open Internet, harming competition and consumer choice,” and offers a parade of horrors that, according to some commenters, paid priority may engender. Order ¶¶ 103, 126, 127. In doing so the Order cites substantive

comments from only a few, interested sources for the assertion that its “conclusion is supported by a well-established body of economic literature.” Order ¶ 126.

Contrary to the Commission’s assertions, however, neither the comments nor the economic literature support its conclusion. The comments filed by Sandvine, for instance, explain that “the FCC has put tremendous focus on Pay for Priority. We’re not quite sure why.” Promoting and Protecting the Open Internet, *Comments of Sandvine, Inc.*, GN Docket 14-28, at 8. The comments further note that the Commission’s theory that paid prioritization will lead to a bifurcation of the Internet into “fast” and “slow” lanes is likely “technically unsound.” *Id.* at 9. In other words, Sandvine’s comments argue *against* a ban on paid prioritization and criticize the Commission’s underlying theory of harm—yet the Order mischaracterizes them as supporting the Commission’s preconceived agenda. Indeed, the very point of Sandvine’s comments was to explain that “innovative service plans” (such as those that the Order seeks to ban) “increase[] adoption of the Internet around the world, enhanced competition, and given consumers more (and more affordable) choice.” *Id.* at 2.

Even more problematic is the Commission’s assertion that its conclusion is supported by economic literature. Commenters, including authors of

this brief, submitted extensive comments that discussed myriad contemporary economic and technical studies at great length.<sup>8</sup> Unsurprisingly there have been numerous studies over the past decade that consider the question of paid prioritization.<sup>9</sup> This well-developed body of literature consistently concludes that paid prioritization may have positive or negative effects on consumers and that it is difficult, if not impossible, to determine *ex ante* whether any specific instance of paid prioritization will have positive or negative effects.<sup>10</sup> *The Commission ignores this entire body of literature*, neither acknowledging nor rebutting it. Rather, the “well-established body of economic literature” to which the Commission cites comprises four articles from the 1980s on price discrimination, one unpublished article, and one almost entirely irrelevant article from 2000. Order ¶126 n. 296.

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<sup>8</sup> Protecting and Promoting the Open Internet, *Policy Comments of ICLE & Tech-Freedom*, GN Docket No. 14-28 (Jul. 17, 2014); Protecting and Promoting the Open Internet, *Comments of Justin (Gus) Hurwitz, Assistant Professor of Law, University of Nebraska College of Law*, GN Docket 14-28 (Jul. 17, 2014); Protecting and Promoting the Open Internet, *Comments of Daniel Lyons, Associate Professor of Law, Boston College Law School*, GN Docket 14-28 (Jul. 18, 2014).

<sup>9</sup> *See id.* and studies cited therein.

<sup>10</sup> Among many other examples, *see, e.g.*, Robert W. Crandall, et al., *Vertical Separation of Telecommunications Networks: Evidence from Five Countries*, 62 FED. COMM'NS. LAW J. 493 (2010); Marc Borreau, et al., *Net Neutrality with Competing Internet Platforms 3*, CEIS TOR VERGATA RESEARCH PAPER SERIES, vol. 12 no. 307 (2014), available at <ftp://www.ceistorvergata.it/repec/rpaper/RP307.pdf>.



Under the Administrative Procedures Act, a court “will set aside agency action that [fails to demonstrate that] the agency has ‘examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choices made.’” *Business Roundtable v. Sec. and Exch. Comm’n*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Conclusions such as those presented in the Order made “without any evidentiary support and unresponsive to... contrary claim[s],” are “ipse dixit,” and insufficient to meet the agency’s obligations under the Administrative Procedures Act. *Id.* at 1155.

There can be no question that the Commission’s approach here is arbitrary and capricious. But even more, such evidentiary and analytical gaps point to an agency struggling to piece together a defensible basis for its claimed authority.

## **2. The Order Violates *Michigan v. EPA* by not Considering Costs**

When Congress uses broad language in a statutory grant of authority, precisely as Title II’s key operative provisions do (e.g., “just and reasonable” in Section 201(b)), regulators are required to weigh the costs of regulations enacted pursuant to that authority. Failure to do so constitutes sufficient reason

to strike down an agency's decisions. *See Michigan v. EPA*, No. 14-46 (U.S. June 29, 2015) (“Read fairly and in context... the term [appropriate and necessary] plainly subsumes consideration of cost.”). Yet, despite express calls from two Commissioners that the FCC conduct a cost-benefit analysis, the FCC failed to conduct one before promulgating these rules. *See* NPRM (Dissenting Statement of Commissioner Pai). Nor is the casual analysis within the Order (much of which simply dismisses purported costs) a sufficient substitute.

It is difficult to see how, following the Court's decision in *Michigan v. EPA*, the FCC can make such momentous decisions as regulating the Internet without explicitly weighing the costs of the decision against other options—including the alternative of doing nothing.

#### IV. Conclusion

For the foregoing reasons, the court should vacate the Order.

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**APPENDIX A**

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 6,723 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of August, 2015, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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