

ICLE & SCHOLARS AMICUS BRIEF: SUMMARY

U.S. Telecom Association, et al., v. FCC (D.C. Circuit)
(Brief Filed August 6, 2015)

Background/materials on the case:

- ICLE & scholars amicus brief, [here](#).
- The petitioners' primary brief is [here](#), and petitioner Alamo Broadband's brief is [here](#).
- 2015 Open Internet Order, [here](#).
- ICLE & TechFreedom [policy](#) and [legal](#) comments on the Open Internet Order
- *Verizon v. FCC* decision (2010 Open Internet Order case), [here](#).
- “Regulating the Most Powerful Network Ever,” an [essay](#) by Gus Hurwitz laying out some of the administrative law problems created by the Order and discussed in the brief.
- “The Feds Lost on Net Neutrality, But Won Control of the Internet,” an [op-ed](#) by Geoffrey Manne and Berin Szoka presciently discussing the troubling implications of the *Verizon* decision (which are playing out in the current Order and the case)
- “Chevron decision’s domain may be shrinking,” an [op-ed](#) by Randy May discussing the implications of recent Supreme Court case law for judicial deference to agencies
- “Supreme Court checks agency overreach, signaling trouble for FCC,” an [op-ed](#) by Gus Hurwitz and Berin Szoka on the Supreme Court’s *Michigan v. EPA* decision and its implications for the Open Internet Order
- “How to Break the Internet,” an [essay](#) by Geoffrey Manne and Ben Sperry laying out the underlying issues in the net neutrality debate.

ICLE's Brief

ICLE's brief argues that recent Supreme Court cases, including *Utility Air Regulatory Group v. EPA* (UARG) and *King v. Burwell* (last term's Obamacare state exchange case), require the court to strike down the FCC's Open Internet Order because it:

- Exceeds the scope of authority delegated to the FCC by Congress;
- Addresses a question of “vast economic and political significance,” not meriting the judicial deference typically given to federal agencies; and
- Is impermissibly “tailored” to root around the clear statutory limits on the FCC's authority.

In short, the Order subverts the relatively deregulatory regime of the 1996 Telecommunications Act and manufactures a far more interventionist regime for Internet regulation than the Act contemplates.

- It uses tools from the 1934 Act, designed for a now-vanished monopoly, to regulate 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.
- The Order subverts the statutory regime through:
 - Title II reclassification;
 - Assertion of authority under Section 706 (including to ban paid prioritization) beyond the bounds of what the court found permissible in the *Verizon* decision; and
 - Application of common carrier restrictions beyond the traditional “last-mile” Internet access services.

Excessive Power

The FCC's approach to regulating the Internet in its 2015 Open Internet Order presents questions of “vast economic and political significance,” as substantial as any ever considered by a federal agency.

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 by Congress in the Telecommunications Act.

- When it enacted the 1996 Act, Congress was unambiguous about its deregulatory approach. For instance, Section 230 of the 1996 Act, the only part of the act that specifically mentions the Internet, notes that:
 - “It is the policy of the United States to promote the continued development of the Internet and other interactive computer services and other interactive media [and to] preserve the vibrant and competitive free market that presently exists for the Internet... *unfettered by Federal or State regulation.*”
 - The DC Circuit has previously upheld that very understanding of the Telecommunications Act: “The Telecommunications Act’s purpose [is] ‘reduc[ing] regulation in order to... encourage the rapid deployment of new telecommunication technologies.’” (*AT&T v. FCC* (2006)).

It is unlikely, to say the least, 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 Act’s most onerous, common-carrier provisions in Title II.

A Question of “Vast Economic and Political Significance”

The 2015 Open Internet Order deals with a “major question” (as defined by the Supreme Court’s *Brown & Williamson* decision) and interprets the FCC’s authority to assert that it extends beyond what the statute can reasonably mean.

- 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”
- This encompasses not only “last-mile” broadband access services, but the rest of the Internet infrastructure as well, all the way up to the “edge” (content and services provided over the Internet).
- Although it purports to leave these services unregulated, it actually imposes a host of regulatory obligations that dramatically affect these providers.

Courts have dealt with significant questions and self-aggrandizing agencies before. In such circumstances, the courts refrain from reviewing agency actions with their usual *Chevron* deference, and assert judicial authority to override agency interpretations of their statutes.

- Three cases particularly stand out:

- *Brown & Williamson*: “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.”
- *UARG*: “When an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy,’ we typically greet its announcement with a measure of skepticism.”
- *King v Burwell*: “Had Congress wished to assign [questions of such economic and political significance] to an agency, it surely would have done so expressly.” Rather, courts “must turn to the broader structure of the Act to determine the meaning” of language within a statute.

As these cases hold, the court should greet the Commission’s claimed authority with substantial skepticism.

Impermissibly “Tailored”

The Commission simultaneously claims that the Order will ensure that every inch of the Internet is protected — while disclaiming that its Order actually regulates anything but the last mile.

- Despite its ostensible focus on only the consumer-facing (Internet access) side, the Commission clearly has a vision for how the Internet should be run and used — down to preferred applications and business models. Although the Order is the FCC’s attempt to claim powers like those of an Internet central planner, Congress never authorized such a role.

Not only that, the Commission acknowledges that Title II would be unworkable for the Internet, but asserts Title II as the authority for its Order anyway.

- The FCC claims that reclassifying broadband Internet access service as a “telecommunications service” subject to common-carrier regulations under Title II of the Communications Act will promote broadband deployment. But, in the same breath, the Commission also asserts that “[w]e forbear from sections of Title II that pose a meaningful threat to network investment.”
- This statement (and others like it) contains within it an implicit recognition that there are, in fact, sections of Title II that, if not forborne from, would “pose a meaningful threat to network investment.” It is impossible to square that reality with the claimed basis for reclassification in the first place: that it effectuates Congressional intent to promote network investment.

The problem is, the way the Commission reaches this conclusion is through 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 its preferred approach to regulating the Internet that won’t — the Commission hopes — be immediately thrown back again by the court.

- As such, the Commission 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*).

Furthermore, in order to justify itself, the Commission makes questionable use of key 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.

Conclusion

For all of these reasons, the Commission’s Order should be rejected as exceeding the Commission’s statutory authority and as presenting and addressing major questions — questions of “vast economic and political significance” — that necessarily must be addressed, if at all, by Congress.