RECORD NO. 15-1063(L)
CONS. W/15-1078, 15-1086, 15-1090, 15-1091, 15-1092, 15-1095, 15-1099, 15-1117, 15-1128, 15-1151, 15-1164

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Full Service Network; Truconnect Mobile; Sage Telecommunications LLC; Telescape Communications Inc.,

Petitioners,

v.

Federal Communications Commission; United States of America,

Respondents.

Ad Hoc Telecommunications Users Committee, *et al.*,

Intervenors for Respondent,

TechFreedom, *et al.*,

Movant-Intervenor for Respondent.

ON APPEAL FROM THE FEDERAL COMMMUNICATIONS COMMISSION

REVISED OPENING BRIEF OF PETITIONERS FULL SERVICE NETWORK, *et al.*

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The undersigned attorney of record, in accordance with D.C. Cir. R. 28(a)(1), hereby certifies as follows:

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. Ruling Under Review

Petitioners Full Service Network, Sage Telecommunications, Telscape Communications, and TruConnect Mobile petition for review of the final order of the Federal Communications Commission ("FCC") captioned *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015)("Order")(JA__ - __).

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.

\s\ Earl Comstock

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of this Court, Petitioners hereby submit the following corporate disclosure statements.

Petitioner Full Service Network, LP's general purpose is to provide telecommunications service and broadband Internet access service. It does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner Sage Telecommunications, LLC's general purpose is to provide telecommunications service and broadband Internet access service. Its parent corporation is TSC Acquisition Corp. No publicly held corporation owns 10% or more of its stock.

Petitioner Telscape Communications, LP's general purpose is to provide telecommunications service and broadband Internet access service. Its parent corporation is TSC Acquisition Corp. No publicly held corporation owns 10% or more of its stock.

Petitioner TruConnect Mobile's general purpose is to provide telecommunications service and broadband Internet access service. It does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.

STATEMENT REGARDING DEFERRED APPENDIX

The parties have conferred and intend to use a deferred joint appendix.

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TABLE OF AUTHORITIES

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**** Authorities upon which we chiefly rely are marked with asterisks***

STATUTES

RULES

ADMINISTRATIVE MATERIALS

REGULATIONS

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GLOSSARY

1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.
Act	Communications Act of 1934, June 19, 1934, 48 Stat. 1064, *codified generally at* 47 U.S.C. §§ 151 – 620.
Brand X	*Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Serv's*, 545 U.S. 967 (2005).
Chevron	*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
Commission	Federal Communications Commission
Computer II	Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384 (1980), *aff'd sub nom. Computer & Communications Indus. Ass'n*, 693 F.2d 198 (D.C. Cir. 1982).
FCC	Federal Communications Commission
Forbearance Order	Report and Order, *In the Matter of Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, As Amended*, 24 FCC Rcd. 9543 (2009).
JA	Joint Appendix

NPRM	Notice of Proposed Rulemaking, *Protecting and Promoting the Open Internet*, 29 FCC Rcd. 5561 (2014) (JA__ - __)
Order	Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015) (JA__ - __)
Pai Dissent	Dissenting statement of Commissioner Ajit Pai appearing at pages 321-84 of the *Order* (JA__- __)
Petitioners	Collectively Full Service Network, Sage Telecommunications, Telscape Communications, and TruConnect Mobile
Telecommunications Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.
Title II	Title II of the Communications Act of 1934, 47 U.S.C. §§ 201 – 261.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342(1) and 2344. The *Order* (JA ___ - ___) was released on March 12, 2015 and published in the Federal Register on April 13, 2015, 80 Fed. Reg. 19378. The Full Service Network *et al* petition was timely filed on April 23, 2015.

STATEMENT OF THE ISSUES

1. Whether the FCC's forbearance under section 10 of the Communications Act (47 U.S.C. § 160) is lawful.

2. Whether the Communications Act compels regulation of broadband Internet access service, as defined by the FCC, as a "telecommunications service." 47 U.S.C. § 153(53).

3. Whether the FCC's refusal to apply statutory provisions of the Communications Act to broadband Internet access service is lawful.

4. Whether the FCC's interpretation that section 4(i) of the Communications Act (47 U.S.C. § 154(i)) grants authority to use provisions of the Act to implement and enforce other Acts of Congress is lawful.

5. Whether the FCC's interpretation that section 706 of the Telecommunications Act of 1996 (47 U.S.C. § 1302) grants independent regulatory authority is lawful.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in the addendum.

OPPOSITION TO MOTION TO INTERVENE

As directed by the Court in its June 29, 2015 Order, Petitioners address their opposition to the Motion for Leave to Intervene ("Motion") by TechFreedom, Cari.Net, Jeff Pulver, Scott Banister, Charles Giancarlo, Wendell Brown, and David Frankel ("Movants"). That motion was not timely filed. Movants' Motion is two motions as it seeks leave to intervene both in support of the other Petitioners *and* in support of Respondents in opposition to Petitioners Full Service Network *et al*. Motion at 2.

Fed.R.App.P 15(d) requires that any Motion to Intervene be filed within 30 days after a petition for review is filed. *See also Process Gas Consumers Grp. v. F.E.R.C.*, 912 F.2d 511, 514 (D.C. Cir. 1990). Full Service Network and TruConnect filed their appeal with the Third Circuit on April 23, 2015. Movants did not file their Motion until June 8, 2015—more than 45 days later. Movants argue, reply at 3, that Fed. R. App. P 15(d) and 26(a)(1)(C) say that intervention shall be an intervention in all matters. But that makes the 30-day deadline a nullity in all cases in which more than one party files an appeal. Thus, the Movants'

Motion was not timely filed. We request the Court deny Movants' request to intervene in support of Respondents in *Full Service Network, et al. v. FCC, et al.*, No. 15-1511.

STATEMENT OF THE CASE

Pursuant to the Communications Act ("Act"), 47 U.S.C. §§ 151 *et seq.*, communications transmission services offered to the public were regulated as common carriage from 1934 to 2002. In 1980, the FCC adopted a rule that permitted regulated common carrier transmission services to be purchased and then resold to the public in combination with computer processing on an unregulated basis. The combined "information service" offering was not regulated because the public was protected by common carrier regulation of the underlying transmission service. *Second Computer Inquiry*, 77 FCC2d 384 (1980) ("*Computer II*"). In 1996, Congress enacted the Telecommunications Act to update the Act for the 21st Century and ensure universal access to the "information superhighway." *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. The 1996 Act also adopted the FCC's 1980 rule by prohibiting common carrier regulation of information services offered by a regulated telecommunications carrier. 47 U.S.C. § 153(51).

In 2002, the FCC reversed their *Computer II* rule and decided that facilities based providers of transmission services are exempt from common carrier regulation because the use of the Internet Protocol made the underlying transmission offering an information service. *See Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Serv's*, 545 U.S. 967 (2005). In 2010, the FCC adopted rules to protect Internet consumers. *Preserving the Open Internet*, Report and Order, 25 FCC Rcd. 17905 (2010). Those requirements were mostly vacated in *Verizon v FCC*, 740 F.3d 623 (D.C. Cir. 2014). On remand, the FCC adopted the *Order*. The *Order* reverses the FCC's 2002 decision and decides public offerings of Internet Protocol transmission services are in fact "telecommunications services" subject to common carrier regulation. *Order*, ¶ 363 (JA __). The order also forbears from applying almost all of the provisions Congress adopted in the 1996 Act to promote competition and asserts independent authority to act under section 706. *Order*, ¶¶ 37 and 51 (JA __ - __).

SUMMARY OF ARGUMENT

Petitioners are telecommunications carriers who use the statutory framework Congress adopted in 1996 to bring competitive broadband Internet access service to American consumers. In the *Order* (JA __- __) the FCC once again seeks to abandon that framework and continue its "light touch" regulatory regime,

notwithstanding its admission that its predictions of "vibrant intermodal competition" from that regime "cannot be reconciled with marketplace realities." *Order* ¶ 330 (JA __).

The FCC's forbearance is unlawful because the FCC failed to follow its own rules at 47 C.F.R. §§ 1.54 – 1.59. Neither 47 U.S.C. § 160 or judicial precedent allows the FCC to hold the public to a higher standard than it holds itself. The FCC's three paragraphs on forbearance in the *NPRM* (JA __ - __) also fail even the deferential standards of the APA.

In the specific case of 47 U.S.C. §§ 251 and 252 the FCC unlawfully used a nationwide market analysis when the statute compels a local market analysis. Further, the FCC asserts that 47 U.S.C. § 201 provides substitute authority over local interconnection that allows greater FCC discretion. That assertion is contrary to law and judicial precedent. And finally, the FCC's forbearance from the local competition provisions is not supported by the evidence, which shows a lack of consumer choice and high prices slowing broadband adoption.

In the *Order* the FCC reclassifies broadband Internet access service by repudiating the factual findings it used to support its prior classification of broadband Internet access service as an "information service" under the Act. The FCC claims *Chevron* deference for this reversal, but no deference is due because the statute compels the classification. This Court should examine whether any

ambiguity remains by assessing the full statute as the Supreme Court did in *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

This Court has been dealing with broadband and computer issues for 50 years, and a careful examination will reveal that one searches the Act in vain for an explicit prohibition on common carrier treatment of "information services." Instead, the plain language demonstrates that Congress only prohibited the common carrier treatment of information services offered by a telecommunications carrier. 47 U.S.C. § 153(51). The Congressional formulation tracks exactly the FCC's regulation of enhanced services in 47 C.F.R. § 64.702(a), which requires the use of "common carrier transmission facilities" – a "safeguard" this Court relied on to uphold the FCC's "forbearance" for enhanced service in *Computer & Communications Indus. Ass'n.*, 693 F.2d 198 (D.C. Cir. 1982).

The FCC's reversal on key facts involved in the Supreme Court's 2005 analysis in *Brand X*, 545 U.S. 967, and the fact that the Supreme Court did not consider the requirement for use of common carrier facilities in 47 C.F.R. § 64.702(a), mean that *Brand X* is no bar to finding the statute controls. The FCC's definition of broadband Internet access service at 47 C.F.R. § 8.2 is simply an alternative description of what Congress defined as a "telecommunications service" in 47 U.S.C. § 153(53).

Section 1 of the Act, 47 U.S.C. § 151, requires the FCC to execute and enforce the provisions of the Act, and the FCC is acting unlawfully in refusing to apply the definitions of "telephone exchange service" and "local exchange service," 47 U.S.C. §§ 153(54) and 153(32), respectively. Those definitions contain functional tests established by Congress that do not require FCC expertise or approval to apply. Further, the FCC cannot protect services from reclassification by arbitrarily excluding them from the FCC's definition of "broadband Internet access service."

The FCC asserts authority under section 4(i) of the Act, 47 U.S.C. § 154(i), to implement and enforce section 706 of the 1996 Act, 47 U.S.C. § 1302. Such action would be unlawful because it is "inconsistent" with the Act and prior judicial precedent. Congress provides express authority in the Act for the FCC to use the Act to implement or enforce other statutes. Upholding the FCC would expand all statutes beyond the bounds Congress set.

The FCC also asserts that section 706 of the 1996 Act provides independent authority for all of the actions in the *Order*. However, the plain language and structure of the 1996 Act demonstrate that Congress did not grant any such authority. This Court's 2014 decision in *Verizon*, 740 F.3d 623, was based on a different factual and legal premise which has been made moot by the FCC's reclassification in the *Order*, and this Court should review the statute in light of the

Supreme Court's post *Verizon* guidance in *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014). Such a review would also allow this Court to consider two other decisions of this Court that rejected FCC assertions of authority based on Congressional direction to conduct a notice of inquiry in other provisions adopted in the 1996 Act.

STANDING

The order on review makes forbearance decisions and asserts legal authorities that adversely impact Petitioners ability to compete. Petitioners participated in the proceedings below, are telecommunications carriers that seek to provide broadband Internet access services and are adversely affected by the *Order*. Thus, Petitioners are "the object" of the FCC's "administrative action," and "no evidence outside the administrative record" is required to establish Petitioners standing. *See Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002).

STANDARD OF REVIEW

The Court considers petitions for review of agency orders under "the familiar two-step analysis of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)." *Verizon*, 740 F.3d at 635. However, "[e]ven under *Chevron's* deferential standard, agencies must operate 'within the bounds of reasonable interpretation'… [a]nd reasonable 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." *Utility Air Regulatory Grp.*, 134 S. Ct. at 2442 (internal citations omitted). The Court must also determine "whether the Commission's actions were 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Verizon*, 740 F. 3d at 635.

ARGUMENT

1. The FCC's Forbearance is Unlawful

A. The FCC Must Follow Its Own Rules

This Court should vacate the FCC's forbearance in the *Order* because the FCC acted in violation of its own rules. The Supreme Court has held that "regulations validly prescribed by a government administrator are binding on him as well as the citizen, and [ ] this principle holds even when the administrative action under review is discretionary in nature." *Service v. Dulles*, 354 U.S. 363, 372 (1957).

47 U.S.C. § 160 requires the FCC to forbear from the application of any provision of the Act to telecommunications carriers or telecommunications services if the FCC finds that certain statutory requirements are met. In 2009, the FCC adopted rules to govern forbearance petitions. Report and Order, *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, As Amended,* 24 FCC Rcd. 9543 (2009) ("*Forbearance Order*"). *See also* 47 C.F.R. §§ 1.53 – 1.59.

Those rules require that petitions for forbearance shall include "a full statement of the petitioner's prima facie case for relief" and "all supporting data upon which the petitioner intends to rely, including a market analysis…." 47 C.F.R. § 1.54(e). The FCC explained that "complete petitions permit interested parties to file complete and thorough comments on a fully articulated proposal…. " *Forbearance Order*, 24 FCC Rcd. at 9549, ¶ 12.

The proposed rule below, *Protecting and Promoting the Open Internet,* Notice of Proposed Rulemaking, 29 FCC Rcd. 5561 (2014) ("*NPRM*") (JA __ - __), ran to 184 paragraphs. In only three paragraphs on forbearance, the extent of the FCC's discussion was to say that in 2010 "the FCC contemplated that, if it were to classify the Internet connectivity component of broadband Internet access service, it would forbear from applying all but a handful of provisions – sections 201, 202, 208 and 254 – to the service…. We received considerable comment in

that proceeding…." *NPRM* ¶ 154 (JA __). There was no discussion in the *NPRM* of that "considerable comment" or the rationale or supporting data upon which the FCC might rely if it did forbear. Further, the FCC left open several options for reclassification, including the entire retail offering, a wholesale component, or service to edge providers. *NPRM* ¶¶ 149 – 152 (JA ___-___)

Petitioners argued below that the *NPRM* failed to meet the FCC's own regulations. *See* Full Service Feb. 3, 2015 Ex Parte 6 – 11 (JA __). As Commissioner Pai agreed, the FCC was "asking the public to shadowbox with itself" on forbearance. *Pai Dissent* 347 (footnote omitted) (JA __).

The FCC responded to Petitioner's argument by saying "[b]ecause the Commission is forbearing on its own motion, it is not governed by its procedural rules…" *Order* ¶ 438 and n. 1298 (JA __ - __). The statute, the FCC's own practice and judicial precedent do not support the FCC's assertion.

Whether on its own motion or in response to a petition, the same criteria in 47 U.S.C. § 160(a) govern the decision. Nothing in section 10 of the Act suggests that Congress intended the public should meet a different, higher standard than the agency under 47 U.S.C. § 160(a). If anything, the one year time limit and the "deemed granted" mechanism in 47 U.S.C. § 160(c) suggest that Congress felt it necessary to impose additional requirements on the FCC.

Further, as Commissioner Pai said in his dissent, "this isn't how forbearance usually works." *Pai Dissent*, 346 (JA ___) Commissioner Pai observed that in prior decisions the FCC "has specified why such forbearance may be appropriate" and "has offered rationales for forbearing or not forbearing from each statutory provision." *Id.* (footnotes omitted).

The FCC's assertion that '[b]ecause the Commission is not responding to a petition… we conduct our forbearance analysis under… the Administrative Procedure Act, without the burden of proof requirements that section 10(c) petitioners face" is no defense. *Order* ¶ 438 (JA ___). *Any* grant of forbearance under 47 U.S.C. § 160(a) is subject to the Administrative Procedure Act ("APA"). But the agency has adopted rules that it now claims require parties seeking forbearance, but not the agency, to meet a higher standard. *Id.* That dual standard has no basis in law and is contrary to the Supreme Court's holding that agencies are bound to follow their own rules. *Service*, 77 S. Ct at 1157. *See also Reuters Ltd. v. FCC,* 781 F.2d 946, 951 (D.C. Cir. 1986)("fidelity to the rules… is required of those whom Congress has entrusted with the regulatory missions of modern life") and *Wilkinson v. Legal Serv's. Corp.*, 27 F.Supp.2d 32, 61 (D.D.C. 1998).

B. The NPRM Did Not Meet the Requirements of the APA

Further, the FCC's action fails even under the deferential APA standard of review. As this Court said in *Connecticut Light & Power Co. v. Nuclear*

Regulatory Comm'n, 673 F.2d 525 (D.C. Cir. 1982), "an agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary." *Id.*, 673 F.2d at 530–531. It makes a mockery of the statute if the FCC can forbear from "30 statutory provisions and render over 700 codified rules inapplicable," *Order* ¶ 51 (JA __), on the basis of three paragraphs in the *NPRM* that do not identify those 30 provisions and 700 rules, nor provide any discussion of the statutory criteria in relation to each of those provisions or rules. *NPRM* ¶¶ 153 – 155 (JA __ - __). In fact, the *Order* does not even list the 700 rules the FCC claims to forbear from.

C. The FCC's Forbearance from Sections 251 and 252 is Arbitrary, Capricious, and Contrary to Law

Petitioners are competitive carriers who rely on access to communications facilities and unrestricted resale as required by Congress in 47 U.S.C. § 251, which is overseen by State commissions under 47 U.S.C. § 252. As such Petitioners are focused on the FCC's forbearance from sections 251 and 252, *Order* ¶¶ 513 – 514 (JA __-__).

The FCC's justification for forbearing from section 251 (and hence section 252, *Order*, n. 1572 (JA ___)) is that "the Commission retains authority under sections 201, 202 and the Open Internet rules to address interconnection issues" and, further that "the legal structure adopted in this Order better enables us to achieve the tailored framework …[and]… *the application of that framework leaves*

more to the Commission's discretion, rather than being subject to mandatory regulation under section 251." *Order* ¶ 513 (JA ___) (emphasis added). Nothing in the Act elevates the FCC's "discretion" or achievement of the "light touch" framework, *Order* ¶ 37 (JA ___), above the statutory requirements adopted by Congress. Further, the FCC's assertion (*Order*, n. 1574 (JA ___)) that it can use 47 U.S.C. § 201 to provide the same interconnection that Congress provided in 47 U.S.C § 251 is flatly contradicted by history and other provisions of the Act.

i. Because Broadband Internet Access Service is a Local Exchange Service, the Relevant Geographic Market Under Section 10 is Local, Not National

Congress has spoken directly to the issue of how the analysis under 47 U.S.C. § 160 must be conducted. Contrary to the FCC's assertions, *Order* ¶¶ 493-496 (JA ___ - ___), the statutory language is clear that a case by case determination is required: the FCC shall forbear "from applying *any regulation or any provision* of this Act to a telecommunications carrier or telecommunications service… in any or some *of its or their geographic markets* if the Commission determines that enforcement of *such regulation or provision*" is not necessary and "forbearance from applying *such provision or regulation*" is in the public interest. 47 U.S.C. § 160(a)(emphasis added). A determination must be made for each regulation, provision and market, the same as is required by the FCC's rules. *See* 47 C.F.R. §§ 1.54(a) and (b).

Further, Congress directed that the FCC evaluate the effect of forbearance on competition. 47 U.S.C. § 160(b). The FCC must evaluate each provision *using the definition and context of that provision in the Act.* In the context of the local "connection link" to the Internet that phone and cable company broadband service provides, *Order* ¶ 330 (JA ___), each determination must be made on a local market-by-market basis. All three requirements must be satisfied for each rule or provision for forbearance to be granted. *See Cellular Telecomm's. & Internet Ass'n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003) ("The three prongs of § 10(a) are conjunctive…").

For example, 47 U.S.C. § 251(a) applies to all "telecommunications carriers," so the geographic market could be nationwide for offerings of interstate interexchange services. However, 47 U.S.C. § 251(b) applies to "local exchange carriers" so the geographic market, as the name implies and the definition in the Act confirms, is *local* and not national. 47 U.S.C. § 153(32). Further, 47 U.S.C. § 251(c) applies to "incumbent local exchange carriers," which Congress defined to mean "with respect to an area, the local exchange carrier that [] on February 8, 1996 provided telephone exchange service in such area…." 47 U.S.C. § 251(h)(1)(A).

The FCC dismissed Petitioner's argument that the statute requires assessment of local markets to forbear from 47 U.S.C. §§ 251(b) or (c), saying

"[t]he record and our analysis supports forbearance… based on considerations we find to be common nationwide…." *Order* at n. 1306 (JA ____). This Court rejected a previous attempt by the FCC to use a "nationwide" market analysis for section 251, and the Court should likewise reject the FCC's attempt to do so here. *See United States Telecomm's Ass'n. v. FCC*, 359 F.3d 554, 563 (D.C. Cir. 2004) ("The Commission is obligated to establish unbundling criteria that are at least aimed at tracking relevant market characteristics and capturing significant variation.").

ii. The FCC Cannot Use Section 201 to Accomplish Section 251 Interconnection and Unbundling

The FCC's assertion that "the availability of other protections adequately addresses commenters' concerns about forbearance from the … section 251/252 framework," *Order* ¶ 513 (JA ___), ignores this Court's decision in *Bell Atlantic Tel. Co's. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) which held that 47 U.S.C. § 201 "does not expressly authorize an order of physical co-location, and thus the Commission may not impose it." *Id.*, 24 F.3d at 1447. It was in part to address this holding that Congress added 47 U.S.C. §§ 251(c)(2) and (3) to the Act. Further, the FCC's assertion conflicts with the Supreme Court's understanding of 47 U.S.C. § 152(b) in *AT&T Corp. v. Iowa Util's. Bd.*, 525 U.S. 366

(1999)(explaining that 47 U.S.C. § 152(b) "prevented the Commission from taking intrastate action solely because it furthered an interstate goal.").

The FCC cannot use its *interstate* authority under 47 U.S.C. § 201 to regulate broadband Internet access service that is an *intrastate* "telephone exchange service" under the Act. 47 U.S.C. § 153(54). *See* Full Service Network Feb. 20 Ex Parte at 5 – 6 (JA ___). The FCC attempts (*Order* n. 1574 (JA ____)) to rely on "savings provisions" in 47 U.S.C. §§ 251(g) and (i), but those sections do not expand section 201 to include "intrastate" matters; those sections foreclosed arguments that the addition of section 251 — which does address intrastate communications — undid court decisions upholding FCC authority over mixed interstate/intrastate facilities and services.

It also needs to be emphasized that the 1996 Act made State commissions, and not the FCC, the primary party responsible for implementing local competition. The FCC may only act to arbitrate resale, unbundling, and interconnection disputes for telephone exchange service *if a State commission abdicates its role.* See 47 U.S.C. § 252(e)(5)("If a State commission fails to act…"). The FCC has provided no explanation of how it will accomplish the local competition goals in the Act and section 706 of the 1996 Act without sections 251 and 252. Prior to 1996 the courts made clear that section 201 did not reach

interconnection, unbundling or intrastate competition, and nothing in 47 U.S.C. § 160 creates new authority for the FCC under section 201.

iii. The Evidence Before the FCC Does Not Support Forbearance

The FCC admits that its prior predictive judgments "anticipating vibrant intermodal competition for fixed broadband cannot be reconciled with current marketplace realities." *Order* ¶ 330 (JA ___). And the FCC found in its latest review of the broadband Internet access market that only 12 percent of American households had a choice of three or more providers, 27 percent have two options, 45 percent have one option, and 16 percent have none. *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 2015 Broadband Progress Report, 30 FCC Rcd. 1375, 1421 (2015) ¶ 83.

Elsewhere the FCC has found that "[a]s a general rule, the geographic footprint of a cable [provider] rarely overlaps the geographic footprint of another cable [provider]" and that "the situation is similar for telephone [providers]." *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, 30 FCC Rcd. 3253, 3266 (2015) ¶ 30. The 10th Circuit recognized this cable-telephone duopoly in *Qwest Corp. v. FCC*, 689 F.3d 1214, 1223-24 (10th Cir. 2012)("[t]hat duopolistic structure … formed the basis for the Commission's conclusion that regulatory requirements, particularly unbundling, remained necessary….")(internal citations omitted).

In 1987 the FCC said that "local distribution facilities… are essential for the provision of network access to end users of packet services." *Decreased Regulation of Certain Basic Telecommunications Services*, Notice of Proposed Rulemaking, 2 FCC Rcd. 645 (1987), ¶ 28. The FCC also recognized that "new suppliers of packet services that do not own transmission facilities may readily enter this market on a resale basis by interconnecting their … equipment with trunks leased from facilities-based carriers." *Id.*, ¶ 17. Those findings remain valid today.

Further evidence before the FCC shows at least 29 percent of consumers surveyed said that they did not subscribe to broadband Internet access service because it was "too expensive." *2015 Broadband Progress Report*, 30 FCC Rcd. at 1434 ¶ 98. As this Court noted "[f]rom 1974 to 1980 the FCC extensively considered the issue of resale… and based on these proceedings, the FCC concluded that a prohibition on resale and sharing restrictions would lead to a number of benefits, including… increased entry and competition… a greater possibility of innovation, less waste of available communications facilities, the creation of demand for new services… [and] pressures upon established carriers to align their rates with costs….". *Nat'l. Ass'n. of Regulatory Comm'rs v. FCC*, 746 F.2d 1492, 1501 (D.C. Cir. 1984).

The success of the FCC's resale policies motivated the changes Congress made in the 1996 Act. It was to promote competition that Congress imposed a non-discretionary duty on all local exchange carriers to provide unrestricted resale, 47 U.S.C. § 251(b)(1), and on incumbent local exchange carriers to provide for co-location and access to unbundled network elements, 47 U.S.C. §§ 251(c)(2) and (3). *See Bell Atlantic Tel. Co's v. FCC*, 206 F.3d 1, 3 (2000). Further, Congress provided a State commission role to arbitrate local competition disputes, 47 U.S.C. § 252. In light of this clear Congressional purpose 47 U.S.C. § 160 surely requires more to support forbearance than an assertion by the FCC that "other authorities" are adequate and the public interest will be better served by enhancing the agency's discretion. *See Nader v. FCC*, 520 F.2d 182, 192 – 193 (D.C. Cir. 1975)("The Commission cannot satisfy the requirement of reasoned decisionmaking… by claims of judgment and expertise and assurances that the record has been examined.").

2. The Act Compels the Classification of Broadband Internet Access Service

The FCC relies on *Chevron* deference to support reclassification of broadband Internet access service as a telecommunications service. *Order* ¶ 332 (JA ___). No deference is warranted because the plain language and structure of the Act demonstrate that Congress spoke directly to the issue.

47 U.S.C. § 153(51) says that only information service provided by a telecommunications carrier is not subject to regulation under Title II. The FCC's improper classification denied application of Title II for over a decade to essential facilities and frustrated the clear purpose of the 1996 Act to promote local competition and ensure universal service. Upholding the FCC's present classification on the basis of deference will mean that a future FCC could change the classification once again by simply assessing the "facts" differently. Such regulatory uncertainty harms Petitioners and will act as yet another barrier to entry in the provision of broadband services.

Given that the expert agency has reversed itself on fundamental factual issues, *Order* ¶¶ 328 – 381 (JA ___ - ___), this Court should examine the structure and language of the Act to determine if, in light of those new facts, any ambiguity remains on one key question: whether the offering of telecommunications to the public as part of an information service can be anything but a "telecommunications service" under the Act. An agency can change its interpretation of a statute it administers, but its "interpretation, whether old or new, must be consistent with the statute." *Loving v. I.R.S.*, 742 F.3d 1013, 1021 (D.C. Cir. 2014).

A. Broadband and Convergence Are Not New Phenomena

First, a bit of history to put the question in perspective. This Court is no stranger to "broadband" services. Nearly 50 years ago, in *Am. Trucking Ass'ns*,

Inc. v. FCC, 377 F.2d 121 (D.C. Cir. 1966), this Court upheld an FCC order rejecting an AT&T tariff to provide a "broadband transmission medium" for transmitting "telephone, teletypewriter, control, signaling, facsimile and data." *Id.*, 377 F.2d at 124-125. Ten years later, in *Nat'l. Ass'n. of Regulatory Util. Commiss'rs v. FCC*, 533 F.2d 601 (D.C. Cir., 1976) the Court reviewed an FCC order pre-empting State regulation as part of the FCC's plan for "a nationwide broadband communications grid in which cable systems should play an important part." *Id.*, 533 F.2d at 606 (internal quotation marks omitted).

This Court also has a long history with the regulation of computer and communications technologies. In *Computer & Communications Indus. Ass'n. v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) this Court upheld the FCC's seminal "basic" and "enhanced" regulatory framework saying "[i]n *Computer II* the Commission took full advantage of its broad powers to serve the public interest by accommodating a new development in the communications industry, the confluence of communications and data processing." *Id.*, 693 F.2d at 213-214. That was over 30 years ago.

In 1994 this Court upheld an FCC order authorizing "video dialtone service" under Title II of the Act in which the "the Commission envisioned the development of a cost-effective system of video common carriage… over a broadband network analogous to the existing nationwide switched narrowband

network." *Nat'l Cable Television Ass'n., Inc. v. FCC*, 33 F.3d 66, 70 (D.C. Cir. 1994) .

By the mid-1990s a well-established bifurcated regime was in place. The FCC in *Computer II* had adopted "certain safeguards" to ensure that "if such carriers wish[ed] to offer enhanced services, they must sell themselves the basic transmission service 'pursuant to the terms and conditions embodied in their tariff.'" *Computer & Communications Indus. Ass'n,* 693 F.2d at 219. This safeguard is reflected in the definition of "enhanced service" – that the FCC adopted in 1980 and which remains unchanged today – which says "the term enhanced service shall refer to services, *offered over common carrier transmission facilities* used in interstate communications, which employ computer processing applications…." 47 C.F.R. § 64.702(a)(emphasis added).

Likewise, the FCC's 1991 video dialtone rules, which were adopted to address "the increasing convergence of previously separate markets embracing voice, data, graphics and video," *Nat'l Cable Television Ass'n*, 33 F.3d at 69, required a "first level platform" to "be provided on a non-discriminatory common carrier basis" to allow competition at "a second level" for "unregulated, competing gateways for video and related services…." *Id.*, 33 F.3d at 70. Thus, the FCC's video dialtone rules tracked the FCC's *Computer II* basic/enhanced dichotomy.

B. The 1996 Act Adopted the *Computer II* Safeguards

The 1996 Act was adopted against this established judicial and regulatory backdrop. Congress directly addressed the question of the proper regulatory treatment of "information service" by saying "*a telecommunications carrier* shall be treated as a common carrier under this Act only to the extent it is engaged in providing telecommunications service." 47 U.S.C. § 153(51)(emphasis added). A "telecommunications carrier" is "any provider of telecommunications services…." *Id.* Thus, under the Congressional formulation, only an information service *provided by a telecommunications carrier* is prohibited from being regulated as a common carrier service under the Act.

This formulation tracks exactly the approach taken in the FCC's still extant definition of "enhanced service" – which by definition is information processing services offered "*over common carrier transmission facilities*". *See* 47 C.F.R. 64.702(a)(emphasis added). It is only because of the inclusion of the *regulated* transmission component that the bundled offering is not subject to regulation under Title II. The plain language of the Act shows that Congress in 1996 maintained the "safeguard" that the FCC adopted in *Computer II* and this Court upheld in *Computer & Communications Indus. Ass'n*, 693 F. 2d at 219 ("certain safeguards were adopted…").

The Act's structure is clear. In 1934, Congress said "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C. § 153(11). In 1984, Congress said "[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service." 47 U.S.C. § 541(c). In 1996 Congress said "a telecommunications carrier shall be treated as a common carrier under this Act only to the extent it is engaged in providing telecommunications service…." 47 U.S.C. §153(51). In each case Congress linked the exemption or limitation on common carrier treatment to otherwise being regulated under Title II, Title III or Title VI of the Act.

One searches the Act in vain for a similar statement with respect to "information service." The FCC's regulatory definition of "enhanced services" clearly states "[e]nhanced services are not subject to regulation under title II of the Act." 47 C.F.R. § 64.702(a). Congress presumably was aware of this statement, yet chose not to include it in the Act.

As a result, the only way for the statute and the regulation to coexist is if, and only if, there is a regulated telecommunications service included in the public offering of an information service. 47 U.S.C. § 160 provides the FCC the express authority to forbear and thus address the Supreme Court's concern about expanding regulation to information service providers that "own no transmission

facilities." *Brand X*, 125 S. Ct. 2688, 2707. Similar forbearance linked to safeguards is precisely what this Court upheld in 1982. *See Computer & Communications Indus. Ass'n*, 693 F.2d 198, 210 ("we sanction the Commission's forbearance from Title II regulation.").

As this Court stated "Congress was adept at using the terms 'satellite' and 'multichannel video programming distributor' when it chose. In contrast to cable television technology in *Southwestern Cable*, satellite television was not some new phenomenon that Congress had no opportunity to contemplate when enacting § 624A." *Echostar Satellite L.L.C. v. FCC*, 704 F.3d 992, 999-1000 (D.C. Cir. 2013). The same statement applies with respect to the Internet and Congress' use of the terms "information service" and "telecommunications service" in the 1996 Act.

In short, Congress knew how to prohibit common carrier regulation of "information service" and how to define and provide rights for an "information service provider" if it wished to do so. It did not, and as the Supreme Court has said, "in a comprehensive regulatory scheme… such omissions are significant ones." *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988).

C. *Brand X* is Not a Bar to Finding the Statute Controls

The Supreme Court in *Brand X*, 545 U.S. 967 (2005) deferred to an FCC interpretation that the term "offering" in the definition of "telecommunications service" was ambiguous. *Id.*, 545 U.S. at 989. However, the Supreme Court did not then evaluate whether that interpretation was "inconsistent with the design and structure of the statute as a whole." *Utility Air Regulatory Grp.*, 134 S. Ct. at 2442.

Instead the *Brand X* majority reviewed the "regulatory history" of the FCC's definitions of "basic" and "enhanced" service. *Brand X*, 545 U.S. at 976 & 992. But the *Brand X* court overlooked the fact that the FCC's definition of "enhanced service" requires that the information processing be "offered over common carrier transmission facilities…" 47 C.F.R. § 64.702(a). The *Brand X* court rejected concerns that the FCC's interpretation would result in telephone companies "avoiding common carrier regulation of its telephone service… because we do not believe these results would follow from the construction the Commission adopted." *Brand X*, 545 U.S. at 997.

But that is precisely what did happen, with the result that the FCC has in the *Order* reversed all of the factual findings that the *Brand X* majority relied upon in making its decision. *Order* ¶¶ 365 – 381 (JA ___ - ___).

As the FCC noted, *Order* ¶ 333 (JA ___), the majority in *Brand X* agreed that the FCC's interpretation then was not the best reading of the statute. Applying the Supreme Court's more recent pronouncements on *Chevron* in *Utility Air Regulatory Grp.*, 134 S. Ct. at 2442, it is clear that while the term "offering" may be ambiguous when read in isolation, that ambiguity is resolved when the rest of the statute is considered.

D. Under the Plain Language of the Act Broadband Internet Access Service is a "Telecommunications Service"

No deference is due to the FCC's classification of broadband Internet access service because "broadband Internet access service" is a "telecommunications service" under the plain language of the Act. 47 U.S.C. § 153(53). The FCC defines "broadband Internet access service" as a "mass-market retail service by wire or radio that provides the capability to transmit data to and from substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service." 47 C.F.R. § 8.2; *Order* ¶ 187 (JA ___). The FCC defines "mass-market" to mean "a service marketed and sold on a standardized basis to residential customers…" *Order* ¶ 189 (JA ___).

The FCC's definition of "broadband Internet access service" is simply an alternative way of describing what Congress defined as a "telecommunications service." "Telecommunications service" is "the offering of telecommunications for

a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(53). "Telecommunications" is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(50).

Further, the FCC's definition of the term "mass market" is an alternative formulation of the classic common carrier definition as "one who undertakes to carry for all people indifferently," *Nat'l. Ass'n. of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976), that Congress adopted in 1993 in 47 U.S.C. § 332(d)(1) ("commercial mobile service") and 1996 in 47 U.S.C. § 153(53) ("telecommunications service").

Nothing in the FCC's definition of broadband Internet access service as "the capability to transmit data to and receive data from all or substantially all Internet end points" even remotely suggests an offering that meets the statutory definition of "information service." "Information service" is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications*, and includes electronic publishing, *but does not include any use of such capability for the management, control, or operation of a telecommunications system or the*

management of a telecommunications service." 47 U.S.C. § 153(24)(emphasis added).

By requiring that the offering be made "via telecommunications" – which is separately defined at 47 U.S.C. § 153(50) – Congress made clear that the definition of "information service" requires that the user must have the ability to transmit "between or among points specified by the user, information of the user's choosing, without change in the form or content of that information as sent and received." *Id.* "Information service" requires additional processing that is independent of the transmission function. Yet the FCC's definition of broadband Internet access service makes no mention of any processing function at all, much less a processing of information that is in addition to the "telecommunications" required by the statutory definition.

3. The *Order* Unlawfully Fails to Apply Definitions in the Act

The FCC's admitted failure, *Order* ¶¶ 320 and 367 (JA ___ and ___), to apply the "telecommunications management exception" in the definition of "information service" is actually part of a consistent pattern by the agency of refusing to apply statutory provisions of the Act based on its policy preferences at the time. *See e. g., Southwestern Bell Corp. v. FCC*, 43 F.3d 1515, 1516–1517 (D.C. Cir 1995) ("This case presents yet another chapter in the [FCC's] series of attempts to relax the tariff-filing requirements for nondominant carriers."). As this

Court has said, "the FCC cannot abandon the legislative scheme because it thinks it has a better idea." *Id.*, 43 F.3d at 1525 (footnote omitted).

The legislative history of the 1996 Act shows that Congress expected cable networks would be used to provide local voice and data services in competition with the existing phone companies, and that cable and phone companies would compete on a level playing field in those services. *See* Full Service Network Feb. 3, 2015 Ex Parte at 13 (JA at ___). That could hardly have occurred if "telephone exchange service" was limited to then existing circuit-switched local telephone networks.

In the *Order*, the FCC refused to apply the definitions of "telephone exchange service" and "local exchange carrier" to broadband Internet access service. *Order* at n. 1575 (JA ___) ("we need not, and do not, resolve whether broadband Internet access service could constitute 'telephone exchange service' or 'exchange access'…"). At the same time, the FCC purported to grant forbearance from provisions in the Act that apply to those defined services and entities. *Order* ¶¶ 513 – 514 (JA ___ - ___). The FCC cannot have it both ways – nothing in 47 U.S.C. § 160 provides authority for the FCC to grant forbearance in the abstract.

A. Broadband Internet Access Service is a "Telephone Exchange Service"

In 1996 Congress amended the definition of "telephone exchange service" to include "comparable service provided through a system of switches, transmission

equipment, or other facilities (or combination thereof) by which a subscriber can *originate and terminate a telecommunications service*." 47 U.S.C. § 153(54)(B) (emphasis added). The term "comparable service" refers to the original definition of "telephone exchange service" in the Act that Congress preserved as 47 U.S.C. § 153(54)(A). As the FCC states broadband Internet access service now fills that same role. *Order* ¶ 330 (JA ___)("the indispensible function' of broadband Internet access service is the 'connection link…'").

And to the extent broadband Internet access service is a "telephone exchange service" it cannot, under the plain language and structure of the Act, be "jurisdictionally interstate for regulatory purposes" as the FCC attempts to assert in the *Order* ¶ 431 (JA ___). The prior decisions the FCC cites were all predicated on the classification of broadband Internet access service as an information service or, in the case of voice over Internet Protocol, the FCC's refusal to classify, and the FCC's reclassification of broadband Internet access service requires a reevaluation of those decisions.

Nothing in the definition of "telephone exchange service" requires a determination by the FCC before it applies – the definition describes a functional test. 47 U.S.C. § 151 says that the FCC "*shall* execute and enforce *the provisions* of this Act." (emphasis added). As this Court has noted "the Supreme Court has found '[s]hall' to be 'the language of command.'" *Southwestern Bell*, 43 F. 3d at

1521. 47 U.S.C. § 151 commands the execution and enforcement of "the provisions of this Act" not the FCC's "estimations of desirable policy." *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 234 (1994) .

B. Broadband Internet Access Service is a "Local Exchange Service"

The definition of "local exchange carrier" also is a functional test – "any person that is engaged in the provision of telephone exchange service or exchange access." 47 U.S.C. § 153(32). The only discretion the FCC has is that explicitly provided for commercial mobile service. *Id.* Congress amended the definition of "telephone exchange service" and added "local exchange carrier" to the Act to promote local competition through 47 U.S.C. § 251 and video competition through 47 U.S.C. § 573. The FCC is not at liberty to refuse to apply the definitions or obligations Congress included in the Act.

C. The FCC Cannot Arbitrarily Exclude Services From Regulation

The FCC cannot protect services from being a "telecommunications service" by excluding them from the definition of "broadband Internet access service." Yet this is what the FCC attempts to do by excluding "facilities-based [voice over Internet Protocol] services used by many cable customers" from the definition. *Order* ¶¶ 35 and 208 (JA ___ and ___). The arbitrary nature of the FCC's definition of "broadband Internet access service" and its summary exclusion of

"facilities-based" voice over Internet Protocol services is highlighted when one considers that in a 1987 Notice of Proposed Rulemaking the FCC recognized that "packet switching and transmission technology can be used to provide voice as well as data services… if we were to deregulate all services based on packet technology in this proceeding this could result in the automatic deregulation of some voice services provided by dominant carriers in the near future." *Decreased Regulation of Certain Basic Telecommunications Services*, Notice of Proposed Rulemaking, 2 FCC Rcd. 645 (1987), ¶ 24. The exclusion has no basis in the statutory definitions of the Act and is contrary to the Congressional command that the FCC "shall execute and enforce" the provisions of the Act. 47 U.S.C. § 151.

4. Section 4(i) of the Act Does Not Allow the FCC to Issue Rules for or Enforce Other Acts of Congress

The FCC asserts in the *Order* that section 4(i) of the Act, 47 U.S.C. § 154(i), could be used to adopt rules implementing section 706 of the 1996 Act. *Order* ¶¶ 280, 298 and n. 769 (JA ___, ___ and ___).

Section 706 of the 1996 Act is *not* part of the Act. 47 U.S.C. § 1302. The fact that Congress affirmatively chose not to include section 706 in the Act demonstrates that Congress did not intend section 4(i) of the Act to be able to apply to section 706 of the 1996 Act.

Section 4(i) says the FCC may adopt rules "not inconsistent with this Act." 47 U.S.C. 154(i). Adopting rules to implement or enforce the 1996 Act or any

other Act of Congress would be "inconsistent" with the plain language of the Act because the operative provisions of the Act are expressly limited to "this Act," which is the Communications Act of 1934 as amended, or other provisions of law specifically identified by Congress. *See, e. g.* 47 U.S.C. §§ 152, 201(b), 303(r), 401 – 406, 501 – 503.

47 U.S.C. §§ 303(r) and 502 refer to implementation and enforcement of international treaties. In 47 U.S.C. § 229, Congress directed the FCC to adopt rules to implement the Communications Assistance for Law Enforcement Act. In 47 U.S.C. § 503 Congress allowed the FCC to assess forfeitures under the Act for violations of specific provisions of Title 18, United States Code. All of these references would be surplus if the FCC could implement and enforce other laws using 47 U.S.C. § 154(i).

The FCC's interpretation conflicts with two prior decisions of this Court. Such an interpretation would expand all statutes beyond the bounds Congress set by allowing the FCC, in its discretion, to exploit Congressional silence to shoehorn other Acts of Congress into the broad powers granted the FCC by the Act.

In *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) this Court, after reviewing Supreme Court precedent and prior cases of this Court, reaffirmed that "with respect to the Commission's section 4(i) ancillary authority… it is Title II,

Title III, or VI to which the authority must ultimately be ancillary." *Id.*, 600 F.3d at 654.

Further, this Court refused to grant *Chevron* deference to the FCC in a similar context, saying "[t]he failure of Congress to use 'Thou Shall Not' language doesn't create a statutory ambiguity of the sort that triggers *Chevron* deference… 'were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually unlimited hegemony, a result plainly out of keeping with *Chevron*.…" *United States Telecomm's Ass'n. v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004)(emphasis in original; quoting from *Railway Labor Exec's. Ass'n. v. Nat'l. Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994)).

5. Section 706 of the 1996 Act Does Not Grant Independent Regulatory or Enforcement Authority

A. The *Verizon* Decision Analyzed a Different Factual and Legal Situation That Allows This Court to Distinguish That Panel's Holding

The *Order* relies on section 706 of the 1996 Act, 47 U.S.C. § 1302, as an independent basis for the rules, forbearance, and enforcement mechanisms that the FCC adopted. *Order* ¶¶ 281 and 298 (JA ___ and ___). In doing so the FCC relies entirely on this Court's decision in *Verizon*, 740 F.3d 623, citing to "the *Verizon* court" more than 35 times in the *Order*. Ordinarily that might be the end of the discussion, but in this case the *Order* itself demolishes the factual and legal predicate on which the *Verizon* court based its analysis.

The *Verizon* court was presented with an entirely different factual and legal scenario, namely that broadband Internet access service was an "information service" not subject to regulation under Title II of the Act. *Verizon*, 740 F.3d at 631. As a result the *Verizon* court did not consider the multiple sources of authority in Title II that the FCC cited to support the order under review. *Id.*, 740 F.3d at 634 – 635. Instead, the *Verizon* court was presented with a stark choice – either find that section 706 granted authority or rule that the FCC had no authority to regulate a widely used communication service upon which much of the Nation's commerce relies.

Had broadband Internet access service been a "telecommunications service" in 2010 the *Verizon* court would have been addressing a very different question, which is the question presented in this case: did Congress intend a free-standing provision of law to grant independent authority to the FCC to circumvent the comprehensive regulatory scheme for "telecommunications service" Congress adopted in the rest of that same statute? As discussed below, the answer to that question is clearly no.

B. The Plain Language and Structure of the 1996 Act Demonstrate That Congress Did Not Grant Independent Authority in Section 706 of the 1996 Act

Section 706 of the 1996 Act was left free-standing by Congress. 47 U.S.C. § 1302. Congress used the phrase "shall encourage" as its command in section

706(a) and the defined term "notice of inquiry" in section 706(b). 47 U.S.C. §§ 1302(a) and (b). A direction to "encourage" is not the same as a command to do something directly. A "notice of inquiry" has been defined in the FCC's rules since 1984 as a proceeding that cannot lead to rulemaking. 47 C.F.R. § 1.430.

Other provisions in the 1996 Act clarify Congressional intent. In direct contrast to the silence regarding rulemaking in section 706, section 207 of the 1996 Act does expressly direct the FCC to publish rules pursuant to section 303 of the Act. 47 U.S.C. § 303 note.

Further, in two prior cases this Court rejected FCC rules promulgated under sections 257 and 713 of the Act – both of which were added by the 1996 Act – because the FCC attempted to base those rules on Congressional directions to conduct a "notice of inquiry" addressing specific issues. *See Comcast Corp. v. FCC*, 600 F.3d 642, 658-660 (D.C. Cir. 2010); *Motion Picture Ass'n. of Am. v. FCC*, 309 F.3d 796, 802 (D.C. Cir. 2002) .

The declared purpose of section 706 is to encourage universal broadband. Deployment of "advanced telecommunications capability" to "all Americans" necessarily requires access to rights of way and poles, ducts, conduits and tower sites. Yet section 706 makes no mention of rights of way, pole attachments or wireless tower siting, and it is inconceivable that Congress would make a silent delegation of authority to occupy public or private property.

Finally, in section 3(b) of the 1996 Act Congress said "the terms used in this Act meaning have the meanings provided in section 3 of the Communications Act." 47 U.S.C. § 153 note. As a result, an "information service" for purposes of the Act is also an "information service" for purposes of section 706 of the 1996 Act. Congress unambiguously chose not to use the term "information service" in section 706. 47 U.S.C. § 1302. The Supreme Court has said "[i]n a comprehensive regulatory scheme … such omissions are significant ones." *Mackey*, 486 U.S. at 837.

The FCC and the courts must give effect Congress' clear intent, as the Supreme Court recently reiterated: "[a]n agency interpretation that is inconsistent with … the structure of the statute… does not merit deference" *Utility Air Regulatory Grp.*, 134 S. Ct. at 2442; *see also Worldcom, Inc. v. FCC*, 288 F.3d 429, 433 (D.C. Cir. 2002)("But nothing in section 251(g) seems to invite the Commission's reading, under which (it seems) it could override any virtually any provision of the 1996 Act ….").

C. The *Verizon* Court Made Errors of Fact and Law

As Petitioners argued below, the *Verizon* court made errors of fact and law that were essential to that court's holding. *See* Full Service Network March 21, 2014 Comments (JA __ - __). However, this Court need not address those errors because the *Verizon* court holding can be distinguished on the grounds cited above.

CONCLUSION

As this Court has previously said, "the FCC cannot abandon the legislative scheme because it thinks it has a better idea." *Southwestern Bell*, 43 F.3d at 1525. That is precisely what the FCC is attempting to do again in the *Order*. Petitioners request the Court 1) vacate the FCC's forbearance decisions as contrary to law and arbitrary and capricious; 2) vacate the FCC's assertion of authority under 47 U.S.C. § 154(i) to implement section 706 of the 1996 Act as contrary to law; 3) vacate the FCC's assertion of independent authority under section 706 of the 1996 Act as contrary to statute; 4) uphold the classification of broadband Internet access service as required by statute; 5) direct the FCC to apply the statutory definitions in the Act to broadband Internet access service; and 6) vacate the FCC's arbitrary exclusion of "facilities based voice over Internet Protocol service" from broadband Internet access service.

Respectfully submitted,

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Dated: August 7, 2015

CERTIFICATE OF COMPLIANCE

Pursuant to the Court's July 31, 2015 Order and Fed. R. App. P. 32(a)(7)(C), as modified by the Court's June 29, 2015 briefing order, I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 32(a)(3)(B) because this brief contains 8,979 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(2).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2010 version of Microsoft Word in 14 point Times New Roman.

_\s__Earl Comstock___
Earl Comstock

CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of August, 2015, electronically filed the Revised Opening Brief of Petitioner Full Service Network, *et al* in the Office of the Clerk of the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system which will send notification of such filing to all counsel of record

August 7, 2015

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ADDENDUM

STATUTORY AND REGULATORY ADDENDUM

15 U.S.C. § 21

(a) Commission, Board, or Secretary authorized to enforce compliance

Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in the Surface Transportation Board where applicable to common carriers subject to jurisdiction under subtitle IV of Title 49; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Secretary of Transportation where applicable to air carriers and foreign air carriers subject to part A of subtitle VII of Title 49; in the Board of Governors of the Federal Reserve System where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

***

28 U.S.C. § 2342

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of--

(A) the Secretary of Transportation issued pursuant to section 50501, 50502, 56101-56104, or 57109 of title 46 or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; and

(B) the Federal Maritime Commission issued pursuant to section 305, 41304, 41308, or 41309 or chapter 421 or 441 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

28 U.S.C. § 2344

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of-
(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

47 U.S.C. § 151

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority

heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

47 U.S.C. § 152

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V-A.

(b) Exceptions to Federal Communications Commission jurisdiction

Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to

205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

47 U.S.C. § 153

For the purposes of this chapter, unless the context otherwise requires—

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(11) Common carrier

The term "common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

***

(24) Information service

The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

***

(32) Local exchange carrier

The term "local exchange carrier" means any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c) of this title, except to the extent that the Commission finds that such service should be included in the definition of such term.

***

(50) Telecommunications

The term “telecommunications” means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(51) Telecommunications carrier

The term “telecommunications carrier” means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

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(53) Telecommunications service

The term “telecommunications service” means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

(54) Telephone exchange service

The term “telephone exchange service” means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

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47 U.S.C. § 154

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(i) Duties and powers

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

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47 U.S.C. § 160

(a) Regulatory flexibility

Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that--

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive effect to be weighed

In making the determination under subsection (a)(3) of this section, the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance

will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

(c) Petition for forbearance

Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) of this section within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a) of this section. The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

(d) Limitation

Except as provided in section 251(f) of this title, the Commission may not forbear from applying the requirements of section 251(c) or 271 of this title under subsection (a) of this section until it determines that those requirements have been fully implemented.

(e) State enforcement after commission forbearance

A State commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a) of this section.

47 U.S.C. § 201

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the

divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: Provided, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: Provided further, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: Provided further, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

47 U.S.C. § 202

(a) Charges, services, etc.

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services included

Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of common carrier lines of communication,

whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Penalty

Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each such offense and $300 for each and every day of the continuance of such offense.

47 U.S.C. § 208

(a) Any person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(b)(1) Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed.

(2) The Commission shall, with respect to any such investigation initiated prior to November 3, 1988, issue an order concluding the investigation not later than 12 months after November 3, 1988.

(3) Any order concluding an investigation under paragraph (1) or (2) shall be a final order and may be appealed under section 402(a) of this title.

47 U.S.C. § 229

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(a) In general

The Commission shall prescribe such rules as are necessary to implement the requirements of the Communications Assistance for Law Enforcement Act [47 U.S.C.A. § 1001 et seq.].

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(d) Penalties

For purposes of this chapter, a violation by an officer or employee of any policy or procedure adopted by a common carrier pursuant to subsection (b) of this section, or of a rule prescribed by the Commission pursuant to subsection (a) of this section, shall be considered to be a violation by the carrier of a rule prescribed by the Commission pursuant to this chapter.

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47 U.S.C. § 230

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(f) Definitions

As used in this section:

(1) Internet

The term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

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47 U.S.C. § 231

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(e) Definitions

For purposes of this subsection, the following definitions shall apply:

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(3) Internet

The term "Internet" means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide network of computer networks that employ the Transmission Control Protocol/Internet Protocol or any successor protocol to transmit information.

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47 U.S.C. § 251

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty--

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty--

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under

this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether--

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

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(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) “Incumbent local exchange carrier” defined

(1) Definition

For purposes of this section, the term “incumbent local exchange carrier” means, with respect to an area, the local exchange carrier that--

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

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(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

47 U.S.C. § 252

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations
Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

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47 U.S.C. § 254

(a) Procedures to review universal service requirements

(1) Federal-State Joint Board on universal service

Within one month after February 8, 1996, the Commission shall institute and refer to a Federal-State Joint Board under section 410(c) of this title a proceeding to recommend changes to any of its regulations in order to implement sections 214(e) of this title and this section, including the definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for completion of such recommendations. In addition to the members of the Joint Board required under section 410(c) of this title, one member of such Joint Board shall be a State-appointed utility consumer advocate nominated by a national organization of State utility consumer advocates. The Joint Board shall, after notice and opportunity for public comment, make its recommendations to the Commission 9 months after February 8, 1996.

(2) Commission action

The Commission shall initiate a single proceeding to implement the recommendations from the Joint Board required by paragraph (1) and shall complete such proceeding within 15 months after February 8, 1996. The rules established by such proceeding shall include a definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for implementation. Thereafter, the Commission shall complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after receiving such recommendations.

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47 U.S.C. § 257

(a) Elimination of barriers

Within 15 months after February 8, 1996, the Commission shall complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this chapter (other than this section), market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services.

(b) National policy

In carrying out subsection (a) of this section, the Commission shall seek to promote the policies and purposes of this chapter favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.

(c) Periodic review

Every 3 years following the completion of the proceeding required by subsection (a) of this section, the Commission shall review and report to Congress on--

(1) any regulations prescribed to eliminate barriers within its jurisdiction that are identified under subsection (a) of this section and that can be prescribed consistent with the public interest, convenience, and necessity; and

(2) the statutory barriers identified under subsection (a) of this section that the Commission recommends be eliminated, consistent with the public interest, convenience, and necessity.

47 U.S.C. § 303

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(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

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Note to Section 303 - Restrictions on Over-the-Air Reception Devices

Pub. L. 104–104, title II, §207, Feb. 8, 1996, 110 Stat. 114 , provided that: "Within 180 days after the date of enactment of this Act [Feb. 8, 1996], the Commission shall, pursuant to section 303 of the Communications Act of 1934 [47 U.S.C. 303], promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services."

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47 U.S.C. § 332

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(d) Definitions

For purposes of this section--

(1) the term “commercial mobile service” means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

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47 U.S.C. § 401

(a) Jurisdiction

The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter.

(b) Orders of Commission

If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

(c) Duty to prosecute

Upon the request of the Commission it shall be the duty of any United States attorney to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

47 U.S.C. § 402

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

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47 U.S.C. § 403

The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this chapter, or concerning which any question may arise under any of

the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this chapter, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money.

47 U.S.C. § 404

Whenever an investigation shall be made by the Commission it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

47 U.S.C. § 405

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such

further proceedings as may be appropriate: Provided, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

47 U.S.C. § 406

The district courts of the United States shall have jurisdiction upon the relation of any person alleging any violation, by a carrier subject to this chapter, of any of the provisions of this chapter which prevent the relator from receiving service in interstate or foreign communication by wire or radio, or in interstate or foreign transmission of energy by radio, from said carrier at the same charges, or upon terms or conditions as favorable as those given by said carrier for like communication or transmission under similar conditions to any other person, to issue a writ or writs of mandamus against said carrier commanding such carrier to furnish facilities for such communication or transmission to the party applying for the writ: Provided, That if any question of fact as to the proper compensation to the carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper pending the determination of the question of fact: Provided further, That the remedy given by writ of mandamus shall be

cumulative and shall not be held to exclude or interfere with other remedies provided by this chapter.

47 U.S.C. § 501

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than $10,000 or by imprisonment for a term not exceeding two years, or both.

47 U.S.C. § 502

Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this chapter, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs.

47 U.S.C. § 503

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(b) Activities constituting violations authorizing imposition of forfeiture penalty; amount of penalty; procedures applicable; persons subject to penalty; liability exemption period

(1) Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--

(A) willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission;

(B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter or under any treaty, convention, or other agreement to which the United States is a party and which is binding upon the United States;

(C) violated any provision of section 317(c) or 509(a) of this title; or

(D) violated any provision of section 1304, 1343, 1464, or 2252 of Title 18;

shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this subsection shall be in addition to any other penalty provided for by this chapter; except that this subsection shall not apply to any conduct which is subject to forfeiture under subchapter II of this chapter, part II or III of subchapter III of this chapter, or section 507 of this title.

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(3)(A) At the discretion of the Commission, a forfeiture penalty may be determined against a person under this subsection after notice and an opportunity for a hearing before the Commission or an administrative law judge thereof in accordance with section 554 of Title 5. Any person against whom a forfeiture penalty is determined under this paragraph may obtain review thereof pursuant to section 402(a) of this title.

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47 U.S.C. § 541

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(c) Status of cable system as common carrier or utility

Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.

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47 U.S.C. § 543

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(1) The term "effective competition" means that--

(A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system;

(B) the franchise area is--

(i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and

(ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area;

(C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area; or

(D) a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.

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47 U.S.C. § 573

(a) Open video systems
(1) Certificates of compliance

A local exchange carrier may provide cable service to its cable service subscribers in its telephone service area through an open video system that complies with this section. To the extent permitted by such regulations as the Commission may prescribe consistent with the public interest, convenience, and necessity, an operator of a cable system or any other person may provide video programming through an open video system that complies with this section. An operator of an open video system shall qualify for reduced regulatory burdens under subsection (c) of this section if the operator of such system certifies to the Commission that such carrier complies with the Commission's regulations under subsection (b) of this section and the Commission approves such certification. The Commission shall publish notice of the receipt of any such certification and shall act to approve or disapprove any such certification within 10 days after receipt of such certification.

(2) Dispute resolution

The Commission shall have the authority to resolve disputes under this section and the regulations prescribed thereunder. Any such dispute shall be resolved within 180 days after notice of such dispute is submitted to the Commission. At that time or subsequently in a separate damages proceeding, the Commission may, in the case of any violation of this section, require carriage, award damages to any person denied carriage, or any combination of such sanctions. Any aggrieved party may seek any other remedy available under this chapter.

(b) Commission actions

(1) Regulations required

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary (including any reconsideration) to prescribe regulations that—

(A) except as required pursuant to section 531, 534, or 535 of this title, prohibit an operator of an open video system from discriminating among video programming providers with regard to carriage on its open video system, and ensure that the rates, terms, and conditions for such carriage are just and reasonable, and are not unjustly or unreasonably discriminatory;

(B) if demand exceeds the channel capacity of the open video system, prohibit an operator of an open video system and its affiliates from selecting the video programming services for carriage on more than one-third of the activated channel capacity on such system, but nothing in this subparagraph shall be construed to limit the number of channels that the carrier and its affiliates may offer to provide directly to subscribers;

(C) permit an operator of an open video system to carry on only one channel any video programming service that is offered by more than one video programming provider (including the local exchange carrier's video programming affiliate): Provided, That subscribers have ready and immediate access to any such video programming service;

(D) extend to the distribution of video programming over open video systems the Commission's regulations concerning sports exclusivity (47 C.F.R. 76.67), network nonduplication (47 C.F.R. 76.92 et seq.), and syndicated exclusivity (47 C.F.R. 76.151 et seq.); and

(E)
(i) prohibit an operator of an open video system from unreasonably discriminating in favor of the operator or its affiliates with regard to material or information (including advertising) provided by the operator to subscribers for the purposes of selecting programming on the open video system, or in the way such material or information is presented to subscribers;

(ii) require an operator of an open video system to ensure that video programming providers or copyright holders (or both) are able suitably and uniquely to identify their programming services to subscribers;

(iii) if such identification is transmitted as part of the programming signal, require the carrier to transmit such identification without change or alteration; and

(iv) prohibit an operator of an open video system from omitting television broadcast stations or other unaffiliated video programming services carried on such system from any navigational device, guide, or menu.

(2) Consumer access
Subject to the requirements of paragraph (1) and the regulations thereunder, nothing in this section prohibits a common carrier or its affiliate from negotiating mutually agreeable terms and conditions with over-the-air broadcast stations and other unaffiliated video programming providers to allow consumer access to their signals on any level or screen of any gateway, menu, or other program guide, whether provided by the carrier or its affiliate.

(c) Reduced regulatory burdens for open video systems
(1) In general

Any provision that applies to a cable operator under—

(A) sections 533 (other than subsection (a) thereof), 536, 543(f), 548, 551, and 554 of this title, shall apply,

(B) sections 531, 534, and 535 of this title, and section 325 of this title, shall apply in accordance with the regulations prescribed under paragraph (2), and

(C) sections 532 and 537 of this title, and parts III and IV of this subchapter (other than sections 543 (f), 548, 551, and 554 of this title), shall not apply,

to any operator of an open video system for which the Commission has approved a certification under this section.

(2) Implementation

(A) Commission action

In the rulemaking proceeding to prescribe the regulations required by subsection (b)(1) of this section, the Commission shall, to the extent possible, impose obligations that are no greater or lesser than the obligations contained in the provisions described in paragraph (1)(B) of this subsection. The Commission shall complete all action (including any reconsideration) to prescribe such regulations no later than 6 months after February 8, 1996.

(B) Fees

An operator of an open video system under this part may be subject to the payment of fees on the gross revenues of the operator for the provision of cable service imposed by a local franchising authority or other governmental entity, in lieu of the franchise fees permitted under section 542 of this title. The rate at which such fees are imposed shall not exceed the rate at which franchise fees are imposed on any cable operator transmitting video programming in the franchise area, as determined in accordance with regulations prescribed by the Commission. An operator of an open video system may designate that portion of a subscriber's bill attributable to the fee under this subparagraph as a separate item on the bill.

(3) Regulatory streamlining

With respect to the establishment and operation of an open video system, the requirements of this section shall apply in lieu of, and not in addition to, the requirements of subchapter II of this chapter.

(4) Treatment as cable operator

Nothing in this chapter precludes a video programming provider making use of an open video system from being treated as an operator of a cable system for purposes of section 111 of title 17.

(d) “Telephone service area” defined

For purposes of this section, the term “telephone service area” when used in connection with a common carrier subject in whole or in part to subchapter II of this chapter means the area within which such carrier is offering telephone exchange service.

47 U.S.C. § 1302

(a) In general

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

(b) Inquiry

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

(c) Demographic information for unserved areas

As part of the inquiry required by subsection (b), the Commission shall compile a list of geographical areas that are not served by any provider of advanced telecommunications capability (as defined by subsection (d)(1)) and to the extent

that data from the Census Bureau is available, determine, for each such unserved area--

(1) the population;

(2) the population density; and

(3) the average per capita income.

(d) Definitions
For purposes of this subsection:1

(1) Advanced telecommunications capability

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

(2) Elementary and secondary schools

The term “elementary and secondary schools” means elementary and secondary schools, as defined in section 7801 of Title 20.

47 C.F.R. § 1.430

The provisions of this subpart also govern proceedings commenced by issuing a “Notice of Inquiry,” except that such proceedings do not result in the adoption of rules, and Notices of Inquiry are not required to be published in the Federal Register.

47 C.F.R. § 1.53

In order to be considered as a petition for forbearance subject to the one-year deadline set forth in 47 U.S.C. 160(c), any petition requesting that the Commission exercise its forbearance authority under 47 U.S.C. 160 shall be filed as a separate pleading and shall be identified in the caption of such pleading as a petition for forbearance under 47 U.S.C. 160(c). Any request which is not in compliance with this rule is deemed not to constitute a petition pursuant to 47 U.S.C. 160(c), and is not subject to the deadline set forth therein.

47 C.F.R. § 1.54

(a) Description of relief sought. Petitions for forbearance must identify the requested relief, including:

(1) Each statutory provision, rule, or requirement from which forbearance is sought.

(2) Each carrier, or group of carriers, for which forbearance is sought.

(3) Each service for which forbearance is sought.

(4) Each geographic location, zone, or area for which forbearance is sought.

(5) Any other factor, condition, or limitation relevant to determining the scope of the requested relief.

(b) Prima facie case. Petitions for forbearance must contain facts and arguments which, if true and persuasive, are sufficient to meet each of the statutory criteria for forbearance.

(1) A petition for forbearance must specify how each of the statutory criteria is met with regard to each statutory provision or rule, or requirement from which forbearance is sought.

(2) If the petitioner intends to rely on data or information in the possession of third parties, the petition must identify:

(i) The nature of the data or information.

(ii) The parties believed to have or control the data or information.

(iii) The relationship of the data or information to facts and arguments presented in the petition.

(3) The petitioner shall, at the time of filing, provide a copy of the petition to each third party identified as possessing data or information on which the petitioner intends to rely.

(c) Identification of related matters. A petition for forbearance must identify any proceeding pending before the Commission in which the petitioner has requested, or otherwise taken a position regarding, relief that is identical to, or comparable to, the relief sought in the forbearance petition. Alternatively, the petition must declare that the petitioner has not, in a pending proceeding, requested or otherwise taken a position on the relief sought.

(d) Filing requirements. Petitions for forbearance shall comply with the filing requirements in § 1.49.

(1) Petitions for forbearance shall be e-mailed to forbearance@fcc.gov at the time for filing.

(2) All filings related to a forbearance petition, including all data, shall be provided in a searchable format. To be searchable, a spreadsheet containing a significant amount of data must be capable of being manipulated to allow meaningful analysis.

(e) Contents. Petitions for forbearance shall include:

(1) A plain, concise, written summary statement of the relief sought.

(2) A full statement of the petitioner's prima facie case for relief.

(3) Appendices that list:

(i) The scope of relief sought as required in § 1.54(a);

(ii) All supporting data upon which the petition intends to rely, including a market analysis; and

(iii) Any supporting statements or affidavits.

(f) Supplemental information. The Commission will consider further facts and arguments entered into the record by a petitioner only:

(1) In response to facts and arguments introduced by commenters or opponents.

(2) By permission of the Commission.

47 C.F.R. § 1.55

(a) Filing a petition for forbearance initiates the statutory time limit for consideration of the petition.

(b) The Commission will issue a public notice when it receives a properly filed petition for forbearance. The notice will include:

(1) A statement of the nature of the petition for forbearance.

(2) The scope of the forbearance sought and a description of the subjects and issues involved.

(3) The docket number assigned to the proceeding.

(4) A statement of the time for filing oppositions or comments and replies thereto.

47 C.F.R. § 1.56

(a) Opponents of a petition for forbearance may submit a motion for summary denial if it can be shown that the petition for forbearance, viewed in the light most favorable to the petitioner, cannot meet the statutory criteria for forbearance.

(b) A motion for summary denial may not be filed later than the due date for comments and oppositions announced in the public notice.

(c) Oppositions to motions for summary denial may not be filed later than the due date for reply comments announced in the public notice.

(d) No reply may be filed to an opposition to a motion for summary denial.

47 C.F.R. § 1.57

(a) If a petition for forbearance includes novel questions of fact, law or policy which cannot be resolved under outstanding precedents and decisions, the Chairman will circulate a draft order no later than 28 days prior to the statutory deadline, unless all Commissioners agree to a shorter period.

(b) The Commission will vote on any circulated order resolving a forbearance petition not later than seven days before the last day that action must be taken to prevent the petition from being deemed granted by operation of law.

47 C.F.R. § 1.58

The prohibition in § 1.1203(a) on contacts with decision makers concerning matters listed in the Sunshine Agenda shall also apply to a petition for forbearance for a period of 14 days prior to the statutory deadline under 47 U.S.C. 160(c) or as announced by the Commission.

47 C.F.R. § 1.59

(a) A petitioner may withdraw or narrow a petition for forbearance without approval of the Commission by filing a notice of full or partial withdrawal at any time prior to the end of the tenth business day after the due date for reply comments announced in the public notice.

(b) Except as provided in paragraph (a) of this section, a petition for forbearance may be withdrawn, or narrowed so significantly as to amount to a withdrawal of a large portion of the forbearance relief originally requested by the petitioner, only with approval of the Commission.

47 C.F.R. § 8.2

(a) Broadband Internet access service. A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this part.

(b) Edge provider. Any individual or entity that provides any content, application, or service over the Internet, and any individual or entity that provides a device used for accessing any content, application, or service over the Internet.

(c) End user. Any individual or entity that uses a broadband Internet access service.

(d) Fixed broadband Internet access service. A broadband Internet access service that serves end users primarily at fixed endpoints using stationary equipment. Fixed broadband Internet access service includes fixed wireless services (including fixed unlicensed wireless services), and fixed satellite services.

(e) Mobile broadband Internet access service. A broadband Internet access service that serves end users primarily using mobile stations.

(f) Reasonable network management. A network management practice is a practice that has a primarily technical network management justification, but does not include other business practices. A network management practice is reasonable if it is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.

47 C.F.R. § 64.702

(a) For the purpose of this subpart, the term enhanced service shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under title II of the Act.

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