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Refreshing the Record on Net Neutrality

by

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I. Introduction and Summary

When the Federal Communications Commission adopted the *Restoring Internet Freedom Order* in 2017, CNN's website declared it was the "End of the Internet as we know it." Vice.com warned that the repeal of net neutrality "would be an attack on women's abortion rights." And the Senate Democrats famously warned us that we would soon start getting the Internet "one..word..at..a..time."

But a funny thing happened in the wake of net neutrality's repeal: nothing. Internet speeds continued to rise, by 20 percent each year since 2018.[1] The FCC reports that as of 2021, 94 percent of Americans have access to 100 Mbps fixed terrestrial service.[2] And broadband networks proved robust enough to carry America through a once-in-a-century pandemic that moved huge swaths of society online – an unexpected transition that proved more difficult in countries with more heavily regulated networks.

It is perhaps surprising, then, that once the FCC finally achieved a Democratic majority – almost three years into the Biden administration – Chairwoman Jessica Rosenworcel's first priority was

to propose rules to reinstate the *Open Internet Order*, which governed the practices of broadband providers briefly between 2015 and its repeal in 2017.[3] The new Notice of Proposed Rulemaking, adopted by the Commission on October 19, was introduced amidst alarmist rhetoric about the importance of keeping the Internet open and preventing broadband companies from censoring speech, cutting off access to websites, or playing favorites among online services. As always, the case for net neutrality was big on hypothetical *potential* abuses but contained no instances of *actual* anticompetitive conduct – despite that fact that the pandemic offered a golden opportunity for broadband providers to bleed America dry if any were inclined to do so.

The FCC's desire to turn back the regulatory clock reflects the anti-corporate sentiment increasingly infecting government policy. But it fails to reflect the many ways in which the world has moved on since the 2015 *Open Internet Order* was repealed. With the Major Questions Doctrine now firmly embedded in the Supreme Court's jurisprudence, the legal landscape has shifted dramatically, which likely will complicate the agency's efforts to defend a Title II reclassification order on appeal. And policy developments such as increased intermodal competition, continued technological and product innovation, new government assistance programs to close remaining digital divides, and America's experience during the pandemic undermine the already shaky case for imposing public utility-style common carrier rules on broadband networks.

Net neutrality was always a bad idea. Refreshing the record by examining events since the 2015 order will only reinforce that conclusion.

II. Legal Developments: The Major Questions Doctrine

At the time of the 2015 *Open Internet Order*, many recognized that the FCC likely had legal authority to reclassify broadband as a Title II service. Under the *Chevron* doctrine, courts defer to an agency's reasonable interpretation of statutory ambiguity. As Justice Antonin Scalia famously explained, the 1996 Telecommunications Act "is not a model of clarity. It is in many important respects a model of ambiguity or even self-contradiction."[4] The Supreme Court's 2005 *Brand X* decision found the Act's definitions of "telecommunications service" and "information service" were ambiguous, finding the agency could reasonably classify broadband as an information service.[5] And indeed, the D.C. Circuit relied on *Brand X* to uphold the agency's authority to reclassify broadband Internet service as a telecommunications service.[6]

But legal developments since then have cast doubt on the likelihood that *Chevron* deference will continue to be outcome-determinative. Over the past few years, the Supreme Court has clarified that the Major Questions Doctrine operates as a limit on *Chevron* deference. *Chevron* is premised on congressional intent: it presumes that any ambiguities in a statute are intentional, and that Congress intended agencies, not courts, to resolve those ambiguities. But the Major Questions Doctrine holds that this presumption is unwarranted in cases involving matters of "deep economic and political significance." An agency may resolve such major questions only if there is "clear congressional authorization" for the regulation it seeks to impose. The doctrine originates with the Court's 2000 decision preventing the Food & Drug Administration from reinterpreting a 1938 statute to regulate tobacco.[7] Since then, the Court has invoked it to block

agency attempts to regulate greenhouse gases,[8] impose workplace vaccine mandates,[9] restrict residential evictions during the COVID pandemic,[10] shift the electricity grid toward renewable energy,[11] and issue unprecedented student loan relief,[12] all without clear guidance from Congress.

I have long argued that treating broadband networks as Title II common carriers is precisely the type of matter of "deep economic and political significance" that the Major Questions Doctrine carves out from *Chevron*. I discussed this argument at length in a 2016 article published as part of the Free State Foundation's *Perspectives* series.[13] As the FCC has explained, broadband is "essential…for consumers' participation in our society and economy."[14] Broadband providers have invested approximately $2.1 trillion in network infrastructure since 1996,[15] on top of billions in government subsidies, including $65 billion in BEAD funding appropriated by Congress following the COVID pandemic. The question of whether and how to regulate broadband networks has taken on tremendous political significance, as evidenced by the unprecedented millions of comments filed in the FCC's last two proceedings on this topic. Like the court's other Major Questions cases, Title II reclassification would be a substantial expansion of the agency's regulatory authority and impose significant costs on regulated entities. One imagines the Court would be especially hesitant to find Congress implicitly delegated regulatory authority to the FCC here, given that the statutory language largely predates modern broadband technology. This is exactly the type of freelancing at the edge of agency authority that the Court seems to be addressing through the Major Questions Doctrine.

The only real question is whether the Court will avoid the issue by upholding the highly deferential standard employed in *Brand X* under the doctrine of *stare decisis*. But this seems unlikely, given the tenor of the Court. Justice Clarence Thomas, who wrote the *Brand X* decision, has since disowned the opinion's broad interpretation of *Chevron* deference, which he states is "in serious tension with the Constitution, the APA, and over 100 years of judicial decisions."[16] Justice Brett Kavanaugh has been even more explicit: while on the D.C. Circuit during an earlier round of net neutrality litigation, he wrote that it is "indisputable" that Title II classification presents a Major Question that precludes *Chevron* deference, and that "any other conclusion would fail the straight-face test."[17] Notably, Chief Justice John Roberts specifically Cited Justice Kavanaugh's statement in his majority opinion in *West Virginia v. EPA*.[18]

Numerous commentators have come to the same conclusion in light of the NPRM, including President Obama's Solicitor General, Donald Verrilli Jr. While questioning the "wisdom and propriety" of the Major Questions Doctrine, Verrilli nonetheless concluded that "[a] Commission decision reclassifying broadband as a Title II telecommunications service will not survive a Supreme Court encounter with the major questions doctrine" and "[i]t would be folly for the Commission and Congress to assume otherwise."[19]

III. Policy Developments

Several policy developments since 2015 have also called into question the rationales underlying the 2015 *Open Internet Order*. Perhaps most obviously, the performance of America's broadband networks during the COVID pandemic demonstrated the superiority of our light-

touch regulatory models when compared to more heavily regulated networks elsewhere. Increased intermodal competition counters the notion that the industry lacks competition and therefore needs more regulatory guidance, while an innovation-friendly regulatory landscape has led to new offerings that could be threatened by the Commission's efforts to turn back the regulatory clock.

A. Pandemic-Era Network Performance

America's experience during the COVID pandemic vindicated the Pai FCC's decision to repeal the *Open Internet Order*, unleashing investment and relying on antitrust and consumer protection law rather than common carriage mandates to guard against misbehavior. Immediately and without warning, most of American society entered lockdown in early 2020. Huge swaths of the economy shifted online overnight, as cyberspace became the primary locus of socially-distant communication.

If ever there was an opportunity for broadband companies to engage in the kind of nefarious conduct that haunts the nightmares of net neutrality proponents, this was it. Much of our collective experience was lived online, putting broadband providers in a prime position to block disfavored speech or charge tolls for Internet-based goods and services to flow through to consumers. Yet there have been no allegations of a broadband provider exploiting its position to shape the flow of information through online society, either during or since the pandemic. (Query whether the government itself can say the same, given the allegations in *Missouri v. Biden* that federal officials pressured social media companies to suppress conservative viewpoints under the guise of controlling "misinformation").[20]

Instead, American broadband networks held up remarkably well, with consumers noticing very little drop in performance despite peak demand rising between 20 and 40 percent during the pandemic.[21] The FCC's light-touch regulatory framework and focus on facilities-based competition prompted network providers to invest hundreds of millions of dollars in infrastructure, which allowed the public and its network providers to adapt quickly to the increased traffic. Citing an OECD study, Doug Brake notes that American broadband providers invested more than twice as much per capita as their EU counterparts in 2018, which is consistent with long-term investment trends between America's facilities-based competition model and the European intramodal resale competition model, which discourages network investment.

The pandemic provided a natural experiment illustrating the resilience of these two approaches. Examining Ookla Speedtest data, Professor Anna-Maria Kovacs concluded that "U.S. networks generally outperformed their peers" during the pandemic.[22] European networks saw a steeper descent in speeds as the pandemic began, and a much more gradual recovery than their American counterparts. Famously, the European Union's struggles to accommodate the increase in network traffic caused regulators to request that Netflix and YouTube reduce the default video resolution for EU streams.[23] Australian broadband provider Telstra similarly asked users to shift their usage patterns and throttle their children's Internet consumption to reduce peak traffic during the

pandemic.[24] American consumers did not suffer the same indignities, which is a testament to the wisdom of our investment-friendly regulatory model.

B. Positive Developments Creating More Intermodal Competition

The ongoing facilities-based competition between cable and telephone broadband providers helped develop the resilience with which our economy weathered the pandemic. Nonetheless, net neutrality proponents have long decried this so-called broadband "duopoly," arguing that consumers lacked sufficient competition to guard against anticompetitive abuse.

Whatever validity these concerns once had – and the paucity of documented instances of actual anticompetitive misconduct by broadband providers raises significant doubts – this argument is undermined by the growth in innovative new broadband delivery options since the 2015 net neutrality order.

The first of these innovations is the rise of 5G networks. Wireless service fast and reliable enough to compete with wired home broadband networks was long considered the holy grail of broadband competition policy. With the 4G LTE revolution, consumers began treating wireless as a substitute for, rather than merely a complement to, home broadband. Pew Research Center noted that by 2019, 37 percent of Americans reported going online mostly using a smartphone, and 17 percent relied exclusively on their smartphones, citing the performance of wireless networks as the top reason not to subscribe to home broadband.[25] 5G networks are significantly faster, capable of sustained average speeds of 100 Mbps with greater capacity and lower latency than 4G networks. For the past two years, Verizon and T-Mobile have marketed 5G home broadband service with great success: Leichtman Research estimates that as of August 2023, 5.9 million American households subscribe to 5G wireless home broadband, a figure that has grown by over 800,000 per quarter for each of the preceding five quarters.[26]

The broadband market also faces potential disruption from next-generation satellite providers. Companies such as SpaceX, OneWeb, Amazon, and Telesat are in a space race, launching thousands of low earth orbit (LEO) satellites to provide high-speed Internet access. LEO satellites are much closer to the Earth's surface and therefore have the potential to offer higher speed service with lower latency than their geostationary predecessors. The extent to which LEO satellite service will prove a competitive alternative to traditional broadband remains to be seen. But market leader SpaceX announced that its Starlink service had reached 2 million active subscribers worldwide by September 2023, and its service has famously played a significant role in supporting Ukraine's ongoing defense against the Russian invasion.

C. Innovative Products: Network Slicing

Another reason to be wary of reclassification is the chilling effect that imposition of public utility-like strictures might have on innovative product offerings developed since net neutrality's repeal in 2017. Take, for example, 5G network slicing. This network architecture allows a wireless provider to isolate a portion of its network to provide end-to-end service for specific applications that require minimum quality of service guarantees. As wireless carriers rolled out

5G network offerings against the backdrop of the *Restoring Internet Freedom Order*'s light-touch regulatory framework, they have experimented with various forms of network slicing to enhance the performance of applications that cannot function, or cannot function well, by relying merely on general-purpose, best efforts networks. Network slicing could be a vital catalyst in the evolution of the Internet of Things, as connected devices such as security cameras, drones, and autonomous cars take advantage of bespoke network connections to meet each service's unique communication needs.

Although network slicing enhances the performance of these applications, the reclassification NPRM casts some doubt about how – or even if – wireless providers can experiment with such offerings. As the Center for Democracy and Technology explains, network slicing violates the strictest conception of net neutrality, as providers do not treat all traffic identically.[27] Granting a "fast lane" for congestion-sensitive applications for a fee is precisely the kind of paid prioritization that net neutrality advocates have long decried. But forcing these applications on a one-size-fits-all best efforts network could erode or even eliminate their usefulness to consumers.

It is possible that the FCC would exempt network slicing as a "non-BIAS Data Service" exempt from its *Open Internet Order* rules.[28] But the existence and scope of that would-be exemption are unclear, and this lack of clarity can have a chilling effect on companies' willingness to experiment with network slicing and other innovations related to the practical and efficient operation of their broadband networks, for fear of running afoul of the Commission's rules.

IV. Conclusion

Net neutrality has always been a prime example of the proverbial solution in search of a problem. The 2015 order was built largely on the risk of hypothetical anticompetitive behavior by broadband providers, while alluding to only a few instances of actual misconduct and ignoring the potential harm to consumers of applying a one-size-fits-all broadband model to an increasingly heterogenous Internet ecosystem. The years since its repeal have borne witness to the wisdom of returning to the light-touch regulatory framework under which America's broadband networks were built.

The success of those networks during the pandemic, and the innovative new methods of broadband delivery that have been deployed in recent years, show that common carrier regulation under Title II of the Communications Act is at best unnecessary, and likely harmful to consumers and growth. And today's legal landscape is less amenable to agency efforts to grow its authority by imposing regulations of deep economic and political significance without clear authorization from Congress.

There is no shortage of important regulatory questions that the FCC should address now that it has reached full strength. But the record shows that net neutrality definitely is not one of them.

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[1] Cisco Annual Internet Report 2023, Table 5, available at https://www.cisco.com/c/en/us/solutions/collateral/executive-perspectives/annual-internet-report/white-paper-c11-741490.html. Figure is for North American fixed broadband networks.
[2] Federal Communications Commission, 2022 Communications Marketplace Report, Figure III.A.1a, available at https://docs.fcc.gov/public/attachments/FCC-22-103A1.pdf. Calculation is based on census-block-level data.
[3] Safeguarding and Securing the Open Internet, Notice of Proposed Rulemaking (hereafter NPRM).
[4] AT&T v. Iowa Utilities Board, 525 U.S. 366, 397 (1999).
[5] National Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 697 (2005).
[6] U.S. Telecom Ass'n v. Federal Communications Commission, 825 F.3d 674 (D.C. Cir. 2016).
[7] Food & Drug Admin. V. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).
[8] Utility Air Regulatory Group v. EPA, 573 U.S. 302 (2014).
[9] NFIB v. Dep't of Labor, 595 U.S. ___ (2022).
[10] Ala. Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2485, 2488 (2021) (per curiam).
[11] West Virginia v. EPA, 142 S. Ct. 2587 (2022).
[12] Biden v. Nebraska, 600 U.S. ___ (2023).
[13] Daniel A. Lyons, Net Neutrality's Path to the Supreme Court: *Chevron* and the "Major Questions" Exception, Perspectives from FSF Scholars, Vol. 11, No. 21 (2016).
[14] NPRM ¶ 1.
[15] See USTelecom, 2022 Broadband Capex Report, Sept. 8, 2023, available at https://www.ustelecom.org/research/2022-broadband-capex/.
[16] Baldwin v. United States, 589 U.S. ___ (2020) (Thomas, J., dissenting from denial of certiorari).
[17] U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 426 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).
[18] *West Virginia*, 142 S.Ct. at 2609.
[19] Donald B. Verrilli, Jr. and Ian Heath Gershengorn, Title II "Net Neutrality" Broadband Rules Would Breach Major Questions Doctrine (White Paper, Sept. 23, 2023).
[20] Missouri v. Biden, 83 F.4th 350 (5th Cir. 2023).
[21] See Doug Brake, Lessons From the Pandemic: Broadband Policy After COVID-19, Information Technology & Innovation Foundation, July 13, 2020.
[22] Id. (quoting Anna-Maria Kovacs, US broadband networks rise to the challenge of surging traffic during the pandemic, Georgetown University (2020)).
[23] Hadas Gold, Netflix and YouTube are slowing down in Europe to keep the Internet from breaking, CNN.com, March 20, 2020.
[24] Brake, supra note 21 (quoting ABC News, Telstra CEO Andy Penn talks about how coronavirus is affecting telecoms, March 2020).
[25] Monica Anderson, Mobile Technology and Home Broadband 2019, Pew Research Center.
[26] Leichtman Research Group, Press Release, About 840,000 Added Broadband in 2Q 2023, Aug. 14, 2023, available at https://leichtmanresearch.com/about-840000-added-broadband-in-2q-2023/.
[27] Nick Doty & Mallory Knodel, Slicing the Network: Maintaining Neutrality, Protecting Privacy, and Promoting Competition, Center for Democracy & Technology (April 2023) at 6.
[28] See NPRM ¶ 63.