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The FCC's Internet Regulation Plan Fails the Major Questions Doctrine

by

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I. Introduction and Summary

The Federal Communications Commission is scheduled to vote on April 25 on a plan to transform the nation's massive broadband Internet networks, built by over $2.1 trillion in private market capital since 1996, into public utilities. This decidedly ill-advised plan faces an almost certain legal dead end because it's likely to run afoul of the Supreme Court's Major Questions Doctrine. Congress never clearly authorized the agency to undertake such an economically momentous and politically significant action.

The Biden FCC seeks to remake federal policy by changing the definition of broadband Internet services from a lightly regulated "information service" under Title I of the Communications Act to a heavily regulated "telecommunications service" under Title II. Under the agency's Draft Order released on April 4, broadband Internet Service Providers (ISPs) would be subject to three so-called bright-line restrictions, a vague "general conduct" standard, and agency oversight of traditionally private network interconnection agreements.

The Commission's Internet access classification decisions from 2004, 2015, and 2018 were based on the agency's authority to interpret the Communications Act's ambiguous terms "telecommunications services" and "information services." Those prior agency decisions all survived judicial review under the highly deferential *Chevron* doctrine. However, in the time since the D.C. Circuit's 2019 *Mozilla v. FCC* decision upholding the 2018 *Restoring Internet Freedom Order*, Supreme Court decisions, including the landmark *West Virginia v. EPA* (2022) and *Biden v. Nebraska* (2023) decisions, have now firmly embedded the Major Questions Doctrine in the Court's jurisprudence. As a result, it is the Major Questions Doctrine – and not the *Chevron* doctrine which, in any event, may not survive judicial review in *Loper Bright Enterprises v. Raimondo* – that likely will determine the legality of the agency's public utility gambit.

Under the Supreme Court's decisions expounding the Major Questions Doctrine, an agency's action that implicates questions of major economic and political significance requires a clear statement from Congress to support the agency's action. If adopted, the Biden FCC's proposed Title II reclassification decision almost certainly would fall within the purview of the Major Questions Doctrine. Requiring massive broadband Internet access networks built with over $2.1 trillion in private capital since 1996, and upon which so much of our nation's economy is now dependent, to function as public utilities unmistakably involves issues of vast economic significance. Reclassification of broadband services away from a lightly regulated Title I "information service" into a heavily regulated Title II "telecommunications service" would impact all broadband Internet service providers (ISPs), online edge companies, and residential broadband subscribers – whether through the regulation of revenues, prices, or service offering terms and conditions.

The FCC Draft Order's claim that Title II reclassification of broadband services is not economically and politically significant is readily disprovable. "Net neutrality" regulation and Internet freedom have been matters of vast political significance and considerable political controversy for two decades. The vast economic and significance of the FCC's proposed Title II reclassification is reinforced by claims made by the Commission in its Draft Order that Internet access service should now be considered an "essential service" and that it is "absolutely essential to modern life, facilitating employment, education, healthcare, commerce, community-building, communication, and free expression." Such significance also is shown in the Draft Order's claims that Title II reclassification and public utility regulation are necessary to safeguard national security, protect public safety, and ensure cybersecurity.

Chairwoman Rosenworcel's extraordinary September 2023 remarks calling for the public to "make some noise" and "raise a ruckus" to influence the Commission's decision in a rulemaking proceeding is a further demonstration of this controversy's political significance. At the Free State Foundation's Sixteenth Annual Policy Conference on March 12 in Washington, DC, industry and policy experts, current and former Commissioners at the FCC, and Senator Ted Cruz all highlighted in various ways the economic and political significance of the Commission's proposal.

West Virginia v. EPA appears to signal that the reimposition of public utility regulation on broadband ISPs would involve a major question by quoting then-Judge Brett Kavanaugh's 2017 dissent in *US Telecom v. FCC* for the proposition that "Congress intends to make major policy decisions itself, not to leave those decisions to agencies." It may safely be presumed that *West Virginia* opinion author Chief Justice Roberts and his five colleagues in the majority were aware that now-Justice Kavanaugh's dissent stated that "the FCC's 2015 net neutrality rule is one of the most consequential regulations ever issued by any executive or independent agency in the history of the United States" and that "the economic and political significance of the rule is vast."

Now that the Major Questions Doctrine is firmly embedded in Supreme Court jurisprudence, the FCC no longer can rely on *Chevron* deference as the basis for agency authority to reclassify Internet access as a Title II telecommunications service. When the Major Questions Doctrine applies, courts are required to look for a clear statement of congressional authorization for the agency's action. However, Congress has made no clear statement authorizing the FCC to reclassify broadband Internet access service as a telecommunication service under Title II and regulate Internet providers akin to public utilities. In the Telecommunications Act of 1996, Congress did provide a strong indicator that Internet access fits the definition of an "information service" under Title I by defining an "interactive computer service" to include any "information service… including specifically a service… that provides access to the Internet." And in *NCTA v. Brand X Internet Services* (2005), the Supreme Court determined that the Communications Act of 1934 does *not* unambiguously classify cable broadband Internet access service as a "telecommunications service."

The Commission's attempted justification of its Internet power grab comes up short. Unhelpfully, the Draft Order cites the 2016 *US Telecom v. FCC* decision, which never squarely addresses the 2015 *Title II Order*'s merits under the Major Questions Doctrine, as well as the 2017 opinion concurring in the denial of rehearing *en banc* in that case. These decisions pre-date the Supreme Court's 2022 and 2023 decisions solidifying the Major Questions Doctrine.

Nor does the Draft Order fare any better in suggesting that making broadband service classification decisions falls within the FCC's wheelhouse because the Commission is the federal regulator responsible for "regulating interstate and foreign commerce in communications by wire and radio" under Section 1 of the Communications Act. A generalized resort to agency expertise and authority does not satisfy the clear statement requirement. As the Court stated in *West Virginia v. EPA*, "in certain extraordinary situations… something more than a merely plausible textual basis for the agency action is necessary." Even assuming for the sake of argument that the Commission's Section 1 enabling provision provides a plausible textual basis for imposing public utility regulation on broadband Internet service providers, that provision falls far short of constituting a clear statement from Congress authorizing stringent bureaucratic control over the practices and operations of private sector Internet service providers.

Lacking clear authorization from Congress to impose public utility regulation on broadband ISPs, it appears likely that the Biden FCC's Internet regulation plan is legally doomed.

II. The FCC's Prior Internet Access Classification Decisions Depended on Statutory Ambiguity

The Communications Act distinguishes between lightly-regulated Title I "information services" and more heavily-regulated Title II "telecommunications services."[1] In *NCTA v. Brand X Services* (2005), the Supreme Court upheld the first of a series of FCC orders that classified broadband Internet access services as "information services."[2] Applying the *Chevron* doctrine, the Court in *Brand X* concluded that the Communication Act's use of the terms "offering" and "telecommunications service" was ambiguous.[3] Based upon those findings of statutory ambiguity, the court deferred to the Commission's decision to classify cable broadband service as an "information service" under Title I of the Act.[4]

In its 2015 *Title II Order*, the FCC expressly relied on its "delegated authority to interpret ambiguous terms in the Communications Act, as confirmed by the Supreme Court in *Brand X*," when the agency reversed course and reclassified broadband services as Title II "telecommunications services."[5] And in the 2017 *Restoring Internet Freedom Order*, the Commission relied on the same apparent authority when it switched broadband services back to Title I status.[6] Notably, the Commission's 2015 and 2017 Orders were upheld by the D.C. Circuit – in *US Telecom v. FCC* (2016),[7] and *Mozilla v. FCC* (2019),[8] respectively – based on courts applying *Chevron* deference to the perceived ambiguity in the Communications Act.

In October 2023, on a 3-2 vote, the Commission released a notice of proposed rulemaking that would once again reclassify broadband Internet access services as Title II telecommunications services and subject ISPs to a series of bright-line restrictions, a vague catchall conduct standard, as well as oversight of network interconnection. The Free State Foundation submitted detailed comments and reply comments in response to the notice.[9] The proposed reclassification of

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[1] *See* 42 U.SC. § 153(20); 42 U.SC. § 153 (43).
[2] *See NCTA v. Brand X Services*, 545 U.S. 967 (2005).
[3] *NCTA v. Brand X Services*, 545 U.S. at 989, 992.
[4] *See NCTA v. Brand X Services*, 545 U.S. at 989-1000.
[5] Protecting and Promoting the Open Internet, GN Docket 14-28, Report and Order on Remand, Declaratory Ruling, and Order ("*2015 Title II Order*") (released March 12, 2015), at ¶ 43 (citing *NCTA v. Brand X Services*, 545 U.S. at 980-981).
[6] Restoring Internet Freedom, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order ("*Restoring Internet Freedom Order*" or "*RIF Order*")(released January 14, 2018), at ¶ 332.
[7] *US Telecom v FCC*, 825 F.3d 674 (D.C. Cir. 2016)(relying primarily upon *Chevron* deference as applied in *Brand X* to affirm the Obama Administration FCC's decision to change the regulatory classification of broadband Internet services as telecommunications services).
[8] *Mozilla v. FCC*, 940 F.3d 1 (D.C. Cir. 2019)(affirming the Trump Administration FCC's decision to return to the information service classification because the court deemed itself bound by *Brand X*'s holding that the statute's ambiguity required deference under *Chevron* to the agency's interpretation); *id*. at 19 ("[W]e view *Brand X* as binding precedent in this case").
[9] *See* Comments of the Free State Foundation, Safeguarding and Securing the Open Internet, WC Docket No. 23-320 (December 14, 2023), at: https://freestatefoundation.org/wp-content/uploads/2023/12/FSF-Comments-Safeguarding-and-Securing-the-Open-Internet-121423.pdf; Reply Comments of the Free State Foundation, Safeguarding and Securing the Open Internet, WC Docket No. 23-320 (January 17, 2024), at: https://freestatefoundation.org/wp-content/uploads/2024/01/FSF-Reply-Comments-Safeguarding-and-Securing-the-Open-Internet-011724.pdf.

broadband has been subject to plentiful debate, including by industry experts and current and former members of the Commission who were participants in the Free State Foundation's Sixteenth Annual Policy Conference held on March 12 of this year.[10] On April 4, the Commission released its Draft Order,[11] which is scheduled for a vote at the agency's public meeting on April 25. However, developments in the Supreme Court's jurisprudence during the past two years are game-changing regarding expansive assertions of regulatory power. The Commission can no longer rely on perceived statutory ambiguity as the basis for the agency's authority for reclassifying Internet access services as telecommunications services subject to public utility regulation.

III. Since 2019 the Major Questions Doctrine Has Altered the Law Regarding Agencies' Regulatory Authority Claims

In the time since the D.C. Circuit's 2019 *Mozilla* decision, Supreme Court decisions such as *West Virginia v. EPA* (2022)[12] and *Biden v. Nebraska* (2023)[13] have firmly embedded the Major Questions Doctrine in the Court's jurisprudence. As a result, it is the Major Questions Doctrine – and not the *Chevron* doctrine – that likely will determine the legality of any agency imposition of public utility regulation on Internet services.

In setting forth the Major Questions Doctrine, the opinion of the court in *West Virginia v. EPA* states that "certain extraordinary cases. . . something more than a merely plausible textual basis for the agency action is necessary."[14] In cases of major economic and political significance, the agency must demonstrate "clear congressional authorization" for the power it claims.[15] Then-Judge Kavanaugh's 2017 opinion dissenting from the denial of rehearing *en banc* in *US Telecom v. FCC* identifies factors in the Court's cases that are relevant to distinguishing major rules from ordinary rules. Such factors include "the amount of money involved for regulated and affected parties, the overall impact on the economy, the number of people affected, and the degree of congressional and public attention to the issue."[16]

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[10] *See* The Free State Foundation, "Hot Topics in Law and Policy – FSF's Sixteenth Annual Policy Conference (March 12, 2024), at: https://www.youtube.com/watch?v=1qpim76nv1Y; "TMT with Mike O'Rielly – FSF's Sixteenth Annual Policy Conference (March 12, 2024), at: https://www.youtube.com/watch?v=BC-f57mQc4k&t=29s; Senator Ted Cruz's Welcome Remarks – FSF's Sixteenth Annual Policy Conference (March 12, 2024), at: https://www.youtube.com/watch?v=bKIDH1LLxvI.

[11] *See* Safeguarding and Securing the Open Internet, WC Docket No. 23-320; Restoring Internet Freedom, WC Docket No. 17-108, Declaratory Ruling, Order, Report and Order, and Order on Consideration (April 4, 2024) ("Draft Order"), at: https://docs.fcc.gov/public/attachments/DOC-401676A1.pdf.

[12] *West Virginia v. EPA*, 142 S.Ct. 2587 (2022).

[13] *Nebraska v. Biden*, 143 S.Ct. 2355 (2023).

[14] *West Virginia v. EPA*, 142 S.Ct. at 2609 (*quoting Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)).

[15] *West Virginia v. EPA*, 142 S.Ct. at 2609 (*quoting Utility Air Regulatory Group v. EPA*, 573 U.S. at 324).

[16] *US Telecom v. FCC*, 855 F.3d 381, 422-423 (Kavanaugh, J., dissenting from denial of rehearing *en banc*). In *West Virginia v. EPA*, as explained below, Chief Justice Roberts' opinion for the Court cited then-Judge Kavanugh's *US Telecom* dissent favorably. *See* 142 S.Ct. at 2609.

IV. The Proposed Title II Reclassification Involves Matters of Economic and Political Significance

The Draft Order's denial that the Major Questions Doctrine applies at all is mistaken.[17] The facts weigh decisively in favor of the conclusion that the Biden FCC's Internet regulation plan raises issues of vast economic and political significance. Transforming broadband Internet networks – constructed with over $2.1 trillion in private capital since 1996 and with annual capital investments of over $100 million – into public utilities surely is economically significant.[18] This would upend the free market-oriented and light-touch regulatory environment in which most of those investments were made and have operated almost uninterrupted since 1996. In its *Restoring Internet Freedom Order*, the Commission found that "Title II classification likely has resulted, and will result, in considerable social cost, in terms of foregone investment and innovation."[19] In the *RIF Order*, the Commission also found that "regulatory burdens and uncertainty, such as those inherent in Title II, can deter investment in regulated entities," that "this concern is well-documented in the economics literature on regulatory theory," and that "the record also supports the theory that the regulation imposed by Title II will negatively impact investment."[20]

Given the ubiquity of Internet connectivity in the United States, all broadband Internet users would at least indirectly be impacted by Title II reclassification – either because the regulation would restrict ISPs' service offerings and plans or because the regulation would impact pricing and rates. The proposed regulation would restrict broadband ISPs' decisions about how to manage their networks and serve subscribers.[21] It also would subject ISPs to intrusive oversight of their operations according to a vague "general conduct" standard with an open-ended "catchall-backstop."[22] Moreover, the Draft Order puts under a cloud of regulatory uncertainty – and will discourage if not eliminate – price offerings that consumers enjoy today. The Draft Order would subject to the vague "general conduct standard" all manner of "free data" and "sponsored data" mobile plans that have proven popular with low-income and value-conscious consumers."[23] There is a significant likelihood that the Biden FCC eventually will adopt the Obama FCC's finding that those mobile plans are contrary to Open Internet principles. The same cloud of regulatory uncertainty would hover over usage-based billing offerings. Under the Draft Order, a vague standard would apply to any ISP price offerings that would charge high-volume Internet subscribers based on their outsized usage of broadband networks and offer price discounts to low-volume and value-conscious consumers.[24] And the proposal would impact

[17] Draft Order, at ¶ 252.
[18] *See* US Telecom, "2022 Broadband CapEx Report: Broadband Providers Invested $102.4B In Communications Infrastructure Last Year" (September 8, 2023), at: https://ustelecom.org/wp-content/uploads/2023/09/2022-Broadband-Capex-Report-final.pdf. *See also* CTIA, 2022 Annual Survey Highlights (July 25, 2023), at 4 (reporting $39 billion invested in wireless networks in 2022), available at: https://api.ctia.org/wp-content/uploads/2023/11/2023-Annual-Survey-Highlights.pdf.
[19] *See RIFO*, at ¶ 87.
[20] *See RIFO*, at ¶ 88.
[21] *See* Draft Order, Section V(B-E).
[22] *See* Draft Order, at ¶¶ 506-535.
[23] *See* Draft Order, at ¶ 530.
[24] *See* Draft Order, at ¶ 535.

broadband network providers and edge providers by subjecting Internet traffic exchange or network interconnection arrangements to agency intervention.[25]

The political significance of the Biden FCC's Internet regulation plan is easily demonstrated. Over the last two decades, considerable congressional and public attention has been directed to "net neutrality," the "Open Internet," and "Internet freedom." This includes numerous bills that have been filed in Congress directed to these issues from multiple legal and policy perspectives. Title II reclassification of broadband Internet services became a highly visible matter of presidential politics when President Obama released his November 10, 2014, "Message on Net Neutrality."[26]

From a political standpoint, the significance of imposing a public utility regulation plan on broadband Internet services also is evidenced by publicity and advocacy campaigns that have been waged both for and against Title II regulation of broadband Internet services. In the last two net neutrality proceedings, millions of public comments were filed with the agency. Further confirmation of the political significance of the Biden FCC's Internet regulation plan has been provided by Chairwoman Rosenworcel. In her September 2023 announcement of the proposed rulemaking, she called on members of the public to "make some noise" and "raise a ruckus" regarding this considerably major policy issue.[27] Given the politically-charged history of this subject as well as the Chairwoman's own words, the Draft Order's claim that its proposed Internet regulation plan is not a matter of political significance lacks credibility.[28]

V. The FCC's Novel National Security, Public Safety, and Cybersecurity Rationales Reinforce the Proposed Regulation's Economic and Political Significance

The vast economic and political significance of the proposed Title II reclassification is reinforced by claims – made by the Commission for the first time – that Internet access service is an "essential service."[29] According to the Draft Order, broadband connections are "absolutely essential to modern life, facilitating employment, education, healthcare, commerce, community-building, communication, and free expression."[30] In its Draft Order, the FCC makes additional momentous first-time claims that Title II reclassification will safeguard national security, protect public safety, and ensure cybersecurity.[31] Assuming for the sake of argument that all the Commission's "essential service" as well as security and safety rationales are valid, they reinforce the point that Title II reclassification of broadband involves matters of vast political and economic significance.

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[25] *See* Draft Order, at ¶ 203.
[26] See *US Telecom v. FCC*, 855 F.3d 381, 409-412 (D.C. Cir. 2017) (Brown, J., dissenting from rehearing *en banc*).
[27] *See* Remarks of Chairwoman Jessica Rosenworcel (September 26, 2023), at: https://docs.fcc.gov/public/attachments/DOC-397257A1.pdf.
[28] *See* Draft Order, at ¶ 256.
[29] *See*, *e.g.*, Draft Order, at ¶ 26.
[30] Draft Order, at ¶ 26.
[31] Draft Order, at ¶¶ 30-31.

VI. There Is Judicial Recognition That Reclassifying Broadband Services Under Title II Involves a Major Question of Vast Political and Economic Significance

West Virginia v. EPA appears to signal that the reimposition of public utility regulation on broadband ISPs would involve a major question. The Court's opinion quoted then-Judge Brett Kavanaugh's 2017 dissent in *US Telecom v. FCC* for the proposition that "Congress intends to make major policy decisions itself, not to leave those decisions to agencies."[32] It may safely be presumed that Chief Justice Roberts and his five colleagues in the majority were aware that now-Justice Kavanaugh's dissent stated that "[The] net neutrality rule is one of the most consequential regulations ever issued by any executive or independent agency in the history of the United States."[33] He also wrote that "[t]he rule will affect every Internet service provider, every Internet content provider, and every Internet consumer. The economic and political significance of the rule is vast."[34]

In a separate dissent in *US Telecom v. FCC*, Judge Janice Rogers Brown agreed that "turning Internet access into a public utility is obviously a 'major question' of deep economic and political significance—any other conclusion would fail the straight-face test."[35] Judge Brown observed that the D.C. Circuit's 2014 decision in *Verizon v. FCC* "already characterized 'net neutrality' regulation as a 'major question'"[36] when the court wrote that "we think it important to emphasize that ... the question of net neutrality implicates serious policy questions, which have engaged lawmakers, regulators, businesses, and other members of the public for years."[37]

VII. Congress Did Not Provide a Clear Statement of Authority for the FCC to Regulate Internet Service Providers Under Title II

The FCC can no longer rely on *Chevron* deference as the basis for agency authority to reclassify broadband as a Title II telecommunications service. When the Major Questions Doctrine applies, courts are required to look for a clear statement of congressional authorization for the agency's action.[38] Here, it is evident that Congress made no clear statement authorizing the FCC to reclassify broadband Internet access service as a telecommunication service under Title II. In the Telecommunications Act of 1996, Congress did provide a strong indicator that Internet access fits the definition of an "information service" under Title I by defining an "interactive computer service" to include any "information service… including specifically a service… that provides access to the Internet."[39] And in *NCTA v. Brand X Internet Services* (2005), the Supreme Court

[32] *West Virginia v. EPA*, 142 S.Ct. at 2609 (quoting *US Telecom v. FCC*, 855 F.3d at 419 (Kavanaugh, J., dissenting from denial of rehearing *en banc*).
[33] *US Telecom v. FCC*, 855 F.3d 381, 417 (Kavanaugh, J., dissenting from denial of rehearing *en banc*).
[34] *US Telecom v. FCC*, 855 F.3d 381, 417 (Kavanaugh, J., dissenting from denial of rehearing *en banc*).
[35] *US Telecom v. FCC*, 855 F.3d 381, 402 (D.C. Cir. 2017) 402 (Brown, J., dissenting from rehearing *en banc*).
[36] *US Telecom v. FCC*, 855 F.3d 381, 402 (D.C. Cir. 2017) 402 (Brown, J., dissenting from rehearing *en banc*)(citing *Verizon v. FCC*, 740 F.3d at 634).
[37] *Verizon v. FCC*, 740 F.3d at 634.
[38] *See West Virginia v. EPA*, 142 S.Ct. at 2609 (*quoting Utility Air Regulatory Group v. EPA*, 573 U.S. at 324).
[39] 47 U.S.C. § 230(f)(2).

determined that the Communications Act of 1934 does *not* unambiguously classify cable broadband Internet access service as a "telecommunications service."[40]

In its Draft Order, the Commission points to the D.C. Circuit's 2016 decision in *US Telecom v. FCC* as deciding that *Brand X* conclusively establishes the Commission's authority to make that classification decision and that the Major Questions Doctrine does not apply.[41] And the Draft Order cites the 2017 opinion of Judges Srinivasan and Tatel stating that the Commission had clear authorization from Congress to issue its 2015 Title II classification decision.[42] However, the D.C. Circuit panel in the 2016 *US Telecom v. FCC* decision did not squarely address the 2015 *Title II Order*'s merits under the Major Questions Doctrine, and both lower court opinions from that case pre-date the Supreme Court's 2022 and 2023 decisions solidifying the Major Questions Doctrine.

The Draft Order also suggests that making broadband service classification decisions falls within the FCC's wheelhouse because it is the federal regulator responsible for "regulating interstate and foreign commerce in communications by wire and radio" under Section 1 of the Communications Act.[43] However, a generalized resort to agency expertise and authority does not satisfy the clear statement requirement. As the Court stated in *West Virginia v. EPA*, "in certain extraordinary situations… something more than a merely plausible textual basis for the agency action is necessary."[44] That Communications Act provision falls far short of constituting a clear statement from Congress authorizing stringent bureaucratic control over the practices and operations of private-sector Internet service providers. Lacking clear authorization from Congress to impose public utility regulation on broadband ISPs, it is likely that the Biden FCC's Internet regulation plan is legally doomed.

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Further Readings

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Randolph J. May and Seth L. Cooper, "Stop the Biden FCC's Plan to Control Internet Networks," *Perspectives from FSF Scholars*, Vol. 18, No. 52 (December 20, 2023).

[40] *NCTA v. Brand X Services*, 545 U.S. at 970-971.
[41] Draft Order, at ¶ 253 (citing *US Telecom v. FCC*, 825 F.3d at 704) (D.C. Cir. 2016)) (additional cite omitted).
[42] Draft Order, at ¶ 253 (citing *US Telecom v. FCC*, 855 F.3d at 383-388) (D.C. Cir. 2017)) (additional cite omitted).
[43] Draft Order, at ¶ 259 (citing 42 U.S.C. § 151).
[44] *West Virginia v. EPA*, 142 S.Ct. at 2609 (*quoting Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)).

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