

March 2016

Saving the Internet: Why Regulating Broadband Providers Can Keep the Internet Open

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Recommended Citation

Emma N. Cano, *Saving the Internet: Why Regulating Broadband Providers Can Keep the Internet Open*, 2016 BYU L. Rev. 711 (2016).
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2016/iss2/10>

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Saving the Internet: Why Regulating Broadband Providers Can Keep the Internet Open

I. INTRODUCTION

“Net Neutrality” has become a hot topic in the last few years, but the term has gained traction and popularity since the last court decision in *Verizon v. FCC*.¹ The term Net Neutrality was first coined in 2003 by Columbia Law School professor Tim Wu.² Net Neutrality is the principle that Internet providers (“broadband providers”) should allow access to all content and applications equally, irrespective of what the source of the content is.³ Net Neutrality also prohibits broadband providers from favoring or blocking certain services or websites,⁴ thus, making the Internet an open platform for the dissemination and access of content. Under Net Neutrality, creators of content and applications (“edge providers”) freely disseminate content on one end and consumers (“end users”) freely access that content on the other.

Tim Wu argues that Net Neutrality is the end result we should be concerned with achieving, and suggests that the best remedy is a “network neutrality” policy that allows for competition amongst the people and organizations that disseminate their content through the Internet.⁵ Proponents of Net Neutrality argue that an open-access regime will lead to better information, more innovation and investment in Internet infrastructure, and preservation of freedom of speech and freedom to access that speech. Opponents of Net Neutrality argue that a neutral network would have the opposite effect and actually decrease innovation and investment. In addition, opponents, many of them broadband providers, argue that broadband providers have a right to control what content goes through their systems.

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

2. Tim Wu, *Net Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141 (2003).

3. Public Knowledge, *Net Neutrality* [hereinafter *Net Neutrality Timeline*], <https://www.publicknowledge.org/issues/net-neutrality> (last visited Nov. 9, 2015).

4. *Id.*

5. Wu, *supra* note 2, at 146.

The discussion over Net Neutrality has been ongoing for some time, at least since 2003 when the Federal Communications Commission (FCC) first considered how to properly regulate Digital Subscriber Line (DSL) and broadband providers.⁶ The issue has centered around two questions: first, what are the limits broadband providers can put on the information that passes through their lines? For example, can broadband providers block applications that compete with their own services, can they prioritize traffic based on affiliations with edge providers or based on how much edge providers pay broadband providers? Second, how can the FCC regulate broadband providers and how much authority does the agency have to restrict broadband providers' behavior?

Opponents of Net Neutrality had a partial win in January of 2014 when the United States Court of Appeals for the District of Columbia held in *Verizon v. FCC* that the FCC could not impose anti-discrimination nor anti-blocking restrictions on broadband providers.⁷ This decision significantly reduced the FCC's ability to promote and ensure Net Neutrality. However, proponents of Net Neutrality have not lost entirely. The Court's decision also upheld the FCC's authority to regulate broadband providers, just not through the anti-blocking and anti-discrimination rules the Court reviewed.⁸ By affirming the FCC's regulatory authority, the Court made it clear that the FCC can regulate broadband providers as long as the FCC's regulations stay within its statutory authority.⁹ The best way for the FCC to regulate broadband providers in order to promote and ensure an open Internet is by reclassifying broadband providers as common carriers subject to regulation under Title II of the Communications Act of 1934.

After briefly discussing the history of Net Neutrality and the events that led to *Verizon v. FCC*, Part II of this Paper focuses on the D.C. District Court's January 2014 holding that the FCC can regulate as long as it does so within its authority. Using that rule as a framework, this Paper argues that in its most recent ruling, the FCC correctly reclassified broadband providers as common carriers, concluding that this reclassification is the right path for several

6. *Net Neutrality Timeline*, *supra* note 3.

7. *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014).

8. *Id.* at 642.

9. *Id.* at 639-40.

reasons. First, Section III.A argues that broadband providers fall within the definition of a common carrier. Section III.B shows that classifying broadband providers as common carriers allows the FCC to meet its statutorily imposed goal of ensuring deployment of broadband infrastructure¹⁰ and the Commission's ancillary intent to "preserve and promote the open and interconnected nature of the public Internet."¹¹ Section III.C demonstrates that an open Internet will spur investment and innovation. Finally, Section III.D discusses a long history of applying common carrier duties to last-mile facilities, like broadband providers, that supports such classification.

II. THE PRE-*VERIZON V. FCC* ERA

To better understand Net Neutrality, some definitions are helpful at the outset. An 'edge provider' is a person or organization that provides or creates "content, services, and applications over the Internet"; this includes providers like Google, Amazon or Facebook.¹² 'End users' are those who consume edge providers' content: people, businesses, and private and public institutions.¹³ 'Broadband providers' are local access providers who allow edge providers to upload and end users to access content, such as Comcast, Time Warner, and Verizon.¹⁴

The term "Net Neutrality" first came up in Tim Wu's 2003 article titled *Network Neutrality, Broadband Discrimination*. In this article, Wu suggests that a neutral network is about innovation, where the different applications available through the Internet engage in a battle of survival-of-the-fittest and the application that best adapts and provides the most desirable services will survive, those that do not adapt quickly enough, will become obsolete.¹⁵ Proponents of Net Neutrality argue that this survival-of-the-fittest idea is what promotes innovation and investment in Internet infrastructure and what led to the development of streaming video and high-speed internet.¹⁶ As a

10. Telecommunications Act of 1996, 47 U.S.C. § 1302(a) (2008).

11. *Verizon*, 740 F.3d at 631 (citing *In re* Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 20 F.C.C.R. 14986, 14988 ¶ 4 (2005)).

12. *Id.* at 629.

13. *Id.*

14. *Id.*

15. Wu, *supra* note 2, at 145.

16. Brief of Amici Curiae Venture Capital Investors in Support of FCC, *Verizon v. FCC*, 740 F.3d 623 (2014) (No. 11-1355), 2013 WL 210110 [hereinafter Amici Curiae].

result, allowing price discrimination based on content would have detrimental effects on innovation and competition between edge providers, having “dynamic consequences, for the competitive development of new applications.”¹⁷

Wu further argues that the best way to ensure that the Internet remains open and that the traffic of applications remains neutral is by regulating the market so that broadband providers are still allowed to discriminate between traffic, but only for legitimate reasons, like managing bandwidth consumption, and only within the local network that each provider owns and operates, not within the bigger networks that connect broadband provider to each other and allow for information to travel long distances, like from one state or country to another.¹⁸

Until recently, the biggest challenge to achieving Net Neutrality was the FCC’s inability to regulate broadband providers because the FCC chose to classify broadband providers as information services under the Telecommunications Act of 1996. Under this statute, Congress defined two classifications of entities: telecommunication carriers, which involve a pure transmission that does little to alter the supplied information;¹⁹ and information-service providers, which provide enhanced services that involve computer processing applications that act on the “content, code, protocol, and other aspects of subscriber’s information.”²⁰ Congress intended the Telecommunications Act of 1996 to become incorporated into the Communications Act of 1934, which is the statute that primarily regulates telecommunications. Title II of the Communications Act of 1934 imposes on certain telecommunication services what is known as “common carrier duties.” At common law, common carrier duties were imposed by the government on enterprises where a monopoly could form, the enterprise was an essential public service, or the service was of public concern in some way.²¹ When an enterprise fell within one of those three categories, the government could require that enterprise to provide service to all that sought it,

17. Wu, *supra* note 2, at 153.

18. Wu, *supra* note 2, at 165–66.

19. *Verizon*, 740 F.3d at 630.

20. *Id.* (citing *In re* Amendment of Section 64.702 of the Commission’s Rules and Regulations, 77 F.C.C.2d 384, 387 ¶¶ 5–7 (1980) (“Second Computer Inquiry”).)

21. James Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225, 252 (2002).

to deal justly, reasonably, and without discrimination.²² The Communications Act requires that a telecommunication carrier, one that transmits telecommunications services, be classified as a common carrier under Title II of the Act;²³ however, the Act does not say how an information service should be classified.²⁴ Thus, it appears that the FCC *chose* not to classify information services, like broadband providers, as common carriers. But, Congress did not prohibit the FCC from classifying information services, or just broadband providers specifically, as common carriers.

The FCC's old classification of broadband providers was not problematic at first, but then broadband providers acquired technology allowing them to discriminate based on the type and source of the content being transmitted.²⁵ Since broadband providers obtained this technology, the FCC has had to decipher how to regulate broadband providers and under what authority it can regulate them. One of the FCC's first attempts to regulate broadband providers was in March of 2005 when the FCC successfully fined a North Carolina-based broadband provider for blocking its subscribers' access to a competing Voice Over Internet Protocol (VoIP) service.²⁶ However, in July of that same year, the Supreme Court upheld the FCC's classification of cable broadband providers as information service providers, thus leaving them free from common carrier duties.²⁷

The FCC took a significant step toward regulation of broadband providers in September of 2005 with the release of an Internet Policy Statement, which intended to "preserve and promote the open and interconnected nature of the public Internet."²⁸ Under the Statement, the Commission would take action if it found that Internet service providers were violating principles of openness and interconnectedness.²⁹ Following the FCC's policy statement, the

22. *Id.* at 251.

23. 47 U.S.C. § 153(11) (2012).

24. *See id.* § 153(24).

25. Amici Curiae, *supra* note 16, at 15–16.

26. *Net Neutrality Timeline*, *supra* note 3.

27. *Id.*; *Verizon v. FCC*, 740 F.3d 623, 631 (D.C. Cir. 2014).

28. 20 FCC Rcd. 14988 ¶ 4 (2005).

29. *Id.* at 14904 ¶ 96.

Senate attempted to update the Communications Act by adding a reference to Net Neutrality, but the proposed bill was defeated.³⁰

In the fall of 2007, the FCC ordered Comcast to cease discrimination of BitTorrent traffic on its network (“Comcast Order”).³¹ Comcast appealed the order and the FCC took its first hit when the Court struck down the Comcast Order, holding that the FCC failed to show that its action was “reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities.”³²

In December of 2010, in what seems like a response to the Comcast Order’s failure, the FCC announced the imposition of three new rules on broadband providers. First, a transparency requirement that broadband providers “publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services.”³³ Second, an anti-blocking provision prohibiting fixed broadband providers, but not mobile suppliers like cellphone providers, from blocking “lawful content, applications, services, or non-harmful devices, subject to reasonable network management.”³⁴ The FCC defined “reasonable network management” as management tailored to “ensur[e] network security and integrity,” such as managing “traffic that is harmful to the network, addressing traffic that is unwanted by end users . . . and reducing or mitigating the effects of congestion on the network.”³⁵ In addition, the anti-blocking requirement prohibits broadband providers from degrading content in such a way as to render it “effectively unusable.”³⁶ Third, the FCC imposed an anti-discrimination requirement that forbids broadband providers from “unreasonably discriminat[ing in transmission of] lawful network traffic over a consumer’s broadband

30. *Net Neutrality Timeline*, *supra* note 3; Communications, Consumer’s Choice, and Broadband Deployment Act of 2006, S. 2686, 109th Cong. § 901 (2006), <https://www.congress.gov/109/bills/s2686/BILLS-109s2686is.pdf>.

31. *Id.*; In re *Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 F.C.C.R. 13028, 13052 ¶ 43, 13059–60 ¶ 54 (2008), https://apps.fcc.gov/edocs_public/attachmatch/FCC-08-183A1.pdf.

32. *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010) (quoting *Am. Library Ass’n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005)).

33. 25 FCC Rcd. 17937 ¶ 54 (2009).

34. *Id.* at 17942 ¶ 63.

35. *Id.* at 17952 ¶ 82.

36. *Id.* at 17943 ¶ 66.

Internet access service. Reasonable network management shall not constitute unreasonable discrimination.”³⁷ The FCC further added that discrimination for network management needs “during periods of congestion” would not violate the anti-discrimination rule.³⁸

Verizon responded by challenging the Open Internet Order on the grounds that the FCC lacked affirmative statutory authority to establish the rules, the decision to impose the rules was arbitrary and capricious, and the rules violated statutory requirements barring the FCC from imposing common carrier duties on broadband providers.³⁹

The D.C. Circuit Court held that the FCC correctly and reasonably interpreted section 706(a) of the Telecommunications Act of 1996 as granting the FCC regulatory authority⁴⁰ and that it was reasonable to think that Congress vested the FCC with statutory authority to carry out the duties the statute imposed upon it.⁴¹ In addition, the Court found that section 706(b) gave the FCC express authority to adopt the rules in the Open Internet Order.⁴² However, the Court deferred interpretation as to how section 706(b) gives authority for the removal of barriers and advancement of competition to the FCC, and it remains unclear whether the FCC has such authority.⁴³

Despite finding that the FCC has statutory authority to regulate broadband providers and to take immediate action to deploy Internet access, remove barriers, and promote competition, the Court found that the FCC regulations failed because they imposed common carrier duties on broadband providers.⁴⁴ The Court reasoned that the FCC lacked authority to impose common carrier duties on broadband providers because the FCC itself exempted information services like broadband providers from common carrier duties.⁴⁵ The FCC defended the Open Internet Order on the grounds that, unlike common carriers who must provide service to *all* consumers who seek it, broadband providers were still free to make

37. *Id.* at 17944 ¶ 68.

38. *Id.* at 17945–46 ¶ 73.

39. *Verizon v. FCC*, 740 F.3d 623, 634 (D.C. Cir. 2014).

40. *Id.* at 637.

41. *Id.* at 638.

42. *Id.* at 641.

43. *Id.*

44. *Id.* at 655.

45. *Id.* at 650.

individualized decisions as to end users.⁴⁶ Therefore, as long as broadband providers were free to make individualized decisions on whom to provide content to, any restrictions placed on whom to accept content from did not amount to common carrier obligations.⁴⁷ The Court refuted the FCC's reasoning because although end users were broadband providers' traditional customers, that did not mean broadband providers could not also be carriers with respect to edge providers.⁴⁸ Because broadband providers offer a service to edge providers in carrying edge providers' content, the obligations imposed by the Open Internet Order could very well constitute common carrier duties on broadband providers, even if edge providers are not broadband providers' primary customers.⁴⁹

Although the Court struck down the anti-blocking and anti-discrimination requirements, its decision implied that the FCC could regulate broadband providers in order to achieve its goals of maintaining an open Internet and deploying Internet service to all Americans, so long as the FCC regulates within its statutory authority. The Court explicitly affirmed the FCC's ability to regulate by upholding the Commission's interpretation of section 706 of the Telecommunications Act of 1996,⁵⁰ and then implied the Commission's regulatory power by explicitly stating that it was the way the FCC classified broadband providers that proved problematic in determining the common carrier question.⁵¹ In addition, the Court found the FCC's prediction that the Open Internet Order will in fact encourage Internet deployment "both rational and supported by substantial evidence."⁵²

In the months following the *Verizon* decision, the FCC began reworking its Open Internet rules in order to use its statutory ability to regulate broadband providers in a way that allows it to promote an open Internet and deployment of advanced telecommunication capabilities, even opening its website for public comment. The FCC chose the best solution in February of 2015 by reclassifying broadband providers as telecommunication services subject to

46. *Id.* at 653.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 637, 641.

51. *Id.* at 650.

52. *Id.* at 644.

common carrier duties.⁵³ With this new classification, the FCC can effectively regulate broadband providers in ways that are conducive to the deployment of telecommunications capabilities to all Americans.

III. THE CASE FOR COMMON CARRIER CLASSIFICATION

The fact that the D.C. Circuit court upheld the FCC's interpretation of its own regulatory power has important implications for the Net Neutrality debate. The first implication is that the Court agrees that the FCC has the power it was trying to use to regulate broadband providers, but the agency was not executing or exercising that power appropriately. The Court's recognition of the FCC's statutory authority to regulate broadband providers means the agency only had to find the *right* way to regulate. Second, the Court stated that the Open Internet Order regulations were problematic because the old classification of broadband providers prevented the FCC from imposing common carrier duties on broadband providers.⁵⁴ This suggests that if the classification was changed to common carriers, a court would uphold the Open Internet Order rules. The Court acknowledged the fact that the FCC once regulated DSL providers as telecommunications services, thus subject to common carrier duties, and then changed its mind and reclassified DSL providers as information service providers along with other broadband providers, thus immune to common carrier duties, and the court upheld both of those classifications.⁵⁵ Thus, the FCC's new classification of broadband providers is likely to withstand judicial scrutiny as long as the FCC shows the change is not arbitrary or capricious.⁵⁶

Furthermore, in justifying the FCC's interpretation of Section 706, the Court explained that although the FCC's prior interpretation of the section had been overruled, an agency is not bound forever by prior interpretations because "[a]n initial agency interpretation is not instantly carved in stone."⁵⁷ An agency need

53. Press Release, FCC, FCC Adopts Strong, Sustainable Rules to Protect the Open Internet (Feb. 26, 2015), <https://www.fcc.gov/document/fcc-adopts-strong-sustainable-rules-protect-open-internet>.

54. *Verizon*, 740 F.3d at 650.

55. *Id.* at 630–31, 650.

56. *Chevron, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

57. *Verizon*, 740 F.3d at 636 (quoting *Chevron*, 467 U.S. at 863).

only “adequately explain the reasons” for a change in policy and a Court cannot reject a new interpretation “simply because it is new.”⁵⁸ As a result, the FCC can now subject broadband providers to common carrier duties as long as the Commission adequately explains its reasons for doing so.

Unless the FCC reclassified broadband providers as common carriers, it would be incredibly difficult, if not impossible, for it to effectively regulate broadband providers in a way that meets the Commission’s goals. Prior to the reclassification, broadband providers were able, maybe even encouraged, to discriminate and block edge provider content for no other reason than to increase their profits. Verizon’s counsel even stated during oral arguments that, were it not for the Open Internet Order, Verizon would be exploring ways to charge edge providers for using Verizon’s infrastructure to reach end users.⁵⁹ Reclassification of broadband providers as common carriers may not seem vital to some; however, failing to reclassify would have had adverse effects on consumers, edge providers, and the evolution of the Internet as a whole. The sections below explore the reasons for and benefits of imposing common carrier duties on broadband providers.

A. Broadband Providers Are by Their Very Nature Common Carriers

Enterprises were historically classified as common carriers when the services they provided were of a public nature. The services offered by broadband providers are public in nature, and therefore, broadband providers should be classified as common carriers. As a result, this is more of making an accurate classification than a reclassification. In *Internet Interconnection*, James Speta explains that designation as a common carrier is a common law tradition. At common law, an enterprise was classified as a common carrier when the work or trade the enterprise carried out was considered public for one of two reasons: (1) the activity had been historically provided by the king or under the king’s writ; or (2) the public had assisted the enterprise in some way.⁶⁰ Designation as a common carrier imposed on such enterprises the duty to serve all who sought service

58. *Id.* at 636 (quoting Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005)).

59. *Id.* at 646.

60. Speta, *supra* note 21, at 255–56.

without discrimination and to deal on just and reasonable terms.⁶¹ The reason for imposing common carrier duties was a fear of monopoly, the idea that the service offered by the enterprise is essential, or the idea that the enterprise concerns the public in some way.⁶²

The reasons for imposing common carrier duties are met by the current Net Neutrality argument. First, the threat of monopoly is not entirely unfounded in the context of broadband providers. The fact that broadband providers want to block competitors' applications and content, charge edge providers for delivering their services to end users, and establish a tiered system of services are all relevant evidence that, unless regulated, broadband providers will use their power and technology to block out competitors and maintain their power and control on the market. About ninety-six percent of Americans today only have access to, at most, two broadband providers.⁶³ This suggests that there is already too little competition in the broadband market and many of the big broadband providers own applications that compete with smaller companies. For example, Comcast owns Hulu, thus it would not be entirely unfounded to think that Comcast has incentives to block other streaming video services, like Netflix, to promote Hulu. If allowed to discriminate content, Comcast could easily block or slow down its consumers' connection to Netflix, but provide fast, uninterrupted access to Hulu. Another example is AT&T's blocking of Apple's FaceTime from its networks unless consumers agreed to enter into a Mobile Share plan.⁶⁴ Fortunately, AT&T's block on FaceTime was short lived and ended in early 2013.⁶⁵

Further proof of a potential monopoly are the statements made by Comcast's CEO on national television that Comcast does not compete with Time Warner Cable. He explicitly stated that each broadband company focuses on different markets, saying Time Warner is in New York and Comcast is in Philadelphia. A similar pattern is followed in the rest of the country so the providers stay out of each other's way, ensuring that an end user cannot get Time

61. *Id.* at 251.

62. *Id.* at 252.

63. FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 37 (2010), <http://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf>; *Amici Curiae*, *supra* note 16, at 10 (arguing nineteen broadband providers control about 93% of the market).

64. *Net Neutrality Timeline*, *supra* note 3; *see infra* footnote 108.

65. *See infra* footnote 108.

Warner in a Comcast market.⁶⁶ In denying that broadband providers' behavior reduces competition, the CEO of Comcast inadvertently described a monopoly by explaining that Comcast and Time Warner, two established and powerful broadband providers, have agreed to not compete with each other and divided markets between each other, driving the price of broadband service up since neither faces real competition; the probability of a monopoly is more likely now, along with the potential ability to also block content and information.⁶⁷

Second, access to an open internet is essential nowadays. This is why Congress mandated the FCC to encourage deployment of advanced telecommunications capability to all Americans, focused specifically on elementary and secondary schools.⁶⁸ Practically every aspect of modern life requires access to the Internet. Elementary schools, government agencies, small businesses, Fortune 500 companies, home security companies, restaurants, colleges, call centers—virtually every entity, whether public or private, uses, if not depends on, the Internet. Internet access in general is vital, but so is access to an open Internet where individuals, business, and governments can access the information that they want and need, when they want and need it, without any interference from companies who are already making millions of dollars from customers' dependency.

Finally, broadband providers are common carriers because the services they willingly set out to provide are of public concern.⁶⁹ An open Internet is a public concern because the Internet is the medium through which our society runs. Aside from the social and entertainment benefits that the Internet provides, there are also

66. *Last Week Tonight with John Oliver: Net Neutrality (HBO)*, (HBO Broadcast June 1, 2014), <http://www.youtube.com/watch?v=fpbOEoRrHyU>.

67. End users in the United States pay more for Internet services than end users in any other country. However, in May 2014 the internet speed in the United States was slower than the speed in countries like the Czech Republic, Liechtenstein, Israel, and Estonia. *Id.*

68. 47 U.S.C. § 1302(a) (2012).

69. Public interest in an open Internet is demonstrated by the approximately four million comments the FCC received in a three month period regarding Internet openness and how to ensure net neutrality. Press Release, *supra* note 53; Mike Snider, Roger Yu & Emily Brown, *What is Net Neutrality and What Does It Mean for Me?* (Feb. 27, 2015, 12:19 AM), <http://www.usatoday.com/story/tech/2015/02/24/net-neutrality-what-is-it-guide/23237737/> (arguing a majority of commenters on the Open Internet proceedings were private individuals).

business transactions and important private, public, and governmental communications that happen over the Internet, as well as important systems that stabilize our economy and safeguard our money that would simply not work without the Internet. The Internet is a public good. It is no longer a privilege or a luxury; it is a public necessity and it became that way because it was not owned, regulated, or controlled by anyone.

Attempting to impose unnatural controls and regulations, such as discriminating or blocking content and applications based on the source, will deteriorate the Internet ecosystem in ways that prevent this public medium from performing the role it plays in our society. If restricted, the Internet would become a closed-off network where the quality and quantity of information that end users can access is limited and where investment is likely significantly reduced, causing the growth of the Internet to slow down.⁷⁰ To put it into perspective, “[i]f the next Facebook has to pay for an Internet fast lane, the next Mark Zuckerberg might go into investment banking instead of creating the next big new thing on the Internet.”⁷¹

Broadband providers may argue that there is nothing wrong with asking edge providers to pay fees in order to disseminate their content to end users; they may even claim that this model is used in many other industries, like advertisers that must pay television and radio stations for airtime. After all, broadband providers own the infrastructure through which information passes from edge providers to end users. However, there is more at stake in the Net Neutrality controversy than what is at stake in other industries because indiscriminate access to lawful content on the Internet is essential in our society.

In some respects, Internet content may be available from readily obtainable alternatives. For example, information about which stores will have a sale on what day is accessible in other ways like watching television, listening to the radio, or reading a newspaper. The change in medium may present some costs, but those costs will likely not be significant.

70. Letter from Mike Ananny et. al., Annenberg School for Communications & Journalism, University of Southern California, to Edith Ramirez, FTC Chairwoman (Jan. 29, 2015) [hereinafter Professor Letter to FTC], <https://cyberlaw.stanford.edu/downloads/ProfessorLetterToFTC-20150129.pdf>.

71. *Id.*

On the other hand, many of the services and information available through an open Internet would be incredibly costly to obtain otherwise. Access to libraries, databases, county records, court decisions, online classes, and bank statements could be costly and time consuming to obtain through other mediums. In addition to the essential uses of the Internet, leisure is also more readily available online than through other sources. People can do almost anything through the Internet,⁷² and their ability to do so should not be limited simply because broadband providers want more profits either through prioritizing their own subsidiary companies or by charging edge providers money to distribute their products and services.

B. A Common Carrier Classification Allows the FCC to Meet Its Goals

Classifying broadband providers as common carriers allows the FCC to reinstate the anti-discrimination and anti-blocking rules from the Open Internet Order. It also allows the FCC to remove barriers to infrastructure and investment by making broadband providers transmit information indiscriminately. These policies will help maintain an open Internet, encourage competition, and

72. Eighty-seven percent of online adults in America say the Internet and cellphones have helped them to learn new things; over seventy percent feel they are better informed about national and international news and pop culture; and sixty-seven percent feel better informed about family and friends. Kristen Purcell & Lee Rainie, *Americans Feel Better Informed Thanks to the Internet*, PEW RES. CTR. (Dec. 8, 2014), <http://www.pewinternet.org/2014/12/08/better-informed/>. Twenty-eight percent of adults read an e-book in 2013 and half own a tablet or e-reader. Kathryn Zickuhr & Lee Rainie, *E-Reading Rises and Device Ownership Jumps*, PEW RES. CTR. (Jan. 16, 2014), <http://www.pewinternet.org/2014/01/16/e-reading-rises-as-device-ownership-jumps/>. Thirty-eight percent of Americans who were single and looking for a partner said they had used online dating sites or mobile dating apps. Aaron Smith & Maeve Duggan, *Online Dating & Relationships*, PEW RES. CTR. (Oct. 21, 2013), <http://www.pewinternet.org/2013/10/21/online-dating-relationships/>. Sixty-one percent of Internet users bank online. Susannah Fox, *51% of U.S. Adults Bank Online*, PEW RES. CTR. (Aug. 7, 2013), <http://www.pewinternet.org/2013/08/07/51-of-u-s-adults-bank-online/>. Seventy-two percent of American adults use social media. Joanna Brenner & Aaron Smith, *72% of Online Adults are Social Networking Site Users*, PEW RES. CTR. (Aug. 5, 2013), <http://www.pewinternet.org/2013/08/05/72-of-online-adults-are-social-networking-site-users/>. Of those who donated to a presidential campaign in 2012, fifty percent did so online. Aaron Smith & Maeve Duggan, *Presidential Campaign Donations in the Digital Age*, PEW RES. CTR. (Oct. 25, 2012), <http://www.pewinternet.org/2012/10/25/presidential-campaign-donations-in-the-digital-age/>.

continue the growth of the Internet, encouraging the deployment of advanced telecommunications.

The Telecommunications Act of 1996 gives the FCC the responsibility of encouraging the reasonable and timely deployment of advanced communications to all Americans.⁷³ The FCC can fulfill this responsibility by using measures such as “price cap regulation, regulatory forbearance, *measures that promote competition* in the local telecommunications market, or other regulating *methods that remove barriers* to infrastructure investment.”⁷⁴ The FCC must also make an annual inquiry to determine the availability of advanced telecommunications capability to all Americans.⁷⁵ If the agency determines that advanced telecommunications are not being deployed reasonably and timely, then 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.”⁷⁶

To simplify, the goal stipulated in the Telecommunications Act of 1996 is the reasonable and timely deployment of advanced telecommunications capability to all Americans; the FCC must not only have this as a goal, but also must ensure that such deployment actually happens. If Americans do not have the capability of accessing advanced telecommunications in a reasonable and timely manner, then the FCC must remedy this by taking immediate action to accelerate the deployment of such capability. The FCC’s immediate action may include removing barriers to infrastructure investment *and* promoting competition.

The FCC attempted to ensure reasonable and timely deployment through the rules imposed in the Open Internet Order. The FCC found that deployment of advanced telecommunications capability was neither reasonable nor timely and that broadband providers were partly to blame for the failure in deployment.⁷⁷ As a result, the agency used its statutory authority to remove barriers and promote competition and adopted the transparency, anti-blocking, and anti-discrimination rules. Thus, the FCC met the necessary requirements

73. 47 U.S.C. § 1302(a).

74. *Id.* (emphasis added).

75. 47 U.S.C. § 1302(b).

76. *Id.* (emphasis added).

77. 25 F.C.C.R. 17907 ¶ 4, 17972 ¶ 123 (Dec. 21, 2010).

to fulfill its statutorily imposed duty by knowing its goal, determining its goal was not being met under the then-existing conditions, identifying the obstacles to reaching that goal, and implementing remedial action within its authority to promote competition and reduce barriers. The D.C. Circuit even reiterated that the FCC had acted within its authority and duties under Section 706 of the Telecommunications Act.⁷⁸ Yet, the court chose to strike down the anti-discrimination and the anti-blocking rules.⁷⁹ Verizon argued, and the court agreed, that those rules imposed common carrier duties upon broadband providers who were exempt from those duties because they were not classified as common carriers.⁸⁰

The question that necessarily arose after *Verizon* was simple: if the court held that the FCC can use measures that promote competition and reduce barriers to ensure the reasonable and timely deployment of advanced communications, how could the FCC regulate the biggest obstacle to attaining this goal, namely broadband providers, without exceeding its scope and being overruled again? The answer was even simpler: the FCC had to reclassify broadband providers as common carriers.⁸¹

A reclassification of broadband providers as common carriers allows the FCC to reinstate the anti-discrimination and anti-blocking rules under the Open Internet Order. The D.C. Circuit already acknowledged that the FCC has the power to regulate under Section 706 of the Telecommunications Act, so the FCC's authority and ability to use that authority were no longer an issue. The court also held that Congress intended the Telecommunications Act of 1996 to "be inserted into" the Communications Act of 1934, Title II of which sets out regulations for common carriers.⁸² So if the FCC can promote competition and remove barriers to investment through Section 706 and, furthermore, use that authority to regulate entities that fall within Title II of the Communications Act, then all the FCC had to do was impose common carrier duties on broadband providers and then use the statutory authority granted in Section 706 of the Telecommunications Act in order to arrive at its desired

78. *Verizon v. FCC*, 740 F.3d 623, 642 (D.C. Cir. 2014).

79. *Id.* at 655.

80. *Id.* at 655.

81. *Id.* at 655–56.

82. *Id.* at 650.

goal of deploying advanced telecommunications capability to all Americans.

Reclassifying broadband providers as common carriers should not be problematic. In *Chevron, Inc. v. Natural Resources Defense Council*, the Supreme Court found that an agency is not bound forever by its prior interpretations.⁸³ Rather, an agency may change its mind on a prior interpretation as long as it gives an adequate explanation for its change in policy.⁸⁴ As long as the agency's decision does not seem capricious and arbitrary, the Court will uphold it, even if it is not the same outcome the Court would have reached.⁸⁵ Therefore, the FCC just needs to provide an adequate explanation for reclassifying broadband providers as common carriers. One of these explanations could be that, as argued in the previous section, broadband providers are by their very nature common carriers, and thus should ascribe to the same rules as enterprises classified as such.

A second explanation could be that unless the FCC reclassified broadband providers as common carriers, the FCC would have no power to regulate them. Leaving the FCC powerless leads to an absurd result because the FCC would be deprived of its authority to deploy telecommunications capabilities, increase competition, and reduce barriers. Courts have stressed time and time again that statutes cannot be read in such a way that leads to an absurd result.⁸⁶ Striking the new classification would result in absurdity; therefore, not only does the new classification make sense, it is also likely to be upheld by a court. Additionally, the FCC could argue that the public or quasi-public nature of the service broadband providers offer requires the imposition of common carrier duties, just like it did at common law.

Without reclassification of broadband providers, the FCC would be unable to ensure reasonable and timely deployment because access to Internet content and applications will be limited, blocked, slowed down, and interrupted by broadband providers based on arbitrary policies such as giving preferential access to applications the

83. *Chevron, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984).

84. *Verizon*, 740 F.3d. at 636.

85. *Chevron*, 467 U.S. at 866.

86. *Holy Trinity Church v. U.S.*, 143 U.S. 457, 459–60 (1892); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

provider owns, or limiting end-user access only to edge providers who pay the broadband provider a fee, or offering different speeds of Internet connection at different prices to end users.

The possibility arises that FCC regulation will impair the development and growth of the Internet, as opposed to improving it. Opponents of Net Neutrality argue that broadband providers are better equipped to ensure investment and to encourage growth⁸⁷ because, after all, this is their livelihood and their area of expertise. Therefore, broadband providers should be left alone to pursue their business in the ways that seem most profitable, and the market will work inconsistencies out so that deployment of advanced telecommunications is done reasonably and timely without any government regulation.⁸⁸ Although a scenario free from government intervention seems ideal, it is highly unlikely. Much of the investment in the Internet so far has come from edge providers, not from broadband providers. Although broadband providers have invested in improving the infrastructure, this has been largely a reactionary effort. Edge providers have invested in new technology, new applications, and information; end users have demanded it; and broadband providers have responded by using bigger pipes that can carry edge providers' content to end users. Unless the FCC intervenes in some way, edge provider investment will decrease once broadband providers begin discriminating based on content because the cost of putting content and applications on the market will increase.⁸⁹ As a result, development will decrease, less information will be available, and innovation will suffer.

87. Josh Steimle, *Am I the Only Techie Against Net Neutrality?*, FORBES (May 14, 2014, 10:09 AM), <http://www.forbes.com/sites/joshsteimle/2014/05/14/am-i-the-only-techie-against-net-neutrality/> (arguing that the government is too slow, and has too many failures in the public sector to be trusted with regulating the Internet). In my opinion, the article confuses the issues and the role the FCC seeks to play. The author accuses the FCC of almost attempting to take over entirely; his argument is against government-owned broadband, which is not at issue. The FCC rules seek to prohibit the creation of monopolies and the discrimination of data that leads to restricted information by requiring disclosures so that broadband providers do not misuse their power. See Hal Singer, *How the FCC Will Wreck the Internet*, WALL STREET J. (May 28, 2015, 8:04 PM), <http://www.wsj.com/articles/how-the-fcc-will-wreck-the-internet-1432857872> (arguing that the FCC's Open Internet Order will lower capital investments by broadband providers and delay innovation).

88. Steimle, *supra* note 87.

89. Professor Letter to FTC, *supra* note 69.

C. Open Internet Will Spur Investment and Innovation

Another reason to classify broadband providers as common carriers is to protect the “virtuous cycle/circle” of innovation. Proponents of Net Neutrality argue that an open Internet is necessary for two reasons. First, an open Internet will spur innovation that will improve the Internet and the content available on the Internet. When edge providers do not have to worry about paying fees to have their content transmitted or have to worry about their content being blocked from reaching end users, they are more likely to invest resources in developing new content or spreading new or unique information. However, if edge providers are constantly concerned about their content being blocked, their cost of business goes up because it takes more money to get their information to their audience, whether that is by paying broadband providers or by having enough funds to compete with broadband provider’s applications.

Second, innovation will improve and benefit the economy as a whole, creating growth, expansion, and new economic opportunities. The Internet has led to an increase and ease in globalization and international transactions.⁹⁰ People at any level of entrepreneurship can participate in the market; transactions are also facilitated between individuals wherever they may be.⁹¹ Because businesses can sell and transact with people all over the world, the need for labor, manufacturing, and ideas increases to levels not possible before.

On the other hand, without an open Internet, incentives to invest and innovate will be reduced dramatically as the benefits of the Internet will be internalized by broadband providers, in the form of increased revenues and market control, and the negative effects will be distributed amongst everyone else, through a lack of or slow

90. Just in the United States, total e-commerce sales for the first quarter of 2015 was \$80.3 billion, a 3.5 percent increase from the last quarter of 2014. U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, U.S. CENSUS BUREAU NEWS, QUARTERLY E-COMMERCE SALES 1ST QUARTER 2015 (May 15, 2015), <http://www2.census.gov/retail/releases/historical/ecom/15q1.pdf>.

91. For example, PayPal, which, according to its own website, has over 173 million active customer accounts, allows payment in over 100 currencies, withdrawal of funds to bank accounts in 57 currencies, holds balances in PayPal accounts in 26 currencies, and is available in 203 markets. *PayPal About*, PAYPAL, <https://www.paypal.com/us/webapps/mpp/about/> (last visited Nov. 9, 2015).

development of new technologies and reduced quantity and quality of content and applications.

On the first argument, Net Neutrality proponents assert that an open Internet inspires what has come to be known as the “virtuous circle” of innovation.⁹² In the “virtuous circle,” an open Internet motivates edge providers to invest money, time, and resources in developing new content and applications.⁹³ It also motivates investors to finance edge providers; the investors who submitted an *Amici Curiae* in behalf of the FCC, claim that such investment spurs better and faster development than would occur otherwise.⁹⁴ The rapid Internet development results in increased demand from end users for faster Internet and access to more content and applications.⁹⁵ The increase in demand encourages broadband providers to invest in bigger and better transmission technology.⁹⁶ The improved technology fosters new investment in development of content and applications, which restarts the cycle all over again.⁹⁷ While it is true that providing bigger pipes is a significant investment paid for mostly by broadband providers, these broadband providers benefit by the increased end-user demand, which leads to increased profits. In 2013, Comcast saw an eight percent revenue gain in its broadband division alone.⁹⁸

Net Neutrality is a requisite in order for innovation and investment to continue. The Internet has been successful because of its open nature; had the Internet been a closed system from the beginning, it would not have seen the growth and success that characterize it. The Internet grew and prospered because of three open-Internet characteristics. First, there were no gatekeepers when

92. *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014).

93. *Amici Curiae*, *supra* note 16, at 2.

94. *Id.*

95. *Id.* at 2–3.

96. *Id.* at 3.

97. *Id.*

98. Brian Stelter, *Comcast Profit Jumps 28.6% on Growth of Broadband*, N.Y. TIMES, (July 31, 2013), http://www.nytimes.com/2013/08/01/business/media/comcast-profit-jumps-26-on-growth-of-broadband.html?_r=0; see also *AT&T to Invest \$14 Billion to Significantly Expand Wireless and Wireline Broadband Networks, Support Future IP Data Growth and New Services*, AT&T (Nov. 7, 2012), <http://www.att.com/gen/press-room?pid=23506&cdvn=news&newsarticleid=35661> (stating that AT&T expects its growth drivers, wireless, wireline, and managed IT services to make up ninety percent of total revenues by 2016).

the Internet started.⁹⁹ The Internet was completely open to anyone with an idea; as the Wireless Founders Coalition for Innovation stated, “[w]hat makes the wireline Internet so friendly from an entrepreneur’s perspective is its Openness. One does not have to ask Comcast or Time Warner Cable or even Verizon’s DSL division for permission to launch a new product, service, or device.”¹⁰⁰ Indeed, the open Internet provides a forum for all kinds of content and Internet applications and provides individuals and corporations alike the ability to disseminate information and reach people across the globe without first having to ask anyone for permission.

Second, the Internet was initially created to be “application-blind.”¹⁰¹ From the beginning, the idea was that the technology supporting the flow of traffic would be indifferent to the “substance, functionality, and content of that traffic.”¹⁰² This structure allowed the Internet to be accessible to any new application in the future, thus avoiding application-specific functionality.¹⁰³ Because indiscriminate access was the purpose of the Internet, transmission devices only looked at information’s forwarding address, not the substance of the information;¹⁰⁴ in fact, transmission devices were unable to look at the information’s content at all, thus broadband providers were unable to distinguish between types of applications.¹⁰⁵ However, new technological development, brought in large part from openness that spurred investment, has resulted in specialized tools that have the capacity of identifying between packets of information.¹⁰⁶ This technology not only allows broadband providers to identify the substance of the information going through their transmission lines, but also allows them to “block, shape, monitor, and prioritize that traffic.”¹⁰⁷

99. *Amici Curiae*, *supra* note 16, at 4.

100. *Id.* at 4–5 (quoting Letter from Wireless Founders Coalition for Innovation to Chairman Kevin Martin, WT Docket Nos. 06-150, 96-86, PS Docket No. 06-229, at 3 (June 7, 2007)).

101. *Id.* at 5.

102. *Id.*

103. *Id.*

104. *Id.* at 5–6.

105. *Id.* at 6.

106. *Id.* at 16.

107. *Id.* at 2, 16–17 (quoting Nate Anderson, *Deep Packet Inspection Meets Net Neutrality*, ARS TECHNICA (July 26, 2007), <http://arstechnica.com/gadgets/2007/07/deep-packet-inspection-meets-net-neutrality/>).

Broadband providers with access to these tools now can act on their incentives to discriminate between content and have actually used that technology to discriminate, such as AT&T blocking Apple's FaceTime from its networks unless consumers entered into a Mobile Share Plan.¹⁰⁸ Such technological breakthroughs call for different approaches to maintaining an open Internet. Gone are the days when the market would regulate itself; instead, the advances and development that came as a result of an open Internet now provide the means for gatekeepers to block content and for the potential monopolization of the market to the detriment of all involved, except for broadband providers.

Third, the Internet was intended to be a general-purpose resource.¹⁰⁹ The availability of the network to everyone fostered an environment in which anyone could add to the already existing infrastructure.¹¹⁰ The accessibility that characterizes the Internet has allowed robust competition between edge providers, thus improving the speed, infrastructure, content, and availability of information on the Internet. Thus the "virtuous circle" of innovation caused the Internet to explode and become the ever-changing and evolving tool we depend so much on. Curtailing edge provider development and innovation by allowing broadband providers to discriminate, slow down, and block content would damage the competitive nature of the Internet and reduce its efficiency and development in unimaginable ways. The drafters of the Amici Brief in support of the FCC have explicitly expressed their reluctance to invest in Internet development if broadband providers are not regulated and are

108. David Sohn, *Assessing AT&T Limits on FaceTime*, CTR. FOR DEMOCRACY AND TECH. (Nov. 12, 2012), <https://cdt.org/blog/assessing-att-s-limits-on-facetime/>; *see also Net Neutrality Timeline*, *supra* note 3; *AT&T Blocking FaceTime*, SAVE THE INTERNET, <http://www.savetheinternet.com/att-facetime> (last visited Nov. 30, 2015). Thankfully, AT&T's block of FaceTime was short lived and ended in early 2013. Cecilia Kang, *AT&T lifts FaceTime restrictions on Apple iPhones*, WASH. POST BLOG (Nov. 8, 2012), https://www.washingtonpost.com/blogs/post-tech/post/atandt-lifts-facetime-restrictions-on-apple-iphones/2012/11/08/cbec36de-29de-11e2-b4e0-346287b7e56c_blog.html; Brian X. Chen, *AT&T Backpedals on FaceTime Restrictions*, N.Y. TIMES BLOG (Nov. 8, 2012), http://bits.blogs.nytimes.com/2012/11/08/att-backpedals-on-facetime-restrictions/?_r=1; Kevin Bostic, *AT&T to Bring FaceTime Over Cellular to All Customers by End of Year*, APPLEINSIDER (May 20, 2013), <http://appleinsider.com/articles/13/05/20/att-to-bring-facetime-over-cellular-to-all-customers-by-end-of-year>.

109. Amici Curiae, *supra* note 16, at 6.

110. *Id.*

allowed to interfere with the dissemination of information through the Internet.¹¹¹

Aside from the benefits and increased development that openness has brought for the Internet itself, there are economic benefits that also come from Internet openness that benefit society as a whole and which should be a motivating factor for regulation of broadband providers as common carriers. An open Internet encourages entrepreneurship by edge providers,¹¹² which turns into increases in the number of business and transactions. Take the World Wide Web for example: open access to this application allows the existence of websites, like Etsy, that encourage start-up entrepreneurship. Thus, a homemaker in Salt Lake City, Utah can sell homemade metal necklaces and bracelets not just to her neighbors, friends, and family, but also to people in her entire city, state, country, and even internationally. Though the impact of such an enterprise may seem small and inconsequential, consider a simplified version of the effects at each step of the transaction. The homemaker posts her product on Etsy; a consumer freely accesses it and decides to purchase a necklace. The consumer pays for the product online, probably through some third-party that will retain a small percentage of the payment for facilitating the transaction; the payment also involves the consumer's bank, which becomes a player in the small \$50 transaction. Upon receiving the order, the homemaker goes to her local hardware store to purchase supplies to make the consumer's necklace. Purchasing the materials then involves the hardware store owner, be it a regional store or local business; regardless of its identity, said business likely purchased the materials from, at the very least, one other distributor, who likely procured the raw materials from some other business. After acquiring the necessary supplies, the homemaker goes home and makes the necklace, which she later sends through the mail—involving yet another player in the transaction. The cycle continues with not just this homemaker, but with thousands of people like her who offer a variety of goods and services, from banking to online payments, shopping to blogs, and newspapers to hair salons. All of these enterprises can participate in the national and global economy because the Internet is an open forum.

111. *Id.* at 3–4.

112. *Id.* at 4.

The ability to share, create, sell, trade, and disseminate through the Internet has had a significant impact on the worldwide economy. A research study carried out by the global management-consulting firm McKinsey & Company shows that, as of October 2011, the Internet accounted for twenty-one percent of “GDP growth in mature economies.”¹¹³ The same report showed that the Internet accounted for 3.4 percent of GDP in developed economies “that make up 70 percent of global GDP.”¹¹⁴ The total contribution to the global GDP was larger than the GDP of Canada or Spain and the Internet’s contribution was growing faster than Brazil’s GDP.¹¹⁵ In fact, the Internet’s contribution to GDP in 2009 was larger than that of the Education, Communication, Agriculture, Utilities, and Mining sectors.¹¹⁶ In the five years prior to the McKinsey study, the Internet made up twenty-one percent of GDP growth in advanced economies.¹¹⁷ If the Internet were a country, it would be one of “the world’s top five economies.”¹¹⁸

The development of the Internet is also responsible for job creation; in France, the Internet destroyed about 500,000 jobs in fifteen years, but created 1.2 million new jobs—which translates into 2.4 new jobs for every job destroyed.¹¹⁹ Small businesses have also grown immensely because of the Internet.¹²⁰ In a survey of more than 4,800 small and medium enterprises, those businesses that made substantial use of the Internet for their business grew twice as much over a three-year period as those that did not use the Internet as much.¹²¹ Those same businesses also made twice as much revenue from exports as businesses that did not use the Internet with the same intensity.¹²² The Internet has also improved the standard of

113. James Manyika & Charles Roxburgh, *The Great Transformer: The Impact of the Internet on Economic Growth and Prosperity*, MCKINSEY GLOBAL INST. (Oct. 2011), http://www.mckinsey.com/insights/high_tech_telecoms_internet/the_great_transformer.

114. *Id.*

115. *Id.*

116. *Id.* Ex. 2.

117. *Id.*

118. DALBERG, OPEN FOR BUSINESS?: THE ECONOMIC IMPACT OF INTERNET OPENNESS 27 (Mar. 2014), http://www.dalberg.com/documents/Open_for_Business_Dalberg.pdf.

119. Manyika & Roxburgh, *supra* note 113.

120. *Id.*

121. *Id.* Ex. 3.

122. *Id.*

living.¹²³ As the Internet environment matures and evolves, the standard of living in advanced economies has increased by an average of \$500 in real per capita GDP; that improvement over fifteen years is the same as the improvement that resulted from the Industrial Revolution over a fifty-year period.¹²⁴ In addition, ease of transactions, lowering of transaction costs, and the ability to compare prices and find and purchase from competing businesses have empowered consumers who are a click away from getting whatever they want.¹²⁵ McKinsey also found that online prices are ten percent lower on average than the cost of “offline counterparts.”¹²⁶ This leads to price transparency and increases savings for consumers anywhere from \$18 to \$28 per month¹²⁷—who then put those savings back into the economy through spending or investing. To ensure that consumers and countries continue to reap the benefits that have thus far come from the Internet, the Internet must remain open. The open nature of the Internet is what has led to such unprecedented growth and other economic benefits. Once barriers to content and accessibility are adopted, not only may investment incentives disappear, but also consumers’ ability to use the Internet in the same way will be impaired. A study by Dalberg Global Development Advisors found a strong correlation between Internet openness in a given country and the degree to which that country’s economy has benefited from the Internet.¹²⁸ There are exceptions where a country still sees comparable benefits despite the lack of Internet openness because of the country’s large population.¹²⁹

123. *Id.*

124. *Id.*

125. A 2008 Pew Research Center study on online shopping reports that 66% of online Americans have purchased something online, 78% agree that online shopping is convenient, and 68% agree “that online shopping saves them time.” In 2007, 60% of Americans used the Internet for “product-related research,” and 93% of Internet users in 2007 had “done something related to e-commerce.” John B. Horrigan, *Online Shopping*, PEW RES. CTR. (Feb. 13, 2008), <http://www.pewinternet.org/2008/02/13/online-shopping/>.

126. Manyika & Roxburgh, *supra* note 113.

127. *Id.*

128. The more open the Internet in a given country, the higher the economic impact of the Internet. DALBERG, *supra* note 118, at 28 fig. 4. The more restrictions a country has, the less the Internet contributes “to the overall economy.” *Id.* at 29 fig. 5.

129. *Id.* (arguing that economic benefits are visible regardless of a country’s economic development); *id.* at 31 fig. 6 (showing that countries classified as “partly free”/“not free” by Freedom of the Net have underperforming Internet economies); *id.* at 30 (explaining that China’s Internet economy has grown and managed to have a higher than expected economic

Internet restrictions, on the other hand, “increase . . . the cost of doing business,” consequently reducing investment and use of the Internet because the burdens of those restrictions outweigh the benefits.¹³⁰ As a result, the countries with fewer restrictions on the Internet see the most benefit, in terms of Internet usage’s contribution to their GDP,¹³¹ though there is still not enough data to confirm this through a “statistically significant causal relationship.”¹³² Placing restrictions on the Internet reduces investors’ confidence in the market, consequently reducing investment; entrepreneurs and edge providers also have to use money that would otherwise go to innovation and business growth on compliance and paying broadband providers for access instead.¹³³ There is also a decrease in the quality and availability of information that could spur economic growth.¹³⁴

D. Long History of Applying Common Carrier Duties

Common carrier duties would apply even if broadband providers were still classified as information-service providers, rather than telecommunication service providers because of a long tradition of imposing common carrier duties on information-service providers. If the FCC initially classified information-service providers as common carriers, there must have been a good reason for doing so that is likely applicable now. While the technology used now is very different from that used when the FCC adopted its first set of regulations on broadband providers back in the 1970s, some of the policy reasons may still be applicable. Additionally, the change in policy excepting information-service providers from common carrier duties seems to have been solely based on the uncertainty of the market and future technology¹³⁵ and not necessarily on a concrete factor that required such a change. In fact, there are several pieces of historical evidence that show not only the old practice of regulating

impact despite the many restrictions on Internet use, possibly as a result of China’s huge Internet user base of nearly 600 million).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *In re* Second Computer Inquiry (Second Computer Inquiry), 77 F.C.C.2d 384, 473 (1980).

information-services providers as common carriers, but also Congress' legislative intent and the Court's interpretation of the Telecommunications Act of 1996.

First, in 1980, the FCC abandoned its tradition of imposing common carrier duties on entities in control of the last-mile.¹³⁶ Before this change, the FCC required that information-service providers offer their enhanced services through a completely independent corporate entity and, furthermore, imposed common carrier duties on information-service providers when offering their transmission facilities to other enhanced service providers.¹³⁷ When the FCC amended its practice, it imposed the restrictions only on certain entities like AT&T and GTE.¹³⁸ The FCC justified its change in policy by stating that applying its maximum separation policy to all carriers was inappropriate in the context of the present and anticipated applications of computer processing.¹³⁹ Thus, the FCC's new approach changed a decade-old tradition.

Second, during a brief period of time, the FCC classified DSL providers as telecommunication services.¹⁴⁰ The FCC concluded that some packet-switched services like DSL were simply transmission technologies because all they did was transport information between points without changing the information's form or content.¹⁴¹ However, the FCC did differentiate between transmission through DSL as a telecommunications service and Internet access itself as an information service.¹⁴² As a result, DSL providers could exempt their Internet access service from common carrier regulation, but not their transmission services.¹⁴³

The FCC later changed its mind and reclassified DSL providers as information services exempt from common carrier regulations.¹⁴⁴ The FCC concluded "that wireline broadband Internet access service

136. *Verizon v. FCC*, 740 F.3d 623, 638 (D.C. Cir. 2014); *Second Computer Inquiry*, 77 F.C.C.2d at 473.

137. *Verizon*, 740 F.3d at 629–30.

138. *Second Computer Inquiry*, 77 F.C.C.2d at 472–73.

139. *Id.*

140. 13 FCC Rcd. 24012, 24029–30 ¶ 35 (1998).

141. *Id.* at 24030 ¶ 35.

142. *Id.* at 24030 ¶ 36.

143. *Verizon v. FCC*, 740 F.3d 623, 631 (D.C. Cir. 2014).

144. *Id.*

provided over a provider's own facilities is an information service."¹⁴⁵ In choosing to reclassify DSL providers in both 20 F.C.C.R. 14862 and 17 F.C.C.R. 3033, the FCC reached a "tentative conclusion."¹⁴⁶ This suggests a reluctance to definitely and conclusively classify DSL and other broadband services as information services. If classification as information services was obvious or required, the FCC's conclusion should be nothing but conclusive.

Third, the legislative history of the Telecommunications Act of 1996 suggests that common carrier regulation of broadband providers is a way in which the FCC can achieve its statutorily imposed goals. The Senate Report before the Act was passed explains that Section 304 of the Act, requiring the FCC to initiate and complete regular inquiries to ensure deployment of telecommunications capabilities in a "reasonable and timely" fashion, was a "necessary fail-safe" to make sure the bill met its objective.¹⁴⁷ The legislative history further states that if the FCC finds that telecommunications capabilities are not being deployed promptly, the FCC is required to take immediate action, which may include "methods that remove barriers and provide the proper incentives for infrastructure investment."¹⁴⁸ The Report also states that the purpose of the Act is to enable subscribers throughout the United States to "send and receive information in all its forms—voice, data, graphics, and video—over a high-speed switched, interactive, broadband, transmission capability."¹⁴⁹ If the FCC can use any method to ensure deployment for the purpose of giving end users access to a broad array of services through broadband, then reclassification of broadband providers in order to reach that goal would be allowable. As long as the FCC does not overstep its statutory authority and it gives adequate explanation for the reclassification, the FCC should have no problems implementing its new rules, even if its new policy were challenged.

Finally, the Supreme Court was not entirely on board with the FCC's last classification of broadband providers. In *Nat'l Cable &*

145. 20 FCC Rcd. 14853, 14862 ¶ 12 (2014) (quoting *In re* Appropriate Framework for Broadband Access to Internet over Wireline Facilities, 17 FCC Rcd. 3019, 3033 ¶ 24 (2002)).

146. *Id.*; 17 FCC Rcd. 3019, 3033 ¶ 16 (2002).

147. S. REP. NO. 104-23, at 50-51 (1995).

148. *Id.* at 50.

149. *Id.* at 51.

Telecommunications Ass'n v. Brand X Internet Servs., Justice Breyer, though concurring with the majority's opinion, concluded that the FCC's classification of broadband providers "just barely" fell within the agency's statutory authority.¹⁵⁰ Justice Scalia, on the other hand, dissented from the majority's opinion, concluding that the FCC effectively set up a "regime of *non*-regulation."¹⁵¹ In addition, Justice Scalia concluded that the FCC had exceeded its statutory authority by giving the statute an "implausible reading."¹⁵²

IV. CONCLUSION

The D.C. Circuit Court's decision in *Verizon* certainly limited the FCC's ability to regulate broadband providers in a way that allows the FCC to continue to meet its statutory obligations and its goals under the Internet Order. However, with its latest decision, the FCC can still regulate broadband providers in a way that complies with the language of the Telecommunications Act of 1996 and the Communications Act of 1934. The first step in regulating within these two statutes was imposing common carrier duties on broadband providers because of the nature of the services these enterprises provide. Now that broadband providers have been reclassified as common carriers, they must provide service indiscriminately, justly, reasonably, and to all customers and edge providers who seek it. Although some argue that markets work better when they are free from government regulation and interference, in this case all the FCC is doing is ensuring that the Internet is left open and that broadband providers cannot use technology to deprive customers and edge providers from the benefits of an open Internet.

There are strong reasons for allowing the FCC to regulate in an effort to ensure an open Internet. The first of these is the nature of the enterprise broadband providers are involved in. Internet service has become a necessity, and as such, it must remain open for individuals and entities to access it in the way they are used to accessing it; in addition, the Internet is a public good that is vital in everyday modern life. Second, imposing common carrier duties on broadband providers ensures the FCC can meet its statutorily imposed

150. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1003 (2005) (Breyer, J., concurring).

151. *Id.* at 1005 (Scalia, J., dissenting).

152. *Id.*

goals of encouraging the reasonable and timely deployment of advanced communications to all Americans. Third, an open Internet will spur innovation and investment both within the telecommunications market and in the economy as a whole. An open Internet will continue to benefit the economy as a whole and to connect people, businesses, and consumers across the globe. It will result in improved quantity and quality of information available to all. Finally, there is a long history of imposing common carrier duties on enterprises like broadband providers. Members of the Supreme Court have suggested that the FCC is within its power to regulate broadband providers like it regulates common carriers, and there is at least some evidence that Congress intended the FCC to regulate broadband providers as common carriers.

How broadband providers will be regulated depends mostly on the FCC. The agency can decide to impose common carrier duties on broadband providers. Because neither the Telecommunications Act nor the Communications Act states what duties information services are subject to,¹⁵³ the FCC should be able to change its policy as long as it has a legitimate purpose, including maintaining an open Internet. Such a change is within the agency's authority and a court should defer to the agency. This is just one way for the FCC to regulate broadband providers in a way that maintains an open Internet. Thankfully the agency has demonstrated a commitment to the open Internet. Exactly how this decision will be challenged remains to be seen,¹⁵⁴ and one can only hope that the courts will uphold the FCC and allow the Internet to remain the open, unrestricted forum it has become.

*Emma N. Cano**

153. *Supra* note 23 and accompanying text.

154. AT&T has already joined other trade groups in filing suits claiming the FCC acted capriciously, arbitrarily, and in violation of federal law. Ryan Knutson, *AT&T Sues to Overturn FCC's Net Neutrality Rules*, WALL STREET J. (Apr. 14, 2015, 6:56 PM), <http://www.wsj.com/articles/at-t-sues-to-overturn-fccs-net-neutrality-rules-1429052166>.

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