

GETTING YOUR CAKE BUT NOT EATING  
IT TOO:  
THE EFFECT OF NET NEUTRALITY  
REPEAL ON BROADBAND  
INFRASTRUCTURE DEPLOYMENT

DANIEL HABIF\*

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INTRODUCTION

Still a relatively new invention, the Internet has become vital to the modern economy.<sup>1</sup> This technological revolution would not be possible

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\* J.D. Candidate, American University Washington College of Law (2019); B.A., International Studies, University of Michigan, Ann Arbor (2015). First, I would like to thank my parents for their unconditional love and support. Additionally, I would like to thank my intern supervisors at the FCC, Karen Sprung and Angela DeMahy, for fostering my interest in communications law and exposing me to this topic. I would also like to recognize and thank Professor Victoria Phillips for her help and mentorship while writing this Comment and throughout my years in law school.

1. *See, e.g.*, DELOITTE, WIRELESS CONNECTIVITY FUELS INDUSTRY GROWTH AND INNOVATION IN ENERGY, HEALTH, PUBLIC SAFETY, AND TRANSPORTATION 3 (2017) (explaining how the Internet fuels economic growth and innovation in the energy, health, public safety, and transportation sectors).

without the broadband<sup>2</sup> wireline and wireless infrastructure that connects our computers, smartphones, and an ever-increasing array of gadgets.<sup>3</sup> The explosion of data-hungry devices and the impending arrival of next-generation, or “5G,”<sup>4</sup> wireless technology precipitated the Federal Communications Commission (FCC) to issue two notices of proposed rulemaking (NPRM): one for wireless and one for wireline broadband Internet,<sup>5</sup> which will govern the deployment of next-generation broadband Internet infrastructure.<sup>6</sup> A key issue in the proposed rules is the FCC’s authority under § 332(c)(7)<sup>7</sup> and § 253, respectively,<sup>8</sup> of the 1996 Telecommunications Act (Telecommunications Act).<sup>9</sup> These provisions delegate the authority

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2. The Federal Communications Commission (FCC) defines “broadband Internet” as a “mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service.” *See* Restoring Internet Freedom, 83 Fed. Reg. 7852 (Feb 22, 2017) (to be codified at 47 C.F.R. pts. 1, 8, 20) [hereinafter 2017 Net Neutrality Order].

3. *See generally* Peter M. Lefkowitz, *Making Sense of the Internet of Things*, 59 Bos. B.J., Fall 2015, at 23, <http://www.bostonbar.org/docs/default-document-library/bbj-fall-2015-vol59-no4.pdf>.

4. 5G is the stand-in phrase for the next generation wireless services. *See* Competitive Carriers Ass’n, Comment Letter on the FCC’s Proposed Wireless Infrastructure Rules (June 15, 2017) (noting that complete 5G standards are not likely to be developed until 2020); *see also* Verizon Wireless, Reply Comment Letter on the FCC’s Proposed Wireless Infrastructure Rules (July 17, 2017) (explaining that 5G infrastructure consists of “small cells, distributed antenna system nodes, and small 5G base station equipment”). The standard specifications for 5G, such as LTE for 4G, are still being developed. *Id.*

5. *See* Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, 82 Fed. Reg. 21,761 (May 10, 2017) (to be codified at 47 C.F.R. pts. 1, 17) [hereinafter 2017 Wireless Infrastructure Notice of Proposed Rulemaking (NPRM)]; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, 82 Fed. Reg. 61,520 (Dec. 28, 2017) (to be codified at 47 C.F.R. pt. 63) [hereinafter 2017 Wireline Infrastructure NPRM].

6. *See* 2017 Wireless Infrastructure NPRM, *supra* note 5, at 21,761; 2017 Wireline Infrastructure NPRM, *supra* note 5, at 61,521; *see also* Chaim Gartenberg, *AT&T Announces Plans to Start Rolling Out a True 5G Network by the End of 2018*, VERGE (Jan. 4, 2018, 12:01 AM), <https://www.theverge.com/2018/1/4/16848220/att-5g-network-2018-3gpp-standard-evolution-cellular-network-lte> (reporting that all four major wireless service carriers, AT&T, Verizon Wireless, Sprint, and T-Mobile, announced plans to begin building their 5G networks).

7. *See generally* 47 U.S.C. § 332(c)(7) (2012) (providing state and local governments with the authority to regulate the deployment of mobile wireless services).

8. *See generally id.* § 253 (vesting the FCC and states and cities with the regulatory authority for the deployment of telecommunications services).

9. *See* 2017 Wireless Infrastructure NPRM, *supra* note 5, at 21,762; 2017 Wireline Infra-

for network infrastructure deployment between cities, states, and the federal government.<sup>10</sup> In promulgating the final rules, the FCC must attempt to balance the interests of its main stakeholders: Internet Service Providers (ISPs) and state and local governments.<sup>11</sup> ISPs want the FCC to preempt local governments' regulations regarding where, when, and how they can deploy their network infrastructure, whereas local governments want to retain their power in ensuring that the infrastructure is deployed safely and in an aesthetically-pleasing manner.<sup>12</sup>

As the FCC crafts the final wireless and wireline infrastructure rules, it is likely to encounter a legal issue caused by its actions in another proceeding. On December 14, 2017, the FCC voted to enact the Restoring Internet Freedom Order, which reclassified broadband Internet service from a Title II telecommunication service to a Title I information service.<sup>13</sup> As a result of this reclassification, it is unclear whether §§ 253 and 332(c)(7)—the two sections of the Telecommunications Act that concern the deployment of infrastructure—can apply to Title I services.<sup>14</sup> This Comment will examine whether the FCC may still use its preemption and statutory interpretation authority pursuant to § 253—Removal of Barriers to Entry—and § 332(c)(7) —Mobile Services—to facilitate the deployment of Title I broadband Internet infrastructure.

Part I of this Comment provides an overview of the Communications Act of 1934 (Communications Act), the Telecommunications Act, and the relevance of the Restoring Internet Freedom Order to the 2017 Wireless and Wireline Infrastructure NPRMs. Part II discusses the history of net neutrality and how the FCC has tried to enforce net neutrality principles while keeping the Internet classified as a Title I information service. Part III analyzes §§ 253 and 332(c)(7) and the FCC's power to utilize these statutes to facilitate infrastructure deployment. In Part IV, this Comment argues that because the Restoring Internet Freedom Order reversed the Obama-era Title II classification of the Internet, the FCC no longer has the authority to use these provisions to expedite the provision of solely broadband infrastructure. Finally, Part V offers a recommendation to enable the

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structure NPRM, *supra* note 5, at 61,525.

10. *See generally* 47 U.S.C. §§ 253, 332(c)(7).

11. *See generally* Smart Cmty. & Special Dist. Coal., Comment Letter on Wireline Infrastructure NPRM (June 15, 2017); Competitive Carriers Ass'n, Comment Letter on Wireless and Wireline Infrastructure NPRM (June 15, 2017).

12. Competitive Carriers Ass'n, Comment Letter, *supra* note 11.

13. *See* 2017 Net Neutrality Order, *supra* note 2, at 7852-53.

14. The Commission recognized this discrepancy in the Restoring Internet Freedom proceeding. *See* Restoring Internet Freedom, Notice of Proposed Rulemaking, 82 Fed. Reg. 25,568, 25,573 (June 2, 2017), at 24–25.

FCC to still utilize §§ 253 and 332(c)(7) to provide Americans with a better, faster, and more expansive broadband Internet network.

## I. THE TELECOMMUNICATIONS ACT

The Communications Act established the FCC and delegated its authority.<sup>15</sup> It authorized the FCC to regulate “any railroad and telegraph company [that] . . . maintain[s] and operate[s] a telegraph line.”<sup>16</sup> However, the technological landscape changed dramatically in sixty years, and Congress recognized this evolution in the country’s communications networks.<sup>17</sup> In response, Congress passed the Telecommunications Act in 1996, which amended and modernized the Communications Act with the goal, in part, to, develop the Internet as a communications tool.<sup>18</sup>

The Telecommunications Act added two classifications to the already established Title I and Title II framework: information services and telecommunications services.<sup>19</sup> Under the revised Telecommunications Act, an “information service” is one that can store, transmit, and retrieve information through a communications network.<sup>20</sup> Information service providers are not subject to mandatory regulations, though the Commission may act by utilizing its ancillary authority under Title I to impose regulations on information services and their providers.<sup>21</sup> This ancillary authority is found in § 154(i) of Title I of the Telecommunications Act.<sup>22</sup> The D.C. Circuit narrowed the scope of § 154(i) in *American Library Ass’n. v. FCC*<sup>23</sup> by establishing a two-part test for when the Commission may use this authority.<sup>24</sup>

15. 47 U.S.C. § 151.

16. *Id.* § 11.

17. *Id.* § 230(a)(1) (“The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.”).

18. *Id.* § 230(b)(1) (“It is the policy of the United States to promote the continued development of the Internet and other interactive computer services and other interactive media.”).

19. *Id.*

20. *Id.* § 153(24) (defining an information service as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications”).

21. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 976 (2005).

22. *See* 47 U.S.C. § 154(i) (2012).

23. 406 F.3d 689 (D.C. Cir. 2005).

24. *Id.* at 692 (“The Commission . . . may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission’s general jurisdictional grant under Title I covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”).

Courts have rebuffed the Commission's attempts to use its Title I ancillary authority to regulate ISP networks, finding that the action would exceed the FCC's delegated powers.<sup>25</sup>

In contrast to the loosely regulated Title I information service providers, telecommunications service providers are directly regulated under Title II of the Telecommunications Act, which proscribes regulations for a broad category of other "common carriers."<sup>26</sup> "Telecommunications" is defined in the Act as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."<sup>27</sup> Traditionally, Title II telecommunications providers were companies that provided telephony<sup>28</sup> services via wired landline infrastructure.<sup>29</sup> By providing a service under Title II of the Telecommunications Act, telecommunications providers are subject to mandatory regulations.<sup>30</sup> For example, all Title II common carriers<sup>31</sup> charges must be reasonable, and they may not offer favorable rates to particular customers.<sup>32</sup> Common carriers must also design their systems so that other carriers can connect to their communications networks.<sup>33</sup> The FCC may, if public interest requires it, forbear some of the mandatory Title II provisions.<sup>34</sup>

## II. THE NET NEUTRALITY DEBATE

The evolution of the Internet may depend on how it is classified by the Commission: is the Internet an information service under Title I, which the Commission must proactively regulate using its limited ancillary power; or is the Internet a Title II telecommunications service subject to a host of

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25. See generally *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014); *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

26. See 47 U.S.C. § 151; *Verizon*, 740 F.3d at 630.

27. See 47 U.S.C. § 153(50).

28. See Hank Intven et al., *Internet Telephony—The Regulatory Issues*, 21 HASTINGS COMM. & ENT. L.J. 1, 4–5 (1998) ("Conventional voice telephony relies on a circuit-switched network . . . in which each conversation uses a fixed amount of bandwidth for the duration of the call.").

29. See Patric M. Verrone, *The Comcast Case and The Fight for Net Neutrality*, L.A. LAW., May 2011, at 10.

30. See generally *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 973 (2005).

31. A telecommunications service provider is a "common carrier" under the Telecommunications Act. See 47 U.S.C. § 153(51).

32. See *Brand X*, 545 U.S. at 975.

33. *Id.*

34. See 47 U.S.C. § 160(a).

mandatory regulations? Network neutrality, commonly known as net neutrality, is the principle that ISPs should “treat all Internet traffic the same regardless of source.”<sup>35</sup> There is an ongoing debate concerning the proper classification of the Internet and the necessary classification to ensure net neutrality.<sup>36</sup>

In 2002, the FCC issued its first ruling regarding the classification of broadband Internet.<sup>37</sup> To reflect the change in Internet technology from dial-up to cable modem service,<sup>38</sup> the FCC classified broadband Internet as a Title I information service.<sup>39</sup> This ruling was affirmed by the United States Supreme Court in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*.<sup>40</sup> As network technology improved and ISPs improved their capability to manage their network traffic, concern grew that ISPs could secretly violate net neutrality by throttling users’ Internet connection speed or by providing fast-lanes for prioritized content.<sup>41</sup> In response to complaints that Comcast was interfering with customers’ peer-to-peer file sharing applications,<sup>42</sup> the FCC ordered Comcast to stop meddling with customers’ Internet activity and disclose its network management practices.<sup>43</sup> Comcast challenged the Commission’s authority to enforce this order in *Comcast Corp. v. FCC*.<sup>44</sup> In its ruling, the D.C. Circuit held that the FCC lacked the power to enforce this action under its Title I ancillary authority.<sup>45</sup>

In response, the FCC issued an order forbidding ISPs from blocking In-

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

36. See generally Simone A. Friedlander, Note, *Net Neutrality and the FCC’s 2015 Open Internet Order*, 31 BERKELEY TECH. L.J. 905, 909 (2016).

37. *Id.* at 914.

38. See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 67 Fed. Reg. 18907 (Mar 17, 2002). With dial-up Internet, users send and receive information over traditional telephone lines. *Id.* However, cable modem service utilizes dedicated “broadband” Internet cables that can transmit information much quicker, which ushered in a new era of Internet applications. *Id.*

39. See *id.*

40. 545 U.S. 967, 1000–03 (2005) (finding that the FCC’s designation of the Internet as an information service was a lawful interpretation of the Telecommunications Act under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, especially considering the complex nature of the subject).

41. See Verrone, *supra* note 29, at 11.

42. See *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010) (“Peer-to-peer programs allow users to share large files directly with one another without going through a central server. Such programs also consume significant amounts of bandwidth.”).

43. See *id.* at 645.

44. 600 F.3d 642, 644 (D.C. Cir. 2010).

45. See *id.*

ternet traffic or discriminating in its transmission of content.<sup>46</sup> Rather than rely on its Title I authority recently limited by the D.C. Circuit in *Comcast* to enforce these provisions, the FCC substantiated its order under § 706<sup>47</sup> of the Telecommunications Act.<sup>48</sup> This provision is outside of the Title I and Title II framework and requires the FCC to examine whether the Internet is reasonably deployed to all Americans.<sup>49</sup> If the FCC finds that Americans are not being provided with Internet, § 706 instructs the FCC to remedy the situation by eliminating obstacles to infrastructure investment and spurring competition in the market.<sup>50</sup> Verizon sued the FCC, challenging this order and the FCC's presumed regulatory authority under § 706.<sup>51</sup> The court ruled in favor of Verizon, finding that the FCC was effectively placing Title II common carrier regulations on Title I information service providers—a direct violation of the Telecommunications Act.<sup>52</sup> The court found that the anti-discrimination and anti-blocking (net neutrality) provisions in the order were essentially Title II common carrier regulations.<sup>53</sup> Common carriers are obligated to serve the public indiscriminately.<sup>54</sup> The FCC's order would have required Title I ISPs to abide by this regulation if the FCC prevented them from imposing different rates and download speeds on certain kinds of data.<sup>55</sup> Notably, regarding the § 706 issue, the Court ruled in favor of the FCC, holding that the statute did vest the FCC with the authority to increase broadband Internet deployment when it discovers barriers to deployment.<sup>56</sup> While the FCC won the § 706 battle, the FCC again lost the war to impose net neutrality regulations on ISPs while keeping them classified as Title I information service providers.<sup>57</sup>

If the FCC wanted to enforce net neutrality, it would have to classify the Internet as a Title II telecommunications service.<sup>58</sup> To the dismay of ISPs that prefer not to be subject to Title II's mandatory provisions, the FCC reclassified wireless and wireline broadband Internet as a Title II telecommu-

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46. See Preserving the Open Internet, 76 Fed. Reg. 59,191 (Sept. 23, 2011) (codified at 47 C.F.R. pts. 0, 8).

47. See 47 U.S.C. § 1302(b) (2012).

48. See Daniel T. Deacon, *Common Carrier Essentialism and the Emerging Common Law of Internet Regulation*, 67 ADMIN. L. REV. 133, 146–148 (2015).

49. See 47 U.S.C. § 1302(b); Friedlander, *supra* note 36, at 922.

50. See 47 U.S.C. § 1302(b).

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

52. *Id.* at 658.

53. *Id.* at 657.

54. *Id.*

55. *Id.*

56. *Id.* at 641.

57. See Friedlander, *supra* note 36, at 922.

58. See *id.* at 923.

nications service in 2015.<sup>59</sup> The FCC's order was affirmed by the D.C. Circuit in *U.S. Telecom Ass'n v. FCC*.<sup>60</sup> However, soon after the D.C. Circuit's decision, the FCC voted to reverse its own decision and reclassified wireless and wireline Internet as a Title I information service.<sup>61</sup> While the Commission may believe this reclassification will provide Americans with faster and more innovative Internet options,<sup>62</sup> the FCC may have inadvertently stripped itself of two provisions in the Telecommunications Act that can facilitate network build-out.

### III. BACKGROUND ON §§ 253 AND 332 OF THE TELECOMMUNICATIONS ACT

The FCC's goal for the 2017 Net Neutrality Order, which reclassified Internet service from a Title II to a Title I information service, was to increase competition and provide Americans with better and faster Internet service by spurring infrastructure investment.<sup>63</sup> To that end, in 2017 the FCC issued two notices of proposed rulemaking regarding wireline and wireless infrastructure.<sup>64</sup> The purpose of the NPRMs was to examine federal, state, and local regulatory barriers to infrastructure investment and deployment, and how the FCC could lawfully remove those barriers.<sup>65</sup> However, by reclassifying the ISPs as information providers, the Commission may have compromised its two most effective tools for facilitating broadband Internet deployment.<sup>66</sup> These tools are §§ 253 and 332(c)(7) of

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59. *See generally* Protecting and Promoting the Open Internet, 81 Fed. Reg. 93,638 (Dec. 21, 2016) (to be codified at 47 C.F.R. pts. 1, 8, 20) [hereinafter 2015 Open Internet Order].

60. 825 F.3d 674, 701–06 (D.C. Cir. 2016) (applying the Court's reasoning in *Brand X* and holding that the FCC reasonably interpreted the Telecommunications Act under *Chevron* to reclassify broadband Internet as a Title II telecommunications service given the change in technology).

61. *See* 2017 Net Neutrality Order, *supra* note 2, at 7852–53. The FCC justified the reclassification by presenting evidence that ISP network investment declined during the Title II classification, the old net neutrality rules solved a problem that did not exist, and the FCC should not imperil the growth and innovation that has occurred under the Title I classification by overregulating. *Id.* at 7863.

62. *See id.* at 3 (“We determine that this light-touch information service framework will promote investment and innovation better than applying costly and restrictive laws of a bygone era to broadband Internet access service.”).

63. *See id.*

64. *See generally* 2017 Wireless Infrastructure NPRM, *supra* note 5; 2017 Wireline Infrastructure NPRM, *supra* note 5.

65. *See* 2017 Wireless Infrastructure NPRM, *supra* note 5, at 21,761.

66. The Commission recognized this discrepancy in the Restoring Internet Freedom NPRM. *See* Restoring Internet Freedom, 82 Fed. Reg. 25,568, 25,579 (June 2, 2017) (to be codified at 47 C.F.R. pts. 8, 20); *see also* 2017 Net Neutrality Order, *supra* note 2, at 7890.



the Telecommunications Act.<sup>67</sup>

Section 253 distributes authority between the Commission and states and cities for the deployment of communications infrastructure.<sup>68</sup> Section 253(a) states that “no state or local statute or regulation may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate *telecommunications service*.”<sup>69</sup> This provision is followed by § 253(b) and (c), which preserve state and local authority in the infrastructure deployment process to ensure public safety and manage the public rights-of-way, including the option to charge telecommunications providers reasonable rates to occupy the right-of-way.<sup>70</sup> Finally, § 253(d) grants the FCC preemption power over state or local laws and regulations that, after notice and the opportunity for public comment, violate subsections (a) and (b) of § 253.<sup>71</sup>

The FCC seeks to use this statute to ensure building broadband infrastructure is quicker and more efficient for ISPs.<sup>72</sup> For example, the FCC is proposing to eliminate or curb moratoria, which are construction suspensions that cities impose on ISPs for various reasons such as right-of-way construction or backlog of applications.<sup>73</sup> The FCC also seeks to limit the right-of-way negotiation period between ISPs and localities so that ISPs may get quicker access to the right-of-way to build its infrastructure.<sup>74</sup> Finally, once the ISPs have access to the rights-of-way, the FCC is proposing a cap on the amount of money that cities may charge an ISP to install its facilities on municipal property.<sup>75</sup>

While § 253 broadly regulates the deployment of “telecommunications services,” § 332(c)(7) addresses mobile wireless service specifically.<sup>76</sup> Section

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67. See generally 47 U.S.C. §§ 253, 332(c)(7) (2012).

68. See Frederick E. Ellrod III & Nicholas P. Miller, *Property Rights, Federalism, and the Public Rights-of-Way*, 26 SEATTLE UNIV. L. REV. 475, 479–81 (2003).

69. 47 U.S.C. § 253(a) (emphasis added).

70. See *id.* §§ 253(b), (c).

71. *Id.* § 253(d).

72. See 2017 Wireless Infrastructure NPRM, *supra* note 5, at 21,761; 2017 Wireline Infrastructure NPRM, *supra* note 5, at 61,521.

73. See 2017 Wireless Infrastructure NPRM, *supra* note 5, at 21,777.

74. *Id.*

75. *Id.*

76. In the FCC’s 2017 Net Neutrality Order, the Commission reclassified wireless broadband (along with wireline broadband) as a Title I information service. See 2017 Net Neutrality Order, *supra* note 2, at 7856–57. Wireline, or “fixed” broadband, refers to “a broadband Internet access service that serves end users primarily at fixed endpoints using stationary equipment, such as the modem that connects an end user’s home router, computer, or other Internet access device to the Internet.” See *id.* The term encompasses the delivery of fixed broadband over any medium, including various forms of wired broadband ser-

332(c)(7) describes the deployment of wireless service facilities with a federal and local power-sharing structure similar to § 253.<sup>77</sup> This provision vests states or local government with the authority to determine when and where ISPs may build their personal wireless service facilities.<sup>78</sup> This authority is limited in that states and localities may not “prohibit or have the effect of prohibiting” the erection of wireless facilities.<sup>79</sup> Further, states and local governments must act on any application to build such wireless infrastructure within a reasonable period of time.<sup>80</sup> While § 332(c)(7) does not authorize the FCC to preempt state and local regulations, the Commission can still interpret certain provisions to facilitate infrastructure deployment.<sup>81</sup> For example, in the 2017 Wireless Infrastructure NPRM, the Commission sought to utilize the reasonable time requirement of § 337(c)(7)(B)(iii)<sup>82</sup> to enact a “deemed granted” remedy in which an ISP’s application would be automatically granted if a state or local government fails to act on it within a set period of time that the FCC deems reasonable.<sup>83</sup>

These statutes—§§ 253 and 332(c)(7)—are crucial to the FCC’s authority to clear local regulations and help ISPs build their broadband networks.<sup>84</sup> However, the FCC’s actions in the 2017 Net Neutrality Order may preclude the Commission from using these provisions.

#### IV. SECTIONS 253 AND 332 CAN NO LONGER BE APPLIED TO BROADBAND INTERNET

Now that broadband Internet service is again an information service subject to the FCC’s limited Title I authority,<sup>85</sup> to what extent, if any, may

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vices (e.g., cable, DSL, fiber). *Id.* Wireless or “mobile” broadband is “Internet access service that serves end users primarily using mobile stations.” *Id.* Mobile broadband Internet access includes, among other things, services that use smartphones or mobile-network-enabled tablets as the primary endpoints for connection to the Internet. *Id.*

77. See Andrew Erber, *The Effective Prohibition Preemption in Modern Wireless Tower Siting*, 66 FED. COMM. L.J. 357, 362–64 (2014); 2017 Wireless Infrastructure NPRM, *supra* note 5, at 21,775.

78. See 47 U.S.C. § 332(c)(7)(A) (2012). “Personal wireless facilities” is a term of art that refers to common carrier wireless service. *Id.* § 332(c)(7)(C)(i).

79. See *id.* § 332(c)(7)(B)(i)(II).

80. See *id.* § 332(c)(7)(B)(iii).

81. See also Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs, 545 U.S. 967 (2005) (upholding the FCC’s interpretation of “telecommunications services” under *Chevron*); see generally *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984);

82. See 47 U.S.C. § 332(c)(7)(B)(iii).

83. See 2017 Wireless Infrastructure NPRM, *supra* note 5, at 21,762–63.

84. See *id.* at 21,776–77; see also *id.* at 21,762.

85. See generally 2017 Net Neutrality Order, *supra* note 2.

the FCC employ §§ 253 and 332(c)(7) to facilitate deployment of broadband infrastructure? While § 253(d) authorizes the Commission to preempt state and local laws that violate § 253(a), this power is restricted to laws and regulations that “may prohibit or have the effect of prohibiting . . . telecommunications service.”<sup>86</sup> Similarly, § 332(c)(7) governs the deployment of “personal wireless services,”<sup>87</sup> which remains under Title II Common Carrier authority.<sup>88</sup> However, the FCC carved out wireless broadband Internet from this classification by designating it as a “private mobile service.”<sup>89</sup> The statute states that “the provision of a service that is a private mobile service shall not . . . be treated as a common carrier for any purpose under this chapter.”<sup>90</sup> It is thus unclear if the Commission can still use §§ 253 and 332(c)(7) to facilitate the deployment of broadband Internet.

Congress and the FCC have both made clear that the telecommunications service and information service classifications are mutually exclusive.<sup>91</sup> Section 153(51) of the Telecommunications Act states that “a telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services.”<sup>92</sup> Further, the FCC has stated that a “service provider is to be treated as a common carrier for the telecommunications services it provides, but it cannot be treated as a common carrier with respect to other, non-telecommunications services it may offer, including information services.”<sup>93</sup> The courts have weighed in as well. In *Verizon v. FCC*, the D.C. Circuit struck down the FCC’s second attempt to enforce net neutrality because broadband Internet was classified as an information service.<sup>94</sup> The court stated that the FCC violated § 332 because mobile broadband service was classified as a private mobile service, akin to a Title I information service, and not a commercial mobile service that is regulated as a Title II common carrier.<sup>95</sup>

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86. 47 U.S.C. § 253(a), (d) (1996).

87. 47 U.S.C. § 332(c)(7) (2018).

88. *See id.* §§ 332(c)(7), (c)(7)(C)(i).

89. *See* 2017 Net Neutrality Order, *supra* note 2, at 7862.

90. 47 U.S.C. § 332(c)(2).

91. *See* Deacon, *supra* note 48, at 150–51.

92. 47 U.S.C. § 153(51) (2010).

93. *See* Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, 07–30 FCC Rcd. 19, at ¶ 50 (Mar. 22, 2007) [hereinafter 2007 Broadband Internet Order].

94. *See* *Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014).

95. *Id.* at 650. The FCC classified mobile broadband as an information service because other types of broadband Internet, such as wireline and cable modem service, were already classified as information services, and the FCC determined that wireless broadband functioned similarly to meet the definition of an information service. *See* 2007 Broadband Inter-

Section 706<sup>96</sup> is also likely insufficient to apply §§ 253 and 332(c)(7) to the provision of broadband Internet infrastructure. Section 706, as the *Verizon* court found, grants the FCC power to increase and facilitate broadband deployment.<sup>97</sup> However, the FCC may not use its authority under § 706 to regulate Title I information providers as Title II telecommunications providers.<sup>98</sup> The *Verizon* court stated that it would be a violation of the Telecommunications Act for the FCC to classify the Internet as a Title I information service and then proceed to apply Title II telecommunications services regulations on the Internet and its providers.<sup>99</sup> The FCC thus cannot utilize § 706 to apply §§ 253 and 332(c)(7), provisions that only govern telecommunications services, to broadband infrastructure because it has classified broadband services as an information service, which exempted broadband Internet from Title II common carrier regulations.<sup>100</sup>

The FCC will likely be unable to use its Title I ancillary authority to legally apply §§ 253 and 332(c)(7) to expedite Internet network deployment. In order for the FCC to exercise its ancillary authority under Title I, it must satisfy the D.C. Circuit’s two-part test from *American Library Ass’n v. FCC*.<sup>101</sup> Pursuant to this test, the FCC can only exercise its Title I ancillary authority when the entity or service that the FCC wants to regulate is classified under Title I and the proposed regulations are “reasonably ancillary” to the FCC carrying out its duties under the Telecommunications Act.<sup>102</sup> In *Comcast Corp. v. FCC*, the court struck down the FCC’s order<sup>103</sup> regulating ISP networks based on a failure to satisfy the second element.<sup>104</sup> Lacking specific provisions authorizing Title II-style regulation on Title I providers, the FCC relied on policy statements in the Telecommunications Act to prove

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net Order, *supra* note 93, at ¶¶ 25, 26. In addition, the FCC wanted to allow the Internet to continue to develop unencumbered by Title II regulations. *Id.* at ¶ 27.

96. See generally 47 U.S.C. § 1302(b) (2016).

97. See *Verizon*, 740 F.3d, at 641.

98. See *id.* at 628.

99. *Id.*

100. See Michael Del Priore, Note, *The Trope of Parity*, 36 CARDOZO ARTS & ENT. L.J. 181, 183 (2018) (“[U]nder section 706 of the Telecommunications Act, the FCC’s scope of authority includes common carriers as long as they are classified as telecommunications services.”). But see Deacon, *supra* note 48 (arguing that § 706 grants the FCC more expansive power).

101. 406 F.3d 689, 691–92 (D.C. Cir. 2005).

102. See *id.*

103. See *Complaint of Free Press and Public Knowledge Against Comcast Corp.*, 23 FCC Rcd. 13,028 (2008) [hereinafter *Comcast Order*].

104. See *Comcast Corp. v. FCC*, 600 F.3d 642, 656–68 (D.C. Cir. 2010). The FCC clearly satisfied the first element because it was attempting to regulate the Internet, which was a Title I information service at the time. *Id.* at 646.

that its actions against Title I providers were supplemental to its duties under the Telecommunications Act.<sup>105</sup> These provisions generally stated that it is United States policy and the FCC's responsibility to promote and regulate effective communications services so that all Americans can access and control the information they send and receive.<sup>106</sup> The FCC argued that preventing Comcast and other ISPs from unduly discriminating against Internet traffic that travels through its networks complies with the policy provisions in the Telecommunications Act.<sup>107</sup> The court rejected this argument because policy statements, whether utilized alone or in combination with its Title I authority as the FCC did to satisfy the *American Library* test, are not delegations of authority.<sup>108</sup> The court reasoned that if it sided with the Commission, “it would virtually free the Commission from its Congressional tether” because the FCC could utilize this reasoning to impose almost any regulation on Title I providers, which at the time included ISPs.<sup>109</sup>

If the FCC tried to utilize its Title I ancillary authority to impose §§ 253 and 332(c)(7) on information service providers as ISPs are now classified, it would likely fail upon judicial review.<sup>110</sup> Like in *Comcast*, the FCC would satisfy the first element of the *American Library* test because it is regulating an information service, which is permissible under its Title I authority.<sup>111</sup> To satisfy the second element of the *American Library* test, the FCC could rely on § 332(a)(3), which instructs the FCC to ensure that its actions “encourage competition and provide services to the largest feasible number of users.”<sup>112</sup> The FCC could argue that its actions increase competition because facilitat-

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105. *Id.* at 655.

106. The FCC grounded its authority in § 230(b), which states that “it is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services” and “to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet.” *Id.* at 651–52; *see also* 42 U.S.C. § 230(b) (2012). The FCC also relied on language in § 151 of the Telecommunications Act in which Congress directed the FCC to “to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.” *See* 47 U.S.C. § 151 (1996); *Comcast Corp.*, 600 F.3d at 651–52; *Comcast Order*, *supra* note 103, at 13,035–36.

107. *See Comcast Corp.*, 600 F.3d at 651–52.

108. *See id.* at 654

109. *Id.* at 655.

110. *See Deacon*, *supra* note 48, at 147 (“The D.C. Circuit [in *Comcast Corp. v. FCC*] cast considerable uncertainty over the Commission's ability to flexibly regulate Internet players under Title I.”).

111. *See Comcast Corp.*, 600 F.3d at 646.

112. *See* 47 U.S.C. § 332(a)(3) (2018).

ing broadband infrastructure deployment increases availability to users and decreased regulations encourages providers to enter the market. Under this argument, preempting local regulations to expand broadband Internet using §§ 253 and 332(c)(7) is reasonably ancillary to its statutory mandate under § 332(a)(3).<sup>113</sup> However, as in *Comcast*, a court would likely reject this as a policy statement that is devoid of delegated authority.<sup>114</sup> The Commission would be “breaking free of its Congressional tether” and imposing Title II regulations on ISPs, which are now information service providers.<sup>115</sup>

Ironically, by challenging FCC orders that attempted to regulate their networks while still classifying them as Title I information service providers, ISPs may have inadvertently stripped the FCC of its power to help ISPs improve and expand their broadband networks in the future.<sup>116</sup> ISPs received their cake when the FCC reclassified broadband Internet as a lightly regulated Title I service;<sup>117</sup> but, now that they face the prospect of increased barriers to infrastructure deployment, they may not get to eat it too.

## V. A PATH FORWARD FOR THE FCC

By reclassifying broadband Internet as a Title I information service, the FCC may have frustrated its ability to enact the policies of the 2017 Wireless and Wireline NPRMs that call for reducing regulatory barriers to infrastructure deployment. The proposals in the 2017 Wireless and Wireline Infrastructure NPRMs rely on the authority of Title II infrastructure provisions, which no longer apply to broadband Internet now that it is again classified as a Title I information service.<sup>118</sup> However, the FCC may still be able to legally support its position and facilitate the provision of next-generation broadband network infrastructure through its Title I ancillary authority. The FCC could accomplish this by proclaiming that the regulations it issues regarding §§ 253 and 332(c)(7) only apply to Title II telecom-

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113. *Id.*

114. *See Comcast Corp.*, 600 F.3d at 655.

115. *Id.* The *Comcast* court was worried that an expansive interpretation of the FCC's ancillary authority would render the statutory framework that limits the FCC's authority meaningless and allow the FCC to regulate beyond Congress' delegation. *Id.*

116. *See supra* Part IV.

117. *See* Tom Wheeler, *A Goal Realized: Network Lobbyists' Sweeping Capture of their Regulator*, BROOKINGS INST. (Dec. 14, 2017), <https://www.brookings.edu/blog/techtank/2017/12/14/a-goal-realized-network-lobbyists-sweeping-capture-of-their-regulator/>. Tom Wheeler is the former Chairman of the FCC. Under his leadership, the FCC reclassified broadband Internet as a Title II service. *See also Brookings Expert Page of Tom Wheeler*, BROOKINGS INST., <https://www.brookings.edu/experts/tom-wheeler/> (last visited July 23, 2018).

118. 2017 Wireline Infrastructure NPRM, *supra* note 5 at 21,776–77; 2017 Wireless Infrastructure NPRM, *supra* note 5, at 21,762.

munications facilities, but providers may include their broadband Internet infrastructure when they build dual-use facilities.<sup>119</sup>

While the Commission may be barred from utilizing Title II authority for regulations concerning solely broadband Internet infrastructure now that it is a Title I information service, network facilities today are often comprised of technology that is capable of providing both Internet and telecommunications services, such as telephony.<sup>120</sup> Because these services are deployed together in the same facilities, if a state or local government implements laws or regulations that prohibit or have the effect of prohibiting a provider from building its facility, the Commission should have full authority under §§ 253 and 332(c)(7) to preempt the state or local government because it is impeding the provision of a telecommunications service.<sup>121</sup>

The FCC may rely on precedent for applying a telecommunications service provision to an information service when the facility provides both services.<sup>122</sup> In the FCC's 2007 Broadband Internet Order the Commission applied § 224,<sup>123</sup> which governs pole attachments for Title II telecommunications services, to broadband Internet that was then classified as a Title I information service.<sup>124</sup> The FCC was able to apply a Title II regulation to a Title I service by clarifying that the regulation only applied when the pole attachment was being used to provide both the telecommunications service and the information service.<sup>125</sup> To support its order, the FCC cited the Supreme Court case, *National Cable and Telecommunications Ass'n v. Gulf Power Co.*<sup>126</sup> In *Gulf Power*, the Supreme Court considered whether the FCC could apply § 224(b),<sup>127</sup> a provision that allows the FCC to set pole attachment rates for cable services, to pole attachments that the cable companies were

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119. In the 2017 Net Neutrality Order, the Commission hinted that it may take this approach. See 2017 Net Neutrality Order, *supra* note 2, at 7890 (“Because the same networks are often used to provide broadband and either telecommunications or cable service, we will take further action as is necessary to promote broadband deployment and infrastructure investment.”).

120. See Comcast Corp., Reply Comment Letter on 2017 Wireless and Wireline Infrastructure NPRM (July 17, 2017); Verizon, Reply Comment Letter on 2017 Wireless and Wireline Infrastructure NPRM (July 17, 2017).

121. See 47 U.S.C. § 253(a) (2012).

122. See 2007 Broadband Internet Order, *supra* note 93, at ¶ 60.

123. See generally 47 U.S.C. § 224 (2018).

124. See 2007 Broadband Internet Order, *supra* note 93, at ¶ 60; see also T-Mobile USA, Inc., Comment Letter on 2017 Wireless and Wireline Infrastructure NPRM (June 15, 2017).

125. See 2007 Broadband Internet Order, *supra* note 93, at ¶ 60.

126. 534 U.S. 327 (2002); see also 2007 Broadband Internet Order, *supra* note 93, at ¶ 62.

127. See generally 47 U.S.C. § 224(b).

using to provide Internet and telecommunications services.<sup>128</sup> The Supreme Court sided with the FCC.<sup>129</sup> The Court found that the Telecommunications Act is silent as to the rates for this kind of comingled poll attachment and granted the FCC jurisdiction to fill in the gap because of the complex and technical nature of the subject.<sup>130</sup> In addition, the Court thought it would be paradoxical to punish cable companies for innovating and offering their customers another service by stripping the cable companies of their protections under the statute.<sup>131</sup>

The Supreme Court has further supported the argument that the Commission can choose the classification for single network infrastructure facilities offering two services that are classified as Title I information and Title II telecommunications services.<sup>132</sup> In *Brand X*, the FCC's determination that dial-up Internet is an information service was challenged under the argument that it is actually both a telecommunications and information service.<sup>133</sup> In adjudicating the matter, the Court noted that although dial-up Internet did contain both telecommunications and information services because the technology transmitted Internet data using telephone lines,<sup>134</sup> the services were essentially a single package and deferred to the Commission's interpretation to that effect.<sup>135</sup>

In this case, regarding a dual-use facility featuring broadband Internet as one component, the Commission could argue that a facility that provides both a telecommunications service and an Internet service is a single facility that offers telecommunications service and so is controlled by §§ 253 and 332(c)(7). Like the challenged statutory provisions in *Gulf Power*, §§ 253 and 332(c)(7) do not mention the FCC's authority to regulate facilities that provide both Internet and telecommunications services.<sup>136</sup> Considering this is a technical infrastructural deployment issue similar to pole attachments, the Supreme Court's reasoning should apply to broadband infrastructure, and

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128. See *Gulf Power Co.*, 534 U.S. at 332.

129. *Id.* at 338–39.

130. *Id.* (“[T]he subject matter here is technical, complex, and dynamic; and as a general rule, agencies have authority to fill gaps where the statutes are silent. It might have been thought prudent to provide set formulas for telecommunications service and ‘solely cable service,’ and to leave unmodified the FCC’s customary discretion in calculating a ‘just and reasonable’ rate for comingled services.”).

131. *Id.* at 339.

132. See *Comcast Corp. v. FCC*, 600 F.3d 642, 649 (D.C. Cir. 2010) (citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 990–91 (2005)).

133. *Id.*

134. For further explanation of dial-up Internet technology, see *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, *supra* note 38.

135. See *Comcast Corp.*, 600 F.3d, at 649.

136. See 47 U.S.C. §§ 253, 332(c)(7) (2012).



as in *Gulf Power*, the FCC can regulate where the statute is silent.<sup>137</sup>

Further, just as it did not make sense to the Supreme Court that cable companies would lose their statutory protections for adding a service for their customers, the FCC should still be able to pave the way for ISPs to deploy their infrastructure especially because they are offering Internet service in addition to telecommunications service.<sup>138</sup> Finally, just as the Court in *Brand X* supported the FCC's power to determine that a cable that contained telecommunications and information services was a telecommunications service for purposes of the Telecommunications Act, the FCC should have the power to clarify that a dual-use wireless or wireline facility offering Internet and a telecommunications service is a telecommunications facility governed by §§ 253 and 332(c)(7).<sup>139</sup> With these legal justifications, the FCC may still be able to utilize §§ 253 and 332(c)(7) to facilitate the broader deployment of broadband Internet despite the fact that broadband Internet is a Title I information service.

#### CONCLUSION

This is an uncertain time for Internet regulation. The dueling Title I and Title II classification has ramifications for how the Internet will continue to evolve and how ISPs will deploy and upgrade the infrastructure that provides the Internet. By bouncing between classifications, the FCC has created an ambiguous regulatory environment and imperiled its ability to use two of its central provisions—§§ 253 and 332(c)(7)—to aid ISPs in providing Americans with the most up-to-date Internet networks. Without a clear and consistent ruling, ISPs will face an uncertain regulatory landscape that may leave them hesitant to invest in their networks, resulting in slower or no broadband Internet for millions of Americans.<sup>140</sup> In that case, the FCC will have failed to fulfill its role in ensuring Americans have a cutting-edge, cost-effective broadband communications networks.

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137. See *Nat'l Cable and Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 338–39 (2002).

138. *Id.* at 339.

139. See *Comcast Corp.*, 600 F.3d at 649.

140. See FED. COMM'NS COMM'N, *CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN* 136 (2010).