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Net Neutrality and "the Department of the Internet": Creating Problems through Solutions

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Cover Page Footnote

I would like to dedicate this Comment to, as well as thank, all the following people. First and foremost, I thank my Lord and Savior, Jesus Christ, for blessing me with the people and opportunities that made this article possible. Next, I want to thank my parents for their unconditional love and support not only through law school, but throughout my education. I would not be where I am today were it not for their encouragement. I would like to thank my faculty advisor, Professor Jacob Kreutzer, who provided valuable insight in helping me towards finishing a publishable Comment. Thanks should also go to my graduate school thesis committee from my time at Wright State University: Doctors Liam Anderson, Carlos Costa, and Vaughn Shannon. The three of you taught me the essential skills and techniques of academic research and writing, which ultimately laid the foundation for this article. I am forever indebted to you for the mentorship you provided me with during graduate school. Last, and certainly not least, I want to thank my law school family: Russell Knowles, Marty Gehres, Sierra Faler, and David Bailey. The four of you have blessed me beyond reason with your friendship and support these past three years and for that I am eternally grateful.

NET NEUTRALITY AND “THE DEPARTMENT OF THE INTERNET”¹: CREATING PROBLEMS THROUGH SOLUTIONS

*Macklin K. Everly**

- I. INTRODUCTION.....56
- II. BACKGROUND.....58
 - A. *What is “net neutrality”?*58
 - i. Understanding the Internet and the Internet marketplace in the light of net neutrality.59
 - ii. The Internet is a network of networks.....60
 - B. *The FCC and the Internet: A History*.....62
 - i. The origins of FCC Internet regulation stem from the Communications Act of 1934.....62
 - ii. The Telecommunications Act rebranded the basic versus enhanced services dichotomy.63
 - iii. The rise of broadband services and the net neutrality debate.....64
 - iv. Net neutrality goes to court.65
 - v. “Started from the bottom, now we [sic] here.”67
- III. ANALYSIS.....68
 - A. *The Internet’s functional structure precludes it from classification as a telecommunications service under Title II*...69
 - i. The OSI Model.....69
 - ii. Bandwidth is a finite resource essential to information services that must be managed.71

¹ Term coined by Commissioner Ajit Pai in his dissent to the 2015 Open Internet Order. Dissenting Statement of Commissioner Ajit Pai, Protecting and Promoting the Open Internet, GN Docket No. 14-28 at 4 (Pai, Comm’r, dissenting), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A5.pdf (last visited Apr. 1, 2017).

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iii. Telecommunication networks verses Internet service networks.....	72
B. <i>The 2015 Order violates the First Amendment</i>	73
i. BIAS providers are protected by the First Amendment.	73
ii. The 2015 Order provisions violate the First Amendment.	78
C. <i>The 2015 Order will encourage regulatory capture by big BIAS providers</i>	79
D. <i>The economic implications of the 2015 Order will stifle broadband innovation</i>	81
i. The 2015 Order’s bright-line rules are economically unjustified.	82
ii. Net neutrality rules will compromise the economic growth of the two-sided broadband market.	83
IV. CONCLUSION	85

I. INTRODUCTION

The Federal Communications Commission (hereinafter “FCC”) adopted the 2015 Open Internet Order (hereinafter “2015 Order”) in a 3-2 decision.² The rules within the 2015 Order impose regulations on broadband Internet access service providers (hereinafter “BIAS providers”), which the FCC has been trying to codify since 2010. They premise their support for the imposition of the 2015 Order upon the ideal of establishing and maintaining the equality of information on the Internet. This characterization of net neutrality is appealing to the layperson on its surface, but it is misleading in that the means by which the FCC seeks to achieve that ideal creates more problems than it solves. The net neutrality regulations in the 2015 Order should be rejected by the courts.³ The bright-line rules contained within it cannot be implemented from technological, legal, and economical perspectives because the Internet cannot conform to these new obligations due to its functional structure; they cannot stand against First Amendment review as they impinge the rights of broadband Internet access service BIAS providers; and there is evidence to suggest the rules actually contravene the economic goals espoused by the FCC. Based on these arguments, the FCC’s net neutrality regulations should be struck down.

Imagine a version of cyberspace where all information on the Internet is treated equally. Broadband providers would not be able to block access to certain content, they could not impair Internet traffic traveling to consumers,

² FCC Adopts Strong, Sustainable Rules to Protect the Open Internet, 2015 FCC LEXIS 615, 13 (Feb. 26, 2015); Protecting and Promoting the Open Internet, GN Docket No. 14-28, FCC 15-24 (released Mar. 12, 2015), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf (last visited Apr. 1, 2017).

³ The 2015 Order underwent oral arguments before the D.C. Circuit Court of Appeals on December 4, 2015, after the author began his research and writing, but before the Comment’s completion. On June 14, 2016, after the Comment’s completion, the D.C. Circuit Court rendered a decision supporting 2015 Order. This Comment’s prescriptive recommendations, at the time they were written, were intended for both the D.C. Circuit Court as well as the Supreme Court, should it grant certiorari on appeal.

and they could not create “fast lanes” and “slow lanes” which favor certain types of Internet traffic over others for the right price. These are the bright-line rules proposed by the FCC in their 2015 Order.⁴ The stated purpose of the 2015 Order is “to protect and promote” an open Internet that will, among other things, enable consumer choice, promote competition in the Internet marketplace, and spur innovation “thereby [] encourag[ing] the deployment of [broadband availability] and remov[ing] barriers to infrastructure investment.”⁵ It is around these principles the debate over “net neutrality” is centered: whether or not the 2015 Order will actually have a positive effect on the broadband market and its availability to edge providers and consumers.

But at what cost is this “equality” achieved? Is it the true purpose of net neutrality regulation? Imagine a version of cyberspace explicitly regulated by the government and potentially regulated through manipulation of the government by lobbyists for corporate giants like Google, Amazon, and Comcast.⁶ In this version of cyberspace, the broadband Internet marketplace would no longer be regulated by the natural principles of supply and demand because broadband providers would no longer be allowed to charge different rates to edge providers (e.g. Netflix, YouTube, Etsy, etc.) for different tiers of data transmission speeds.⁷ Broadband providers would also be barred from choosing the content and messages they want to carry to their customers, thus suffering an infringement of their First Amendment rights.⁸

Twice the FCC has attempted to institute these regulations.⁹ Twice those regulatory orders were brought before the District of Columbia Circuit Court of Appeals.¹⁰ Twice those regulations have been struck down.¹¹ The court specifically struck down portions of the rules that sought to equate broadband information service providers with common carriers subject to Title II of the 1996 Telecommunications Act.¹² After the FCC issued the 2015 Order, the United States Telecom Association (hereinafter “USTA”) filed petitions for review “on the grounds that [the 2015 Order] is arbitrary, capricious, and an abuse of discretion within the meaning of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* [and that it] violates

⁴ Press Release, Fed. Comm’n Comm’n, FCC Adopts Strong, Sustainable Rules to Protect the Open Internet: Rules Will Preserve the Internet as a Platform for Innovation, Free Expression and Economic Growth (Feb. 26, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-332260A1.pdf (last visited Apr. 1, 2017).

⁵ Protecting and Promoting the Open Internet, 47 C.F.R. § 8.1 (2015).

⁶ Henry Scanlon, *On Net Neutrality, Even John Oliver Would Call John Oliver An Idiot*, THE FEDERALIST (Feb. 27, 2015), <http://thefederalist.com/2015/02/27/on-net-neutrality-even-john-oliver-would-call-john-oliver-an-idiot/> (last visited Apr. 1, 2017).

⁷ *Id.*

⁸ Joint Brief for Verizon and MetroPCS at 3, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. Jul. 2, 2012) (No. 11-1355), 2012 WL 9937411, at *3.

⁹ *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010); *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014).

¹⁰ *Comcast Corp.*, 600 F.3d at 644; *Verizon*, 740 F.3d at 628.

¹¹ *Comcast Corp.*, 600 F.3d at 644; *Verizon*, 740 F.3d at 628.

¹² *Comcast Corp.*, 600 F.3d at 644; *Verizon*, 740 F.3d at 659.

federal law”¹³ Now, for a third time, the most recent FCC Order has gone before the D.C. Circuit Court to have its legality determined.¹⁴

This Comment will analyze the FCC’s 2015 Order, the arguments of its supporters and opponents, and recommend the judiciary (be it the D.C. Circuit in its deliberations or the Supreme Court should it grant certiorari) strike down the 2015 order to resolve the net neutrality debate. Part II of this Comment will provide background on what net neutrality is; what the Internet is and how it works as a technology; and the history of the FCC’s regulation of the Internet. Part III will discuss the practical, technological difficulties the FCC faces by classifying the Internet as a public utility as well as the substantial burdens such reclassification will place upon BIAS providers’ First Amendment rights through application of the 2015 Order. Part III will also discuss the negative sociopolitical and economic effects the 2015 Order will likely have upon the broadband market. Finally, Part IV will present the overall conclusions of the Comment and sum up its recommendation to the courts to reject the 2015 Order.

II. BACKGROUND

In order to adequately address the complex issues of net neutrality, a basic knowledge of the Internet, the Internet marketplace, and their history is necessary. Without a foundation, it is extremely difficult to speak to the practicality of instituting net neutrality regulations. By the same token, a brief explanation of the history of FCC telecommunications and Internet regulation is necessary to understand why BIAS cannot be reclassified as common carrier telecommunications services under Title II of the Telecommunications Act. Finally, rounding out the knowledgebase necessary for assessing and contributing to the net neutrality debate requires an overview of the litigation surrounding the FCC’s attempts to more heavily regulate Internet and broadband providers.

A. What is “net neutrality”?

The term “net neutrality,” coined by Columbia University Law professor Tim Wu, is shorthand for the concept of network neutrality.¹⁵ It “refers to the principle that all Internet traffic should be treated equally by the internet service providers (ISPs) not discriminating or charging different fees

¹³ Protective Petition for Review at 2, U.S. Telecom Ass’n v. FCC, No. 15-1063 (D.C. Cir. Mar. 23, 2015) 2015 WL 1476449, at *2; Supplemental Petition for Review at 2, U.S. Telecom Ass’n v. FCC, No. 15-1063 (D.C. Cir. Apr. 13, 2015).

¹⁴ Ryan Knutson & Thomas Gryta, *Telecom Industry Sues to Overturn Net Neutrality*, WALL ST. J. (Apr. 13, 2015, 7:22 PM), <http://www.wsj.com/articles/fcc-publishes-net-neutrality-rules-starting-clock-for-challenges-1428937026> (last visited Apr. 1, 2017).

¹⁵ Emil Guillermo, *Father of Net Neutrality, Tim Wu, Hails FCC Decision*, NBC NEWS (Feb. 26, 2015, 4:35 PM), <http://www.nbcnews.com/news/asian-america/father-net-neutrality-tim-wu-hails-fcc-decision-n313656> (last visited Apr. 1, 2017).

by user, content, site, platform etc.”¹⁶ The debate does not center on the equality of information, but rather, around the practicality, given the structure of the Internet, and legality of the FCC’s newest attempt to regulate the Internet through its 2015 Order, which requires net neutrality by “compel[ing] broadband providers to treat all Internet traffic the same regardless of source”¹⁷

i. Understanding the Internet and the Internet marketplace in the light of net neutrality.

In order to understand the landscape of the net neutrality debate, it is important to gain a foundational knowledge of how the Internet and the Internet marketplace operate. The Internet marketplace has four primary participants: backbone networks, broadband providers, edge providers, and end users.¹⁸ It is helpful to imagine the Internet as a cyber-road system much like a physical system of interconnected highways and roads.

Backbone networks are at the core of the Internet and take on a role like that of the interstate highways.¹⁹ They are the mechanism responsible for “[r]outing data traffic over long distances using high-speed fiber lines” between local access Internet providers like Verizon or AT&T.²⁰ Access to these networks used to be furnished via dial-up connections over local telephone lines, but now Internet access is made available predominantly through broadband providers,²¹ which grant “consumers a pathway, or ‘on-ramp,’ to the Internet”²² In 2013, the Pew Research Center conducted a study which found 70% of adults who use the Internet—a 67% increase from statistics in 2000—utilize a high-speed broadband Internet connection, while only 2% utilized a dial-up connection over public telephone networks, thus demonstrating the magnitude of broadband predominance.²³ Edge providers are entities that “provide content, services, and applications over the Internet” to be enjoyed by consumers.²⁴ Common examples of edge providers are companies like Amazon or Netflix.²⁵ As the parties whose content will no

¹⁶ Ionela Bălătescu, *The Economics of Net Neutrality: Policy Issues*, 6 KNOWLEDGE HORIZONS – ECON. 114, 114 (2014).

¹⁷ *Verizon*, 740 F.3d at 628.

¹⁸ *Id.* at 628–29.

¹⁹ U.S. GEN. ACCT. OFF., GAO-02-16, TELECOMMUNICATIONS: CHARACTERISTICS AND COMPETITIVENESS OF THE INTERNET BACKBONE MARKET I (2001).

²⁰ *Id.*

²¹ *Verizon*, 740 F.3d at 629.

²² U.S. GEN. ACCT. OFF., *supra* note 19, at 1.

²³ *Broadband vs. Dial-up Adoption Over Time*, PEW RES. CTR.: INTERNET, SCI. & TECH., <http://www.pewinternet.org/data-trend/internet-use/connection-type/> (last visited Apr. 1, 2017).

²⁴ *Verizon*, 740 F.3d at 629.

²⁵ Jessica J. González, *Decoding “Network Neutrality”: A User-Friendly Explanation of Verizon v. FCC and Its Impact on Latinos*, NAT’L HISP. MEDIA COAL. (Jan. 16, 2014), <http://nhmc.org/blog/decoding-network-neutrality-a-user-friendly-explanation-of-verizon-v-fcc-and-its-impact-on-latinos/> (last visited Apr. 1, 2017).

longer be throttled²⁶ or blocked, they stand much to gain should the 2015 Order be allowed to stand. Lastly, end users are vital participants in the structure of the Internet and the Internet marketplace. Put simply, end users are the consumers who enjoy and utilize the content and applications published on the Internet by edge providers.²⁷

There has been debate as to whether edge providers and end users are truly two distinct entities, because all end users have the ability to become edge providers each time they access the Internet.²⁸ However, the distinction between edge providers and end users should not be erased simply because they are not mutually exclusive of one another. It is the *functionality* of the two participants as mechanisms of the Internet marketplace that distinguishes them, not the edge providers' ability to act as end users or vice versa. In other words, the same individual can have different roles within the marketplace and be subject to different rules in each role.

ii. The Internet is a network of networks.

In *Verizon v. FCC*, the D.C. Circuit Court, in addressing the 2010 Open Internet Order (hereinafter "2010 Order"), provided what it admitted to be "a slightly oversimplified example" of how the Internet works,²⁹ but that oversimplification dilutes too much the true nature of what the Internet is structurally and how it functions. The court characterized the operation of the Internet as follows:

[W]hen an edge provider such as YouTube transmits some sort of content – say, a video of a cat – to an end user, that content is broken down into packets of information, which are carried by the edge provider's local access provider to the backbone network, which transmits these packets to the end user's local access provider, which, in turn, transmits the information to the end user, who then views and hopefully enjoys the cat.³⁰

This crude picture of the Internet is effective in helping the layperson to understand how the participants interact on a basic level, but it "fails to

²⁶ Throttling is a network management practice by which Internet providers manage bandwidth devices (e.g. servers) in order to avoid overloading the devices' processing capacity. See, e.g., Andrew Berg, *Wheeler to Verizon: Throttling is Not Network Management*, WIRELESS WK. (July 31, 2014, 9:51 A.M.), <https://www.wirelessweek.com/news/2014/07/wheeler-verizon-throttling-not-network-management> (discussing Verizon's plan to throttle "LTE customers on unlimited plans that use an exorbitant amount of data.") (last visited Apr. 1, 2017).

²⁷ *Verizon*, 740 F.3d at 629.

²⁸ See Brett Frischmann, *Does the FCC Really Not Get It About the Internet?*, WASH. POST (Oct. 31, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/31/does-the-fcc-really-not-get-it-about-the-internet/> (last visited Apr. 1, 2017).

²⁹ *Verizon*, 740 F.3d at 629.

³⁰ *Id.*

recognize both the nature of the Internet's structure and functions"³¹ The Internet is commonly referred to as a "network of networks." It is a virtual network, which stands independent, although it utilizes the physical networks to carry information between end points.³²

The Internet was initially comprised of three physical networks capable of independent operation: ARPANET, SATNET, and PRNET.³³ The three networks were developed and created by the U.S. Department of Defense's Advanced Research Projects Agency (ARPA),³⁴ each respectively utilizing land-based cable, space-based satellite, and air-based radio.³⁵ In 1977, ARPA successfully connected the "three [physical] networks . . . in an intercontinental demonstration."³⁶ The Internet's birth came about after a successful demonstration of joining these physical networks together.

In *United States Telecom Association v. FCC*, Richard Bennett³⁷ submitted an amicus brief to the D.C. Circuit Court in which he presented an explanation of the Internet's design elements.³⁸ These elements consist of an information "packet routing function[,] known as Internet Protocol (IP); an end-to-end error detection, correction[,] and pacing system known as Transmission Control Protocol; a pool of globally unique addresses . . . ; a pool of non-unique, non-routable private addresses; and a collection of non-uniform but generally interoperable algorithms and applications"³⁹ These elements of the physical networks are joined into a single virtual

³¹ Brief for Richard Bennett in Support of Petitioners at 2, *U.S. Telecom Ass'n v. FCC*, No. 15-1063 (D.C. Cir. Aug. 6, 2015) <https://www.ustelecom.org/news/filings/gn-15-1063-richard-bennett-amicus-brief> (last visited Apr. 1, 2017) [hereinafter Brief for Richard Bennett].

³² *Id.* 2-3.

³³ *Id.* at 4.

³⁴ Colleen Brown & John Sherry, *History of the Internet*, in 2 THE INTERNET ENCYCLOPEDIA 115 (Hossein Bidgoli ed., 2004). ARPA was formed under the Eisenhower administration in 1958 as an "agency dedicated to the development of space-related military technology" during the U.S. race against the Soviet Union to develop defense and space technology. *Id.* ARPA changed its name to DARPA (Defense Advanced Research Projects Agency) in 1972. MARK W. GREENIA, THE HISTORY OF COMPUTING: AN ENCYCLOPEDIA OF THE PEOPLE AND MACHINES THAT MADE COMPUTER HISTORY (Lexikon Servs., 1998) <http://www.computermuseum.li/Testpage/99HISTORYCD-ARPA-History.HTM> (last visited Apr. 1, 2017).

³⁵ JOHNNY RYAN, A HISTORY OF THE INTERNET AND THE DIGITAL FUTURE 37 (2010).

³⁶ Leonard Kleinrock, *History of the Internet and Its Flexible Future*, 15 IEEE WIRELESS COMM'NS 8, 13 (2008).

³⁷ Richard Bennett is a leading scholar at the American Enterprise Institute who specializes, among other research areas, in Internet privacy, Internet regulation, and public policies of network regulation and innovation. See generally Richard Bennett, AM. ENTER. INST., <https://www.aei.org/scholar/richard-bennett/> (last visited Apr. 1, 2017).

³⁸ See generally Brief for Richard Bennett, *supra* note 31.

³⁹ *Id.* at 4-5; see Brief for Amicus Curiae Christopher S. Yoo in Support of Petitioners at 5, *U.S. Telecom Ass'n v. FCC*, No. 15-1063 (D.C. Cir. Aug. 7, 2015) ("[T]he heart of the Internet is the Internet Protocol[,] . . . [which] routes transmissions based on IP addresses . . . [that] represent individual physical locations."). Transmission Control Protocols allow routers to protect themselves from dangerous activities performed by other routers via Jacobson's Algorithm. Brief for Richard Bennett, *supra* note 31, at 6. The algorithm forces "hosts" to reduce their rate of transmission when an Internet router signals that congestion is becoming too much for the receiving router to handle safely. *Id.* Further, these algorithms process information to determine and deliver custom transmission services. *Id.* at 5.

network by routers.⁴⁰ It is important to keep in mind that “[r]outers are not themselves networks and the services they perform are not simple transmission services as understood by the Communications Act; rather . . . [they] create a single virtual network out of a plurality of diverse physical networks”⁴¹ These design elements help to demonstrate, as will be discussed *infra*,⁴² why the Internet cannot technologically be reclassified as a telecommunications service under the Telecommunications Act of 1996 due to its technological structure and functionalities.

B. *The FCC and the Internet: A History*

i. The origins of FCC Internet regulation stem from the Communications Act of 1934.

The FCC was created by and ultimately gains its authority from the Communications Act of 1934.⁴³ With the advent of the Internet in the 1970s and 1980s, the FCC was alerted to the existence of a new, relevant category of communications services.⁴⁴ Title II of the Communications Act contains regulations of common carriers, which are defined circularly by the Act—as noted by courts and scholars alike—“as any person engaged as a common carrier for hire.”⁴⁵ Common carriers are required by the Communications Act to “furnish . . . communication service upon reasonable request” with “[a]ll charges, practices, classifications, and regulations [for such] service [being] just and reasonable”⁴⁶ As such, the FCC has the authority to police the rates and services provided by common carriers.⁴⁷ The principles of common carriage date back to the Nineteenth Century and arose under common law to guarantee nondiscrimination to customers who make reasonable demand and can pay the set price for lawful use of the service.⁴⁸ Common carrier regulations were initially applied to the railroad industry and were expanded as history and technology progressed until those obligations were eventually applied to telephone services.⁴⁹

During the early stages of the Internet’s development, the FCC came to realize that it would be necessary to determine some sort of classification

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See discussion *infra* Section III.A.

⁴³ 47 U.S.C. § 151 (2012) (establishing the purpose of the Communications Act and creating the Federal Communications Commission to execute and enforce its provisions).

⁴⁴ Daniel T. Deacon, *Common Carrier Essentialism and the Emerging Common Law of Internet Regulation*, 67 ADMIN. L. REV. 133, 138 (2015).

⁴⁵ 47 U.S.C. § 153(10) (2012); see, e.g., *Verizon v. FCC*, 740 F.3d 623, 651 (D.C. Cir. 2014); Deacon, *supra* note 44, at 138.

⁴⁶ 47 U.S.C. § 201(a)–(b).

⁴⁷ 47 U.S.C. § 1302.

⁴⁸ Eli M. Noam, *Beyond Liberalization II: The Impending Doom of Common Carriage*, 18 TELECOMMS. POL’Y 435, 436 (1994); *Common Carrier*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁴⁹ Deacon, *supra* note 44, at 138.

for the sets of “interactive computers forming logical networks overlaying physical networks.”⁵⁰ It became necessary to differentiate between transmission services and data-processing services.⁵¹ In 1980, the FCC released its Second Computer Inquiry (commonly referred to as the Computer II Order),⁵² which created a dichotomy between “basic services” and “enhanced services,” the latter being exempt from Title II common carrier regulations due to its existence as a data processing service.⁵³ Basic services were those that offered “pure transmission capability” where the service “does not interact with user supplied information.”⁵⁴ Enhanced services, on the other hand, were those that involved manipulation of the data being transmitted, such as e-mail, the World Wide Web, and protocol processing.⁵⁵

ii. The Telecommunications Act rebranded the basic versus enhanced services dichotomy.

With the passage of the Telecommunications Act of 1996, Congress codified and rebranded the FCC’s Computer II Order’s “bright-line test” to create a new dichotomy between telecommunications service providers that are subject to Title II common carrier regulation and information service providers (the rebrand of enhanced service providers) that are exempt from Title II regulation.⁵⁶ Telecommunications carriers are statutorily defined as “provider[s] of telecommunications services” and are “treated as . . . common carrier[s] . . . only to the extent that [they are] engaged in providing telecommunications services”⁵⁷ The statute does not subject information services to common carrier obligations.⁵⁸

It is also important to note, for the sake of understanding the landscape of the current net neutrality debate, Title I of the Telecommunications Act to which broadband providers are currently subject, has two important provisions upon which the FCC and proponents of net neutrality often lean. First, section 160(a) of Title I is a forbearance provision,

⁵⁰ Robert Cannon, *The Legacy of the Federal Communications Commission’s Computer Inquiries*, 55 FED. COMM. L.J. 167, 182 (2003).

⁵¹ Deacon, *supra* note 44, at 138.

⁵² See, e.g., *id.*; Cannon, *supra* note 50, at 181.

⁵³ Deacon, *supra* note 44, at 138; see *Verizon v. FCC*, 740 F.3d 623, 629–30 (D.C. Cir. 2012); see also Cannon, *supra* note 50, at 183–88.

⁵⁴ Cannon, *supra* note 50, at 184 (“[P]rocessing used ‘solely to facilitate the movement of information’ is a part of the basic service.”). The FCC included within its definition of basic services those carriers which utilized computers within their networks “for the purpose of providing a communications service” *Id.* at 185; accord Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, 419 ¶ 93 (1980) [hereinafter Second Computer Inquiry].

⁵⁵ See, e.g., Cannon, *supra* note 50, at 187–88 (“The Commission has found that e-mail, voice mail, the World Wide Web, newsgroups, fax store-and-forward, interactive voice response, gateway, audiotext information services, and protocol processing are enhanced services.”); accord Second Computer Inquiry, *supra* note 54, at 420 ¶ 97.

⁵⁶ See Deacon, *supra* note 44, at 139.

⁵⁷ 47 U.S.C. § 153(51) (2012).

⁵⁸ See *id.* § 153(24).

which allows the FCC to refrain from enforcement of certain provisions where enforcement is unnecessary.⁵⁹ This provision is often cited by proponents as reassurance the FCC will not use the 2015 Order to heavily regulate broadband providers beyond what is necessary.⁶⁰ Second, section 154(i) grants the FCC ancillary authority, which “authorizes the FCC to ‘perform any and all acts . . . not inconsistent with [the Act], as may be necessary in the execution of its functions.’”⁶¹ This provision is essentially the FCC’s own Necessary and Proper Clause and enables the FCC to make its own rules to achieve and enforce substantive statutory provisions over which it has been given express authority.⁶² The FCC most recently invoked this authority in *Verizon* via section 706 of the Telecommunications Act to be discussed *infra*.⁶³

iii. The rise of broadband services and the net neutrality debate.

In 1998, with the increase in development and provision of Digital Subscriber Line (hereinafter “DSL”) services⁶⁴ to Internet users,⁶⁵ the FCC saw fit to classify DSL as a telecommunications service subject to Title II regulation.⁶⁶ Because of the nature of DSL provision and its exclusive use of the telephone lines, the FCC recognized it as a pure transmission technology and, therefore, a telecommunications service within the meaning of the Telecommunications Act.⁶⁷

Soon after the FCC’s Title II classification of DSL, it issued the Cable Broadband Order in which cable broadband providers were determined to be exempt from Title II common carrier regulation.⁶⁸ The FCC decided because these providers furnish a “single, integrated information service” they are “not telecommunications carriers at all”⁶⁹ The FCC further reasoned broadband services are functionally information services, because the services offered by broadband providers cannot be separated from the data-

⁵⁹ See *id.* § 160(a).

⁶⁰ See Pierre C. Hines, *The Third Way 2.0: Evaluating the Title II Reclassification and Forbearance Approach to Net Neutrality*, 103 GEO. L.J. 1609, 1639 (2015) (asserting that the FCC should “(1) reclassify[] broadband access as a telecommunications service; (2) defin[e] the scope of broadband Internet access service; and (3) forbear[] from unnecessary Title II provisions”).

⁶¹ *Id.* at 1614 (alteration in original); accord 47 U.S.C. § 154(i).

⁶² Hines, *supra* note 60, at 1614. The limits of ancillary authority were established by *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968), which Pierre Hines has explained as follows: “[T]he FCC must show that its rules are ‘reasonably ancillary’ to the effective performance or achievement of a ‘substantive’ statutory provision—not just a policy statement.” Hines, *supra* note 60, at 1614.

⁶³ See discussion *infra* notes 95–100.

⁶⁴ DSL service is broadband Internet service furnished over telephone lines. *Verizon v. FCC*, 740 F.3d 623, 630 (D.C. Cir. 2014).

⁶⁵ ROUZBEH YASSINI ET AL., PLANET BROADBAND 29 (2004).

⁶⁶ *Verizon v. FCC*, 740 F.3d 623, 630–31 (D.C. Cir. 2012); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd. 24011, 24029–30 ¶ 35 (1998).

⁶⁷ *Verizon*, 740 F.3d at 630–31.

⁶⁸ *Internet Over Cable Declaratory Ruling*, 17 FCC Rcd. 4798, 4833 ¶ 95 (2002).

⁶⁹ *Verizon*, 740 F.3d at 631.

processing capabilities of the service.⁷⁰ The Cable Broadband Order was challenged and vacated in the Ninth Circuit,⁷¹ but was later affirmed by the Supreme Court in *National Cable Telecommunication Association v. Brand X Internet Services*; the Court held the FCC had reasonably exercised its statutory authority when it decided to classify cable broadband providers as information services.⁷² The Supreme Court also noted in its opinion the FCC had the option of utilizing its ancillary authority under Title I to impose certain regulations on Internet access providers exempt from Title II.⁷³

iv. Net neutrality goes to court.

In 2008, public interest groups, Free Press and Public Knowledge, brought a complaint to the FCC concerning interference by Comcast in “its customers’ use of peer-to-peer applications,’ including, in particular, the application BitTorrent.”⁷⁴ The FCC ruled in favor of the petitioners and condemned Comcast’s actions, ordering Comcast to re-work its network traffic management practices and disclose the details and implementation procedures of its new approach to the FCC.⁷⁵ This decision, the FCC claimed, was based in the jurisdiction granted to it by its ancillary authority,⁷⁶ “arguing that punishing the conduct at issue was reasonably ancillary to a number of statutory policies and provisions.”⁷⁷

The D.C. Circuit Court vacated the Comcast Order on the grounds that the FCC had failed to show specifically its statutory grant of authority of which the Comcast Order was ancillary.⁷⁸ The FCC had tried to rely on congressional policy announcements regarding Internet regulation, but, per *Southwestern Cable Co.*,⁷⁹ policy statements are insufficient to justify the exercise of ancillary jurisdiction.⁸⁰

The result of *Comcast Corp.* spurred the FCC to find a way to regulate broadband providers and establish a set of net neutrality regulations.⁸¹ It first considered reclassification of broadband providers under Title II with an implementation of the Communication Act’s forbearance provision⁸² to keep from imposing all of the common carrier regulations upon broadband

⁷⁰ See Deacon, *supra* note 44, at 142.

⁷¹ *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1132 (9th Cir. 2003).

⁷² *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005); see Deacon, *supra* note 44, at 142; see also Hines, *supra* note 60, at 1616.

⁷³ *Nat’l Cable & Telecomms. Ass’n*, 545 U.S. at 996; Deacon, *supra* note 44, at 144–45.

⁷⁴ Deacon, *supra* note 44, at 146.

⁷⁵ *Comcast Corp. v. FCC*, 600 F.3d 642, 645 (2010); see Free Press and Public Knowledge, 23 FCC Rcd. 13028, 13059–60 ¶ 54 (2008).

⁷⁶ See discussion *supra* notes 61–62.

⁷⁷ Deacon, *supra* note 44, at 146.

⁷⁸ *Comcast Corp.*, 600 F.3d at 644; *Verizon v. FCC*, 740 F.3d 623, 632 (D.C. Cir. 2014).

⁷⁹ See *supra* text accompanying note 62.

⁸⁰ *Comcast Corp.*, 600 F.3d at 654.

⁸¹ Deacon, *supra* note 44, at 148.

⁸² See discussion *supra* notes 59–60.

providers.⁸³ Instead of pursuing reclassification, the FCC issued the 2010 Order, which attempted “to impose net neutrality regulations on broadband Internet access providers.”⁸⁴ The 2010 Order imposed (1) transparency obligations on fixed and mobile broadband providers⁸⁵ to disclose network management practices;⁸⁶ (2) “No blocking” rules prohibiting fixed and mobile broadband providers from blocking lawful Internet content;⁸⁷ and (3) nondiscrimination rules prohibiting fixed broadband providers from “unreasonably discriminat[ing] in transmitting lawful network traffic.”⁸⁸

In imposing the 2010 Order, the FCC relied, and still does, upon section 706 of the Telecommunications Act, which reads:

The Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.⁸⁹

Proponents of net neutrality and the FCC claim these net neutrality rules promote policies of the “virtuous cycle of innovation” and claim that broadband “providers’ ability to block or differentiate among edge providers⁹⁰ undermines that cycle by raising barriers to entry by edge providers”⁹¹ Additionally, section 706(b) requires the FCC to conduct an annual survey of the availability of advanced telecommunications capability to the general population and to take action in accelerating its deployment should that availability be found lacking.⁹²

The 2010 Order was brought before the D.C. Circuit Court in *Verizon v. FCC*, where Verizon argued the FCC “lacked affirmative statutory authority to promulgate the rules, that its decision to impose the rules was arbitrary and capricious, and that the rules contravene statutory provisions prohibiting the [FCC] from treating broadband providers as common

⁸³ Reclassification, however, did not pan out for the FCC due to political pressures from their congressional allies and access providers. Deacon, *supra* note 44, at 148.

⁸⁴ *Id.* at 148.

⁸⁵ Fixed broadband “serves end users primarily at fixed endpoints using stationary equipment, . . .” whereas mobile broadband “serves end users primarily using mobile stations” or devices. Protecting and Promoting the Open Internet, 80 Fed. Reg. 19738, 19764 ¶ 188, 19847 (Apr. 13, 2015) (to be codified at 47 C.F.R. pts. 1, 8 & 20) [hereinafter 2015 Open Internet Order].

⁸⁶ Preserving the Open Internet, FCC Rcd. 10-201, 17905, 17906 ¶ 1(i) (2010) (report and order) (No. 09-191) [hereinafter 2010 Open Internet Order].

⁸⁷ *Id.* at 17906 ¶ 1(ii).

⁸⁸ *Id.* at 17906 ¶ 1(iii).

⁸⁹ 47 U.S.C. § 1302(a) (2012).

⁹⁰ See discussion *supra* notes 23–24.

⁹¹ Deacon, *supra* note 44, at 149.

⁹² 47 U.S.C. § 1302(b); Deacon, *supra* note 44, at 149.

carriers.”⁹³ Verizon also brought a challenge claiming the 2010 Order violated its First Amendment rights; however, the court elected to forgo consideration of that challenge in its opinion.⁹⁴

The court upheld the section 706 jurisdictional claims made by the FCC.⁹⁵ Applying the *Chevron* standard,⁹⁶ the court determined the Commission made a reasonable interpretation of the statutory ambiguity inherent in the language of section 706(a).⁹⁷ Similarly, the court also found that the Commission’s interpretation of section 706(b) was reasonable in “empower[ing] it to take steps to accelerate broadband deployment if and when it determines that such deployment is not ‘reasonable and timely.’”⁹⁸

However, the court disagreed with the Commission on the 2010 Order’s net neutrality provisions restricting broadband providers’ ability to block edge provider content and discriminate in their transmission of edge provider content.⁹⁹ The court’s decision was based on the Telecommunications Act’s “statutory prohibition . . . on treating ‘information services’ providers—including broadband Internet access providers—as ‘common carriers.’”¹⁰⁰ The court once again applied the *Chevron* standard of review to the interpretation of “common carrier” under the Telecommunications Act.¹⁰¹ It held, based on the common carrier duties delineated in section 201(a),¹⁰² the 2010 Order “imposes [the duty of common carriers] on broadband providers”¹⁰³ Since broadband providers were, at the time, statutorily exempt from Title II common carrier obligations, the FCC could not regulate them as such.¹⁰⁴ Upon this rationale, the court struck down the anti-blocking and anti-discrimination provisions.¹⁰⁵

v. “Started from the bottom, now we [sic] here.”¹⁰⁶

After losing *Verizon*, the case was remanded for further consideration, and the FCC went back to the drawing board to implement new net neutrality regulations.¹⁰⁷ At the heart of the current controversy are the

⁹³ *Verizon v. FCC*, 740 F.3d 623, 634 (D.C. Cir. 2014).

⁹⁴ *Id.* This Comment will discuss the First Amendment implications of the 2015 Order *infra* Section III.B.

⁹⁵ *Id.* at 639–40; Deacon, *supra* note 44, at 150.

⁹⁶ See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–46 (establishing that courts must (1) look to whether Congress has directly spoken to the precise question at issue and if not (2) whether the agency’s construction of the statute is reasonable).

⁹⁷ *Verizon*, 740 F.3d at 635.

⁹⁸ *Verizon*, 740 F.3d at 641.

⁹⁹ Deacon, *supra* note 44, at 150.

¹⁰⁰ *Id.*; see 47 U.S.C. § 153(20) (2012).

¹⁰¹ *Verizon*, 740 F.3d at 650–51.

¹⁰² See discussion *supra* notes 43–46.

¹⁰³ *Verizon*, 740 F.3d at 653.

¹⁰⁴ Deacon, *supra* note 44, at 150.

¹⁰⁵ *Verizon*, 740 F.3d at 659.

¹⁰⁶ DRAKE, STARTED FROM THE BOTTOM (Cash Money Records 2013).

¹⁰⁷ See generally Protecting & Promoting the Open Internet, 29 FCC Rcd. 5561 (2014).

2015 Order's¹⁰⁸ provisions imposing no blocking, no throttling, and no paid-prioritization rules on broadband providers as well as reclassification of broadband Internet access services as telecommunications services subject to Title II regulation.¹⁰⁹ The 2015 Order also adopts a standard for Internet conduct, which will sharply contribute to subjecting BIAS providers to such heavy regulation that, should the 2015 Order stand, will essentially transform the FCC into the "Department of the Internet."¹¹⁰ As the 2015 Order is currently written, the standards it adopts for regulating the network management and business practices of BIAS providers places the Internet under heavy regulation, the likes of which it has never been subjected to since its birth.

III. ANALYSIS

This section will provide analysis of the primary arguments for rejecting the bright-line net neutrality rules of the 2015 Order. First, the Internet, as a broadband technology, is incapable of conforming to the common carrier obligations imposed by the 2015 Order's reclassification of BIAS as Title II telecommunications services.

Second, subjecting BIAS providers to the no blocking and no throttling rules is an impermissible infringement upon the First Amendment rights of BIAS providers as both speakers and members of the press. Supreme Court precedent confirms protection of the rights of mass communication actors, like BIAS providers, under the First Amendment's Press Clause, and the 2015 Order's bright-line rules directly compromise those rights.¹¹¹

Third, the entrenchment of net neutrality regulation within a powerful government agency operates dangerously to expose the broadband market to precisely one of the problems the FCC is claiming to protect against: exploitation of the broadband market by "big" BIAS providers and Internet giants, which will negatively affect the broadband industry's economic growth. The 2015 Order essentially serves as an invitation for the regulatory capture of the FCC, which will allow larger Internet marketplace players to avoid the sanctions of the free market.

Finally, the 2015 Order provides no evidence and fails to rebut the

¹⁰⁸ 2015 Open Internet Order, *supra* note 85, at 19739 ¶¶ 14–18, 19787 ¶¶ 336–39.

¹⁰⁹ See Motion for Stay or Expedition of U.S. Telecomm. Ass'n at 8–9, U.S. Telecomm Ass'n v. FCC (D.C. Cir. May 13, 2015) (No. 15-1063) https://www.ustelecom.org/sites/default/files/documents/1343793_1%202015%2003%2013%20Joint%20Motion%20for%20Partial%20Stay%20Pending%20Judicial%20Revi....pdf (last visited Apr. 1, 2017).

¹¹⁰ *Id.* at 13.

¹¹¹ See generally, e.g., *Turner Broad. Sys. v. FCC (Turner II)*, 520 U.S. 180 (1997); *Denver Area Educ. Telecom. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996); *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622 (1994); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974); *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

distinct possibility that its bright-line rules, particularly its no paid-prioritization rule, will actually work against the stimulation of innovation and deployment of broadband infrastructure, *ipso facto*, working in contravention of the FCC's congressionally mandated mission of "encourage[ing] the deployment . . . of advanced telecommunications capability to all Americans . . ."¹¹²

A. The Internet's functional structure precludes it from classification as a telecommunications service under Title II.

The Internet is based on what is called the Open Systems Interconnect (hereinafter "OSI") Model. It consists of seven layers: The Physical Layer, the Data Link Layer, the Network Layer, the Transport Layer, the Session Layer, the Presentation Layer, and the Application Layer.¹¹³ Each of these layers, beginning with the Physical Layer, contributes to the layer above it and depends upon the layer below it.¹¹⁴ The interplay between the layers are fundamental to understanding why the functional structure of the Internet precludes its classification as a Title II telecommunications service according to the language of the Telecommunications Act. However, as only the Physical, Data Link, and Network Layers are chiefly relevant to this analysis, they will be the primary focus and only a brief explanation will be necessary for the remaining layers.

i. The OSI Model.

Briefly, the layers perform the following functions. The Physical Layer tangibly connects computers together via cables and wires. The Data Link Layer formats, sends, and receives data packets across the network via the Physical Layer. The Network Layer, consisting of routers, processes data via the Internet Protocol to identify the destination of the data it receives. The Transport Layer determines the amount of data sent between a computer and a server (i.e., determines how much information is shared between the user's computer and the website to which the user is connected).¹¹⁵ The Session Layer controls the communication functions between the user and the web server, thus "[creating] the session between [the users' computer] and the computer [they] are trying to get information from."¹¹⁶ The Presentation Layer is responsible for formatting or translating data between the lower layers and the highest Application Layer.¹¹⁷ Finally, the Application Layer is

¹¹² 47 U.S.C. §1302(a) (2012).

¹¹³ Eli the Computer Guy, *The OSI Model Demystified*, YOUTUBE, at 02:50 (Dec. 10, 2010), <https://www.youtube.com/watch?v=HEEnLZV2wGI> (last visited Apr. 1, 2017).

¹¹⁴ *Id.* at 02:58.

¹¹⁵ *Id.* at 04:53.

¹¹⁶ *Id.* at 04:17.

¹¹⁷ *The OSI Model's Seven Layers Defined and Functions Explained*, MICROSOFT SUPPORT, <https://support.microsoft.com/en-us/kb/103884> (last visited Apr. 1, 2017).

closest to the user as it is the actual interface with which the user interacts to send information across the network via the lower layers.¹¹⁸ Essentially, it “serves as the window for users and application processes to access network services.”¹¹⁹

The Physical Layer is furthest away from the user in terms of sending and receiving information across the Internet.¹²⁰ This layer “is concerned with the transmission and reception . . . [of information] over a physical medium . . . [via] electrical/optical, mechanical, and functional interfaces . . . and carries the signals for all of the higher layers.”¹²¹ It is literally the wires and connectors between computers and servers that carry information between them.¹²²

The Data Link Layer connects the higher layers to the Physical Layer.¹²³ As mentioned above, it formats data packets into frames and sends them out across the network.¹²⁴ Data is wrapped with a “header” and a “trailer,” which are processed by the next layer in order to establish the data packet’s purpose and destination.¹²⁵ This process is analogous to the preparation and sending of pieces of mail. Consider the example of an engaged couple preparing their wedding invitations for mailing: each letter (i.e. data packet) is placed into an envelope (i.e. frames), addressed to the appropriate recipient, and then sent through the mail. It has been conceded by opponents of net neutrality that “an element of telecommunications service is embedded [in] the Data Link Layer of the Internet Service that the [ISPs] offer[] to the public.”¹²⁶ Thus, the meaning of telecommunications services under the Telecommunications Act can be read to encompass the Data Link Layer.

Although Data Link Layer functions may fall within the legal definition of telecommunications services, the applicability falls away in the Network Layer where the Internet Protocol¹²⁷ subsists.¹²⁸ The Network Layer

¹¹⁸ Eli the Computer Guy, *supra* note 113, at 03:23; MICROSOFT SUPPORT, *supra* note 117.

¹¹⁹ MICROSOFT SUPPORT, *supra* note 117.

¹²⁰ Eli the Computer Guy, *supra* note 113, at 02:59.

¹²¹ MICROSOFT SUPPORT, *supra* note 117.

¹²² Eli the Computer Guy, *supra* note 113, at 06:17; MICROSOFT SUPPORT, *supra* note 117.

¹²³ Hubert Zimmermann, *OSI Reference Model—The ISO Model of Architecture for Open Systems Interconnection*, 28 IEEE TRANSACTIONS ON COMM’N 425, 426–27 (1980). Each layer successively connects the layers above it with the layers below it. *Id.*

¹²⁴ *Id.* at 430; MICROSOFT SUPPORT, *supra* note 117; Chris H., *OSI Model: The Data Link Layer*, YOUTUBE, at 01:00 (Nov. 20, 2012), <https://www.youtube.com/watch?v=pi7mMjixiY> (last visited Apr. 1, 2017).

¹²⁵ Chris H., *supra* note 124, at 01:26.

¹²⁶ Filing by Richard Bennett in FCC Docket 14-28 at 2 (Dec. 30, 2014), <http://apps.fcc.gov/ecfs/document/view?id=60001011505> (last visited Apr. 1, 2017) [hereinafter Comments of Richard Bennett].

¹²⁷ The Internet Protocol is a set of rules used for formatting and addressing data packets for transmission in the Data Link Layer. *Internet Protocol (IP)*, TECHOPEDIA, <https://www.techopedia.com/definition/5366/internet-protocol-ip> (last visited Apr. 1, 2017).

¹²⁸ Comments of Richard Bennett, *supra* note 126, at 2.

is where router functions are located.¹²⁹ It “provides [the] functional and procedural means to exchange . . . data units between [routers] over a network connection.”¹³⁰ The transmission element of traditional telecommunications services no longer exists at this level, because the Internet Protocol is incapable of transmitting information.¹³¹ Transmitting the data to its destination depends on the transmission functions of other network elements (i.e., the Data Link Layer); the routers of the Network Layer absolutely do not perform any transmission within the meaning of “telecommunications services.”¹³² Rather, they perform information service functions by “generating, acquiring, storing, transforming, processing, retrieving, utilizing, [and/or] making available information via telecommunications.”¹³³

ii. Bandwidth is a finite resource essential to information services that must be managed.

Routers in the Network Layer are participants of the Internet, not access points, that must operate according to Internet norms.¹³⁴ Thus, to conform to those norms and protect themselves from deviating participants, routers utilize the Transmission Control Protocol Congestion Control system as a means of managing the network traffic passing through them.¹³⁵ This protocol system operates according to “Jacobson’s Algorithm[,] [which] requires Internet members – known as ‘hosts’¹³⁶ – to reduce their rate of transmission when signaled by an Internet router that congestion is growing to dangerous levels.”¹³⁷ This algorithm (and other derivations of it) operates between the host and the router to manage the congestion of data traffic.

When a user accesses their Internet service, their provider will dynamically allocate a certain amount of bandwidth to that particular access point.¹³⁸ When only one user is using that access point, they will have access to the entire bandwidth capacity and experience faster, smoother enjoyment of their desired content.¹³⁹ However, “if many users are active, each contends with the others for capacity and . . . a host of other factors”¹⁴⁰ then become relevant in the amount of bandwidth assigned to each user.¹⁴¹ This dynamic

¹²⁹ Eli the Computer Guy, *supra* note 113, at 05:28.

¹³⁰ Zimmermann, *supra* note 123, at 430.

¹³¹ Comments of Richard Bennett, *supra* note 126, at 4.

¹³² See 47 U.S.C. § 153(53) (2012).

¹³³ 47 U.S.C. § 153(24) (2012); see Comments of Richard Bennett, *supra* note 126, at 2–5; Brief for Richard Bennett, *supra* note 31, at 5.

¹³⁴ Comments of Richard Bennett, *supra* note 126, at 5.

¹³⁵ *Id.*

¹³⁶ “Hosts are owned and maintained by end users” Brief for Richard Bennett, *supra* note 31, at 6. Essentially, an Internet host is any computer connected to the Internet.

¹³⁷ Comments of Richard Bennett, *supra* note 126, at 5.

¹³⁸ *Id.* at 6.

¹³⁹ *Id.*

¹⁴⁰ For example, number of users, user demand, upstream congestion, and server capacity. *Id.*

¹⁴¹ *Id.*

allocation of bandwidth in a network is real-time negotiation of service between Internet service providers and hosts via information processing in the Network Layer.¹⁴² As the quality of Internet service along a specific allocation of bandwidth is a function of multiple user-specific factors, its availability is dictated “on a statistical basis and provided by a system that relies on information processing”¹⁴³

iii. Telecommunication networks verses Internet service networks.

The Internet services regulated by the 2015 Order are functionally not telecommunication services within the meaning of the Telecommunications Act. The chief example of a telecommunications service is the Public Switched Telephone Network (hereinafter “PSTN”). Telecommunications networks, although they do use bandwidth, only allocate a fixed bandwidth to users for the duration of a call.¹⁴⁴ The user’s experience will remain unchanged regardless of heavy or light traffic on the network or will simply not connect if the network is overloaded.¹⁴⁵ Additionally, the pathway of the call on the PSTN is determined upon its initial setup and will be “used by all subsequent elements of the call.”¹⁴⁶ Telecommunications networks also tend to be much smaller, with only a few hundred devices at the most, connected through a closely controlled network.¹⁴⁷

Internet service networks, as information services, stand in stark contrast to telecommunications networks. As discussed *supra*, they allocate bandwidth to users on a dynamic basis, adapting to the real-time needs and statistical characteristics of the users.¹⁴⁸ Unlike users on the PSTN, Internet service users will inevitably experience changes in their connection according to the amount of traffic on the network.¹⁴⁹ As network traffic is affected by various factors, routers are constantly recalculating routes for data to reach its destination, thus “perform[ing] several orders of magnitude more computation than telephones [sic] switches do.”¹⁵⁰ Additionally, the scope of Internet service is exponentially larger and more unpredictable than the scope of telecommunications services.¹⁵¹ It consists of a loose connection of “billions of machines attached over hundreds of millions of telecommunications connections” all with unique characteristics attempting to reach specific destinations to accommodate nearly infinite needs and

¹⁴² *Id.*

¹⁴³ *Id.* at 7.

¹⁴⁴ *Id.* at 6.

¹⁴⁵ *Id.* at 6–7.

¹⁴⁶ *Id.* at 9.

¹⁴⁷ *Id.* at 13.

¹⁴⁸ See discussion *supra* Section III.A.2.

¹⁴⁹ Comments of Richard Bennett, *supra* note 126, at 6–7.

¹⁵⁰ *Id.* at 9.

¹⁵¹ *Id.* at 13.

desires.¹⁵²

The juxtaposition of a primary telecommunications network, the PSTN, with Internet service networks highlights the fact that the Internet service sold to end users by BIAS providers are fundamentally and technologically different. Where primary telecommunications networks provide only a basic transmittal service, BIAS providers enable not only the transmission of information, but also provide an infrastructure for enhanced services, which do significantly more than simple transmission.¹⁵³ Essentially, the FCC's reclassification of BIAS providers as common carrier telecommunication providers is the equivalent of trying to bring "fish" within the legal definition of a "dog."

B. The 2015 Order violates the First Amendment.

The FCC claims it has the authority to regulate the Internet according to the 2015 Order via section 706 of the Telecommunications Act.¹⁵⁴ Applying the *Chevron* standard of agency regulations, the D.C. Circuit Court upheld the FCC's jurisdiction to regulate the Internet as properly encompassed within the scope of section 706.¹⁵⁵ As Congress never spoke directly to the issue of FCC Internet regulation under section 706, the court reviewed the rationality of the FCC's interpretation that section 706 "'provides express authority' for the rules it adopted."¹⁵⁶ It determined the FCC's interpretation of the statute was rational since it is plausible Congress intended such regulation based on the absence of such discussion or concern in the legislative history of the statute.¹⁵⁷ Additionally, the court determined the scope of authority granted by section 706 was sufficiently limited in that it must "fall within the Commission's subject matter jurisdiction over such communications" and "must be designed to achieve a particular purpose"¹⁵⁸ However, despite the *Verizon* court's recognition of the FCC's section 706 authority to develop net neutrality regulations, those regulations must still withstand First Amendment review. Further analysis will demonstrate the 2015 Order, as written, cannot survive under the First Amendment.

i. BIAS providers are protected by the First Amendment.

BIAS providers, although appropriately subject to section 706 jurisdiction, are still protected speakers under the First Amendment. To justify their net neutrality regulations, the FCC has established three primary

¹⁵² *Id.*

¹⁵³ See discussion *supra* Section II.B.1 (discussing the statutory differences between telecommunications services and enhanced services).

¹⁵⁴ See discussion *supra* Section II.B.4.

¹⁵⁵ *Verizon v. FCC*, 740 F.3d 623, 635 (D.C. Cir. 2014).

¹⁵⁶ *Id.* at 641.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 640.

reasons why the First Amendment rights of BIAS providers are not violated by the 2015 Order. First, they argue the new rules do not compromise the rights of BIAS providers, because they “are not speakers, but rather serve as conduits for the speech of others.”¹⁵⁹ Thus, because they are not speakers, they are undeserving of First Amendment protections. Second, the FCC puts forth the “gatekeeper control” argument, which is one of the more powerful arguments in the arsenal of net neutrality proponents. They argue BIAS providers’ natural position between end users and the Internet itself, gives them the ability and motivation to exercise gatekeeper control over the speech of end users and edge providers.¹⁶⁰ Therefore, that ability to act as gatekeeper must be curbed. Third is the “editorial quality” theory.¹⁶¹ Essentially, the FCC claims, because BIAS providers “exercise little control over the content which users access on the Internet[,]” they lose any qualification they might have had as speakers.¹⁶² Each of these premises contradict established First Amendment case law.

BIAS providers fall squarely within the protections of the First Amendment Press Clause, which reads in pertinent part, “Congress shall make no law . . . abridging the freedom of speech, or of the press”¹⁶³ The Supreme Court recognized long ago, as implicit within the Press Clause, the liberty of circulation.¹⁶⁴ This essential characteristic of freedom of the press provides First Amendment protection to publication systems capable of mass dissemination.¹⁶⁵ As BIAS providers function as such publication systems, they are entitled to the liberty of circulation.¹⁶⁶

In *Turner Broadcasting System, Inc. v. FCC* (hereinafter “*Turner I*”), the Supreme Court recognized cable operators “as [] conduit[s] for the speech of others” because they select their programming sources and then transmit them to their viewers.¹⁶⁷ *Turner I* concerned the institution of certain “must-carry provisions” of the Cable Television Consumer Protection and Competition Act of 1992 upon cable operators and cable programmers.¹⁶⁸ Ultimately, after remand, the Court upheld the must-carry provisions in *Turner II*, because the government had satisfied its burden of demonstrating

¹⁵⁹ 2015 Open Internet Order, *supra* note 85, at 19832–33 ¶¶ 543, 545.

¹⁶⁰ *Id.* at 19747 ¶ 78.

¹⁶¹ FRED B. CAMPBELL, JR., HOW NET NEUTRALITY INVITES THE FEDS TO IGNORE THE FIRST AMENDMENT & CENSOR THE INTERNET 5 (June 4, 2015), <http://cbit.org/wp-content/uploads/2015/06/CBIT-whitepaper-1A-06-04-15-FINAL.pdf> (last visited Apr. 1, 2017). The term “editorial quality theory” is coined by Mr. Campbell to characterize an argument of the FCC. *Id.*

¹⁶² 2015 Open Internet Order, *supra* note 85, at 19833 ¶ 548 (emphasis added).

¹⁶³ U.S. CONST. amend. I.

¹⁶⁴ *Ex parte Jackson*, 96 U.S. 727, 733 (1877).

¹⁶⁵ CAMPBELL, *supra* note 161, at 9.

¹⁶⁶ *Id.* at 8 (“The Internet . . . offers functionality that is substantially similar to the delivery of newspapers through the mail, the broadcast of radio and television programming, [] the transmission of cable programming[,] and . . . is replacing these forms of media distribution.”).

¹⁶⁷ *Turner I*, 512 U.S. 622, 629 (1994).

¹⁶⁸ Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1471 (1992).

an important government interest in their implementation.¹⁶⁹ However, despite the Court's "conduit" designation of cable operators, it still recognized cable operators to be speakers entitled to First Amendment protections.¹⁷⁰ As BIAS providers deliver, in part, the same types of services to their customers, their function as conduits of transmission, per *Turner I* and *Turner II*, does not preclude them from protected status under the First Amendment as "entities entitled to use their facilities to convey messages of their own choosing."¹⁷¹

In defending the 2015 Order, the FCC draws attention to the case of *Miami Herald Publishing Co. v. Tornillo*.¹⁷² Their utilization of this case, however, is detrimental to their cause. In referencing this case, they seek to distinguish BIAS providers solely as conduits rather than protected speakers who engage in protected First Amendment speech. It was important for the FCC to try and draw this distinction between BIAS providers and other protected entities participating in mass dissemination of speech, because recognizing BIAS providers as such would prove fatal to the primary functions (no blocking, no throttling, no paid-prioritization) of the 2015 Order.

The appellant newspaper in *Tornillo* petitioned the Supreme Court to declare a Florida "right of reply" statute¹⁷³ unconstitutional as a violation of their First Amendment free press rights.¹⁷⁴ The Court declared the statute unconstitutional despite arguments by the appellee regarding how the growing dominance of newspapers and news services (compared to the printing press of 1791) had "become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion" threatening "fairness and accuracy" in modern media.¹⁷⁵ Thus, compelled access mandates affecting distributors of mass communication were established as contrary to First Amendment principles.

The arguments put forth by the right of access advocates in *Tornillo*

¹⁶⁹ *Turner II*, 520 U.S. 180, 224 (1997) (holding that Congress' judgment in passing the Cable Television Consumer Protection and Competition Act was "grounded on reasonable factual findings supported by [substantial] evidence . . ."). The rationale and holding of the *Turner* cases will be distinguished *infra*.

¹⁷⁰ *Turner I*, 512 U.S. at 636 ("There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.")

¹⁷¹ Randolph J. May, *Net Neutrality Mandates: Neutering the First Amendment in the Digital Age*, 3 *I/S: J.L. AND POL'Y FOR INFO. SOC'Y* 198, 202 (2007).

¹⁷² *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974); 2015 Open Internet Order, *supra* note 85, at 19833 ¶ 547 (2015).

¹⁷³ The Court referred to this statute as creating "an enforceable right of access to the press . . ." *Tornillo*, 418 U.S. at 247.

¹⁷⁴ *Id.* at 244. The 1913 "right of reply" Florida statute mandated: "[I]f a candidate for nomination or election is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges." *Id.*

¹⁷⁵ *Id.* at 247-51.

are extremely similar to those of net neutrality advocates.¹⁷⁶ In light of the great technological advances that have led to the development of the Internet and BIAS providers, net neutrality supporters claim affirmative government action is necessary to combat the vast amount of power BIAS providers potentially have over individual speech.¹⁷⁷ However, the *Tornillo* Court recognized First Amendment precedent on the freedom of the press “does not sanction repression of that freedom by private interests” regardless of the amount of power exercised by the entity in question.¹⁷⁸ BIAS providers, as speakers with the ability to exercise editorial discretion, fall squarely within the scope of *Tornillo*’s protection. Hence, the First Amendment bars the imposition of the bright-line rules of net neutrality as they function only to “intru[de] into the function of editors.”¹⁷⁹

The FCC also argues that BIAS providers’ status as “gatekeepers” to the Internet gives them immense power and potential to compromise the openness of the Internet.¹⁸⁰ However, this status does not serve as a justification for the revocation of their First Amendment rights of editorial discretion as it is a “common feature of most mass communications systems.”¹⁸¹ In drafting the First Amendment, the Founding Fathers most probably wrote it with the intent to establish application of the right to freedom of the press to every person seeking to use communications technology for mass publication; not as creating a dichotomy between the industry of the press and those who want to use the technology of the press.¹⁸² Along this line of reasoning lies the conclusion that the Press Clause was written with the calculated risk of potential abuse.¹⁸³ Therefore, BIAS providers’ “technical ability to engage in practices that pose a threat to Internet openness” by no means overcomes their protections under the First Amendment.¹⁸⁴

In fact, it is ironically the FCC’s identification of BIAS providers as “gatekeepers” to the Internet which that strengthens First Amendment arguments against net neutrality. Identifying their gatekeeper status directly

¹⁷⁶ See *id.*

¹⁷⁷ Compare 2015 Open Internet Order, *supra* note 85, at 19747 ¶ 77 (stating that “the Internet’s openness is critical to its ability to serve as a platform for speech and civic engagement . . .”), with *Tornillo*, 418 U.S. at 251 (“The First Amendment interest of the public in being informed is said to be in peril because the ‘marketplace of ideas’ is today a monopoly controlled by the [power of modern media empires].”).

¹⁷⁸ *Tornillo*, 418 U.S. at 252.

¹⁷⁹ *Id.* at 258.

¹⁸⁰ 2015 Open Internet Order, *supra* note 85, at 19747 ¶ 78.

¹⁸¹ CAMPBELL, *supra* note 161, at 4.

¹⁸² Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 463 (2012).

¹⁸³ *CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 124–25 (1973) (“[T]he authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility -- and civility -- on the part of those who exercise the guaranteed freedoms of expression.”).

¹⁸⁴ 2015 Open Internet Order, *supra* note 85, at 19747 ¶ 78.

brings to light the First Amendment rights of BIAS providers and how the FCC is seeking to suppress their engagement in free expression through exercise of their legitimate editorial discretion as transmitters of speech.¹⁸⁵ The gatekeeper argument has been tried before and it has failed.¹⁸⁶ The argument essentially stands for the proposition that the immense power and influence of mass media platforms presents a high risk of abuse, which compromises the fairness and accuracy of information provided to the public; thus, the government is justified in taking action to abate that.¹⁸⁷ However, the mere ability of BIAS providers to exercise editorial discretion over so much content, just like the news services complained of in *Tornillo*, is not a valid justification for quashing their freedom to publish—or not to publish—under the First Amendment and to exercise their editorial judgment while doing so.¹⁸⁸

Finally, the FCC claims BIAS providers' choice not to exercise editorial discretion disqualifies them from First Amendment protection and renders them "mere conduits for the messages of others."¹⁸⁹ This theory of editorial quality is not compatible with the First Amendment. By the FCC's own admission, they acknowledge the editorial capacity of BIAS providers as a justification for instituting the 2015 Order, and, at the same time, the FCC claims BIAS providers' decision not to exercise such editorial discretion renders them "mere conduits," unprotected by the First Amendment.¹⁹⁰ Supreme Court precedent demonstrates the question of First Amendment protection as it relates to editorial discretion "has never turned on the perceived quality of the editorial function that their operators choose to offer."¹⁹¹ Rather, protection is triggered based on the inherent characteristics of the speaker (i.e., conduit versus speaker) and the speech itself (i.e., public or private speech, content, etc.) to establish the existence of protection and the applicable standard of review.¹⁹² Where the transmitted speech is determined to be intended for public dissemination, the Press Clause will serve to shield that speech.¹⁹³ BIAS providers' transmission of speech and their choice to exercise editorial discretion or not combined with the extremely public nature of Internet speech entitles them to First Amendment

¹⁸⁵ CAMPBELL, *supra* note 161, at 36.

¹⁸⁶ *See, e.g.,* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974).

¹⁸⁷ *See id.* at 250–51.

¹⁸⁸ *See id.* at 252 ("Freedom to publish means freedom for all and not for some.") (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).

¹⁸⁹ 2015 Open Internet Order, *supra* note 85, at 19833 ¶ 548.

¹⁹⁰ *Id.* at 19833 ¶¶ 545, 548.

¹⁹¹ CAMPBELL, *supra* note 161, at 5.

¹⁹² *See Ex Parte Jackson*, 96 U.S. 727, 733 (recognizing the "[l]iberty of circulating is as essential to [the] freedom of publishing . . ."); *see also* *Turner I*, 512 U.S. 622, 639 (1994) (recognizing that "whatever relevance . . . physical characteristics may have in the evaluation of particular [speech] regulations, they do not require the alteration of settled principles of . . . First Amendment jurisprudence").

¹⁹³ *Cf. Katz v. United States*, 389 U.S. 347, 352 (1967) (holding that speakers using a common carrier like the telephone to disseminate speech are "entitled to assume that the words [they] utter[] into the mouthpiece will not be broadcast to the world").

protection.

ii. The 2015 Order provisions violate the First Amendment.

Not only would the FCC's decision trample upon the First Amendment rights of BIAS providers, it would also recognize a non-existent right of end users to access BIAS provider networks.¹⁹⁴ The FCC is concerned about BIAS providers' ability to affect the speech of competing speakers (e.g., edge providers).¹⁹⁵ However, *Turner I* established for cable providers that "[i]t is the operator's right that is preeminent" and not that of the viewers and listeners.¹⁹⁶ Even the FCC has held "on several occasions [in the past] that no private individual or group has a right to command the use of broadcast facilities."¹⁹⁷ As BIAS providers engage in and provide the same services—arguably even more services than—as cable providers, they are also within the purview of First Amendment protections for mass communication system providers.¹⁹⁸ Implicit within this line of thought is the premise that any sort of claimed right of access would infringe upon the property rights of BIAS providers as well. The Supreme Court held in *U.S. Postal Service v. Council of Greenburgh*¹⁹⁹ that people do not have a right of "guarantee[d] access to property used to disseminate mass media communications" because private property owners have the "power to preserve the property under [their] control for the use to which it is lawfully dedicated."²⁰⁰

Additionally, the FCC rules deprive BIAS providers of all editorial discretion by compelling them to convey all edge provider content at all times.²⁰¹ In *Wooley v. Maynard*, the Supreme Court determined compelled speech is a violation of the First Amendment.²⁰² In *Wooley*, the appellee sought to have the court declare unconstitutional a New Hampshire statute, which criminalized the action of covering the state motto "Live Free or Die" on New Hampshire vehicle license plates.²⁰³ The Court made note of the compromise of private property that resulted from the statute as it "require[d]

¹⁹⁴ See *Denver Area Educ. Telecom. Consortium, Inc. v. FCC*, 518 U.S. 727, 816 (1996) (Thomas, J., concurring in part and dissenting in part).

¹⁹⁵ 2015 Open Internet Order, *supra* note 85, at 19747 ¶ 78.

¹⁹⁶ *Denver*, 518 U.S. at 816 (Thomas, J., concurring in part and dissenting in part); *see, e.g., Turner I*, 512 U.S. at 636.

¹⁹⁷ *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 113 (1973).

¹⁹⁸ *See, e.g., Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 255 (1974) (holding that mass dissemination newspapers were protected by the Press Clause from any claims of right of access); *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 133 (1981) ("[T]he First Amendment [has] never meant 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'").

¹⁹⁹ *See infra* note 200.

²⁰⁰ CAMPBELL, *supra* note 161, at 21 (quoting *Greenburgh Civic Ass'ns*, 453 U.S. at 129–30).

²⁰¹ Brief for Former FCC Commissioner Harold Furchtgott-Roth and Washington Legal Foundation as Amici Curiae in Support of Petitioners at 24, *U.S. Telecom. Ass'n v. FCC*, (D.C. Cir. Aug. 6, 2015) (No. 15-1063) [hereinafter Brief for Harold Furchtgott-Roth].

²⁰² *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (recognizing that the First Amendment includes the right to refrain from speaking and subsequent protection against the compulsion of certain speech).

²⁰³ *Id.* at 706–07.

that appellees use their private property as a ‘mobile billboard’”²⁰⁴ In the case of BIAS providers, the 2015 Order effectively functions in much the same way as it prohibits them from choosing to refrain from publishing an edge provider’s speech, should it so desire.

Allowance of the net neutrality regulations to stand would also result in impermissible government discrimination amongst speakers. Under the rules, edge providers’ speech would be privileged above that of BIAS providers.²⁰⁵ The FCC states that the First Amendment is one of their chief concerns in establishing the 2015 Order as it “serve[s] First Amendment interests of the highest order, promoting ‘the widest possible dissemination of information from diverse and antagonistic sources’”²⁰⁶ In the case of net neutrality, the sources referenced by the FCC in its quotation of *New York Times v. Sullivan*²⁰⁷ are edge providers and end users. Although the intentions behind such elevation of speech rights are noble, they are impermissible.²⁰⁸

C. The 2015 Order will encourage regulatory capture by big BIAS providers.

The 2015 Order will allow big BIAS providers (e.g., Comcast and AT&T) and other Internet giants (e.g., Google and Amazon) to influence the politics of net neutrality, thus shrouding their “gatekeeper” status from the sanctions of the free market by lobbying government officials. This is known as “regulatory capture,” (often commonly referred to as “crony capitalism”), and it is through this sociopolitical phenomenon that success in business depends upon having a close, influential relationship with government officials rather than upon “a free market and the rule of law”²⁰⁹

The theory of regulatory capture is centered around the State’s power to coerce.²¹⁰ That power to coerce makes the government at once both a powerful obstacle to foul play in the free market as well as a desirable partner for industries to bed. When the State institutes pervasive regulation in any one industry, the larger players in that industry will inevitably seek to “utilize[e] [the powers] of the state . . . to increase [their] profitability.”²¹¹ Put simply, the government’s power to coerce, in addition to other factors outside the scope of this Comment, lead to a practical *incentivization* of crony

²⁰⁴ *Id.* at 715.

²⁰⁵ Brief for Harold Furchtgott-Roth, *supra* note 201, at 25.

²⁰⁶ 2015 Open Internet Order, *supra* note 85, 19833 ¶ 544.

²⁰⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

²⁰⁸ See *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (holding that the government may not elevate the voices of certain speakers over other segments of society).

²⁰⁹ *Crony Capitalism*, INVESTOPEDIA, <http://www.investopedia.com/terms/c/cronycapitalism.asp> (last visited Apr. 1, 2017).

²¹⁰ George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. AND MGMT. SCI. 3, 4 (1971) (“The state has one basic resource which in pure principle is not shared with even the mightiest of its citizens: the power to coerce.”).

²¹¹ *Id.*

capitalism.²¹²

The 2015 Order plants the seeds of regulatory ivy necessary to bind together the government with big BIAS providers and Internet giants. In addition to its outright bans on paid prioritization, blocking, and throttling, the 2015 Order includes a mandate to BIAS providers to refrain from “unreasonably interfer[ing] with or unreasonably disadvantag[ing]” the access or use of BIAS infrastructure by edge providers and end users.²¹³ The reasonability of any practices challenged under the rule are to be determined on a case-by-case basis.²¹⁴ The FCC claims this broad standard is for the purpose of “protect[ing] free expression” and promoting innovation without harm to end users and edge providers.²¹⁵ However, this expansion of government will only serve to encourage the development of crony capitalism. Based on the theory of “regulatory capture,”²¹⁶ scholars have found regulations initially implemented with the public interest in mind “tend to be captured by the industries they were established to regulate”²¹⁷

The 2015 Order’s broad language allows for too much opinion and interpretation of broadband firms’ business practices as they relate to network traffic management of content.²¹⁸ The FCC has explicitly left to itself the responsibility of determining, “on a case-by-case basis, practices that unreasonably interfere with or unreasonably disadvantage the ability of consumers to reach the Internet”²¹⁹ Thus, determinations of which BIAS provider actions violate the “no unreasonable interference or unreasonable disadvantage standard” will depend, in great part, upon the input of lawyers and advisors to the Commission.²²⁰ Naturally, the larger BIAS providers will easily be able to afford the legal and political manpower necessary to sway the Commission into coming to a decision that will be economically beneficial for them and disadvantageous to their competitors. Even at the dawn of the FCC’s efforts to implement net neutrality regulations in 2010, Commissioner Robert McDowell foresaw the potential for enabling crony capitalism among BIAS providers:

²¹² Randall G. Holcombe, *Crony Capitalism: By-Product of Big Government*, 17 INDEP. REV. 541, 549 (2013) (“The more pervasive government regulation is in an economy, the more important engagement in the political process to try to steer regulatory benefits favorably will be for the profitability of business.”).

²¹³ 2015 Open Internet Order, *supra* note 85, 19740 ¶ 21.

²¹⁴ *Id.* at 19756 ¶ 135.

²¹⁵ *Id.* at 19740 ¶ 22 (“This ‘no unreasonable interference/disadvantage’ standard protects free expression, thus fulfilling the congressional policy that ‘the Internet offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.’ And the standard will permit considerations of asserted benefits of innovation as well as threatened harm to end users and edge providers.” (alteration in original)).

²¹⁶ See Holcombe, *supra* note 212, at 543; see also Stigler, *supra* note 210, at 3.

²¹⁷ Holcombe, *supra* note 212, at 545.

²¹⁸ See 2015 Open Internet Order, *supra* note 85, at 19756 ¶ 135.

²¹⁹ *Id.*

²²⁰ Alden Abbott, *How Government-Imposed ‘Net Neutrality’ is a Recipe for Crony Capitalism*, DAILY SIGNAL (Mar. 30, 2015), <http://dailysignal.com/2015/03/30/how-government-imposed-net-neutrality-is-recipe-for-crony-capitalism/> (last visited Apr. 1, 2017).

Using these new rules [of the 2010 Order] as a weapon, politically favored companies will be able to pressure three political[ly] appointe[d] [FCC Commissioners] to regulate their rivals to gain competitive advantages. Litigation will supplant innovation. Instead of investing in tomorrow's technologies, precious capital will be diverted to pay lawyers' fees.²²¹

With the codification of the FCC's "no unreasonable interference/disadvantage" standard, it will be a simple matter for Internet giants to "play[] the Washington influence game" to ensure the FCC decides certain behavior, which happens to affect those giants' profitability, is reasonable.²²² On the other side of that coin, those same giants will have the ability to lobby government officials to ensure those officials determine that the practices of their smaller competitors, who do not have the means to play at politics, are unreasonable. This would grant a competitive edge to large BIAS providers, which would have been unobtainable (or at least not as easily attainable) within a broadband market not regulated under Title II.²²³ Such practices may have already begun.²²⁴

D. The economic implications of the 2015 Order will stifle broadband innovation.

The FCC claims the heavy-handed regulation of net neutrality will stimulate broadband access innovation, thus ensuring more consumers and edge-providers are able to receive broadband service.²²⁵ They call this a "virtuous cycle" in which innovations at the edges of the network enhance consumer demand, leading to expanded investments in broadband infrastructure that, in turn, spark new innovations at the edge."²²⁶ The *Verizon* court, in dealing with the 2010 Order, upheld the Commission's "virtuous cycle" theory under the *Chevron* standard.²²⁷ The court determined, based on the record, the Commission had relied on enough economic literature to reach such a conclusion.²²⁸ However, the court's ruling on this point is

²²¹ 2010 Open Internet Order, *supra* note 85, at 18050 (McDowell, Comm'r, dissenting).

²²² Abott, *supra* note 220.

²²³ See Holcombe, *supra* note 212, at 549.

²²⁴ See Brooks Bolick, *Wheeler Tweaks Net Neutrality Plan After Google Push*, POLITICO (Feb. 25, 2015), <http://www.politico.com/story/2015/02/fcc-chairman-tom-wheeler-net-neutrality-plan-google-115502> (last visited Apr. 1, 2017); Chriss W. Street, *Net Neutrality Passes: Everybody Equal, But Google Much More Equal*, BREITBART (Feb. 26, 2015), <http://www.breitbart.com/big-government/2015/02/26/net-neutrality-passes-everybody-equal-but-google-much-more-equal/> (last visited Apr. 1, 2017).

²²⁵ See 2015 Open Internet Order, *supra* note 85, at 19738 ¶¶ 2–4.

²²⁶ See *id.* at 19739 ¶ 7.

²²⁷ *Verizon v. FCC*, 740 F.3d 623, 644–45 (D.C. Cir. 2014) ("The Commission's finding that Internet openness fosters the edge-provider innovation that drives [the] 'virtuous cycle' was likewise reasonable and grounded in substantial evidence. Continued innovation at the edge . . . 'depends upon low barriers to innovation and entry by edge providers,' and thus restrictions on edge providers' 'ability to reach end users . . . reduce the rate of innovation.'" (second omission in original)).

²²⁸ *Id.* at 645.

contestable as there is also plenty of economic evidence, cited by numerous scholars and opponents to the FCC's virtuous cycle theory, demonstrating the great potential net neutrality regulations have for actually stifling innovation in the broadband market.²²⁹ Not only is there evidence contradicting the FCC's assertion that broadband infrastructure innovation will be stimulated by government regulation,²³⁰ there is a severe lack of evidence showing the broadband market has failed in such a way as to justify the need for net neutrality regulation.²³¹ In fact, the 2015 Order arguably seeks to alter the two-sided market of the broadband industry, albeit unintentionally so as to create disincentives to innovation and expansion of the broadband market. Indeed, such regulation may very well work directly against the FCC's statutory mandate from the Telecommunications Act that works to encourage the deployment of advanced telecommunications services to Americans.²³²

i. The 2015 Order's bright-line rules are economically unjustified.

At a glance, it seems promoting an open Internet via the 2015 Order's bright-line rules would result in stimulating BIAS provider infrastructure innovation. After all, it is difficult to argue with the FCC's ornate description of the "virtuous cycle" in the 2010 Order.²³³ The rules are painted with language that implies great positive effects on social and political goals (e.g., protecting free expression²³⁴), but the possibility is very real the rules could have the opposite economic effect of what the FCC intended.²³⁵ It has become increasingly prevalent in recent economic analyses that "strict [net] neutrality . . . would constitute a disincentive for short-term efficiency [in the broadband market] as well as longer-term investment and network innovation"²³⁶

Justification of the FCC's economic regulation of BIAS providers requires two things: "the presence of a non-transitory market failure and . . . [evidence showing] the expected benefits of such regulation exceed the expected [economic] costs."²³⁷ Economists analyze whether those conditions

²²⁹ See generally, e.g., Dennis L. Weisman, *The Political Economy of Net Neutrality Regulation*, 12 ECON. VOICE 13 (2015); Thomas W. Hazlett & Dennis L. Weisman, *Market Power in US Broadband Services*, 38 REV. INDUS. ORG. 151 (2011); Johannes M. Bauer & Jonathan M. Obar, *Reconciling Political and Economic Goals in the Net Neutrality Debate*, 30 INFO. SOC'Y 1 (2014); Dennis L. Weisman & Robert B. Kulick, *Price Discrimination, Two-Sided Markets, and Net Neutrality Regulation*, 13 TUL. J. TECH. & INTEL. PROP. 81 (2010); Ionela Bălătescu, *The Economics of Net Neutrality: Policy Issues*, 6 KNOWLEDGE HORIZONS – ECON. 114 (2014).

²³⁰ See Bauer & Obar, *supra* note 229, at 1.

²³¹ Hazlett & Weisman, *supra* note 229, at 153–54.

²³² See 47 U.S.C. §1302(a) (2012) ("The Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . .").

²³³ See 2015 Open Internet Order, *supra* note 85, at 19740 ¶ 14.

²³⁴ *Id.* at 19756 ¶ 137.

²³⁵ Bauer & Obar, *supra* note 229, at 12 ("[S]trict neutrality regulation most likely would have positive effects on political goals but affect economic goals negatively, as it eliminates some of the market mechanisms that enhance network operation.")

²³⁶ *Id.* at 10.

²³⁷ Weisman, *supra* note 229, at 14.

are met by looking to the market power²³⁸ of BIAS providers.²³⁹ If there is an abnormal concentration of market power, there is a much higher chance of a market failure, which should likely be remedied by government regulation; however, without such a showing, net neutrality regulations begin to take on the appearance of a solution in search of a problem. In his partial concurrence and dissent to the *Verizon* decision, Circuit Judge Silberman acknowledged the Commission's failure in the 2010 Order to "identif[y] any practices of [BIAS] providers as 'barriers to investment . . .'"²⁴⁰ Indeed, the Commission has again failed to cite to any specific examples of such barriers in its 2015 Order, as it only warns of the *potential* and/or *possibilities* of certain network practices resulting in barriers to investment.²⁴¹

ii. Net neutrality rules will compromise the economic growth of the two-sided broadband market.

Through the 2015 Order, the FCC is trying to make it easier for new BIAS providers, edge providers, and end-users to enter and/or access the broadband market. The central premise behind this goal is to promote static efficiency²⁴² in the market. There is an argument this could be beneficial to end-users and edge providers in the short term by granting easier, cheaper access to BIAS provider platforms.²⁴³ Ultimately, however, net neutrality regulation will harm BIAS providers' incentive to more rapidly improve their infrastructure to reach more edge providers and end-users.

To clarify this point, consider the real-world example of the development of DSL²⁴⁴ and cable modems during the 1990s and early 2000s. DSL was initially released by telephone companies to the consumer in 1989, and its use in American households grew, slowly replacing dial-up connections.²⁴⁵ Between 1999 and 2002, however, cable modems were released as another option for Internet service. By the first quarter of 2003,

²³⁸ An industry player is said to have market power when it can keep its prices "above competitive levels for a significant period of time." Hazlett & Weisman, *supra* note 229, at 154.

²³⁹ See generally, e.g., Weisman, *supra* note 229; Hazlett & Weisman, *supra* note 229; Weisman & Kulick, *supra* note 229.

²⁴⁰ *Verizon v. FCC*, 740 F.3d 623, 661 (D.C. Cir. 2014) (Silberman, J., dissenting).

²⁴¹ See 2015 Open Internet Order, *supra* note 85, at 19754 ¶ 126 (discussing only how commenters argue paid prioritization could introduce barriers that may harm innovation and competition); *id.* at 19777 ¶ 275 (discussing the FCC's authority under section 706 to act in a matter to regulate methods that would remove barriers to infrastructure investment); *id.* at 19778–79 ¶ 282 (addressing how the 2015 Order is designed to address broadband providers' ability to erect barriers that "harm the virtuous cycle."); *id.* at 19781 ¶ 297 (discussing further how the rules will "remove potential information barriers by ensuring that edge providers have the necessary information to develop innovative products and services . . ."); *id.* at 19818 ¶ 477 (discussing a 2015 Order governing pole attachments and how "[l]eveling the pole attachment playing field for new entrants that offer solely broadband services also removes barriers to deployment and fosters additional broadband competition").

²⁴² Static efficiency concerns the allocation of resources at a given point in time and generally affects short-term economic efficiency. Hazlett & Weisman, *supra* note 229, at 152.

²⁴³ *Id.* at 158.

²⁴⁴ See *supra* Section II.B.3 (discussing classification of DSL services under Title II).

²⁴⁵ Hazlett & Weisman, *supra* note 229, at 158.

“[cable modem] subscribers outnumbered DSL households by nearly two-to-one”²⁴⁶ DSL providers, as common carriers, “faced extensive unbundling obligations,”²⁴⁷ whereas “[c]able operators were unregulated[,] with respect to their data access offerings”²⁴⁸ Put simply, the cable modems were lightly regulated while DSL services were more heavily regulated and their respective rates of economic growth were oppositely affected. This conclusion is further illustrated by the relaxation of regulations governing DSL between 2003 and 2005.²⁴⁹ The deregulation of DSL services resulted in the loss of cable modem’s large market share advantage as DSL rapidly began to add more subscribers.²⁵⁰ The nearly immediate out-pacing of DSL subscriptions by cable modems can be attributed to the fact their services were regulated very differently during that period.²⁵¹

The FCC claims paid prioritization is not a network management practice, but rather, a business practice alone.²⁵² Even with a concession to this point, the FCC is still working against its congressional directive to spur innovation, deployment, and economic growth in the broadband market. By disallowing BIAS providers to enter into paid prioritization agreements, the two-sidedness of the broadband market is being altered in such a way as to stifle growth in the industry.

Two-sided markets consist of two participants interacting over a third-party platform, whose goal is to entice those participants into utilization of their platform; platforms entice participants through pricing of access/membership to the platform and its benefits.²⁵³ Edge providers and end users each find value in the transactions they conduct over the BIAS platform. Since the sensitivity of each party to the price of access or utilization can be different, the BIAS platform’s value ultimately depends upon the total price level of the market and how that total price is allocated between the two sides.²⁵⁴ The optimal price allocation in a two-sided market depends upon the elasticity of the price range the platform can offer to each side. In the case of BIAS platforms, this means the optimal total value between edge providers and end users can only be achieved when BIAS providers are able to affect the prices for edge providers to utilize their infrastructure. Put more simply, there is a “seesaw” effect on the price

²⁴⁶ *Id.*

²⁴⁷ Hazlett & Weisman, *supra* note 229, at 158. Unbundling obligations are a regulatory practice whereby market competitors are allowed access to incumbent market participants’ technological facilities. *See, e.g.*, 47 U.S.C. § 251(c)(3) (2012).

²⁴⁸ Hazlett & Weisman, *supra* note 229, at 158.

²⁴⁹ *Id.* at 158.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² 2015 Open Internet Order, *supra* note 85, at 19740 ¶ 18.

²⁵³ Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. ECONOMICS 645, 645 (2006).

²⁵⁴ Weisman & Kulick, *supra* note 229, at 90.

allocation between edge providers and end users.²⁵⁵ When BIAS providers are able to engage in practices like paid-prioritization of edge providers like Netflix or Amazon, it brings down the cost of access/membership for end users and allows the BIAS platform to turn a profit on facilitating the transaction between the two. The profit can then be invested in improving broadband infrastructure to reach and provide better service to more Americans and accomplish the objective of the Telecommunications Act.²⁵⁶ By prohibiting the practice of paid prioritization, the FCC has effectively truncated BIAS providers' returns on their infrastructure investments.²⁵⁷ This truncation limits a BIAS provider's ability to remain financially viable over time and actually creates an incentive to penny-pinch rather than invest and innovate, because without profit, there can be no effective investment.

IV. CONCLUSION

The 2015 Order's bright-line rules against paid-prioritization, blocking content, and throttling content should be rejected by the judiciary. This Comment has articulated four primary arguments as to why the judiciary should strike down the 2015 Order. First, the Internet, as an enhanced services technology, simply cannot conform to Title II common carrier regulation and obligations. The Internet's functional structure precludes it from a realistic Title II reclassification. Second, BIAS providers are legally protected under the First Amendment's Press Clause as conduits that engage in *and* transmit speech, just like other forms of mass media communications which are shielded by the Press Clause. It is unconstitutional for the FCC to institute a governmental regulation that requires BIAS providers to carry all lawful content submitted to them by edge providers, because it deprives BIAS providers from exercising their protected editorial discretion. Additionally, imposition of these rules also constitutes impermissible government discrimination amongst speakers by privileging the speech of edge providers over that of BIAS providers. Third, the 2015 Order presents a very real danger of regulatory capture of the FCC by larger BIAS providers and corporate Internet giants. If such a regulatory capture were to occur, the FCC's entire purpose in issuing the 2015 Order would be rendered moot as the "open Internet" would no longer have the promise of free marketplace sanctions to punish companies who abusively exercise whatever "gatekeeper" control they may have over their subscribers. Finally, the bright-line rules alter the two-sided market of the broadband industry in a way that is highly

²⁵⁵ See Rochet & Tirole, *supra* note 253, at 659 (“[The] ‘seesaw principle’: a factor that is conducive to a high price on one side, to the extent that it raises the platform’s margin on that side, tends also to call for a low price on the other side as attracting members on that other side becomes more profitable.”).

²⁵⁶ See Weisman & Kulick, *supra* note 229, at 92 (“The higher the price elasticity of broadband access, the more pronounced [the seesaw] effect will be in moving towards universality of broadband subscription.”).

²⁵⁷ See Weisman, *supra* note 229, at 15.

likely to result in stifling investment and innovation in the broadband market. The 2015 Order is impractical, illegal, politically dangerous, and economically unsound; therefore, the judiciary should reject it.