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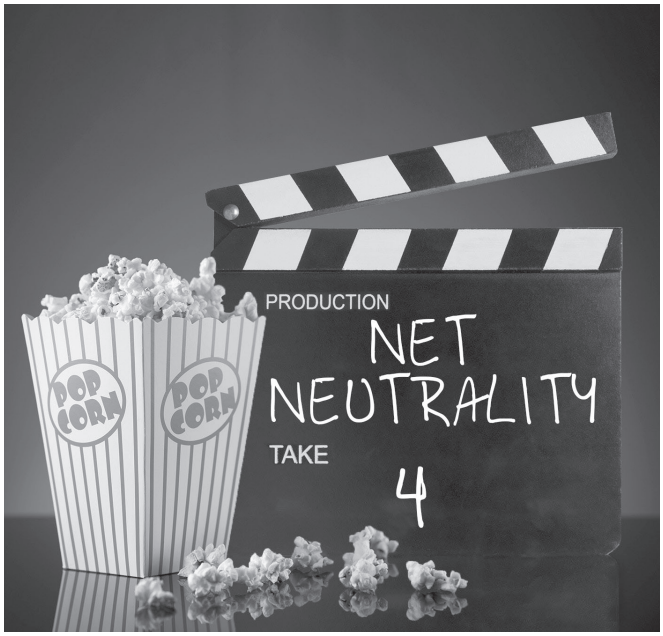
Net Neutrality: Take 4!

By Joe Cosgrove Jr.

The latest episode in the long-running "Net Neutrality" (NN) series was recently released for our binge-viewing pleasure. The D.C. Circuit Court of Appeals authored its fourth script in this highly watched and controversial series.[1] In *Mozilla v. FCC*, the court largely upheld the Federal Communications Commission's (FCC or Commission) "Restoring Internet Freedom Order" (RIFO or 2018 Order) of 2018[2] with four exceptions. The court upheld the classification of broadband internet access service (BIAS) as an "information service" under Title I[3] but remanded on three discrete issues and vacated the FCC's Preemption Directive. The likely "net" effect of this Opinion will be to prolong this series for one or more viewing seasons at regulatory, judicial, and legislative theatres (or streaming services) near you.

Before exploring the twists and turns of this latest dramatic episode, a brief recap of prior episodes may prove helpful.



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Origin Story and Prior Episodes

What is "Net Neutrality"?[4] This "non-partisan" sounding phrase seems like it should be easy to define. But as Professors Benjamin and Speta have explained, a consensus on the definition and associated law and policy have proven to be complicated and challenging.[5]

Cosgrove

One view of NN is that broadband service providers should charge consumers only once for internet access, not favor one content provider over another, and not charge content providers for sending information over broadband lines to end users.[6]

Benjamin and Speta summarize the basic "pro" and "con" arguments regarding NN. NN supporters say "tiering" of service quality would lead to "pay for play" and the degradation of the public internet as the focus turns to "private" pay-to-play networks (i.e., better quality for those that pay).[7] On the other hand, NN opponents argue the ability to charge content providers imposes costs on services that require extra network costs and assure a level of quality certain providers need.[8] In addition, NN opponents argue that charging for tiers of

continued on page 3

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service will foster innovation and provide revenue for investment in high-speed networks.

As a predicate to the first court decision on NN, the FCC (via then-Chairman Powell) issued a "Policy Statement" in 2005, noting the FCC's "ancillary jurisdiction" authority to "encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet."[9] The Policy proclaimed that consumers are entitled to open content, open applications, open interconnection, and open competition.[10]

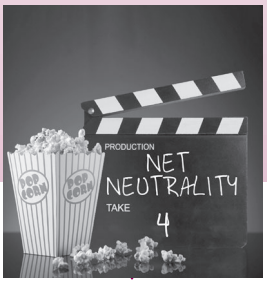
Comcast v. FCC (NN Episode 1)

In 2007 a dispute arose when some subscribers discovered that Comcast was interfering with their "peer-to-peer" (i.e., sharing files) networking applications *(*e.g., *Bit Torrent)*. The complainants argued that Comcast violated the Policy Statement of 2005. Comcast responded that it needed to manage scarce network capacity and that the Policy Statement was not "law."[11] The FCC relied on 47 U.S.C. § 154(i)[12] as a source of "ancillary" authority and attempted to compel Comcast (i.e., the "broadband provider") to comply with its internet practices.

In 2010, the D.C. Court of Appeals applied the two-part test in *American Library Association v. FCC*[13] as to when the agency "may exercise ancillary jurisdiction":

> (1) the Commission's general jurisdictional grant under Title I covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities.[14]

A little neglect may breed great mischief.
—Ben Franklin, as quoted by the FCC



The court rejected the FCC's arguments because the FCC had not tied the ancillary authority over Comcast's internet service to any "statutorily mandated responsibility" or an "express statutory delegation." This case and its ancillary jurisdiction analysis will play a lead role in *Mozilla*.

Verizon v. FCC (NN Episode 2)[15]

The court next dealt with NN in a case reviewing the FCC's *Open Internet Order* from 2010.[16] The FCC had primarily relied on section 706[17] of the Telecommunications Act to establish "prophylactic rules" that applied to both fixed and mobile broadband platforms: transparency requirements regarding network management, anti-blocking, prohibition on "impairing or degrading" content/applications/services, and an antidiscrimination requirement.[18]

On review, the court found that section 706 gave the FCC authority to enact internet rules. But the court vacated some of the rules (e.g., antidiscrimination/anti-blocking) because the FCC had classified broadband as an "information service" and the Telecommunications Act prohibits applying *common carrier* regulations to such services. The court rejected Verizon's argument that section 706 is a "statement of policy." The court held that the FCC offered a "reasoned explanation for its changed understanding of section 706(a)" and the new interpretation is reasonable considering they were dealing with an ambiguous statute.

USTA v. FCC (NN Episode 3)[19]

After this mixed result, the FCC went back to the writers' room and came up with a new set of rules in 2015 in the "Title II Order" (or Open Internet Order).[20] The FCC proposed a "combination" approach—relying on section 706 and "forbearance" of twenty-seven provisions of Title II and 700 rules. This approach was described as a "light-touch" regulatory framework for the twenty-first century and specifically "eschews" future use of industrywide rate regulation. The FCC relied on *Brand X* for authority to change its interpretation to find that broadband internet access service (BIAS) is a "telecommunications service" under 47 U.S.C. §§ 153(50) and (53).

The FCC applied three "bright-line" rules to both fixed and mobile BIAS: no blocking (case-by-case), no throttling, and no paid prioritization. The FCC also issued a "General Conduct Rule"—quoting Ben Franklin, "a little neglect may breed great mischief"—and kept an "enhanced transparency" rule.

For the third time in seven years, the court's docket involved a review of the FCC's efforts to deal with NN. The court upheld the FCC's "combination approach." The court flatly rejected all opposing arguments challenging the FCC's order—that the FCC lacked authority to reclassify broadband as a telecommunications service; if it did, FCC failed to adequately explain why it had reclassified; and to do so the FCC had to determine broadband providers were common carriers. The court found that the FCC satisfied the two-part *Chevron*[21] test and met the criteria for forbearance under 47 U.S.C. § 160(a)(1)–(3).

Mozilla v. FCC (NN Episode 4)[22]

This series took another dramatic twist in 2018 when the FCC did another regulatory flip-flop on NN with Ajit Pai occupying the chair's seat at the dais (with his very large coffee mug). The FCC issued an order to "end utility-style regulation of Internet in favor of market-based policies" and called it the "Restoring Internet Freedom Order" (RIFO or 2018 Order).[23] The vote was three to two along party lines. The RIFO restored BIAS[24] to the Title I *information service* classification and established a "light-touch" framework to promote "investment and innovation."[25]

The RIFO required internet service providers (ISPs) to disclose (but did not prohibit) blocking, throttling, affiliated prioritization, paid prioritization, congestion management practices, and commercial terms. The RIFO eliminated the "General Conduct Rule" as being unnecessary and too vague.[26]

Numerous petitioners consisting of internet companies, nonprofits, and state and local governments challenged the RIFO. The case (consolidated with several other challenges) was argued before a panel of Circuit Judges Millett and Wilkins and Senior Circuit Judge Williams.[27]

The *Mozilla* opinion of 2019 was issued *per curiam*, though each judge exercised his or her editorial influence through concurring and/or dissenting opinions.[28]

In a dramatic twist in 2018, the FCC did another regulatory flip-flop on NN.

Broadband Internet Classification, *Brand X*, and DNS and Caching

The court approached the key issue of whether the FCC lawfully classified BIAS "through the lens of . . . *Brand X*," which upheld the FCC calling cable modem/broadband an "information service,"[29] which is defined in 47 U.S.C. § 153(24) as:

> The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.[30]

The FCC primarily hung its argument on two information-processing features that are functionally integrated with BIAS, Domain Name Services (DNS) and caching.[31] The court's review was conducted per the two-step *Chevron* test, where a court defers to the agency's interpretation of an ambiguous statute if the construction is reasonable.[32]

The court noted that the Supreme Court in *Brand X*[33] concurred in the FCC's argument that DNS[34] and caching[35] could be relied upon to classify a service (there, cable modem) as an "information service."[36] Indeed, the Supreme Court endorsed the FCC's position that DNS and caching are "inextricably intertwined" with high-speed transmission.[37] The FCC said that DNS is "indispensable to ordinary users as they navigate the Internet."[38] The court held the FCC's reasoning in the 2018 Order "tallies with the line of argument in *Brand X*."[39]

Petitioners raised a host of objections to the classification based on DNS and caching, but the court found them "unconvincing."[40] One of the objections was that DNS and caching should be classified under the "telecommunications management" exception (TME).[41] The court supported the FCC's construction of TME as things that primarily benefit the network provider and not the user (DNS, caching). These include Simple Network Management Protocol and Network Control Protocol.[42] The court found it significant that the information service definition in the Act was "lifted nearly verbatim" from the Modification of Final Judgment (MFJ). Thus, the court found compelling the analysis of Judge Greene in assessing the MFJ's equivalent of TME in response to whether the BOCs could offer relay services for the hearing impaired. The court found Judge Greene's analysis supported the FCC's position on DNS and caching.[43] Moreover, the court found it very plausible, as argued by the FCC, that an expanded view of the TME could "swallow" the information services category.[44]

The court also rejected other challenges to the DNS and caching findings, including that users may obtain DNS from providers other than their ISPs and that caching is not indispensable.[45] The court pointed to *Brand X* as already determining that DNS and caching were information services functionally integrated with internet access service. The court was also persuaded that the FCC was aware of alternative providers but found that the vast majority of users rely on DNS from their ISP.[46]

Mobile Broadband Classification

In order to have a uniform approach to broadband services, the FCC took a policy-driven definitional

approach to classify mobile broadband as "private mobile service."[47] Otherwise, as a "commercial mobile service," it would be subject to common carriage treatment. The FCC desired consistency in treatment between the fixed and mobile BIAS under Title I. The court once again upheld this approach under *Chevron*.

The petitioners raised several arguments opposing this classification, including that mobile broadband is the functional equivalent of commercial mobile service (CMRS).[48] The court found various rebuttals by the FCC persuasive, including that "Consumers purchase mobile broadband to access the internet, on-line video, games, search engines, websites . . . ," whereas consumers buy mobile voice service to make calls. In addition, in supporting its "non-substitutability" argument, the FCC pointed to the price gap between voice/text plans and mobile broadband plans.[49]

Section 706 Authority, Section 257, and the 2018 Order's Transparency Requirements

Petitioners' multiprong attack continued with arguments that the FCC could have addressed the harms of blocking and throttling and issued rules under section 706 of the Telecommunications Act (e.g., forbearance), rather than moving to the "information service" decision.[50] The FCC said it viewed section 706 as "exhorting" the Commission to exercise market-based or deregulatory authority and not as an independent grant of regulatory authority.[51] The court applying *Chevron* agreed with the FCC's reading of section 706.[52]

The petitioners' next arrow was that the FCC did not have authority to issue the "transparency rule"[53] under 47 U.S.C. § 257[54] but should have used section 706. The court rejected this attempt as well, finding the statute ambiguous and the FCC met the *Chevron* test.[55]

Arbitrary and Capricious Challenges

The court then addressed several "arbitrary and capricious" challenges to the 2018 Order. The FCC tried to shield its entire Order from scrutiny by "weight of its statutory interpretation alone."[56] The court rejected this argument. The court explained that the FCC could advance a reasonable interpretation under *Chevron* but still have aspects of the decision fail the arbitrary and capricious test under the Administrative Procedure Act.[57] Unfortunately for the Commission, this was a harbinger of several adverse findings.[58]

The court said the FCC at times "seemed to whistle past the graveyard" on the issue of pole attachments.

Public Safety

Government petitioners successfully challenged the FCC's failure to consider the "public safety" implications for the change in BIAS classification as being arbitrary and capricious.[59] The court noted that Congress created the Commission for certain purposes, including "promoting safety" through the use of wire and radio communications.[60] This duty is so fundamental that failure to consider the issue is arbitrary and capricious.[61] Government entities like Santa Clara County and the California Public Utility Commission raised issues of internet-related warning systems during emergencies if there were blocking or throttling of emergency communications.[62] The court found the FCC's and supporting intervenors' rationalizations on the lack of specificity in addressing public safety wholly lacking merit.[63]

Pole Attachments

The government petitioners found another winning argument on the issue of "pole attachments" because the classification of BIAS as an information service removed it from the "pole attachment" regulations of Title II.[64] The court remanded on this issue because the FCC did not adequately address how the reclassification of broadband would impact the regulation of pole attachments.[65] The key statute, 47 U.S.C. § 224, applies to attachments by *cable television systems and telecommunications service providers*, and it does not speak to information services.[66] The court said the Commission at times "seemed to whistle past the graveyard" on this issue using platitudes that pole owners should not use the 2018 Order as pretext to thwart broadband providers from attaching equipment.[67] The court observed that the issue was particularly problematic for providers of stand-alone broadband services.[68]

Lifeline Program

Government petitioners hit the "trifecta" with their challenge that the FCC had brushed off their argument that the reclassification removed the statutory basis for including broadband in the Lifeline Program (which subsidizes low-income consumers' access to communications).[69] Broadband had been added to the Lifeline Program in 2016.[70] But to receive Lifeline support, an entity must be an "eligible telecommunications carrier," which only extends to "common carriers" under Title II.[71] Thus, the court remanded and said that "the

decision to strip it of Title II common-carrier status . . . facially disqualifies broadband from inclusion in the Lifeline Program."[72]

Preemption

Perhaps the most interesting scene in Episode 4 involves preemption. This issue prompted conflicting views on the panel. The *Mozilla* opinion vacates the portion of the 2018 Order that preempts "any state or local requirements that are inconsistent with [its] deregulatory approach."[73] The court labels the latter the "Preemptive Directive."[74] The court outlined the FCC's basic rationale of wanting to establish a "uniform set of federal regulations" and not a "patchwork" that includes various state and local regulations.[75] Thus, the FCC proclaimed that the 2018 Order

> preempt[s] any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order.[76]

The government petitioners played another winning hand arguing that the Preemptive Directive exceeded the Commission's statutory authority.[77] The majority found that the Commission would have needed either "express or ancillary authority" to issue the Preemptive Directive and that it had neither.[78] The majority said that the FCC has express authority to regulate in Title II (common carrier/telephony), Title III (broadcast and cellular), and Title VI (cable). Broadband is not within these three titles.[79] Moreover, the FCC does not have "ancillary authority" under Title I (47 U.S.C. § 154(i)) because it is not an independent grant of authority and must be tied to Title II, III, or VI.[80]

The FCC then moved to its "impossibility exception" and "federal policy of nonregulation for information services" arguments. Both were rejected.[81] The impossibility exception arose from precedent like *Louisiana PSC*, which reasoned that "the realities of technology and economics" sometimes hinder the statute's "parceling of responsibility."[82] As it found the latter argument unpersuasive, the court was equally unimpressed with the "federal policy" arguments stating the power to preempt cannot be the "mere byproduct of self-made agency policy."[83] The court cited *Louisiana PSC* and other precedent as rejecting the FCC's argument that it should be entitled to preempt "inconsistent state regulation" because it "frustrates federal policy."[84]

The FCC also could not carry the day with a "conflict preemption" argument either. The court simply pointed to oral argument where the Commission confirmed that the Preemption Directive's plain language is "broader than ordinary conflict preemption."[85] As would be expected, the court also said that "conflict-preemption analysis 'involves fact-intensive inquiries,'" which were not present before the court in this appeal.[86]

The Preemptive Directive was vacated.[87] The issues of public safety, pole-attachment regulation, and the Lifeline Program issue were remanded, but the court did not vacate the 2018 Order in its entirety.[88]

Stick around for the *Mozilla* credits, as Judges Millett, Wilkins, and Williams all wrote their own opinions.

Mozilla "Credits"

In this *Mozilla* episode, it is worthwhile to "stick around for the credits," as Judges Millett, Wilkins, and Williams all wrote their own opinions.

Millett focused on the central issue of the FCC's reliance on DNS and caching to support its information service classification. Judge Millett noted that the controlling precedent of *Brand X* was decided fifteen years ago and the market and technology for broadband access has changed dramatically since then.[89] Judge Millett said that the court was bound by the Supreme Court precedent, but DNS is no longer limited to being provided by the consumer's ISP provider and caching does not work when users employ encryption.[90] He argued that the Commission's reliance on DNS and caching are "blinkered" off from modern broadband reality.[91] Millett's opinion was in reality a missive to the Supreme Court (and/or Congress) to "bring the law into harmony with the realities of the modern broadband marketplace."[92]

Judge Wilkins's concurring opinion was to the point, joining the court's opinion and agreeing with Judge Millett that broadband technology and marketing has changed since 2005 but revisiting *Brand X* is a task for the Supreme Court.[93]

Judge Williams then volleyed a robust concurrence/dissent. Judge Williams led off by arguing that the Commission met the "impossibility exception" and should be allowed to preempt state regulation that frustrates lawful federal authority.[94] Nor did he think that the Preemption Directive's language is broader than has been used under this exception.[95]

Judge Williams stated that a federal agency's preemption authority need not be expressly granted:

> If [the agency's] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.[96]

Judge Williams also attempted to leverage *Chevron*'s statement that where "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority."[97] He was also dismissive of the majority's wait for the "case-by-case" conflict litigation approach and the ignoring of the Commission's finding that an ISP "generally could not comply with state or local rules for intrastate communications without applying the same rules to interstate communications."[98] Judge Williams concluded with a dissenting statement that the net result of the majority makes no sense:

> My colleagues and I agree that the 1996 Act affords the Commission authority to apply Title II to broadband, or not. Despite the ample and uncontested findings of the Commission that the absence of preemption will gut the *Order* by leaving all broadband subject to state regulation in which the most intrusive will prevail . . . and despite Supreme Court authority inferring preemptive power to protect an agency's regulatory choices, they vacate the preemption directive. Thus, the Commission can choose to apply Title I and not Title II—but if it does, its choice will be meaningless. I respectfully dissent.[99]

Will the NN Series Be Renewed?

During the pendency of the challenge to RIFO, there has been a flurry of both federal[100] and state[101] NN legislation filed (and in some cases enacted) with the intent to reverse the RIFO and impose the Title II common carrier approach. In addition, Democratic contenders for the presidency have been outspoken on this issue, promising to change the paradigm back to the Obama administration's approach. Parties to the *Mozilla* case may seek rehearing and/or further appeal to the Supreme Court.[102]

Thus, like the growing number of streaming services, with the court's "mixed bag" ruling, we are likely to see even more state regulation on NN—and resulting challenges at the FCC and in courts. The result will be many more episodes for regulatory fans in this long-running series.

Net Neutrality remains a thriving series, and even though newer debates/series of note are coming to the forefront—privacy, security, the size and power of social media companies, antitrust, and possible Section 230 reform—it may be difficult to move NN off its perch at the top of the regulatory box office. inf

Endnotes

1. Mozilla Corp. v. Fed. Commc'ns Comm'n (*Mozilla*), No. 18-1051 (D.C. Cir. Oct. 1, 2019).

2. *In re* Restoring Internet Freedom, 33 FCC Rcd. 311 (2018) [hereinafter *2018 Order*].

3. As will be seen, the FCC has jumped back and forth from classifying BIAS as either a "telecommunications service" under Title II of the Communications Act or an "information service" under Title I.

4. Timothy Wu is generally credited with coming up with the phrase "Net Neutrality." Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. Telecomm. & High Tech. L. 141 (2003), *available at* SSRN: https://ssrn.com/abstract=388863 or http://dx.doi.org/10.2139/ssrn.388863.

5. Stuart Minor Benjamin & James B. Speta, *Chapter 14: Regulating Broadband Networks*, *in* Internet and Telecommunication Regulation 740 (Carolina Academic Press 2019).

6. Robert W. Hahn & Scott Wallsten, *The Economics of Net Neutrality*, 3 Economists' Voice 1 (2006), http://courses.ischool.berkeley.edu/i205/s10/readings/week12/hahn-wallsten-neutrality.pdf.

7. Benjamin & Speta, *supra* note 5, at 740.

8. *Id.*

9. *In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd. 14986 (2005).

10. The origin story of NN arguably predates this Policy Statement. The FCC has long faced decisions on how to classify and treat new services. For example, the disruptive service of cable challenging the broadcast incumbents led to a string of cases that, among other things, set out the parameters of "ancillary authority." United States v. Sw. Cable Co., 392 U.S. 157 (1968); FCC v. Midwest Video Corp. (*Midwest Video II*), 440 U.S. 689 (1979); AT&T Corp v. City of Portland, 216 F.3d 871 (9th Cir. 2000); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (*Brand X*).

11. Comcast v. FCC, 600 F.3d 642, 645 (D.C. Cir. 2010) (1st NN).

12. 47 U.S.C. § 154(i) provides: "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."

13. 406 F.3d 689 (D.C. Cir. 2005).

14. *Id.* at 692.

15. Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014) (NN Episode 2).

16. *In re* Preserving the Open Internet, 25 F.C.C.R. 17905 (2010).

17. Section 706 (47 U.S.C. § 1302) provides:

> The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and

timely basis of advanced telecommunications capability to all Americans (including, in particular elementary and secondary schools and classrooms) 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.

18. But the FCC did not expressly state its rules forbid broadband providers from granting preferred status to those who pay for such benefits. Instead, at this point in time, the FCC warned that it is "unlikely that pay for priority" would satisfy a nondiscrimination standard (but did not even apply the nondiscrimination standard to mobile providers because it was deemed to be a more competitive market).

19. U.S. Telecomm Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016); U.S. Telecomm Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016), *reh'g denied*, 855 F.3d 381 (D.C. Cir. 2017).

20. *In re* Protecting & Promoting the Open Internet, 30 FCC Rcd. 5601 (2015).

21. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984). The ongoing debate over the continued viability of *Chevron* is beyond the scope of this article.

22. Mozilla Corp. v. Fed. Commc'ns Comm'n, No. 18-051 (D.C. Cir. Oct. 1, 2019)..

23. *2018 Order*, *supra* note 2.

24. BIAS means "mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service." BIAS includes "fixed" and "mobile" technologies. *Id.* ¶¶ 21, 22.

25. *Id.* ¶¶ 1, 2. RIFO also classified mobile broadband as a "private mobile service." *Id.* ¶¶ 26-64, 65–85.

26. *Id.* ¶¶ 4, 115.

27. Argued Feb. 1, 2019.

28. Decided Oct. 1, 2019.

29. Mozilla Corp. v. Fed Commc'ns Comm'n, No. 18-1051, at 13 (D.C. Cir. 2019).

30. The Act defines "telecommunications service" (as distinct from "telecommunications," *see* 47 U.S.C. § 153(53)), as follows:

The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

47 U.S.C. § 153(50).

31. *Mozilla*, No. 18-1051, at 15.

32. *Id.*

33. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005),

34. DNS is the internet's system for converting alphabetic names into numeric IP addresses. *Definition of: DNS*, PC Mag.: Encyclopedia, https://www.pcmag.com/encyclopedia/term/41620/dns.

35. Caching (pronounced "cashing") is the process of storing data in a cache. *Cache*, Techopedia, https://www.techopedia.com/definition/3553/cache.

36. *Mozilla*, No. 18-1051, at 16.

37. *Id.* at 18.

38. *Id.* at 20 (citing *2018 Order*, *supra* note 2, ¶ 34 (quoting AT&T Comments at 73, J.A. 189)).

39. *Id.* at 19.

40. *Id.* at 21.

41. *Id.* at 22.

42. *Id.* at 24–25.

43. *Id.* at 26 (citing United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131, 225–232 (D.D.C. 1982), and United States v. W. Elec. Co., 714 F. Supp. 1, 3, 5 (D.D.C. 1988), *aff'd in part, rev'd in part*, 900 F.2d 283 (D.C. Cir. 1990)).

44. *Id.* at 28.

45. *Id.* at 40.

46 *Id.* at 41 (citing *2018 Order*, *supra* note 2, ¶ 34 & n.109).

47. *Id.* at 46.

48. *Id.* at 62. CMRS is defined in 47 U.S.C. § 332(d)(3).

49. *Mozilla*, No. 18-1051, at 64 (citing *2018 Order*, *supra* note 2, ¶ 85).

50. *Id.* at 66.

51. *Id.* at 66 (citing *2018 Order*, *supra* note 2, ¶ 270).

52. *Id.* at 67.

53. The "transparency rule" provides that "[a]ny person providing broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient to enable consumers to make informed choices . . . ." *2018 Order*, *supra* note 2, ¶ 215.

54. 47 U.S.C. § 257 deals with market barrier proceedings and reports to Congress.

55. *Mozilla*, No. 18-1051, at 69–70.

56. *Id.* at 73.

57. *Id.*

58. It should be noted that in this lengthy decision, there were several challenges under this category that are not discussed herein such as harm to edge providers, reliance on antitrust and consumer protection laws by the Commission (which "barely" survived review, *id.* at 93), cost-benefit analysis, and data roaming rates. In this section, the focus is on the areas of adverse findings to the Commission.

59. *Id.* at 93.

60. *Id.* (citing 47 U.S.C. §§ 151 and 615 (wireless)).

61. *Id.* at 94.

62. *Id.* at 94-96.

63. *Id.* at 97–100.

64. *Id.* at 104.

65. *Id.* at 104–05.

66. *Id.* at 106.

67. *Id.* at 107 (citing *2018 Order*, *supra* note 2, ¶ 196).

68. *Id.* at 108.

69. *Id.* at 109.

70. *In re* Lifeline & Link UP Reform and Modernization, 31 FCC Rcd. 3962, 3964 (2016).

71. 47 U.S.C. §§ 254(e), 214(e).
72. *Mozilla*, No. 18-1051, at 111.
73. *Id.* at 121 (citing *2018 Order*, *supra* note 2, ¶ 194).
74. *Id.*
75. *Id.* at 121–22.
76. *Id.* at 122 (citing *2018 Order*, *supra* note 2, ¶ 195).
77. *Id.*
78. *Id.* at 124.
79. *Id.* .
80. *Id.* at 125 (citing Comcast Corp. v. FCC, 600 F.3d 642, 654 (D.C. Cir. 2010)).
81. *Id.* at 126.
82. *Id.* at 126–27(citing La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 360 (1986)).
83. *Id.* at 130.
84. *Id.* at 133 (citing *La. Pub. Serv. Comm'n*, 476 U.S. at 368).
85. *Id.* at 135 (citing Oral Arg. Tr. 171).
86. *Id.* at 136 (citing Alascom, Inc. v. FCC, 727 F.2d 1212, 1220 (D.C. Cir. 1984); *id.* at 144–45.
87. *Id.* at 146.
88. *Id.* at 145.
89. Mozilla Corp. v. Fed. Commc'ns Comm'n, No. 18-1051, at 1 (D.C. Cir. Oct. 1, 2019) (Millett, J., concurring).
90. *Id.* at 7–8.
91. *Id.* at 9.
92. *Id.* at 16.
93. Mozilla Corp. v. Fed. Commc'ns Comm'n, No. 18-1051 (D.C. Cir. Oct. 1, 2019) (Wilkins, J., concurring).
94. Mozilla Corp. v. Fed. Commc'ns Comm'n, No. 18-1051, at 2 (D.C. Cir. Oct. 1, 2019) (Williams, J., concurring in part and dissenting in part) (citing Pub. Serv. Comm'n of Md. v. FCC, 909 F.2d 1510, 1515 (D.C. Cir. 1990).
95. *Id.* at 3.
96. *Id.* at 4 (citing Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 154 (1982) (quoting United States v. Shimer, 367 U.S. 374, 383 (1961))).
97. *Id.* at 5 (citing Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984)).
98. *Id.* at 20 (citing *2018 Order*, *supra* note 2, ¶ 200).
99. *Id.* at 23.
100. H.R. 1644, "Save the Internet Act of 2019," which declares that the Declaratory Ruling, Report and Order, and Order in the matter of restoring internet freedom that was adopted by the Commission on December 14, 2017 (FCC 17–166), shall have no force or effect. The Act also would restore as in effect on January 19, 2017, the Report and Order on Remand, Declaratory Ruling, and Order in the matter of protecting and promoting the open internet that was adopted by the Commission on February 26, 2015 (FCC 15–24). H.R. 1644 has passed the House as of this writing. https://www.congress.gov/bill/116th-congress/house-bill/1644/text.
101. Over 100 such bills were filed in over 30 states in 2018. Heather Morton, *Net Neutrality Legislation in States*, Nat'l Conf. of State Legislatures (Jan. 23, 2019), http://www.ncsl.org/research/telecommunications-and-information-technology/net-neutrality-legislation-in-states.aspx; Klint Finley, *Can the FCC Really Block California's Net Neutrality Law?*, Wired (Oct. 8, 2018), https://www.wired.com/story/can-fcc-really-block-californias-net-neutrality-law/.

Professor Speta and others have raised the question of whether a "patchwork quilt" of state legislation on NN makes sense. Rachel Sandler, *The FCC's Net-Neutrality Protections Are About to Disappear—But Supporters Are Moving on Multiple Fronts to Put Them Back in Place*, Bus. Insider (Mar. 3, 2018), https://www.businessinsider.com/is-there-hope-for-net-neutrality-2018-2/; Kaveh Waddell & Nat'l J., *The FCC Has Ruled on Net Neutrality; Do States Get a Say?*, The Atlantic (Mar. 3, 2015), https://www.theatlantic.com/politics/archive/2015/03/the-fcc-has-ruled-on-net-neutrality-do-states-get-a-say/458568/.

102. Andrew Wynch, *Exclusive: Bernie Sanders Pledges to Nominate FCC Commissioners Who Will Reinstate Net Neutrality*, Daily Dot (July 30, 2019), https://www.dailydot.com/layer8/net-neutrality-bernie-sanders-2020/; Klint Finley, *Elizabeth Warren Unveils a Plan to Expand Broadband Access*, Wired (Aug. 7, 2019), https://www.wired.com/story/elizabeth-warren-unveils-plan-expand-broadband-access/.