

**A White Paper**  
**A Legal House of Cards**  
**Why the FCC Will Lose in Court on Title II Internet (80%)**

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*Disclosures*

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## Why FCC Will Lose in Court on Title II Internet (80%) – A Legal House of Cards

### I. Summary

The FCC's Open Internet Order, which reclassified the commercial Internet as a Title II utility, is very likely (80%) in the end, to be overturned in court – for a third time.

The FCC's legal theory and many core assumptions are so aggressive, it's clear that the FCC expects, and needs, continual and maximal deference from the court to prevail. The FCC also requires the courts to view the FCC's most aggressive assertion of unbounded authority ever, as a mere administrative interpretation of ambiguous law, and not a political bypass of Congress and the 1996 Telecom Act.

The FCC's case also has so many serious conceptually inter-dependent flaws that it is like a fragile **house-of-cards**, built of flimsy definitional, precedential, and factual assumptions. This means opponents only need to knock down one of the FCC's supporting "cards" for the entire house of cards to collapse. In contrast, the FCC needs every card in its house of cards to withstand scrutiny and remain standing.

Simply the FCC's case is politically strong, but legally weak.

As an analyst, one does not have to see the order's final language to predict with confidence that the FCC's case faces serious legal trouble overall, because the eight big conceptual legal problems spotlighted here are not dependent on the details of the FCC's order. After two FCC-failed court reviews in 2010 in [Comcast v. FCC](#) and 2014 in [Verizon v. FCC](#), and decades of multiple Title II definitional and factual precedents completely contrary to the FCC's current legal theory, the legal field-of-play is much more clear than usual or most appreciate.

Those who take the time to inform themselves of the FCC's obvious and daunting legal problems will come away very-skeptical of the FCC's chances of success after all appeals are exhausted.

I will revisit this Part I analysis to confirm the outcome's likely probability, once the FCC's legal case is known in better detail when the order is made public. However, absent a legal secret "FCC magic wand" yet unknown in this well-trod, high-scrutiny, eighty-year, Title II legal space, the general outcome probability 80% for the FCC to ultimately lose in court -- is unlikely to change much.

### II. Summary of the FCC's Title II Legal House of Cards:

1. FCC's decision is not an administrative interpretation of law but a political bypass of Congress.
2. FCC is not Congress and has no legislative authority to "modernize" communications law.
3. FCC's legal theory is a Rube Goldberg contrivance to manufacture legal authority.
4. FCC's legal theory recognizes no statutory bounds on FCC authority or jurisdiction.
5. FCC reclassification assumes it can overrule legally-settled definitions and findings of fact.
6. FCC asserts authority for an illegal goal; compel zero-price for service with no compensation.
7. FCC is arbitrary & capricious ignoring large reliance interests & need for proportionality.
8. FCC's legal forbearance theory is inherently contradictory and thus arbitrary.

### III. The FCC's Title II Legal House of Cards

#### 1. FCC's decision is not an administrative interpretation of law but a political bypass of Congress

The FCC's assertion of authority to regulate the Internet was overturned a second time in January 2014 by the D.C. Court of Appeals, in [Verizon v. FCC](#). In a response to that decision, FCC Chairman Wheeler [stated](#) February 19, 2014 that the FCC would not appeal and would accept the Court's *"invitation by proposing rules that will meet the court's test for preventing improper blocking of and discrimination among Internet traffic..."* under Section 706 of the Telecommunications Act of 1996.

Thus Chairman Tom Wheeler and his General Counsel Jonathan Sallet originally did not believe in solving the FCC's net neutrality legal authority problem via Title II reclassification. Two months later in late April, FCC Chairman even formally proposed a Chairman's draft NPRM for his fellow commissioners' review that did not propose to reclassify broadband under Title II.

After an intense well-publicized three week lobbying campaign for Title II, the FCC NPRM that passed 3-2 on May 14, 2014, included consideration of Title II reclassification as a potential source of legal authority.

On November 10, 2015, President Obama publicly [said](#) *"I believe the FCC should reclassify consumer broadband service under Title II of the Telecommunications Act,"* which is exactly what the FCC majority voted to do February 26<sup>th</sup>.

The day after the FCC vote, President Obama [sent](#) this thank you note to Reddit users: *"Earlier today, the FCC voted to protect a free and open internet... This would not have happened without the activism and engagement of millions of Americans like you. And that was a direct result of communities like reddit. So to all the redditors who participated in this movement, I have a simple message: Thank you. — President Barack Obama"*

The next day, Politico reported that a DNC fund-raising email went out which [said](#): *"The FCC has approved President Obama's plan to ensure a free and open Internet. If you are reading this, we're guessing you agree that the Internet should be open and free – now say you'll keep fighting for more progress."*

At a minimum this creates the public perception that the President influenced the FCC's decision on what legal theory to adopt to produce what the President [wanted](#): *"the strongest possible rules to protect net neutrality."*

If the FCC decision was not independent of executive branch pressure, it creates a separation of powers concern that the FCC may not be interpreting the law based on its independent role as a creature of

Congress, but as a de facto arm of the Executive Branch in this particular case. The legal problem is the Executive Branch can't effectively legislate and implement the same policy, bypassing Congress' constitutional role.

If the FCC's administrative interpretive objectivity is in serious question in this case, the courts have a constitutional obligation to not defer to a potential-executive branch surrogate's administrative interpretation of the law here, but to conduct their own judicial branch determination of whether or not the FCC's order is legal or not.

Importantly, if the FCC does not enjoy the presumption of [Chevron Deference](#) that the FCC assumes it will enjoy, and desperately needs to enjoy in order to win, the case will be examined on the legal merits, which is where the FCC's case is at its weakest.

## **2. FCC is not Congress and has no legislative authority to “modernize” communications law**

If the FCC is justifying the assertion of FCC Title II authority over the Internet to protect net neutrality and to prevent blocking, throttling and paid prioritization, why is it also asserting new FCC Title II authority over privacy under Section 222, or new FCC universal service authority under Section 254?

If reclassification is a vehicle to resurrect and apply multiple authorities not related to the legal purpose of this case, it implies the FCC is acting in a legislative capacity rather than an administrative one.

Moreover the FCC tellingly defended its order and Title II reclassification by saying that the FCC “*Order will modernize Title II.*” Only Congress can pass legislation to “modernize” eighty-year old law fortified with over a thousand legal precedents.

“Modernization” and the inherent political tradeoffs and new policy decisions that true “modernization” involves, is inherently a legislative update authority and action of Congress, not an FCC administrative expert action.

Under the guise of “*interpreting ambiguous statutes*” the FCC is essentially claiming that previous Congresses envisioned that the FCC had the authority to wholesale reverse over forty years of consistent precedent in order to assert sweeping price regulatory jurisdiction over the entire Internet that the Congress stated in 1996 should be “unfettered by Federal” regulation, so that the FCC, not a future Congress, could pick and choose which industries to apply that new regulatory authority to or not, and to also decide what provisions of Title II should be done and undone in one omnibus legal “modernization” action, and by the way, that the FCC retains the latitude to “change its mind” to reverse, re-reverse, re-re-reverse U.S. Internet authority and policy etc. -- without limit over time.

Let's bring this bypass-of-Congress issue back to a highly-relevant and recent, Supreme Court precedent from last June.

In [Util. Air Reg. Grp. v. EPA](#), The Supreme Court made clear that an agency must be “ground[ed] in the statute” rather than in “reasoning divorced from the statutory text” and that “an agency has no power to ‘tailor’ legislation to bureaucratic policy goals” to create regulation “unrecognizable to the Congress that designed it.”

Sound familiar? The Supreme Court is limiting independent agency latitude to bypass Congress and the law, to implement major policy changes pushed by the Executive Branch, but not directly authorized by Congress. This SCOTUS precedent appears to undercut the FCC’s expectation for strong Chevron Deference.

To win this case, the FCC must prove that this SCOTUS precedent limiting Chevron Deference does not apply to the FCC’s assertion of sweeping Internet authority via Title II reclassification.

### **3. FCC’s legal theory is a Rube Goldberg contrivance to manufacture legal authority**

Why is the FCC’s legal case so exceptionally complex, convoluted, and inherently contradictory? Politics.

No lawyer in their right mind would construct such a caricature of a legal theory of a case like this one, unless they were politically compelled to do so.

Enter Rube Goldberg stage right.

Iconic cartoonist [Rube Goldberg](#), was famous for drawing the most complicated, convoluted solutions to the most simple of problems -- exactly what the FCC is doing here in devising the most complicated and convoluted legal theory to address the simple problem of: does the FCC have the direct legal authority from Congress to ban Internet paid prioritization?

To honor and humble Mr. Goldberg, let’s draw the FCC’s most complicated and convoluted case here in our minds.

Let’s start with the problem to be solved. In [Verizon v. FCC](#) the Court ruled the FCC did not have the authority to ban a two-sided Internet market to impose a permanent zero price for downstream Internet traffic. Visualize a frowning king on a throne waving a scepter at an ISP resulting in gold coins spilling out in the direction of Silicon Valley.

[Verizon v. FCC](#) drew a partial solution under Section 706 that did not allow a permanent ban of paid prioritization, but allowed FCC oversight of individualized bargaining like in its data roaming case. (To provide this partial solution, the court reinterpreted Section 706 to be a pro-regulatory provision not the de-regulatory provision that was written originally by Congress. Mr. Goldberg might draw this fantastical maneuver as a pair of flip-flops flowing through a straw.)

In search of the additional authority to achieve the FCC's holy grail of authority to ban prioritization, the FCC looks to Title II. Mr. Goldberg might draw this part of the visual journey as an unexpected "Amazing Race" set of challenges for the FCC lawyers to try and best the plaintiffs' lawyers.

Part of this Goldberg-ian "Amazing Race" FCC legal journey will be drawn as an obstacle course of nine FCC precedents, [1970](#), [1980](#), [1986](#), [1998](#), [1999](#), [2002](#), [2004](#), [2005](#), and [2007](#), that consistently decided that basic and enhanced services, or telecommunications and information services, were mutually-exclusive service classifications. For each of these precedents the FCC must prove why their interpretation of definitions and facts were wrong and explain with a straight face to the cameras and the audience back home, why they changed their mind on nine foundational precedents.

The Goldberg-ian drawing would then portray a series of Houdini escapes from danger where the FCC successfully makes hundreds of billions of dollars in infrastructure investment reliance interests magically disappear and the FCC magically also convinces the court that a permanent price ban with no cost recovery, via a combination an unprecedented combination of Section 706 and Title II, is legal and not confiscatory. Poof! in a drawn cloud of magical smoke.

Then the Goldberg-ian drawing would depict the FCC's legal gymnastics floor routine of justifying why they asserted jurisdiction over the entire end-to-end Internet fairly, and not arbitrarily or capriciously, and then decided to apply this jurisdiction *selectively* to only one part of the Internet based on market power, but with no formal market power analysis proceeding.

Then the Goldberg-ian drawing would include a depiction of a high-dive where the high-diver does a forward summersault followed immediately by a physics-defying reverse summersault, followed by yet another immediate physics-defying forward summersault to depict the FCC's never-been-tried-before wholesale/partial forbearance theory. That's because the FCC, in asserting Title II authority to reverse its longstanding Internet information services classification for all of Title II, only to reverse that reversal immediately by forbearing from 27 Title II provisions. Follow that highest-degree-of-difficulty-ever high dive?

In the end, the Goldberg-ian drawing depicts an FCC stumbling, tripping and falling flat on its face, well short of the court's "Finish Line" of a legal FCC Title II order.

Simply, what by-the-book court can look at this cartoonish Rube Goldberg theory of the case and imagine that a Congress, eighty or twenty years ago, intended to grant the FCC this open-ended authority to be used in this unimaginably convoluted way?

#### **4. FCC's legal theory recognizes no statutory bounds on FCC authority or jurisdiction**

After consistently deciding that basic and enhanced services, or telecommunications and information services, were mutually-exclusive service classifications in nine FCC precedents over 44 years, in [1970](#),

[1980](#), [1986](#), [1998](#), [1999](#), [2002](#), [2004](#), [2005](#), and [2007](#), the FCC is now asserting the right to redefine information services defined functions to be telecommunications functions under the law.

If the FCC's asserted authority to redefine plain definitions in law, to assert Title II authority, is upheld in court, it can essentially assert jurisdiction over the entire Internet and most everything connected to it.

The same theory the FCC is applying to Broadband Internet Access Services (BIAS), the FCC could reapply to cloud computing, application platforms, websites using CPNI for advertising, etc.

The FCC is also effectively asserting the unfettered authority and discretion to decide what part of the Internet ecosystem is subject to the FCC's Title II authority at what time. Essentially the FCC is asserting maximal regulatory authority to regulate Internet prices, terms and conditions, and maximal discretion to apply it divorced from the definitional constraints Congress wrote into existing law.

Simply, like a king, the FCC is effectively asserting imperial authority, that three votes at the FCC are all that is required to decide what law applies or does not apply to what people, entities, or industries, when and where.

The question the FCC will not want to answer is under the FCC's legal theory, what statute or other entity limits the FCC's authority and jurisdiction and how?

On top of this overreach, the FCC reaches further. The FCC also is asserting apparently statutorily-boundless authority via a new "*Standard for Future Conduct*" to influence and police any potential future behaviors that the FCC may deem in violation of its ever-evolving views on what should and shouldn't be allowable on the Internet.

For movie fans, this is eerily like "pre-crime" regulation made famous in the Spielberg [movie](#) "Minority Report."

From the FCC [summary](#): "*A Standard for Future Conduct -- Because the Internet is always growing and changing, there must be a known standard by which to address any concerns that arise with new practices. The Order establishes that ISPs cannot "unreasonably interfere with or unreasonably disadvantage" the ability of consumers to select, access, and use the lawful content, applications, services, or devices of their choosing; or of edge providers to make lawful content, applications, services, or devices available to consumers. Today's Order ensures that the Commission will have authority to address questionable practices on a case-by-case basis, and provides guidance in the form of factors on how the Commission will apply the standard in practice.*"

Once again, the courts will ask, what are the statutory bounds of the authority that the FCC is asserting over unknown future behavior?

## **5. FCC reclassification assumes it can overrule legally-settled definitions and findings of fact**

In addition to depending on absolute Chevron Deference, the FCC is depending largely on a SCOTUS [precedent](#) that the FCC has the latitude to change its mind.

The implicit and flawed FCC assumption here is that it can “change its mind” about anything, even legally-settled definitions and findings of fact about those definitions. This is some of the thinnest legal ice the FCC hopes to jump up and down on.

In 1996, Congress [defined](#) in law that Title II “Telecommunications” was mutually exclusive from the Title I definition of “Information Service:”

*“TELECOMMUNICATIONS.--The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.”*

*“INFORMATION SERVICE.--The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, 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.”*

Since Congress created these unambiguous mutually-exclusive definitions for information services and telecommunications services in the [1996 Telecom Act](#), the FCC has interpreted them three times in [1998](#), [1999](#), and [2002](#), before the SCOTUS Brand X [opinion](#) in 2004, and three times in [2004](#), [2005](#), and [2007](#), after the SCOTUS Brand X [opinion](#).

At core the FCC’s legal theory demands that everything the FCC has done on this for almost two decades in understanding how the Internet actually technically operates, and in interpreting the parts of the statutory definitions considered unambiguous -- is all wrong and this FCC (under pressure from the President and the Executive Branch) should now be considered “right” on all the technical facts and statutory definitions that were previously legally settled.

What good are FCC legal precedents, if one precedent from a different industry (broadcasting) can be considered to supersede multiple successive Title II precedents?

The court can discern here that the FCC’s position looks more like an arbitrary and capricious, political re-interpretation of the statute for political purposes, than an independent, objective, expert agency legal decision based on the law, precedent and facts.

Further undermining the FCC’s legal case that they have latitude to “change their mind” is that they implicitly are claiming they also can change Congress’ mind for them, by ignoring the 1996 Telecom Act’s clear change in policy from the Title II maximal regulation, towards promoting competition to reduce regulation.

The FCC’s case also completely contradicts the Policy of the United States in [law](#): “to preserve the... competitive free market... Internet... unfettered by Federal and State regulation.”

The FCC order even politically redefines the Internet to not include broadband, when the unambiguous definition of the Internet in the [1996 Telecom Act](#) certainly includes broadband networks: “INTERNET.-- The term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks.”

## 6. FCC asserts authority for an illegal goal; compel zero price for service with no compensation

If one remembers the two months after the [Verizon v. FCC](#) the uproar was all about how the decision would allow Internet “fast lanes” and “paid prioritization” and the whole push for Title II was that it would allow them to ban “paid prioritization.”

*Translation:* “no fast lanes” and “paid prioritization” are politically correct euphemisms for FCC zero-price regulation because the FCC claims it isn’t for Internet price regulation.

To mandate no “paid prioritization,” the FCC order asserts combined authority under Title II and Section 706 in order to set a permanent zero-price for delivery of all downstream Internet traffic.

This permanent price ban, the most extreme form of price regulation, effectively bans a two-sided market from developing to ensure that the biggest Internet streamers, Netflix, Google-YouTube, Facebook, Amazon et al, never have to pay for their outsized Internet distribution, because the consumer is expected to pay for the Internet under a de facto, receiving-party-pays economic model, despite the longstanding Title II “telecommunications” economic model of sending-party-pays.

This FCC zero-price regulation forces users and ISPs to economically subsidize some of the biggest and most valuable companies in the world.

What the courts know is that Title II common carrier law and regulation precedent have never allowed zero-price regulation of any service because that would not allow any recovery of costs or any profit. In other words, it would be illegally confiscatory – a constitutional takings without just compensation.

What the courts also know is that eighty-years of Title II precedents do not require all traffic to be treated equally. There are numerous Title II court precedents allowing higher prices for high volumes, different prices for business versus residential, different prices for specialized services, etc.

**Probably the FCC order’s biggest legal vulnerability of all** is that it intends to combine two authorities, Title II and Section 706, that each by themselves do not individually have the authority to legally enable an FCC mandate of permanent zero pricing of a service, that combined together somehow do!

The simple point here is that all the legal misdirection the FCC conjures up with its alchemy of Title II and Section 706, is just putting lipstick on a pig.

No matter how one messages a permanent ban on “paid prioritization” it is illegal under any claimed combination of legal authorities, because forcing an entity to permanently provide a commercially provided service that has a cost, with no offsetting price opportunity to recover that cost or earn a profit on that commercial service, is per se confiscatory – an unconstitutional takings without just compensation.

## **7. FCC is arbitrary & capricious ignoring large reliance interests & need for proportionality**

The FCC has gone out of their way to argue that their Title II order will have no effect to discourage investment or innovation, so it can wholesale disregard at least a decade of extraordinarily –large economic reliance interests on the FCC not reclassifying the Internet as a Title II telephone utility.

In January 2011, President Obama gave strong governmental assurances to economic reliance interests in his [Executive Order 13563](#) – *Improving Regulation and Regulatory Review*.

*“Section 1. General Principles of Regulation. (a) Our regulatory system... must promote predictability and reduce uncertainty. It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative.”*

*“As stated in that Executive Order and to the extent permitted by law, each agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations...”*

Nothing in this Executive Order signaled to any commercial interest involved in providing the Internet’s trillion dollar infrastructure that the President in November of 2014 could abruptly and without warning effectively [repudiate](#) this clear Executive Order for the FCC alone by calling for the “strongest possible” utility regulation of the Internet for the first time.

A court should ask: how does the FCC square that circle?

Broadband companies also have invested several hundred billion dollars in broadband and Internet backbone infrastructure relying on many consistent bipartisan decisions and FCC assurances over the last decade that the FCC had no intention of reclassifying the Internet under Title II regulation.

This is a trillion dollar bait and switch, with irreparable harms because now there can be little investor confidence that government assurances to reliance interests can be relied upon going forward. Simply, the risk cost of long term capital for Internet infrastructure investment has been increased significantly going forward.

Adding to the arbitrariness and capriciousness of the FCC order is that it disregards one of the most basic criteria of justice and fairness – proportionality.

Over the last decade, two thousand American broadband ISPs have handled literally quadrillions of communications with less than a handful of problems requiring FCC involvement to resolve, and all were resolved without the FCC's newly asserted Title II authority.

If we listen to the FCC's own words, their new Title II regulations are "*to preserve the free and open Internet,*" meaning they are needed simply to maintain the net neutrality status quo of pre-FCC Title II regulations.

Imposing the strongest, most-antiquated, and burdensome FCC regulations on the most modern and dynamic part of the American economy is hugely disproportionate and unnecessary regulatory overkill: effectively nuking the 99.8% of all American ISPs that have never even been accused of doing anything wrong that could violate net neutrality.

As for the FCC's claim of a "modernized" light touch Title II approach, it is the worst kind of joke. "Light-touch Title II" is a new infamous oxymoron.

The FCC's legal spin and messaging here is like telling the innocent people that have been herded into the regulatory equivalent of an internship camp, that they should be grateful to their new warden because they did not get assigned to a Super-Max regulatory prison, only a medium security regulatory prison!

If a court fairly looks at this issue through the lens of judicial fairness and justice -- as they must under the law and Constitution -- they will see that the huge irreparable costs/risks of the FCC's Title II reclassification overwhelm the asserted, but unproven risks to the status quo of blocking, throttling or paid prioritization.

#### **8. FCC's legal forbearance theory is inherently contradictory thus arbitrary**

To justify Title II reclassification of broadband, the FCC claims there is not enough broadband competition to protect consumers.

However, to forbear from Title II under Section 10, FCC precedent requires the FCC to find that enough competition exists to warrant the forbearance de-regulation.

What is it FCC? Is there enough competition or not? Your legal theory cannot maintain polar opposite assumptions simultaneously.

Such gross legal dissonance is embarrassing and inherently arbitrary.

#### IV. Conclusion

The FCC's Title II reclassification legal theory is such a politically and legally inter-dependent "house of cards," that it all could collapse if a court pokes even one hole in the FCC's case.

In other words, the FCC has to win on all the legal issues explained in this analysis, where opponents only need one of their very strong arguments to succeed in court to bring down this highly inter-dependent house of cards.

Why it is easy to predict that this case is in serious trouble of ultimately getting overturned in court (80%) is the appreciation that the construction of the FCC's entire legal case has been driven by partisan politics and not the law, precedent or the facts.

To win, the FCC needs the courts to act politically and not judicially. It can happen, but it shouldn't, if the judicial system operates fairly as it is constitutionally designed to operate.

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