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## Broadband, the States, and Section 706: Regulatory Federalism in the Open Internet Era

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# Broadband, the States, and Section 706: Regulatory Federalism in the Open Internet Era

by CHARLES M. DAVIDSON\* AND MICHAEL J. SANTORELLI\*\*

Abstract: The relationship between federal and state regulators in the U.S. telecommunications space has long been fraught with tension regarding the boundaries of regulatory authority over communications services of all kinds. Unlike with basic services like traditional telephony, however, Congress expressed a clear preference for leaving advanced services like broadband “unfettered” by both state and federal regulation, a preference that for many years was taken literally by the Federal Communications Commission (FCC), resulting in a minimalist approach that prevailed for more than a decade. Though incredibly successful when measured by a range of metrics, federal regulators recently elected to dramatically alter this approach to broadband. This decision has raised many questions about the reach of FCC authority over broadband and whether its sweeping reinterpretation of federal law might have unlocked new state level authority over services once thought to be immune from such piecemeal regulation.

This paper provides a comprehensive analysis of these recent changes and evaluates whether and to what extent state regulators might have authority to regulate elements of broadband service in their states under section 706 of the Telecommunications Act of 1996. The text of this provision, as reinterpreted by the FCC and upheld by federal appeals courts, calls on both the FCC and individual state public utility commissions (PUCs) to encourage the deployment of broadband services by using an array of “regulating methods” to remove barriers to investment. Some have argued that the FCC’s recent decision to reclassify broadband as a telecommunications service subject to common carrier regulation bolsters the case for a more active state role, as this regulatory paradigm was long defined by its dual federal state character. In reality, though, federal statutes, FCC precedent, federal case law, and a range of other factors make clear that any regulatory authority over broadband accruing to the states under section 706 is very narrow, if it exists at all, and subject to a number of limitations, including federal preemption.

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The views expressed herein are those of the authors alone.

The states, though, are not without recourse when attempting to improve broadband connectivity. Indeed, governors, legislatures, attorneys general, PUCs, and numerous other state actors have many tools and resources at their disposal for bolstering broadband deployment and adoption. As such, state PUCs should not look to section 706 as a panacea for solving broadband woes. Rather, this paper argues that section 706 is best interpreted against the larger backdrop of the totality of state efforts to advance broadband in line with policy imperatives articulated by state level officials. Doing so will yield more comprehensive, effective, and viable broadband strategies.

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## I. Introduction

In January 2014, the D.C. Circuit Court of Appeals issued a ruling in the case of *Verizon v. FCC*<sup>1</sup> that struck down major elements of the Federal Communications Commission's (FCC or Commission) Open Internet Order of 2010.<sup>2</sup> In doing so, however, the D.C. Circuit accepted the FCC's expansive theory regarding its general authority to regulate broadband Internet access services.<sup>3</sup> This theory, which was mapped out in detail in the 2010 order,<sup>4</sup> revolved primarily around a new interpretation of section 706 of the Telecommunications Act of 1996.<sup>5</sup> According to the FCC's interpretation, which was deemed "reasonable" by the D.C. Circuit,<sup>6</sup> the Commission, contrary to previous understandings,<sup>7</sup> appears to have broad authority under section 706 to "adopt . . . rules in order to promote competition and investment in voice, video, and audio services."<sup>8</sup> This authority is not limitless, but it is substantial.<sup>9</sup>

Less discussed in the aftermath of *Verizon* and the FCC's subsequent efforts to respond to the ruling was whether and how this new understanding of section 706 applies to the states. This is an incredibly important discussion to have since, according to section 706(a):

The Commission *and each State commission* with regulatory jurisdiction over telecommunications services shall encourage the

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1. 740 F.3d 623 (D.C. Cir. 2014).

2. See *In re Preserving the Open Internet*, 25 FCC Rcd. 17,905 (2010) (hereinafter *2010 Open Internet Order*). The court vacated antidiscrimination and anti-blocking rules, but upheld a disclosure rule, which required broadband service providers to be more transparent about their network management practices and other aspects of Internet access service. *Verizon*, 740 F.3d at 628.

3. The court held that the Commission's rules pertaining to blocking and discrimination were tantamount to common carrier regulation and thus in conflict with prior determinations by the FCC that broadband was not to be regulated in such a manner according to its classification as an "information service." *Verizon*, 740 F.3d, at 649–50.

4. *2010 Open Internet Order*, *supra* note 2, at 17,966–72.

5. Section 706 was enacted as part of the Telecomms. Act of 1996, Pub. L. 104-104, 110 Stat. 153, but was later codified in 47 U.S.C. § 1302.

6. *Verizon*, 740 F.3d at 636–37.

7. See, e.g., *In re Deployment of Wireline Services Offering Advanced Telecomms. Capability*, 13 F.C.C.R. 24,012, 24,047 (1998) (reading section 706 as not "constitut[ing] an independent grant of authority.") (hereinafter *1998 Advanced Services Order*).

8. *2010 Open Internet Order*, *supra* note 2, at 17,972.

9. The court did note — and accept — two limiting principles offered by the FCC. *Verizon*, 740 F.3d at 639–40. These limits are discussed in more detail *infra* section III.

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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.<sup>10</sup>

Some argue that this section appears to provide the FCC *and* each state public utility commission (PUC) with concurrent jurisdiction over broadband services, subject only to the traditional limitations of regulatory power exerted by these bodies — i.e., the FCC only has jurisdiction over interstate elements of communications services, while state PUCs have primary authority over intrastate aspects of those services.<sup>11</sup> Indeed, since the *Verizon* ruling, there have been several citations to section 706(a) in support of more expansive PUC jurisdiction over certain aspects of broadband service.<sup>12</sup> However, when read in light of established legal precedent, related FCC action, including the Commission's most recent attempt to implement open Internet rules,<sup>13</sup> and federal and state laws regarding the regulation of advanced communications services like VoIP, the more persuasive argument is that the scope of PUC authority under section 706 is, at most, very narrow and likely non-existent given the looming threat of federal preemption.<sup>14</sup>

This paper frames the parameters of a much-needed conversation about the relationship between section 706, broadband, and the states. In the absence of such a frank assessment, there will remain some uncertainty

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10. 47 U.S.C. § 1302(a) (emphasis added).

11. The interplay of state and federal jurisdiction over communications services has long been the source of much controversy. State PUC authority over intrastate elements of service is not absolute and has been subject to federal preemption in a number of instances. For a recent example, see *In re* FCC 11-161, 753 F.3d 1015 (10th Cir. 2014) (upholding FCC preemption of state regulations impacting universal service and intercarrier compensation). For an extended discussion, see generally Charles M. Davidson & Michael J. Santorelli, *Federalism in Transition: Recalibrating the Federal-State Regulatory Balance for the All-IP Era*, 29 BERKELEY TECH. L. J. 1131 (2014) (hereinafter *Federalism in Transition*).

12. See *infra* Section III, for examples and further discussion.

13. See *In re* Protecting & Promoting the Open Internet, Report & Order on Remand, Declaratory Ruling, & Order, 30 FCC Rcd. 560, GN Docket 14-28 (rel. Mar. 12, 2015) (hereinafter *2015 Open Internet Order*).

14. See *infra* Sections III and IV for additional discussion.

regarding the reach and role of state regulation in the broadband space.<sup>15</sup> Such uncertainty could encourage PUCs to explore the outer limits of their perceived authority under the new understanding of section 706, which, in turn, would likely trigger disruptive and counterproductive legal clashes between service providers, state PUCs, and the FCC.<sup>16</sup> The better course forward for states looking to improve broadband connectivity would be to leverage the ample array of non-regulatory resources at their disposal.

The paper proceeds as follows:

**Section 2** provides essential context for discussions about optimal approaches to improving broadband connectivity. In particular, this section examines the historical role of section 706 and of state PUCs in implementing the regulatory framework that the Commission developed for broadband in the late 1990s and early 2000s. The section concludes by evaluating the results of this framework, measured in terms of growth of the broadband ecosystem and the consumer welfare gains it generated.

**Section 3** assesses the contours of section 706 authority, post-*Verizon* and in light of recent interpretations of the provision by the FCC. More specifically, this section examines: the shift in interpretation of section 706 by the FCC; the subsequent acceptance of this new reading by the D.C. Circuit; efforts by the FCC to operationalize this provision; and the extent to which regulatory entities and other stakeholders are attempting to apply it at the state level. These efforts are evaluated against a backdrop of considerable legal, regulatory, and legislative precedent regarding the proper balance of regulatory federalism in the modern communications space.

**Section 4** provides a workable path forward for state actors interested in improving broadband connectivity. This path is built upon foundational principles stemming from successful approaches to facilitating growth of this transformative technology over the last two decades. The section then applies these principles to the modern broadband environment in an effort to provide a high-level schematic for state actors — governors, legislatures, regulators, and others — interested in working together to improve

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15. The FCC's 2015 Open Internet Order did offer some guidance about how it might address state attempts to regulate broadband under section 706 going forward. *See, e.g., 2015 Open Internet Order, supra* note 13 at ¶¶ 430-33. However, language in the Open Internet Order, and a related Order regarding federal preemption of state laws impacting municipal broadband deployment, suggest that there remains some uncertainty about the contours of state regulatory authority over broadband under the new framework. For further discussion, *see infra* Section III.

16. *See, e.g., Federalism in Transition, supra* note 11 (discussing how this dynamic between the FCC and state PUCs has evolved over the last century).

broadband. The tools available for this task do not require section 706 to be effective. Indeed, attempting to use section 706 as a basis for state level regulatory intervention would likely undermine the positive efforts of other state actors to bolster connectivity. Accordingly, it is respectfully submitted that state PUCs refrain from looking to section 706 as a source of regulatory authority over broadband and instead work to determine how best to leverage their ample resources and core competencies to supplement other state efforts to enhance broadband.

## **II. Section 706, The States, and Broadband Regulation Prior to *Verizon***

Prior to *Verizon* and the 2010 open Internet rules, section 706 played only a minor role in the broadband space. Indeed, it mostly served as a vehicle for engaging in inquiries regarding broadband deployment in the United States; the states played only an advisory role in these efforts. From the perspective of determining the best approach to regulating broadband, beginning in the early 2000s the Commission, looking beyond section 706, spearheaded the development of a framework for advanced communications services that was minimalist in nature and administered primarily at the national level.<sup>17</sup> Coupled with state legislation that echoed the general deregulatory tenor of FCC action in this space, the prevailing policy environment that eventually evolved supported the emergence of a vibrantly innovative and intensely competitive broadband ecosystem. The following section traces this evolution and evaluates the many positive impacts that this regulatory framework had on broadband and consumers for more than a decade.

### **A. Initial Interpretations and Applications of Section 706 by the FCC,**

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17. The “minimalist” and “light touch” framework mentioned throughout this paper refers to the regulatory approach to broadband that resulted from classifying it as an “information service.” Despite assertions to the contrary, the FCC’s recent decision to reclassify broadband as a “telecommunications service” subject to common carrier regulation is neither “light touch” nor “minimalist” in nature. On the contrary, it represents a significant departure from the historical approach to advanced services and results in the imposition of numerous new regulatory requirements on every type of broadband service provider. For discussion of likely harms arising from such a dramatic shift in regulating broadband, *see generally* Christopher S. Yoo, *Is There a Role for Common Carriage in an Internet-Based World?*, 51 HOUS. L. REV. 545 (2013). *But see* 2015 *Open Internet Order*, *supra* note 13, at ¶¶ 409-25 (arguing that reclassification would not negatively impact broadband).

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### and the States

Shortly after passage of the 1996 Telecommunications Act, the FCC, in response to several petitions from service providers, issued an order that, among many other things, attempted to begin mapping out a regulatory approach that could support continued growth of “advanced services,” including broadband.<sup>18</sup> The goal of the order, issued in 1998, was to “ensure that the marketplace [was] conducive to investment, innovation, and meeting the needs of consumers.”<sup>19</sup> Part of this order comprised the FCC’s first interpretation of section 706. It concluded that, “in light of the statutory language, the framework of the 1996 Act, its legislative history, and Congress’ policy objectives, the most logical statutory interpretation is that section 706 does not constitute an independent grant of authority.”<sup>20</sup> Instead, the Commission saw it as a directive to use authority granted elsewhere in the Act to encourage broadband deployment.<sup>21</sup>

The FCC also contemplated state level regulation of advanced services in its 1998 order. In particular, the Commission surmised that there might be intrastate aspects of advanced services, and if there were, states were “encourage[d]” to treat those services the same regardless of whether they were provided by an incumbent telephone company or “any other competing carrier offering advanced services.”<sup>22</sup> However, the Commission stopped short of mandating a particular regulatory role for the states vis-à-vis advanced services, opting instead to gather further comment on potential roles.<sup>23</sup>

In response to the order and several related entreaties by the FCC,<sup>24</sup> the National Association of Regulatory Utility Commissioners (NARUC), which lobbies on behalf of PUCs, acted to stake out the collective position of state regulators regarding the proper approach to incubating and regulating the nascent advanced communications sector. In a February 1999 resolution, for example, NARUC proposed a close working relationship

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18. *1998 Advanced Services Order*, *supra* note 7.

19. *Id.* at 24,014.

20. *Id.* at 24,047.

21. *Id.* at 24,047–48 (concluding that “the better interpretation of section 706 is that it directs us to use, among other authority, our forbearance authority under section 10(a) to encourage the deployment of advanced services.”).

22. *Id.* at 24,063.

23. *Id.* at 24,064.

24. *See, e.g., William Kennard, Chairman, FCC. Speech to the Annual Convention of the National Association of Regulatory Utility Commissioners.* (Nov. 10, 1997)

between state PUCs and the Commission in furtherance of the policy imperatives outlined in the 1996 Act.<sup>25</sup> That resolution “commit[ed] state commissions and the FCC to take full advantage of their complementary strengths, and identif[ed] several specific practices which may be applied in various contexts in order to do so. These include[d] participation in one another’s key proceedings, hands-on consultation, best practices guidelines, and cooperative development of substantive models or standards.”<sup>26</sup> The FCC responded in October 1999 by launching the Federal-State Joint Conference on Advanced Services (Joint Conference).<sup>27</sup>

The Joint Conference, as initially conceived by NARUC and eventually formalized by the FCC, was positioned as a means of facilitating an “open dialogue” between the Commission and state regulators in an effort to determine the most effective means of “encourag[ing] the rapid deployment of advanced services to all Americans.”<sup>28</sup> In addition to identifying best practices for these purposes, a core aim of the Joint Conference, as outlined by the FCC in the order establishing it, was to “minimize[e] potential inconsistencies and overlaps between federal and state policy.”<sup>29</sup> Thereafter, the primary role of the Joint Conference was as a forum for identifying successful methods of supporting broadband deployment and otherwise contributing to the FCC’s determination of whether “advanced telecommunications capability” was being deployed in a reasonable and timely manner throughout the country.<sup>30</sup>

With regard to formal regulatory roles for PUCs vis-à-vis broadband, there were two main factors that militated against providing the states with latitude for experimenting with new policies. *First*, the 1996 Act, a major piece of bipartisan legislation, indicated a clear policy preference for leaving

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25. See *Resolution Regarding Petitions to the FCC for Action Under Section 706*, NARUC (Feb. 1999).

26. See Bob Rowe, *Strategies to Promote Advanced Telecommunications Capabilities*, 52 FED. COMM. L.J. 381, 402 (2000).

27. See *In re Federal-State Joint Conference on Advanced Telecomms. Services*, Order, 14 FCC Rcd. 17622 (Oct. 8, 1999), available at [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-99-293A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-99-293A1.pdf).

28. *Id.* at 17,624.

29. *Id.* at 17,625.

30. See, e.g., *In re Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Americans in a Reasonable & Timely Fashion, & Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecomms. Act of 1996*, Second Report, 15 FCC Rcd. 20913, 20916–17 (Aug. 21, 2000) (noting that the “Joint Conference conducted a series of field hearings across the country — from Alaska to Miami — to gather data on the deployment of advanced telecommunications capability.”).

the Internet “unfettered by Federal or State regulation.”<sup>31</sup> *Second*, even though the FCC initially indicated that the states might have a role to play in regulating intrastate aspects of Internet service provided by telephone companies, the true nature of the market — a competitive space dominated by borderless high-speed services — quickly came into focus as innovative alternatives like cable modem service emerged.<sup>32</sup> Consequently, the FCC began to develop a regulatory framework that better reflected these new dynamics, one that was minimalist in nature and administered exclusively at the federal level.<sup>33</sup> The FCC’s subsequent work echoed the Act’s policy statement; its legal authority to do so stemmed from a series of cases that indicated that the FCC had broad discretion to interpret and implement the Act’s many provisions, even those that seemed to specifically empower the states.<sup>34</sup>

### **B. The Prevailing Regulatory Model: Minimalism in the Regulation of Wireless, Broadband, and VoIP**

This basic dynamic — of initially responding to new communications technologies by applying (or attempting to apply) existing federal and state regulation and then adjusting via deregulation to reflect market characteristics — has been evident at the federal level for many years, including in the context of wireless telephony, broadband Internet access, and IP-enabled services like VoIP.<sup>35</sup> The result was the development of

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31. 47 U.S.C. 230(b)(2).

32. See, e.g., JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, *DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 205* (The MIT Press 2005) (“[b]alkanizing Internet-related services into 50 different schemes of state level common carrier regulation would be deeply inconsistent with several of the Internet’s defining characteristics. Among these characteristics are the geographical indeterminacy of Internet transmissions, including the portability of IP addresses; the Internet’s traditional freedom from regulatory intrusion; and, more generally, the Internet’s celebrated tendency to obliterate political boundaries of all kinds”).

33. See, e.g., William E. Kennard, Chairman, FCC, *Connecting the Globe: A Regulator’s Guide to Building a Global Information Community*, at IX-2 (1999), available at <http://www.fcc.gov/connectglobe/regguide.pdf> (observing that “Government policy can have a profound impact on Internet development; it can either foster it or hinder it. To date, the Internet has flourished in large part due to the absence of regulation. A “hands-off” approach allows the Internet to develop free from the burdens of traditional regulatory mechanisms.”).

34. See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). Numerous subsequent cases refined the balance of regulatory federalism in the post-1996 Act communications space. For further discussion, see generally *Federalism in Transition*, *supra* note 11.

35. The FCC’s 2015 Open Internet Order fundamentally altered this dynamic. See *infra* Section III for additional discussion.

minimalist regulatory frameworks for advanced communications services administered primarily at the federal level, leaving states with narrowly defined roles that, in many cases, were narrowed even further, or eliminated outright, by state legislatures. The following provides an overview.

### 1. *Wireless Telephone Regulation*

The FCC was initially very hands-on in regulating the market for wireless telephone service, implementing a top-down approach to allocating spectrum and otherwise shaping the market for mobile services.<sup>36</sup> In addition, many state PUCs extended common carrier rules to wireless voice providers, reasoning that intrastate voice communications of any kind automatically fell within their regulatory purview.<sup>37</sup> However, once it became evident that this piecemeal state-federal regulatory approach threatened further growth of the wireless market, federal policymakers in 1993 enacted legislation to clarify what the regulatory framework should look like.<sup>38</sup> This entailed the development of a national model that freed service providers from the “dual . . . regulatory jurisdictional system designed to regulate the monopol[istic]” telephone industry.<sup>39</sup> Many aspects of state regulatory authority over wireless telephony were significantly curtailed by the resulting statute.<sup>40</sup> In addition, Congress clarified that wireless telephony was to be treated as a common carrier service but was to be subject to a narrower set of regulations than traditional wire-based telephone service.<sup>41</sup> This approach hinged on the fact that wireless voice services interconnected with the public switched telephone network

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36. See, e.g., Charles M. Davidson & Michael J. Santorelli, *Seizing the Mobile Moment: Spectrum Allocation Policy for the Wireless Broadband Century*, 19 COMMLAW CONSPECTUS 1, 29–31 (2010) (discussing this early “command and control” approach) (hereinafter *Seizing the Mobile Moment*).

37. See, e.g., Babette E. Boliek, *Wireless Net Neutrality Regulation and the Problem with Pricing: An Empirical, Cautionary Tale*, 16 MICH. TELECOMM. & TECH. L. REV. 1, 28–32 (2010) (“[T]wenty-nine states had not banned regulation, either by law or by de facto bans on [wireless] regulation promulgated by their public utility commissions.”).

38. Omnibus Budget Reconciliation Act of 1993, 47 U.S.C. § 332 (2012).

39. Leonard J. Kennedy & Heather A. Purcell, *Section 332 of the Communications Act of 1934: A Federal Framework That is “Hog Tight, Horse High, and Bull Strong,”* 50 FED. COMM. L.J. 547, 550 (1998).

40. According to the statute, “no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.” 47 U.S.C. § 332(c)(3)(A) (2012).

41. See 47 U.S.C. §§ 332(c)(1)-(8) (2012).

(“PSTN”), which had long delivered traditional voice service to customers across the country.<sup>42</sup>

This explicit embrace of a relatively minimalist approach to a voice service,<sup>43</sup> coupled with concomitant changes to federal spectrum allocation policy and subsequent state legislation further curtailing PUC involvement with wireless issues,<sup>44</sup> facilitated the rapid deployment of nationwide wireless networks.<sup>45</sup> In recent years, these gains have been bolstered by FCC action to streamline state and local processes impacting wireless network deployment (e.g., siting)<sup>46</sup> and by legislation in many states to either remove any regulatory oversight of wireless from PUCs or to streamline related processes (e.g., consumer complaints).<sup>47</sup>

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42. See 47 U.S.C. § 332(d) (2012).

43. The FCC implicitly acknowledged such relative minimalism when implementing the new regulatory framework for wireless voice services in the mid-1990s. In particular, the Commission noted that: While the [1993 Act] ensures that all CMRS providers will be subject to certain key requirements of Title II, Congress has given the Commission authority to forbear from applying other Title II provisions if such regulation is not needed to prevent unreasonably discriminatory rates or practices, or to protect consumers, and if such forbearance is consistent with the public interest (e.g., the Commission action, by augmenting competition, promotes better services for consumers at reasonable prices). *By taking these steps, Congress acknowledged that neither traditional state regulation, nor conventional regulation under Title II of the Communications Act, may be necessary in all cases to promote competition or protect consumers in the mobile communications marketplace* (emphasis added). See *In re Implementation of Sections 3(N) & 332 of the Commc’ns Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd. 1411, 1481 (released Mar. 7, 1994).

44. See, e.g., Sherry Lichtenberg, *Telecommunications Legislation 2014: Completing the Process*, NRRI Report No. 14-07 (Jun. 2014), <http://nrri.org/documents/317330/b72af483-4ac3-4cc8-9d1f-1871a9284c9a> (providing an overview of recent legislation to narrow PUC authority over various aspects of wireless service) (hereinafter *Completing the Process*); Sherry Lichtenberg, *Examining the Role of State Regulators as Telecommunications Oversight is Reduced*, NRRI Report 15-07 (Aug. 2015), <http://nrri.org/download/nrri-15-07-telecom-regulation/> (hereinafter *Examining the Role*).

45. *Seizing the Mobile Moment*, *supra* note 36, at 31–40. For discussion of specific impacts, see *infra*, section II.B.2.

46. See *In re* Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review & to Preempt Under Section 253 State & Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, Declaratory Ruling, 24 FCC Rcd. 13994 (released Nov. 18, 2009) (Declaratory Ruling) (implementing a “shot clock” to guide siting review processes) (hereinafter *Shot Clock Order*); *In re* Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, WT Docket No. 13-238, Report and Order, FCC 14-153 (released Oct. 21, 2014) (Report and Order), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2014/db1021/FCC-14-153A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1021/FCC-14-153A1.pdf) (providing further guidance on an array of wireless infrastructure-related requirements).

47. See, e.g., *Completing the Process*, *supra* note 44; *Examining the Role*, *supra* note 44; *Seizing the Mobile Moment*, *supra* note 36.

## 2. *Broadband Internet Access Regulation*

In the context of high-speed Internet access services, the initial regulatory response tilted towards more traditional common carrier policies for certain providers. More specifically, high-speed DSL service offered by incumbent telephone companies fell under the regulatory regime that grew out of the *Computer Inquiries*, which required providers of “enhanced services” to make available the transmission component underlying those services on a nondiscriminatory basis to competitors.<sup>48</sup> However, firms operating outside the common carrier market for telephony — notably cable companies — were not subject to these rules.<sup>49</sup> Such a bifurcated regulatory approach raised concerns. Some argued that, in the absence of a more active approach (like common carriage), cable companies and other firms not subject to strictures like “open access” would be free to “impose whatever conditions they desire[d] on their customers” and exert too much control over the content flowing through their networks.<sup>50</sup> Others, however, voiced concerns around the need for achieving regulatory parity and fostering a competitive environment in what quickly became a rapidly growing market.<sup>51</sup>

Regulators were thus presented with a clear policy choice: impose “open access” requirements on all broadband providers in an effort to assure parity that mirrored common carrier regulation, or implement a more minimalist approach to foster continued growth of the market. The FCC ultimately opted for the latter path, and between 2002 and 2007 it developed, and successfully defended in court, a light-touch regulatory framework for every type of broadband Internet access service — cable, DSL, and mobile,

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48. See, e.g., James B. Speta, *Handicapping the Race for the Last Mile?: A Critique of Open Access Rules for Broadband Platforms*, 17 YALE J. ON REG. 39, 61–69 (2000) (discussing the regulatory treatment of these access services).

49. *Id.*

50. See Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 927 (2001) (hereinafter *End of End-to-End*).

51. See, e.g., Michael K. Powell, Chairman, FCC, *The Great Digital Broadband Migration*, Remarks before the Progress & Freedom Foundation (Dec. 8, 2000), <http://transition.fcc.gov/Speeches/Powell/2000/spmkp003.html> (“Convergence is radically altering economic assumptions and underlying cost structures. It is changing the game of capital formation and altering business models. The culmination of these changes is what I am referring to by the Broadband Digital Migration. The challenge for us is to make a similar leap from analog-rooted regulations to ones that are applicable and relevant to the digital environment.”).

among others.<sup>52</sup> Numerous state legislatures have also acted by enacting or contemplating enactment of laws reflecting this policy preference. Many of these laws serve to underscore the lack of jurisdiction over broadband services by their PUCs; others have focused on supporting or funding deployment of networks to unserved areas.<sup>53</sup>

### 3. VoIP Regulation

Almost immediately after the 1996 Act was enacted, a coalition of telephone service providers petitioned the FCC seeking a declaratory ruling regarding the regulatory treatment of a new form of voice communications — VoIP.<sup>54</sup> The complaint suggested that the new service was nothing more than a “telecommunications service” that should be regulated as a common carrier.<sup>55</sup> This case presented for the first time the “fundamental question of whether a service provided over the Internet that appear[ed] functionally similar to a traditionally-regulated service should be subject to existing regulatory requirements.”<sup>56</sup>

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52. See *In re Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities*, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 F.C.C.R. 4798 (released Mar. 15, 2002), *aff'd* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S. 967 (2005); *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Report and Order of Proposed Rulemaking, 20 FCC Rcd. 14853 (released Sept. 23, 2005); *In re Classification of Broadband Over Power Line Internet Access Serv. as an Info. Serv.*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd. 13281 (released Nov. 7, 2006); *In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd. 5901 (released Mar. 23, 2007).

53. See, e.g., *Completing the Process*, *supra* note 44 (providing an overview of recent state laws related to these efforts); see also *Examining the Role*, *supra* note 44.

54. See *In re The Provision of Interstate & Int'l Interexchange Telecomms. Serv. via the "Internet" by Non-Tariffed, Uncertified Entities, America's Carriers Telecomm. Ass'n Petition for Declaratory Ruling, Special Relief, and Inst. of Rulemaking Against VocalTec, Inc.; Internet Tel. Co.; Third Planet Publ'g Inc.; Camelot Corp.; Quarterdeck Corp.; & Other Providers of Non-tariffed, & Uncertified Interexchange Telecomm. Serv.*, FCC, RM No. 8775 (Mar. 4, 1995).

55. The crux of the petition was that it was “not in the public interest to permit long-distance service to be given away, depriving those who must maintain the telecommunications infrastructure of the revenue to do so . . . nor [was] it in the public interest for these select telecommunications carriers to operate outside the regulatory requirements applicable to all other carriers.” *Id.* See also *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501, 11505 (1998).

56. See Kevin Werbach, *Digital Tornado: The Internet and Telecommunications Policy*, at 28, (FCC Office of Plans & Policy, Working Paper No. 29, 1997), available at [http://transition.fcc.gov/Bureaus/OPP/working\\_papers/oppwp29.pdf](http://transition.fcc.gov/Bureaus/OPP/working_papers/oppwp29.pdf) (hereinafter *Digital Tornado*).

In the absence of clear guidance (the FCC never acted on the petition), and since many saw this new service as a threat to the revenues that formed the basis of USF funding mechanisms,<sup>57</sup> the states began to assess whether and how VoIP, in particular any localized elements of the service, might (or should) fit within their regulatory purview.<sup>58</sup> The Minnesota PUC in 2003, for example, attempted to impose traditional “telephone company” regulations on a VoIP service offered by Vonage. The FCC responded by preempting the PUC’s decision, reasoning that because VoIP service “cannot be separated into interstate and intrastate communications for compliance with Minnesota’s requirements without negating valid federal policies and rules,” the FCC would have sole authority to regulate VoIP service.<sup>59</sup> In its order, the FCC held that it, and “not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to [the Vonage service] and other IP-enabled services having the same capabilities.”<sup>60</sup>

In combination with two other orders issued in 2004, the FCC had finally provided some clarity regarding the appropriate balance of regulatory federalism for the still emerging service.<sup>61</sup> After the Minnesota PUC unsuccessfully appealed the order in federal court,<sup>62</sup> legislatures in well over

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57. See Robert Cannon, *State Regulatory Approaches to VoIP: Policy, Implementation, and Outcome*, 57 FED. COMM. L.J. 479, 492 (2005) (“If the policy objective is protection of revenue, then regulating anything that could be used as a substitute for that revenue source could be an appropriate approach/implementation.”).

58. *Digital Tornado*, *supra* note 56, at 38 (noting that “If federal rules governing Internet telephony are problematic, state regulations seem even harder to justify” and that “there is a good argument that Internet services should be treated as inherently interstate. The possibility that fifty separate state Commissions could choose to regulate providers of Internet telephony services within their state (however that would be defined), already may be exerting a chilling influence on the Internet telephony market.”).

59. See Vonage Holdings Corporation, Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm’n, 19 FCC Rcd. 22404, 22404–05 (2004).

60. *Id.*

61. See Petition for Declaratory Ruling That Pulver.com’s Free World Dialup Is Neither Telecomms. Nor a Telecomms. Service, 19 FCC Rcd. 3307 (2004); Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges, 19 FCC Rcd. 7457 (2004).

62. Minn. Pub. Util. Comm’n v. FCC, 483 F.3d 570 (8th Cir. 2007). The Court of Appeals for the Eighth Circuit sided with the FCC and upheld application of the so-called “impossibility exception,” which, under the 1934 Act, allows the FCC to “preempt state regulation of a service which would otherwise be subject to dual federal and state regulation where it is impossible or impractical to separate the service’s intrastate and interstate components, and the state regulation interferes with valid federal rules or policies.” *Id.* at 576.

half of the states ultimately adopted laws that prohibit their PUCs from regulating VoIP service.<sup>63</sup> In addition, the FCC extended a number of additional obligations to VoIP providers, many of which mirrored duties traditionally required of basic telephone service providers.<sup>64</sup> However, despite opening a rulemaking proceeding in 2004, the FCC has yet to officially classify VoIP as either a heavily regulated “telecommunication service” or a lightly regulated “information service.”<sup>65</sup>

### C. Impacts and Outcomes

As has been documented extensively elsewhere, there is significant evidence to demonstrate a causal relationship between the implementation of a deregulatory model in each of these segments and increases in investment, competition, and innovation.<sup>66</sup> These gains also coincided with

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63. See generally *Completing the Process; Examining the Role*, *supra* note 44.

64. Among other things, the FCC now requires interconnected VoIP providers to provide E911 services, protect customer proprietary network information, comply with various disability access requirements, and make telephone numbers portable. See *In the Matter of Telephone Number Requirements for IP-Enabled Services Providers*, 22 FCC Rcd. 19531 (2007); *In the Matter of IP-Enabled Services*, 22 FCC Rcd. 11275, 11283–91, ¶¶ 17-31 (2007); *In the Matter of IP-Enabled Services*, 22 FCC Rcd. 6927, 6954-57, ¶¶ 54-59 (2007); *In the Matter of IP-Enabled Services*, 20 FCC Rcd. 10245 (2005).

65. See *In the Matter of IP-Enabled Services*, 19 FCC Rcd. 4863 (2004). The FCC’s 2015 Open Internet Order suggests that VoIP will remain subject to a minimalist regulatory regime. However, the Commission has given itself relatively broad authority to revisit the regulatory approach to IP-enabled services like VoIP in the future if the services are offered in a manner that is tantamount to an evasion of the FCC’s “open Internet protections.”

66. See, e.g., James Speta, *Deregulating Telecommunications in Internet Time*, 61 WASH. & LEE L. REV. 1063, 1147 (2004) (assessing the pro-competitive impacts of preventing municipalities from entering communications markets); Thomas Hazlett et al., *Sending the Right Signals: Promoting Competition through Telecommunications Reform*, a Report to the U.S. Chamber of Commerce (Sept. 2004), available at [http://www.uschamber.com/sites/default/files/reports/0410\\_telecommstudy.pdf](http://www.uschamber.com/sites/default/files/reports/0410_telecommstudy.pdf) (comparing and contrasting the regulatory frameworks for telephone and broadband services and finding that the exacting regulatory approach for the former would hinder, rather than advance, competition and innovation in the market for the latter) (“*Sending the Right Signals*”); Robert Crandall & Hal Singer, *The Economic Impact of Broadband Investment*, Broadband for America (Feb. 2010), available at [http://www.broadbandforamerica.com/sites/default/themes/broadband/images/mail/broadbandforamerica\\_crandall\\_singer\\_final.docx](http://www.broadbandforamerica.com/sites/default/themes/broadband/images/mail/broadbandforamerica_crandall_singer_final.docx) (finding that “In a largely deregulatory climate, broadband penetration skyrocketed to nearly sixty-five percent penetration by the end of the decade as absolute and quality-adjusted prices fell, and first-generation technologies — cable modem, DSL, and 3G wireless — individually covered approximately 90 percent of all U.S. households and collectively covered even more.” *Id.* at 1); Kevin A. Hassett & Robert J. Shapiro, *Regulation and Investment: A Note on Policy Evaluation under Uncertainty, With an Application to FCC Title II Regulation of the Internet*, Georgetown Center for Business & Public Policy (July 2015), available at

and fed into a fundamental transformation of consumer expectations for their communications services.

Another indicator of the success of this regulatory approach is the key role it played in fostering the creation of an ecosystem of firms that spans discrete but related segments (i.e., ISPs, content providers, and device manufacturers).<sup>67</sup> Unlike under common carriage, which for many years focused on preserving a narrow set of market conditions that tended to deter such collaboration,<sup>68</sup> deregulation created the conditions under which such cross-sector partnerships could thrive. In short, the bright lines that once separated discrete segments of the communications space — and that were once enforced by onerous rules implemented concurrently by the FCC and individual states — disappeared in response to minimalism. This dynamic is best illustrated by the rapid evolution of the mobile broadband space.

Cross-sector partnerships in the wireless space have long existed (e.g., between handset developers and service providers), but, for the most part, firms tended to focus on competing within their immediate market.<sup>69</sup> Over the last few years, however, these lines have begun to blur and are increasingly disappearing, as a result of the rapid emergence of next generation wireless broadband services. The rise of smartphones powered by operating systems that enable a universe of cutting-edge add-ons, the use of which can be monetized in many ways, along with the deployment of faster and more reliable mobile broadband networks has fundamentally altered the nature of competition and innovation in what is now an

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<http://cbpp.georgetown.edu/sites/cbpp.georgetown.edu/files/Shapiro-regulation-investment-note-policy-evaluation-FCC-titleII-regulation-internet.pdf> (“*Regulation and Investment*”).

67. See *Connecting America: The National Broadband Plan*, at 15–16, FCC (2010), available at <http://download.broadband.gov/plan/national-broadband-plan.pdf> (providing a more detailed conceptual definition of the ecosystem) (“*National Broadband Plan*”).

68. The common carrier regulatory framework articulated in the Communications Act of 1934 was, in many ways, the natural result of a policy choice made years before by regulators. Once it became clear that the market for providing telephone service was a natural monopoly — i.e., that the provision of telephony was optimally provided by a private firm with a large scale — it was incumbent upon federal and state policymakers to develop a regulatory framework that could effectively manage the dominant firm and ensure that it was able to meet its many service obligations. In short, the common carrier framework that emerged in the early 20th century was shaped largely by market conditions and a desire to assure that consumers would have universal access to affordable telephone service. For further discussion, see ROBERT BRITT HORWITZ, *THE IRONY OF REGULATORY REFORM: THE DEREGULATION OF AMERICAN TELECOMMUNICATIONS* 99–102 (1989).

69. See, e.g., Thomas Hazlett, *Online Markets vs. Traditional Markets: Modular Confines of Mobile Networks: Are iPhones iPhony?*, 19 SUP. CT. ECON. REV. 67 (2011) (providing an overview of how the ecosystem has developed).

interconnected ecosystem.<sup>70</sup> Numerous firms now compete across sectors for the attention — and dollars — of consumers as they seek to position themselves as the primary facilitator of the mobile experience.<sup>71</sup>

This dynamic, which is evident throughout the broadband space, did not stem from a particular set of regulatory provisions or legal obligations. Rather, it evolved organically out of the conditions created and fostered by the minimalist approach to regulation enshrined in federal statutes and implemented by the FCC up until recently.<sup>72</sup>

### III. Section 706, The States, and Broadband Regulation After *Verizon*

Attempts to modify the regulatory framework for broadband began in the late 2000s.<sup>73</sup> A watershed moment came in 2008, when the FCC attempted to censure a broadband ISP for allegedly throttling data traffic from a peer-to-peer website.<sup>74</sup> The FCC, however, was eventually rebuked by a federal appeals court, which noted that the Commission, according to its interpretation of the Communications Act, lacked authority to regulate

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70. See, e.g., Thomas Hazlett, David Teece & Leonard Waverman, *Walled Garden Rivalry: The Creation of Mobile Network Ecosystems*, George Mason Univ. Law and Econ. Research Paper Series 11–50 (Nov. 2011), available at [http://www.law.gmu.edu/assets/files/publications/working\\_papers/1150WalledGardenRivalry.pdf](http://www.law.gmu.edu/assets/files/publications/working_papers/1150WalledGardenRivalry.pdf).

71. The FCC's 2015 Open Internet Order hinges on a fundamentally different view of how the ecosystem works, one that was first outlined in the 2010 Order and subsequently accepted by the D.C. Circuit in *Verizon*. In particular, it views the “virtuous cycle” of innovation in the broadband ecosystem as being driven almost exclusively by firms at the edge of the network (e.g., content providers). See *2015 Open Internet Order*, *supra* note 13 at ¶ 75.

72. See, e.g., *Seizing the Mobile Moment*, *supra* note 36 (further discussing this dynamic in the wireless space).

73. Previously, in 2005, the FCC adopted a non-binding policy statement that detailed four principles regarding consumer access to the Internet. According to the statement, consumers were entitled to: (1) access the lawful content of their choice; (2) run applications and use services of their choice, subject to the needs of law enforcement; (3) connect their choice of legal devices that do not harm the network; and (4) competition among firms in the ecosystem. See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd. 14986 (2005).

74. See *In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications and Broadband Industry Practices* Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management,” Memorandum Opinion & Order, 23 FCC Rcd. 13028 (2008) (citing to the 2005 policy statement).

such behavior.<sup>75</sup> After the court's decision, the FCC attempted to develop a sturdier legal foundation upon which to build rules that could support Commission authority to enforce open Internet rules. The result was its 2010 open Internet order, which hinged on a new interpretation of section 706 as the primary enabler of more active regulation of broadband service.<sup>76</sup> This new interpretation, which was echoed in its most recent attempt to implement open Internet rules, has had broad ramifications. This section examines the evolution of these changes and evaluates how the FCC's new regulatory framework for broadband impacts the states.

#### A. Changing Course: A New Interpretation of Section 706(a)

Administrative agencies like the FCC are allowed to change their minds subject to certain limitations.<sup>77</sup> As the Supreme Court noted recently, to substantiate a revised interpretation of its enabling statute or a change in policy, an agency must "provide reasoned explanation for its action."<sup>78</sup> Specifically, the Court stated: "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate."<sup>79</sup> However, there are cases that do require a "more detailed justification." According to the Court, agencies "must" provide such an explanation when its "new policy rests upon factual findings that contradict those which underlay its prior policy" or "when its prior policy has engendered serious reliance interests that must be taken into account."<sup>80</sup>

In 2010, the FCC, in the context of its open Internet rulemaking, revisited its initial interpretation of section 706.<sup>81</sup> According to the Commission's "present understanding," this section "authorizes the Commission (along with state commissions) to take actions, within their

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75. *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

76. 2010 Open Internet Order, *supra* note 2.

77. *See, e.g., Chevron U.S.A. v. NRDC*, 467 U.S. 837, 863 (1984) ("An initial agency interpretation is not instantly carved in stone."); *NCTA v. Brand X*, 545 U.S. 967 (2005).

78. *FCC v. Fox*, 556 U.S. 502, 515 (2009).

79. *Id.* at 503.

80. *Id.* at 515. *See also* *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199, 191 L. Ed. 2d 186 (2015) (slip op. at 13) (clarifying that such changes require the relevant administrative agency to "provide more substantial justification.").

81. 1998 Advanced Services Order, *supra* note 7, at 24047.

subject matter jurisdiction and not inconsistent with other provisions of law, that encourage the deployment of advanced telecommunications capability by any of the means listed in the provision.”<sup>82</sup> To reiterate the primacy of this new “understanding,” the FCC took the additional step of underscoring that this new reading prevailed over any other, noting in a footnote that, “[t]o the extent the [1998 order] can be construed as having read Section 706(a) differently, we reject that reading of the statute.”<sup>83</sup> In addition, the Commission offered a detailed analysis of the legislative history of section 706(a), concluding that it, combined with the actual text of the statute, represented “specific delegation of legislative authority to promote the deployment of advanced services.”<sup>84</sup>

The FCC also acknowledged that its new authority under section 706(a) was not “limitless.”<sup>85</sup> On the contrary, the FCC identified several limitations. *First*, its authority “does not . . . extend beyond [its] subject matter jurisdiction under the Communications Act” (i.e., interstate communications by wire or radio). *Second*, its “actions under Section 706(a) must “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.” “And *third*, “the activity undertaken to encourage such deployment must” use the regulatory tools specifically identified in the law.<sup>86</sup>

(In a subsequent order issued in an unrelated proceeding in 2011, the Commission further clarified that section 706(a) and section 706(b) operate independently of one another.<sup>87</sup> Section 706(b), which does not implicate the states, provides the Commission with “additional authority, beyond what the Commission possesses under section 706(a) or elsewhere in the Act, to take steps necessary to fulfill Congress’s broadband deployment objectives.”<sup>88</sup> This nuance was affirmed by a federal appeals court in June 2014.<sup>89</sup>)

In its review of the 2010 open Internet rules, the D.C. Circuit struck down major elements of the FCC’s order, but upheld this new reading of

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82. 2010 Open Internet Order, *supra* note 2, at 17969.

83. *Id.* at 17969.

84. *Id.* at 17971.

85. *Id.* at 17970.

86. *Id.*

87. See *In the Matter of Connect America Fund, Report and Order and Further Notice of Proposed Rulemaking*, 26 FCC Rcd. 17663 (2011) (“*Connect America Order*”).

88. *Id.*

89. See *In re* FCC 11-161, 753 F.3d at 1049–54.

section 706(a). The court accepted the Commission's decision to eschew previous interpretations and embrace a reading that operates as an independent grant of authority to regulate broadband.<sup>90</sup> In particular, the court found reasonable the FCC's various reasons for making this change, observing that the analysis of the "statute's text, its legislative history, and the resultant scope of the Commission's authority" left it with "no basis" for denying its "changed interpretation."<sup>91</sup>

In anticipating arguments that this new reading might leave the FCC with "boundless" ability to regulate broadband, the court accepted two important limitations to the new authority wielded by the FCC.<sup>92</sup> These limiting principles are:

1. The FCC cannot use section 706 to expand the reach of its authority beyond historical limits: "the section must be read in conjunction with other provisions of the Communications Act, including, most importantly, those limiting the Commission's subject matter jurisdiction to 'interstate and foreign communication by wire and radio.'"<sup>93</sup>
2. "[A]ny regulations must be designed to achieve a particular purpose: to 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.'"<sup>94</sup> As the court noted, the FCC was thus limited to "promulgat[ing] only those regulations that it establishes will fulfill this specific statutory goal — a burden that . . . is not meaningless."<sup>95</sup> In the context of open Internet rules, the court accepted the FCC's argument that its rules were necessary to

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

91. *Id.* at 637.

92. *Id.* at 639–40 ("We are satisfied that the scope of authority granted to the Commission by section 706(a) is not so boundless as to compel the conclusion that Congress could never have intended the provision to set forth anything other than a general statement of policy. The Commission has identified at least two limiting principles inherent in section 706(a)." (citations omitted)).

93. *Id.* at 640.

94. *Id.*

95. *Id.* (internal citations omitted).

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preserve the “virtuous cycle” of investment and innovation in the broadband space.<sup>96</sup>

The court also addressed concerns about whether mention of state PUCs might somehow negate the FCC’s new interpretation of section 706(a) as an independent grant of regulatory authority over broadband. For example, the court mentioned that “reference to state commissions [in the statute] does not foreclose” the FCC’s new reading.<sup>97</sup> Although the court did not enter into an extended analysis of this point, it did refute arguments that “Congress would not be expected to grant both the FCC and state commissions the regulatory authority to encourage the deployment of advanced telecommunications capabilities.”<sup>98</sup> In doing so, it noted in passing that “Congress has granted regulatory authority to state telecommunications commissions on other occasions, and we see no reason to think that it could not have done the same here.”<sup>99</sup> Interestingly, the court, in support of this assertion, cited to a Supreme Court case from 1999 that held that the FCC possesses significant “power and responsibility to dictate the manner in which state commissions exercise such authority.”<sup>100</sup> As discussed in more detail below, this highlights a critical limitation on potential new authority for PUCs to regulate broadband Internet access services.

**B. Further Guidance: The 2015 Open Internet Rules, and FCC Preemption of State Laws Impacting Municipal Broadband Deployment**

Approximately one year after *Verizon*, the FCC adopted a pair of orders that provided some additional guidance about the actual contours of section 706 authority for the states. Although both orders were subsequently challenged in court, they nevertheless provide key insights into how the FCC views the balance of regulatory federalism in this new era of more expansive broadband regulation.<sup>101</sup>

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96. *Id.* at 644–45.

97. *Id.* at 638.

98. *Id.*

99. *Id.*

100. *Id.* (citing to *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 385-386).

101. See *U.S. Telecom Assoc. v. FCC*, No. 15–1063 (D.C. Cir.) (challenging the legality of core aspects of the FCC’s open Internet order); *Tennessee v. FCC*, No. 15–3291 (6th Cir.) (challenging FCC preemption of state law limiting the expansion of municipal broadband networks).

In its 2015 Open Internet Order, the FCC included a nearly categorical prohibition of state level regulation of broadband services. In “reaffirm[ing] [its] longstanding conclusion that broadband Internet access service is jurisdictionally interstate for regulatory purposes,” the FCC forcefully underscored that a key characteristic of the Internet is its “global” nature, one that makes it “impossible or impractical” to clearly identify separable intrastate and interstate components of it.<sup>102</sup> However, the FCC did not assert exclusive regulatory jurisdiction over the service. Instead, it only reiterated that it would “guard against” state regulation of broadband that “conflict[s]” with its approach.<sup>103</sup> Such “conflict preemption” has deep roots in the telecommunications space, as well as in other areas of regulatory law, and, theoretically, allows for at least some level of state regulation.<sup>104</sup>

The order did note that “states of course have a role with respect to broadband.”<sup>105</sup> Without referring to the exhortation in section 706 — that the FCC and state PUCs “shall encourage” broadband deployment — the order acknowledged the existence of several explicit grants or reservations of authority to the states that might have been unlocked as a result of reclassification.<sup>106</sup> Whether and how the FCC might reconcile its preemption pledge with this concession about the likely existence of at least some regulatory authority for the states remains to be seen.<sup>107</sup>

In a related decision made on the same day as the open Internet ruling, the FCC applied its new interpretation of section 706 in the context of

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102. *2015 Open Internet Order*, *supra* note 13, at ¶ 431.

103. *Id.* See also *Id.* at ¶ 433 (“... we announce our firm intention to exercise our preemption authority to preclude states from imposing obligations on broadband service that are inconsistent with the carefully tailored regulatory scheme we adopt in this Order . . . . The Commission has used preemption to protect federal interests when a state regulation conflicts with federal rules or policies, and we intend to exercise this authority to preempt any state regulations which conflict with this comprehensive regulatory scheme or other federal law.” (citations omitted)).

104. See, e.g., *Federalism in Transition*, *supra* note 11 (discussing the contours of federal preemption and state regulation in the context of basic telephone service).

105. *2015 Open Internet Order*, *supra* note 13, at ¶ 431, fn. 1276. See also ¶ 276, n. 708 (noting that the “Commission’s interpretation does not preclude all state commission action in this area, just that which is inconsistent with the federal regulatory regime we adopt today.” (citations omitted)).

106. See, e.g., *Id.* at ¶ 531 (making clear that the FCC was not forbearing from specific provisions of the Communications Act “insofar as they merely reserve state authority”). These specific grants and reservations of authority are discussed in more detail *infra*.

107. The FCC says that it will “act promptly” to address these issues, engaging in a “case-by-case” approach to “prevent state regulations that would conflict with the federal regulatory framework or otherwise frustrate federal broadband policies.” *Id.* at ¶ 433.

municipal broadband. Responding to two petitions seeking preemption of state laws that limited the ability of municipal ISPs to expand their networks, the FCC found the laws to be “barriers to infrastructure investment” and thus in “conflict with the federal policy set out in section 706.”<sup>108</sup> This action, while nominally limited to state laws impacting existing municipal broadband networks, was revealing of how the Commission — and potentially the states — might apply section 706 going forward.<sup>109</sup> In particular, the FCC put forward a rather open-ended reading of Congress’s “unique level of . . . concern with broadband deployment,” seeming to justify a liberal interpretation of what the amorphous phrase “other regulating methods” included in section 706(a) might mean.<sup>110</sup> Indeed, the FCC appears to view this provision as a catchall that encompasses the array of “regulatory tools” that entities like the Commission have long availed themselves of in the regulation of telecommunications services.<sup>111</sup> As such, the possibility exists that a state PUC could attempt to adapt this same logic when justifying a regulatory action aimed at an entirely intrastate element of broadband deployment.<sup>112</sup>

When read together, some might argue that these two initial applications of the FCC’s new interpretation of section 706 appear to provide at least some theoretical room for the states to explore the outer limits of whatever regulatory authority they might have over broadband. Even though both orders go to great lengths to underscore the willingness of the FCC to preempt state actions — regulation and legislation — that it deems inconsistent with federal policy prerogatives for broadband and other advanced communications services, there is little guidance about what, if any, limits the Commission might place on its analysis of the interstate nature of broadband.<sup>113</sup> The 2015 Open Internet Order’s acknowledgement that the Communications Act contains an array of specific grants or reservations of authority over telecommunications services to the states suggests a largely

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108. See *In the Matter of City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160A-340 et seq.*, Memorandum Opinion & Order, at ¶ 10, 30 FCC Rcd. 2408, WC Docket No. 14-115, FCC 15-25 (rel. Mar. 12, 2015) (“2015 Preemption Order”).

109. *Id.* at ¶ 11.

110. *Id.* at ¶ 135.

111. *Id.* at ¶ 144.

112. See *infra*, Section III.D, for further discussion.

113. See, e.g., Christopher S. Yoo, *Wickard for the Internet? Network Neutrality After Verizon v. FCC*, 66 FED. COMM. L. J. 415, 427 (2014) (analogizing this approach to a Supreme Court case that “opened the door to an expansion of the commerce power such that left few activities outside its scope” (citation omitted) (“*Wickard for the Internet*”).

hands-off application of this standard. This could invite some state experimentation, possible examples of which are discussed in the next section and evaluated in section III.D.

### C. Proposed Applications of Section 706(a) at the State Level

Since *Verizon*, there have been several attempts to decipher what the FCC's new interpretation and recent applications of section 706(a) actually means in practice for state PUCs.

First, PUCs in California and New York both cited to section 706(a) as a basis for expanding the scope of their review of proposed transactions involving ISPs to encompass broadband. During reviews of two recent mergers — first, the proposed (and ultimately abandoned) merger of Comcast and Time Warner Cable, and subsequently the merger of Charter Communications and Time Warner Cable — as well as the proposed sale of broadband lines from Verizon to Frontier, these PUCs have attempted or been urged to use section 706(a) as a means of circumventing state laws limiting the scope of their review to considering only the impacts of the transaction specifically on basic telephone and cable service.<sup>114</sup>

The California PUC, for example, argued in the context of the Comcast-Time Warner Cable merger that the “affirmative grant of authority” under section 706(a) does not run afoul of state law and indeed compels it to “examine the implications of the merger on broadband deployment” in the state.<sup>115</sup> Similarly, staff at the New York PUC, in reviews of both

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114. See CA Pub. Utils. Code § 710; *Joint Petition of Time Warner Cable, Inc. and Comcast Corporation for Approval of a Holding Company Level Transfer of Control*, Comments of the NY State Department of Public Service Staff, at 11–16, Case 14–M–0183, NY PSC (Aug. 8, 2014), available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={0A5EAC88-6AB7-4F79-862C-B6C6B6D2E4ED}> (discussing the standard of review to be used by the PSC in the context of its review of the proposed merger) (“*New York PSC Staff Comments*”); *Joint Petition of Charter Communications and Time Warner Cable for Approval of a Transfer of Control of Subsidiaries and Franchises, Pro Forma Reorganization, and Certain Financing Arrangements*, Redacted Comments of the NY State Dep’t of Pub. Service Staff, at 12, CASE 15-M-0388 (Sept. 16, 2015), available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={C60985CC-BEE8-43A7-84E8-5A4B4D8E0F54}> (“*Redacted Comments*”).

115. See *Joint Application of Comcast Corp., Time Warner Cable Inc., Time Warner Cable Information Services (CA), LLC, and Bright House Networks Information Services (CA), LLC for Expedited Approval of the Transfer of Control of Time Warner Cable Information Services (CA), LLC (U6874C)*; and the *Pro Forma Transfer of Control of Bright House Networks Information Services (CA), LLC (U6955C), to Comcast Corp. Pursuant to CA Pub. Utils. Code Section 854(a)*, Scoping Memo and Ruling of Assigned Comm’r and Administrative Law Judge, at 10-12, Application 14-04-013 (Aug. 14, 2014), available at <http://docs.cpuc.ca.gov/PublishedDocs/>

transactions, interpreted *Verizon* to mean that it is “obligated,” according to the “clear Federal mandate” included in section 706(a), to “consider the impact of broadband on the proposed transaction in New York State.”<sup>116</sup> In the context of its review of the Verizon-Frontier sale, the California PUC was asked to use section 706(a) as a way of expanding the scope of review to consider the impacts of the transaction on broadband and VoIP service in the state.<sup>117</sup>

*Second*, there have been several interpretations of *Verizon* that suggest that states could use section 706(a), either alone or in combination with other authority (e.g., common carrier authority stemming from reclassification), to expand their general regulatory purview to encompass various aspects of broadband and IP-enabled services.<sup>118</sup> The following provides a summary of several such analyses.

- *Pole Attachments*. One early analysis suggested that an area ripe for PUC intervention in furtherance of the mandate included in section 706(a) is to rationalize the processes by which pole attachments are administered.<sup>119</sup> In particular, this analysis argued that section 706

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Efile/G000/M101/K123/101123512.PDF. See also *Joint Application of Comcast Corp., Time Warner Cable Inc., Time Warner Cable Information Services (CA), LLC, and Bright House Networks Information Services (CA), LLC for Expedited Approval of the Transfer of Control of Time Warner Cable Information Services (CA), LLC (U6874C)*; and the *Pro Forma Transfer of Control of Bright House Networks Information Services (California), LLC (U6955C), to Comcast Corporation Pursuant to California Public Utilities Code Section 854(a)*, Proposed Decision, at 18–21, Application 14-04-013 (Feb. 13, 2015), available at <http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M146/K376/146376008.PDF> (largely accepting this interpretation).

116. NY PSC Staff Comments at 10; Redacted Comments at 12–13.

117. See, e.g., *In the Matter of the Joint Application of Frontier Commc'n Corp., Frontier Communications Of America, Inc. (U 5429 C), Verizon CA Inc. (U 1002 C), Verizon Long Distance, LLC (U 5732 C), And Newco West Holdings LLC for Approval of Transfer of Control Over Verizon CA Inc. and Related Approval of Transfer of Assets and Certifications*, Protest of the Office of Ratepayer Advocates to Frontier/Verizon Joint Application for Approval of Transfer of Control and Related Approval of Transfer of Assets and Certifications, at 5–6, A.15-03-005 (Mar. 18, 2015), available at [http://www.tellusventure.com/downloads/frontier/ora\\_protest\\_frontier\\_verizon\\_27apr2015.pdf](http://www.tellusventure.com/downloads/frontier/ora_protest_frontier_verizon_27apr2015.pdf).

118. See, e.g., Tejas N. Narechania, *Federal and State Authority for Network Neutrality and Broadband Regulation*, 18 STAN. TECH. L. REV. 456, 485 (2015) (“Stated simply, section 706 contains a significant grant of authority to state commissions.”) (“*Federal and State Authority*”); Wickard for the Internet at 446–47 (noting that while “the statute . . . seems to accord state PUCs the same regulatory authority that it accords to the FCC,” there is significant evidence in the legislative history of the 1996 Telecommunications Act to suggest that the “federal government should be able to preempt state regulation notwithstanding the language of section 706(a)”).

119. *Federal and State Authority* at 485–90.

would provide PUCs with “the authority necessary to extend pole attachment rights to broadband providers” should the FCC decline to do so or if states “opt out of the federal pole attachment scheme.”<sup>120</sup> The FCC addressed this issue in its 2015 open Internet order and extended the prevailing federal-state regulatory regime for pole attachments to cover broadband services.<sup>121</sup> In its analysis, the Commission noted that relying just on section 706 for this change was inadequate.<sup>122</sup> Instead, “section 224 [of the Communications Act] and [other] implementing regulations [included in the order] provide a more certain foundation” for creating a leveler playing field vis-à-vis accessing poles in the deployment of broadband networks.<sup>123</sup> Continuing forward with this regime could present challenges to broadband deployment because, in recent years, there has been a move toward greater federal guidance of what can be a byzantine system of building wireline and wireless broadband networks.<sup>124</sup> Whether more individualized state action in this context would truly result in removal of barriers to broadband deployment remains to be seen.<sup>125</sup>

- *Universal Service.* Another analysis suggests that section 254 of the Communications Act might supplement new authority stemming from section 706.<sup>126</sup> Section 254 concerns universal service and provides the FCC and state PUCs with broad discretion to “preserve and advance” it.<sup>127</sup> On its face, the two statutory mandates seem to work together — both are focused on facilitating broader broadband deployment via concurrent federal and state action. Indeed, section 254 explicitly

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120. *Id.* at 487. *See also* 47 U.S.C. § 224 (detailing the federal and state level regulatory regime for pole attachments).

121. *See* 2015 *Open Internet Order* at ¶¶ 478-485.

122. *Id.* at ¶ 485.

123. *Id.*

124. *See, e.g.,* *Shot Clock Order* (providing guidance in the context of wireless siting at the state level); *In the Matter of Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240 (Apr. 7, 2011) (providing guidance for the thirty states that have not opted out of the federal system for pole attachments).

125. For further discussion, *see infra*, section III.D.

126. *See* Mark Cooper, *Decision Making in the Face of Complex Ambiguity: Mapping the FCC's Route to the Broadband Network Compact*, at 17-18, Consumer Federation of America (Mar. 2014), available at <http://www.consumerfed.org/pdfs/MAPPING-A-ROUTE-TO-THE-BROADBAND-NETWORK-COMPACT.pdf>.

127. 47 U.S.C. § 254.

allows states to adopt universal service rules “not inconsistent” with the FCC’s rules.<sup>128</sup> Prior to *Verizon*, the FCC acted to include broadband as a supported service in the federal universal service scheme; in doing so, it preempted some state authority over various aspects of universal service.<sup>129</sup> In addition, the FCC, in its 2015 open Internet order, preempted states from imposing any new state universal service contribution requirements on broadband (although it indicated that it may revisit this determination in the future).<sup>130</sup> Yet under a dual section 706/section 254 regime, a state PUC could attempt to attach new non-contribution-based universal service obligations, rationalizing that they are essential to meeting the goals of section 706(a). Such an outcome might undermine or contradict state legislative attempts to relieve broadband providers of those obligations and otherwise develop a more modern and streamlined approach to broadband deployment.<sup>131</sup>

- *Broad PUC Authority.* Yet another analysis suggests that the full power of section 706, as wielded by both the FCC and state PUCs, will be realized as a result of reclassification of broadband as a common carrier service.<sup>132</sup> According to this view, the transmission component of broadband service is so essential to consumers and to other industries, including those that provide critical infrastructure services, that the only way to protect against degraded service and uphold a high level of connectivity is to treat broadband in a manner similar to public utilities.<sup>133</sup> With regard to state level regulation, this analysis suggests that the ability of individual PUCs to act in a manner that furthers

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128. 47 U.S.C. § 254(f).

129. *Connect America Order, aff’d sub nom., In re FCC 11–161*, 753 F.3d 1015 (10th Cir. 2014).

130. *2015 Open Internet Order* at ¶ 432. The FCC also decided to forbear from enforcing certain elements of section 254 — parts of subsections (d), (g), and (k). *Id.* at ¶ 486. However, the Commission also recognized that “section 254 expressly contemplates that states will take action to preserve and advanced universal service” and noted that it “will benefit from further deliberation” on the permissible scope of those actions. *Id.* at ¶ 490, n. 1476.

131. For examples of recent state legislative efforts, *see supra*, section II. *See also Completing the Process; Examining the Role.*

132. *See Written Statement of Commissioner Catherine J.K. Sandoval, CA PUC, Before the Congressional Forum on Net Neutrality*, Sept. 24, 2014, available at <http://democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Sandoval-CT-Net-Neutrality-Forum-2014-9-24.pdf> (“*Sandoval Testimony*”).

133. *Id.* The core findings of the FCC’s 2015 Open Internet Order agree with much of this reasoning.

federal and state statutory obligations vis-à-vis core public utilities like providers of electricity, gas, water, and basic telephone service might be compromised without this kind of authority.<sup>134</sup> The analysis argues that this could happen given the increasing interdependence of utility service with advanced communications networks (*e.g.*, electric and water utilities using broadband to deploy mission-critical “smart grid” services).<sup>135</sup> In addition to supporting reclassification in an effort to bolster PUC authority over broadband service, this analysis also recommended that the FCC coordinate more closely with the Federal-State Joint Conference on Advanced Services and “ask state members, many of whom have responsibility for oversight of various Critical Infrastructure sectors, to weigh in on this proposal [for new broadband regulations] and its implications for utility service.”<sup>136</sup>

*Third*, some service providers are also exploring whether and how section 706(a) might relate to their businesses. For example, one firm attempted to argue that this section compels a state PUC to actively intervene in disputes implicating broadband service. This case, which arose in Tennessee, revolved around a dispute between a competitive telephone provider and a municipal entity that provides communications services to businesses and residents.<sup>137</sup> For many years, the two entities worked together, with the municipal provider leasing the competitive carrier access to its telephone transmission facility.<sup>138</sup> However, once that agreement ended, the municipal provider refused to renew or to consider further requests for providing similar wholesale access to its broadband facilities.<sup>139</sup> Citing section 706, the competitive company argued that the municipal provider is “require[d] . . . to offer competitors access to its broadband transmission facilities.”<sup>140</sup> Moreover, the competitive carrier interpreted

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134. *Id.* at 31–41.

135. *Id.*

136. *Id.* at 46. The 2015 Open Internet Order did not heed these recommendations.

137. See *Complaint of Aeneas Communications LLC Against Jackson Energy Authority*, Docket No. 14–00070, TENN. REGULATORY AUTH. (Jul. 8, 2014), <http://share.tn.gov/tra/dockets/1400070.htm>.

138. *Id.* at 2.

139. *Id.*

140. *Id.*

*Verizon* to mean that section 706 compels such access so long as it is made “upon ‘commercially reasonable’ terms and conditions.”<sup>141</sup>

In response, the municipal provider argued that this reading of the case is erroneous, noting that, “there is no uniform federal law requiring [it] to offer competitors access to its broadband transmission facilities. The FCC has not taken any steps to do [sic] promulgate rules or delegate jurisdiction to the [Tennessee PUC] to regulate broadband services under the federal Telecommunications Act, and section 706(a) does not provide any free-standing jurisdiction to the [PUC] to promulgate such rules on its own.”<sup>142</sup> The municipal provider also argued that granting the requested relief would not “fulfill the statutory goal” of section 706(a), which is to “further development of additional advanced telecommunications networks.”<sup>143</sup> The case was officially docketed in October 2014;<sup>144</sup> a year later, the docket was closed upon withdrawal of the complaint.<sup>145</sup>

*Fourth*, another example of how private firms are attempting to wield section 706 to advance their interests arose in the context of television programming. In April 2015, the American Cable Association (“ACA”), on behalf of its membership of independent video and broadband service providers, called on the FCC to use section 706 to “combat” the surging cost of programming, which, in its view, “inhibit[s] broadband investment that would expand competitive choice and initiate new service.”<sup>146</sup> The tie-in to broadband is indirect: according to the ACA, “video programming . . . [is] one of the key services provided over a network offering advanced telecommunications capability (broadband).”<sup>147</sup> The relief requested by the

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141. *Id.* at 3.

142. See *Complaint of Aeneas Commc’n, LLC Against Jackson Energy Authority*, Jackson Energy Authority Motion to Dismiss and Motion in Opposition to Commencement of a Contested Case, at 2, Docket No. 14-00070, TENN. REGULATORY AUTH. (Aug. 7, 2014), available at <http://share.tn.gov/tra/orders/2014/1400070d.pdf>.

143. *Id.* at 3.

144. See *Complaint of Aeneas Commc’n, LLC Against Jackson Energy Authority*, Order Appointing a Hearing Officer, Docket No. 14-00070, TENN. REGULATORY AUTH. (Oct. 16, 2014), available at <http://share.tn.gov/tra/orders/2014/1400070l.pdf>.

145. See *Complaint of Aeneas Commc’n, LLC Against Jackson Energy Authority*, Order Closing Docket, TENN. REGULATORY AUTH. (Oct. 27, 2015), available at <http://share.tn.gov/tra/orders/2014/1400070t.pdf>.

146. See Press Release, American Cable Ass’n, ACA To FCC: Use Sec. 706 To Curb Surging Programming Costs Inhibiting Broadband Investment, (Apr. 7, 2015), <http://www.americancable.org/node/5261>.

147. See *In the Matter of Inquiry Concerning the Deployment of Advanced Telecomm. Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate*

ACA revolves primarily around reforms to existing program access and retransmission rules, which, it argues, are necessary to lower the barriers to entry into the broadband space for smaller companies that lack the financial resources and scale often wielded by larger MVPDs (which also offer broadband services) in negotiations with content companies.<sup>148</sup> Potential action by state PUCs, which traditionally have not had any role in programming disputes,<sup>149</sup> was raised by the ACA in passing, noting that the national lobby group for state regulators had previously endorsed referring such reform questions to the Federal-State Joint Conference on Advanced Services.<sup>150</sup> Whether the FCC will act on this request by the ACA remains to be seen.

#### **D. Limitations and Complications in the Application of Section 706(a) by State PUCs**

Taken together, the 2015 open Internet order, FCC preemption of state laws impacting municipal broadband deployment, and the various analyses discussed in the previous section highlight lingering uncertainty about the extent to which section 706(a) might be applicable at the state level. Indeed, rather than answering the question of how section 706 might empower the states to regulate broadband, these various activities mostly succeed in identifying a range of more nuanced questions about the real reach of this provision:

- Does the perceived regulatory authority pursuant to section 706(a) trump state laws that might preclude particular actions?

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*Such Deployment Pursuant to Section 706 of the Telecomms. Act of 1996, as Amended by the Broadband Data Improvement Act*, Comments of the ACA, at 1, GN Docket No. 14-126 (Mar. 6, 2015), available at <http://www.americancable.org/files/150306%20ACA%20706%20Comments%20Final.pdf>.

148. See generally *id.* (stating that the ACA focuses its comments on actions that “remove barriers to infrastructure investment and encourage more expansive and more rapid deployment of networks that can provide advanced telecommunications capability to encourage investment by small- and medium-sized providers in networks that would provide this capability”).

149. See 47 U.S.C.A. § 544 (f) (West) (explaining that Federal law greatly limits state PUC authority by statute).

150. See Nat’l Ass’n of Regulatory Util. Comm’rs (NARUC), *Resolution on Fair and Non-Discriminatory Access to Content*, at 1, (Feb. 16 2011), available at <http://www.naruc.org/Resolutions/Resolution%20on%20Fair%20and%20Non%20Discriminatory%20Access%20to%20Content.pdf> (urging the FCC to refer the matter to the Section 706 Joint Conference for examination and recommendations).

- In states that have not explicitly addressed broadband, wireless, or IP-enabled services via legislation, to what extent does section 706(a) enlarge the scope of PUC authority over these services?
- What is the range of appropriate actions that PUCs might engage in vis-à-vis encouraging broadband deployment?
- How might FCC and judicial precedent on related issues impact state efforts to regulate broadband?
- How does reclassification of broadband as a “telecommunications service” subject to common carrier regulation impact the analysis?

Answering these questions and developing a framework for rationally interpreting section 706 requires an understanding of the many limitations and complications arising from the interplay of the new interpretation of this section with existing federal and state law, FCC precedent, case law, and other factors. These are discussed in turn below.

### *1. Limitations*

As previously noted, the FCC’s new interpretation of section 706 has invited numerous proposals for state PUC intervention into the broadband space. As discussed in detail below, these proposals evince a shallow understanding of the legal, regulatory, and public policy dynamics that, in practice, ought to preclude any decision by a state PUC to regulate broadband or specific IP-enabled services. Indeed, when read in light of established legal precedent, related FCC action, and federal and state laws regarding the regulation of advanced communications services like VoIP, the strongest interpretation is that the actual scope of PUC authority under section 706 is very narrow and subject to an array of limitations, including federal preemption.

One major limitation on state PUC authority to regulate broadband under section 706(a) stems from the text of the statute itself. The Supreme Court has famously said of the 1996 Telecommunications Act that it “would be gross understatement to say that [it] is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction.”<sup>151</sup> In the context of possible state regulation of advanced communications services like broadband, the Act appears to contradict itself. While section 706(a) appears to unlock regulatory authority for states, several other sections counsel against burdening the Internet with regulation

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151. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 397.

and empower the FCC to preempt state regulatory actions that are inconsistent with the Act and the Commission's interpretation of it.<sup>152</sup>

The Act's legislative history offers another limitation on state regulatory activity. The Congressional reports accompanying the bill that would eventually become the 1996 Telecommunications Act were mostly silent on whether section 706(a) conveys specific regulatory authority to state PUCs. However, there are clues in various sections of these reports and related documents suggesting that any real authority flowing from section 706(a) would be narrow and subject to preemption by the FCC. Indeed, each of the reports provided by the House and Senate during negotiation of the bill contains blunt language about a core goal for the Act: to "provide for a pro-competitive, de-regulatory *national policy framework* designed to accelerate rapidly private sector deployment of advanced telecommunications and information."<sup>153</sup>

Another major limitation revolves around the ability of the FCC to shape PUC regulatory efforts vis-à-vis broadband. In particular, there is substantial legal precedent supporting the FCC's ability to dictate how PUCs interpret and apply provisions of the Act. In the context of broadband regulation, state PUCs would not have *carte blanche*; rather, the vast majority of their efforts would likely be subject to federal preemption. This stems from legal precedent granting administrative agencies like the FCC significant deference to not only interpret ambiguities in their enabling statutes, but, in the specific case of communications services, the ability to resolve those ambiguities in a more federally focused manner.<sup>154</sup> Indeed, litigation in the aftermath of the 1996 Act made clear that the FCC retained

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152. See, e.g., 47 U.S.C. § 230(b)(2); *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d at 576 (explaining the "impossibility exception," which, according to 47 U.S.C. § 152(b), "allows the FCC to preempt state regulation of a service which would otherwise be subject to dual federal and state regulation where it is impossible or impractical to separate the service's intrastate and interstate components, and the state regulation interferes with valid federal rules or policies"); see also *supra* note 13, at ¶ 433 (explaining that the Commission intends to exercise its authority to preempt any state regulations which conflict with this comprehensive regulatory scheme or other federal law).

153. See, e.g., H.R. REP. NO. 104-458, at 1 (1996) (Conf. Rep.) (emphasis added); S. REP. NO. 104-230, at 50-51 (1996) (Conf. Rep.).

154. See, e.g., *supra* note 34, at 397 ("Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." (citations omitted)); *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863 (2013) (holding that courts should defer to an agency's interpretation of its own jurisdiction so long as that interpretation is reasonable).

significant authority to direct PUC efforts vis-à-vis implementing sections of the law, including those that granted PUCs specific duties.<sup>155</sup>

A related limitation stems from previous FCC action to rein in state attempts to regulate advanced communications services like VoIP and otherwise administer the national regulatory framework for advanced communications services like broadband. As noted in section 2, there have been numerous instances where the FCC has acted to nullify state level regulatory action that it deemed inconsistent with its federally focused approach to advanced services. Examples include FCC preemption of PUC attempts to regulate VoIP<sup>156</sup>; FCC action to rationalize wireless siting rules<sup>157</sup>; and FCC efforts to modernize universal service policy.<sup>158</sup> These actions have deep roots in the regulatory approach to advanced services that was developed and implemented in the late 1990s and early 2000s,<sup>159</sup> which grew out of previous efforts to strike an effective balance of regulatory federalism in this space.<sup>160</sup> In short, the FCC has a strong legal basis for preempting state PUC efforts impacting broadband services that it deems inconsistent with its preferred framework.<sup>161</sup>

Finally, there are substantial limitations arising from the array of state laws impacting PUC regulation of communications services. As noted previously, dozens of states have adopted laws expressly limiting, removing, or precluding the regulatory reach of PUCs vis-à-vis broadband, wireless telephony, and IP-enabled services like VoIP.<sup>162</sup> Moreover, it is widely recognized that PUCs are nothing more than a “creature of the State,”

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155. See, e.g., *supra* note 34, at 384–386 (upholding the primacy of the FCC’s general rulemaking authority and its ability to “guide state-commission judgments”).

156. See, e.g., *supra* note 62.

157. See *City of Arlington, Tex.*, 133 S. Ct. at 1863 (upholding the FCC’s *Shot Clock Order*).

158. *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014) *cert. denied sub nom. Cellular S., Inc. v. FCC*, 135 S. Ct. 2050 (2015) and *cert. denied sub nom. U.S. Cellular Corp. v. FCC*, 135 S. Ct. 2072 (2015) and *cert. denied sub nom. Allband Commc’ns Co-op. v. FCC*, 135 S. Ct. 2072 (2015) and *cert. denied sub nom. Nat’l Ass’n of Regulatory Comm’rs v. FCC*, 135 S. Ct. 2072 (2015).

159. See *supra*, section II.B.

160. See, e.g., *Wickard for the Internet* at 446 (discussing previous FCC action in the context of its Computer Inquiries to preempt state regulation of enhanced services); see also *Federalism in Transition*.

161. See, e.g., *2015 Open Internet Order* at ¶¶ 431-433 (reaffirming that broadband is “jurisdictionally interstate for regulatory purposes” and noting that it is ready to preempt state regulatory activity that it deems inconsistent with its “carefully tailored [Open Internet] regulatory scheme . . .”).

162. See *supra*, section II; see also *Completing the Process* (providing an overview of recent efforts); *Examining the Role*, *supra* note 44.

meaning that they are mere creations of state legislatures.<sup>163</sup> Consequently, “such ‘creatures’ quite simply have *no* authority to engage in activities unauthorized in their charters.”<sup>164</sup> However, some have argued that state PUCs may be justified in engaging in such *ultra vires* actions because they are “exercise[ing] substantive federal power.”<sup>165</sup> But, as discussed above, federal case law and FCC precedent suggest that, in the context of broadband regulation, PUC discretion would be extremely limited and subject to expansive checks by the Commission and the courts.

## 2. *Complications*

As the preceding analysis demonstrates, state PUC authority to regulate broadband under section 706(a) is significantly circumscribed by a range of limiting factors. However, this narrow scope hinged in large part on the classification of broadband as a lightly regulated “information service.” Reclassifying it as a “telecommunications service” subject to common carrier regulation under Title II of the Telecommunications Act appears to complicate this dynamic.<sup>166</sup> Indeed, reclassification could invite state attempts to regulate wireline and wireless broadband services as common carriers in a manner consistent with the dual federal-state framework that was long used for basic telephony, the service that Title II was originally developed to govern.<sup>167</sup> State PUCs might also attempt to pull what they perceive as functionally equivalent services like VoIP into their regulatory orbit, even though these services remain lightly regulated at the federal

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163. See *In the Matter of Petitions Pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of State Barriers to Broadband Investment and Competition*, Reply Comments of NARUC, at 7, WC Docket No. 14-115 & 14-116 (Sept. 29, 2014), available at <http://www.naruc.org/Filings/14%200929%20NARUC%20REPLY%20COMMENTS%20ON%20MUNICIPAL%20BROADBAND%20PREEMPTION%20v2.pdf> (“NARUC Comments”).

164. *Id.* (emphasis in the original).

165. See *Federal and State Authority* at 458. See also Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663 (2001).

166. Analyzing the legality (or wisdom) of reclassification is beyond the scope of this paper. However, several observations are relevant here. As previously noted, administrative agencies possess relatively broad latitude to alter or reverse previous interpretations and applications of their enabling statutes. This ability, though, is not without its limits, especially in cases where entities relied on previous interpretations. Such reliance concerns are compounded by the remarkable growth of the broadband sector under the previous light touch regulatory regime. For further discussion, see *supra*, sections II.B & III.A.

167. For a historical overview of this approach, see *Federalism in Transition* at 1138–47.

level.<sup>168</sup> However, although arguments could be made in support of such state level regulatory interventions, the vast majority of these attempts would most likely trigger FCC preemption or otherwise fail when challenged in court.

For example, even though the FCC's reclassification of broadband was accompanied by forbearance of many provisions requiring or implicating some level of state regulation,<sup>169</sup> the Communications Act includes a number of other explicit delegations or reservations of authority to the states, many of which arise in Title II. As but one example, there has been some discussion regarding the extent to which reclassification might implicate traditional ratemaking authority by the FCC and state PUCs.<sup>170</sup> Even though the FCC has stated that it has no intention of regulating rates under sections 201 and 202 at this point in time, PUCs could nevertheless attempt to argue that they are justified in ensuring that rates are "just and reasonable" pursuant to the Act.<sup>171</sup> These arguments could be bolstered by Supreme Court precedent that suggests that PUCs retain primary authority over intrastate ratemaking, as well as interconnection, of telecommunications services.<sup>172</sup> FCC and judicial precedent make clear that intrastate aspects of broadband networks and IP-enabled services like VoIP are essentially nonexistent,<sup>173</sup> but state PUCs could interpret reclassification of broadband as an invitation to revisit these earlier decisions or request that the FCC "unforbear" from its decision not to regulate rates.<sup>174</sup>

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168. *2015 Open Internet Order* at ¶ 207. *See also In the Matter of Technology Transitions*, Ex Parte of NARUC, GN Docket No. 13-5 (Jul. 17, 2015) (arguing that reclassification of broadband supports a strong state regulatory role "with respect to IP-based services — particularly with respect to service quality and universal service.") ("*NARUC Transitions Ex Parte*").

169. *2015 Open Internet Order* at ¶¶ 434-536 (detailing the FCC's forbearance regime for newly reclassified broadband services). *See also Id.* at ¶ 432 (making clear that "the states are bound" by this forbearance regime).

170. *See, e.g.,* George S. Ford & Lawrence J. Spiwack, *Tariffing Internet Termination: Pricing Implications of Classifying Broadband as a Title II Telecommunications Service*, 67 *FED. COMM. L. J.* 1 (2015).

171. *2015 Open Internet Order* at ¶ 441.

172. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 385, fn. 10 ("The arguments we have been addressing . . . assume a scheme in which Congress has broadly extended its law into the field of intrastate telecommunications, but in a few specified areas (ratemaking, interconnection agreements, etc.) has left the policy implications of that extension to be determined by state commissions, which — within the broad range of lawful policymaking left open to administrative agencies — are beyond federal control.").

173. *See supra*, Sections II.B.2 & II.B.3, for additional discussion and examples.

174. *See, e.g., Sandoval Testimony* (arguing that there are identifiable intrastate aspects of broadband service).

State PUCs could also argue that a particular regulatory action is in furtherance of their section 706(a) duties under sections of the Act from which the FCC has yet to forbear. In its reclassification order, the FCC acknowledged that it was not “forbear[ing] with respect to provisions [of the Act] insofar as they merely reserved state authority.”<sup>175</sup> Examples cited in the order include the ability of PUCs to designate “eligible telecommunications carriers” under section 214(e)(2) and reservations of authority under section 253.<sup>176</sup> The latter section preserves state authority to “impose . . . requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.”<sup>177</sup> Even though the FCC elected to forbear from parts of section 254, which pertains to universal service, the other provisions of section 253 appear to provide the states with a potential basis for regulating certain aspects of broadband or IP-enabled services in their states. This kind of argument has already been made by the national organization that lobbies on behalf of state PUCs.<sup>178</sup>

More broadly, reclassification could theoretically support state experimentation around what constitutes the “other regulating methods” included in section 706(a).<sup>179</sup> Indeed, reclassification could arguably provide state PUCs with more “regulating methods” than are presently available to them under the current regulatory paradigm. A liberal reading of this clause could be supported by an argument that a state is compelled to implement a particular regulation under the directive included in section 706. For example, a state PUC could attempt to engage in a number of activities viewed as essential to being able to address “barriers to infrastructure investment.” Certain activities like data collection could be framed as a condition precedent to meeting the statutory directive.

Even though these arguments might seem plausible on their face, the FCC has nevertheless made it quite clear that it will preempt any regulatory activity that it deems inconsistent with its new approach to broadband services.<sup>180</sup> In light of previous analyses demonstrating the enormous power

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175. 2015 *Open Internet Order* at ¶ 531.

176. *Id.* at fn. 1644.

177. 47 U.S.C. § 253(b).

178. *See, e.g., NARUC Transitions Ex Parte* (citing to reclassification in favor of state authority to regulate various aspects of VoIP service).

179. *See supra*, section III.B.

180. *See supra*, section III.C.

that the FCC has over the states in administering every aspect of the Act, including state-centric elements of Title II, PUCs would be wise to avoid attempting to regulate advanced services unless and until the FCC provides them with clear guidance regarding the parameters of any such action.<sup>181</sup> Instead, PUCs should consider working with other state actors to implement the framework discussed in the next section.

#### **IV. Looking Beyond Section 706: A Principles-Based Framework for Improving Broadband Connectivity at the State Level**

The success of the regulatory framework for broadband that prevailed for more than a decade,<sup>182</sup> coupled with the recent shift away from that framework and the continued uncertainty surrounding what section 706 actually means in practice for the states,<sup>183</sup> highlights the need for more clarity about the most appropriate balance of regulatory federalism going forward. This section identifies the contours of an ideal framework to provide more clarity (**section 4.1**) and details an approach for applying it to state level actions meant to enhance broadband connectivity (**section 4.2**).

##### **A. Formalizing the Framework: General Principles of Effective Broadband Regulation**

The regulation of markets requires a delicate balancing act by policymakers since their actions send crucial signals to market participants. How stakeholders interpret these signals is primarily impacted by the rationale underlying regulations, how the policymaking body implements those regulations, and whether regulators consistently apply the policies.<sup>184</sup> In the context of developing sustainable regulatory policies in the modern

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181. For example, there may be opportunities for states to implement federal frameworks that operate as both “floors” and “ceilings.” Such an approach would allow for carefully calibrated and relatively uniform state participation, as opposed to unfettered and piecemeal experimentation by PUCs, an approach that has proven to be inefficient and harmful to the market for advanced communications services. See *Federalism in Transition* at 1198.

182. See *supra*, section II.

183. See *supra*, section III.

184. Shane Greenstein has noted that “private firms benefit from knowing how to anticipate the norms and standards employed by regulators to recognize the signs of health and unhealthy behavior in a situation that is changing so much [*i.e.*, the broadband ecosystem].” This interplay between innovator and regulator is essential to encouraging “innovative health.” See Shane Greenstein, *Glimmers and Signs of Innovative Health in the Commercial Internet*, 8 J. ON TELECOMM. & HIGH TECH. L. 25, 34 (2010).

communications space, the many positive impacts of regulatory minimalism, which emerged and prevailed for more than a decade prior to reclassification, provide persuasive evidence about the viability of this approach.<sup>185</sup> More specifically, its inherent flexibility and adaptability accommodated growth and innovation in ways that more intrusive regulation could never allow.<sup>186</sup> This seems to be an optimal fit for what many expect will be even more rapid and more disruptive change in the coming years.<sup>187</sup>

As policymakers investigate how a new interpretation of section 706 might alter this dynamic, it is worthwhile to understand the foundations of the approach that yielded significant and sustainable consumer welfare gains. The preceding analyses highlighted several key elements of this framework:

***The most effective regulation tends to reflect the nature of the market to which it is applied.*** This maxim has certainly been true with wireless, broadband, and VoIP services. The minimalist policies developed for these services reflected their borderless nature by being administered at the federal level and protecting against the development of a patchwork system of state level regulation. Their flexibility and the *ex post* manner of enforcement was able to accommodate the rapid pace of innovation. And their lack of proscribed behavior encouraged critical business model experimentation that delivered to consumers a range of choices that are increasingly tailored to meet their individual needs.<sup>188</sup>

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185. See Hassett, *supra* note 66.

186. See, e.g., LARRY DOWNES & PAUL NUNES, BIG BANG DISRUPTION: STRATEGY IN THE AGE OF DEVASTATING INNOVATION 72 (2014) (“BIG BANG DISRUPTION”) (“... industries regulated as public utilities ... must first obtain permission just to experiment with new technologies. They also need approval to pass the cost of research and development projects along to ratepayers ... The degree of government oversight often translates to limits on the methods regulated industries employ to pursue disruptive innovation.”); Charles M. Davidson & Michael J. Santorelli, REALIZING THE SMART GRID IMPERATIVE: A FRAMEWORK FOR ENHANCING COLLABORATION BETWEEN ENERGY UTILITIES AND BROADBAND SERVICE PROVIDERS (2011).

187. See, e.g., Downes, *supra* note 186 (discussing major trends and the potential for profound disruption in many sectors via the use of new and emerging technologies); ERIK BRYNJOLFSSON & ANDREW MCAFEE, THE SECOND MACHINE AGE: WORK, PROGRESS, AND PROSPERITY IN A TIME OF BRILLIANT TECHNOLOGIES (2014) (discussing how technology will likely disrupt nearly every facet of the economy). See also Howard A. Shelanski, *Adjusting Regulation to Competition: Toward a New Model for U.S. Telecommunications Policy*, 24 YALE J. ON REG. 55 (2007) (discussing the relative merits of minimalism in the context of accommodating growth in the broadband space).

188. The FCC’s decision to reclassify broadband is tantamount to a rebuke of the market dynamics that evolved under the previous regulatory regime. To that end, some have argued that

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***Some measure of humility and self-restraint is critical to ensuring that regulatory entities don't overreach.*** FCCs led by both Democratic and Republican appointees exercised significant self-restraint and humility in heeding Congress's bipartisan mandate to keep the Internet unfettered from regulation. In particular, these Commissions did not attempt to create additional regulatory authority to police the emerging broadband sector. To the contrary, the FCCs in the late 1990s and early 2000s worked carefully with a range of stakeholders, including counterparts at the state level, to develop a regulatory framework that could successfully foster growth of the emergent broadband ecosystem.

***Legacy regulation should not shackle outcomes.*** Initial regulatory responses to the nascent broadband market, in particular Internet access services provided by telephone companies, were based on historical approaches to communications regulation, which were developed to protect against monopolies in a market characterized by a single platform, a single device, and a single category of service providers.<sup>189</sup> However, once the FCC determined that the broadband market was fundamentally different from telephone markets and was not prone to “natural monopoly,” then the Commission shifted course.<sup>190</sup> The FCC took a similar approach with VoIP and wireless telephony, opting to eschew intrusive regulation in favor of a more hands-off approach that could support rapid cross across a variety of market segments. Shifting back to a more hands-on approach via reclassification will likely undermine core aspects of a regulatory regime that

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a move to common carrier regulation will undermine investment incentives and otherwise chill innovation in the broadband ecosystem. See, e.g., Fred B. Campbell, Jr., *Impact of “Title II” Regulation on Communications Investment: A Comparison Between the United States and the European Union*, Internet Innovation Alliance (Feb. 2015), available at [http://internetinnovation.org/images/misc\\_content/Impact\\_of\\_Title\\_II\\_Regulation\\_on\\_Comms\\_Investment\\_-\\_FINAL.pdf](http://internetinnovation.org/images/misc_content/Impact_of_Title_II_Regulation_on_Comms_Investment_-_FINAL.pdf). See also Hassett, *supra* note 66.

189. *Verizon*, 740 F.3d at 630–31 (citing to the *Advanced Services Order* of 1998 and previous FCC rulings discussing how the Commission initially classified DSL service as a “telecommunications service” subject to Title II regulation).

190. See, e.g., *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, First Report, 14 FCC Rcd. 2398, ¶ 48 (rel. Feb. 2, 1999) (concluding that “the preconditions for monopoly [were] absent” from the fledgling broadband market and noting that the data did “not indicate that the consumer market [for broadband was] inherently a natural monopoly”).

proved exceedingly successful in both the wireline and wireless broadband contexts.<sup>191</sup>

***Legislative guidance has been critical in honing effective regulatory approaches.*** Although the 1996 Act barely mentioned the Internet, it nevertheless set forth a clear preference for keeping it free of unnecessary regulation. While subsequent events have conspired to cast doubt on this straightforward congressional directive,<sup>192</sup> initial interpretations by the FCC were mostly literal. As discussed above, the result was the development of an innovative and competitive broadband ecosystem. Similarly, at the state level, legislation helped to clarify the limited role of PUCs vis-à-vis wireless, VoIP, and broadband services, further bolstering the national administration of a minimalist regulatory framework.

***Objectively collected and analyzed data has been essential to calibrating narrowly targeted regulatory responses.*** Federal

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191. Comparisons between the Title II-based regulatory framework developed for wireless telephony and the new regulatory framework devised for broadband via reclassification are problematic for several reasons. *In the matter of Protecting and Promoting the Open Internet*, 30 FCC Rcd. at ¶¶ 421-423. First, the regulatory framework for wireless telephony arose after Congress intervened to establish a national regulatory approach to what was then a very nascent, though increasingly popular service. The resulting legislation provided clear directives to the FCC and the states regarding the appropriate level of regulation of the service. Davidson & Santorelli, *supra* note 36, at 31-35. Conversely, there is little evidence that Congress ever intended for the FCC to regulate broadband services in a similar manner. *See, e.g.*, discussion *supra*, section II. Second, the nature of the services and the markets in which they compete are significantly different. Wireless telephony delivers voice calls over cellular networks that are built atop swaths of spectrum and routed via towers and antennae; most calls eventually find their way onto the public switched telephone network (PSTN), which has long been regulated as a common carrier. 47 U.S.C. § 332(d)(2) (1996). Broadband, on the other hand, has always operated separate and apart from the PSTN. This is a critical element of the service, which necessitated a different regulatory approach. Indeed, this was long seen as one of its defining characteristics — its ability to provide access to the Internet, itself characterized as a “network of networks,” in a variety of ways (e.g., via cable modem, DSL, fiber, mobile, etc.). *See, e.g.*, JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: TELECOMMUNICATIONS LAW AND POLICY IN THE INTERNET AGE 178-85 (2d ed. 2013) (discussing the technical architecture of broadband Internet access). Reclassification of broadband has required a fundamental reorientation of how broadband networks operate — both on their own and in relation to the PSTN. This dramatic shift in thinking has drawn significant criticism, with many faulting the Commission for misinterpreting its authority to make such decisions. *See, e.g.*, *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, FCC Rcd at 15-25 (Mar. 12, 2015) (Ajit Pai, dissenting).

192. These events include: (1) the *Verizon* decision, which introduced uncertainty regarding the extent to which section 706 conveys regulatory authority over broadband to the FCC and individual state PUCs, (2) recent federal case law that provides regulatory agencies like the FCC with broad discretion to interpret their enabling statutes, and (3) reclassification of broadband as a telecommunications service. For further discussion, see discussion *supra*, section III.

communications law empowers the FCC to collect a range of data and requires it to use the data to produce reports on an array of discrete topics, including the status of broadband deployment<sup>193</sup> and wireless competition.<sup>194</sup> In addition, the statute grants the Commission significant authority to interpret the means (i.e., analyses of the data) and ends (i.e., interpretation of the analyses) of these inquiries. Until recently, reports regarding the broadband and wireless markets consistently reached favorable conclusions about the competitive health of each segment. These reports confirmed the propriety of the minimalist regulatory frameworks that had been forged for each sector and made clear that broad regulatory interventions were unwarranted. Recent FCCs, however, have been accused of inverting this data-driven approach by using these reports as a basis for crafting more intrusive regulatory policies, suggesting that congressional guidance might be necessary to protect against an abuse of discretion.<sup>195</sup>

### **B. Applying the Framework in Furtherance of Broadband Connectivity Goals at the State Level**

With broadband rapidly emerging as a policy priority in states across the country, PUCs will likely be tempted to leverage apparent regulatory authority under section 706 to contribute to these efforts.<sup>196</sup> Indeed, in the

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193. 47 U.S.C. § 1302(b) (2015) requires the FCC to “initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms)” and shall use the inquiry to “determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.”

194. 47 U.S.C. § 332(c)(1)(C) (1996) calls on the FCC to “review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition.”

195. See, e.g., Daniel Frankel, *FCC Looks to Redefine Broadband, Raise Speed Threshold Above 10 Mbps*, FIERCE CABLE (Jun. 2, 2014), <http://www.fiercecable.com/story/fcc-looks-redefine-broadband-raise-speed-threshold-above-10-mbps/2014-06-02> (reporting on FCC efforts to modify a key measure of broadband speeds, which would “significantly impact policy debates and how the FCC regulates Internet service providers. With the greater benchmark, the commission could argue more stridently that ISPs aren’t offering consumers a true broadband experience.”). *But see Verizon*, 740 F.3d at 642 (noting that, while “suspicious” and “questionable,” the timing of recent FCC data analyses suggest that broadband not being deployed in a reasonable and timely manner gave the court “no basis to reject an otherwise reasonable finding”).

196. Many states have adopted laws or launched programs focused on improving broadband connectivity. For example, in early 2015 the governors of Iowa and New York announced

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absence of formal clarification — by the FCC, the courts, or Congress — regarding the outer contours of state regulatory authority over broadband services post-*Verizon* and post-reclassification, PUCs may experiment with new rules and regulations meant to spur broadband deployment. Despite their noble intent, however, these efforts would likely be met with preemption by the FCC or litigation by stakeholders attempting to reconcile the new contours of regulatory authority conveyed by section 706, as interpreted by the FCC and upheld by the federal courts, with the many limitations on that authority, which were noted above.

To protect against unnecessary legal clashes or other outcomes that ultimately distract from the widely shared goal of improving broadband connectivity, PUCs and other state actors should seek to apply the general principles detailed in the preceding section to any broadband-related issue that might arise. Indeed, rather than look to section 706 as a regulatory “*Deus ex machine*” or panacea capable of solving every broadband-related problem that might arise, PUCs should recognize that modern broadband planning is typically part of a much more comprehensive undertaking that involves a range of other state actors. To these ends, the following principles are offered to guide the development and implementation of impactful broadband policies and programs at the state level.

***Clearly identify the broadband-related problem that needs to be addressed.*** A key threshold inquiry for any state policymaker or government entity interested in bolstering broadband is to identify the extent to which there is a problem that needs to be solved. A critical first step to that end will be to define the parameters of acceptable broadband connectivity from both the supply side (measured in availability and speed) and the demand side (measured in subscription rates and digital literacy). Thereafter, resources can be more accurately targeted at realizing these more narrowly tailored goals.

To date, policymakers at the state and federal levels have been focused almost exclusively on broadband supply issues, especially those ensuring

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ambitious plans to bolster broadband in their states. See Press Release, Office of the Governor of the State of New York, Statewide Broadband Access for Every New Yorker (Jan. 16, 2015), <https://www.governor.ny.gov/news/2015-opportunity-agenda-restoring-economic-opportunity-1> (announcing \$500 million in matching funds to support broadband deployment to underserved areas); Matthew Patane, *Obama, Branstad Push Plans to Increase High-Speed Internet*, DES MOINES REGISTER, Jan. 14, 2015, <http://www.desmoinesregister.com/story/tech/2015/01/13/branstad-obama-broadband-internet-access/21721085/> (proposing a \$5 million grant program for similar purposes).

that a minimum level of speed is available to all residents. The ideal level of speed, however, has been elusive as policymakers attempt to “future proof” networks rather than allow consumer demand to organically shape the marketplace.<sup>197</sup> Even the FCC has sent mixed signals about what it deems to be “broadband.” In January 2015, for example, the FCC concluded that broadband “requires access to actual download speeds of at least 25 Mbps and actual upload speeds of at least 3 Mbps.”<sup>198</sup> This represented a significant increase from the previous benchmark of 4 Mbps/1 Mbps, and served to disqualify mobile and satellite broadband connections from being considered when measuring whether a part of the country is deemed “served” by broadband. But this conflicted with a determination made the month before that connections of at least 10 Mbps/1 Mbps were considered broadband for the purposes of directing universal service funding to support deployment of networks capable of offering such speeds.<sup>199</sup> Equally curious is that, for reporting purposes, the FCC still deems broadband to be “available” in a given area if connections of at least 200 kbps are present.<sup>200</sup>

Many states have similarly differing benchmarks for broadband. New York, for example, deems an area “unserved” if it lacks access to wireline connections of at least 6 Mbps/1.5 Mbps.<sup>201</sup> This benchmark in California is 786 kbps/200 kbps.<sup>202</sup> Minnesota’s minimum threshold for broadband is 10

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197. For additional discussion regarding the myopic focus on speed by policymakers, see Charles M. Davidson & Michael J. Santorelli, *Understanding the Debate Over Government-Owned Broadband Networks: Context, Lessons Learned, and a Way Forward for Policy Makers*, at 17–18 & 26, ACLP at New York Law School (June 2014), available at <http://www.nyls.edu/advanced-communications-law-and-policy-institute/wp-content/uploads/sites/169/2013/08/ACLP-Government-Owned-Broadband-Networks-FINAL-June-2014.pdf> (“*Understanding the Debate*”).

198. *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, at ¶ 3, GN Docket No. 14-126, FCC 15-10 (rel. Feb. 4, 2015).

199. *In the Matter of Connect America Fund*, Report and Order, at ¶ 4, WC Docket No. 10-90, FCC 14-190 (rel. Dec. 18, 2014) (“*CAF 2014 Order*”).

200. See *FCC Form 477 – Instructions*, FCC (Jun. 2015), <http://transition.fcc.gov/form477/477inst.pdf>.

201. See, e.g., Press Release, Office of the Gov. of N.Y., Statewide Broadband Access for Every New Yorker (Jan. 16, 2015), available at <https://www.governor.ny.gov/news/2015-opportunity-agenda-restoring-economic-opportunity-1>.

202. See, e.g., *FAQ About the California Interactive Broadband Map*, <ftp://ftp2.cpuc.ca.gov/telco/BB%20Mapping/Interative%20Map/FAQ%20Broadband%20Map.pdf>.

Mbps/6 Mbps,<sup>203</sup> while Maine allocates funding in support of broadband deployment on a sliding scale according to speed, beginning with connections of at least 1.5 Mbps.<sup>204</sup>

Although the existence of such differing views and measurements of broadband would seem to presage conflict between the states and the FCC, there has been little discord to date. On the contrary, numerous states have moved forward with plans and programs focused on achieving goals built around their distinct views of broadband. This dynamic could prove to be sustainable provided that the states retain some measure of autonomy to determine the most sustainable path forward in terms of identifying and pursuing practical broadband goals that make the most sense relative to their needs.<sup>205</sup> A similar approach would also be beneficial on the demand side as states are uniquely positioned to coordinate efforts with municipalities and expert organizations working at the hyper-local level to bring more people online, provide relevant training, develop digital literacy skills, and otherwise ensure that users new and old have every opportunity to put their connections to meaningful and productive uses.<sup>206</sup>

Successful state-led approaches to clearly defined broadband issues on both the supply side and demand side should continue to be informed by objective data and input from stakeholders actively engaged in the provision of connections and training services across the state. In addition, states should consider institutionalizing such processes in order to ensure that their views of and approaches to broadband evolve in a manner that reflects the actual contours of the marketplace and consumer demand. To this end,

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203. See, e.g., Press Release, Connected Minnesota, Minnesota Broadband Availability Speeds Have Increased, but Some Regions Still Lag Behind (Nov. 2014), available at <http://www.connectednation.org/minnesota-broadband-availability-speeds-have-increased-some-regions-still-lag-behind>.

204. See *Annual Report on the Activities of the ConnectME Authority*, CONNECTME (Jan. 2015), <http://www.maine.gov/connectme/about/docs/ConnectME-AnnRpt2014.pdf>.

205. This includes the ability of state legislatures to manage the ways in which their subdivisions engage in broadband-related activities. The FCC, citing sweeping authority under section 706, preempted two state laws that it has deemed restrictive of such municipal broadband efforts. See *2015 Preemption Order*, *supra* note 108. Aside from compelling concerns about regulatory overreach by the Commission, which, if upheld, could upset the balance of federalism articulated in the U.S. Constitution, there are numerous other reasons for preserving a wide berth for state legislatures in the context of broadband planning. See, e.g., *Understanding the Debate*, *supra* note 197.

206. See, e.g., *Understanding the Debate*, *supra*, note 197 (providing numerous examples of how this might work in practice). See also Charles M. Davidson, Michael J. Santorelli and Thomas Kamber, *Toward a More Inclusive Definition of Broadband Adoption*, 6 INT'L. J. OF COMM. 2255 (2012) (examining and identifying successful elements of such multifaceted approaches to demand side issues).

establishing a multi-stakeholder task force or working group might prove beneficial for these purposes.

***Appreciate and leverage the core competencies of all state actors.***

Addressing broadband challenges — availability, adoption, and informed use — is not the exclusive province of any one agency or branch of state government. On the contrary, it is a set of complex issues that increasingly requires multifaceted and interdisciplinary solutions.

Over the past few years, state Governors, state legislators, state attorneys general, and numerous other state level policymakers have come together to forge and implement comprehensive broadband strategies. Viewing the role of PUCs through this lens provides additional context within which to view the prerogatives set forth in section 706. Consequently, the PUC role in the grand scheme becomes much more narrowly defined and hinges on the extent to which its actions are complementary of additional efforts that might be undertaken by other state actors.

A primary focus of many state level broadband activities has been to bolster broadband availability and adoption by supporting the activities of private ISPs and expert nonprofits. Only a handful of states has established universal service funds for these purposes.<sup>207</sup> The federal USF was recently reformed to support broadband as a supported service; the mechanics of that shift are still being developed and implemented.<sup>208</sup> In addition, the FCC also expanded the federal Lifeline subsidy program to cover broadband.<sup>209</sup> As a result, many states, often led by their Governors, have acted to jumpstart forward progress by allocating some public funding to support network deployment to unserved areas and to increase broadband use in under-adopting communities, typically via public-private partnerships.<sup>210</sup> These efforts have ranged widely in size and ambition from the allocation of five

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207. See, e.g., SHERRY LICHTENBERG, STATE UNIVERSAL SERVICE FUNDS 2014, NATIONAL REGULATORY RESEARCH INSTITUTE 17–20 (2015), <http://nrri.org/download/nrri-15-05-state-usf/> (identifying only six states that have established funds in support of broadband deployment and adoption).

208. See, e.g., CAF 2014 Order, *supra* note 199.

209. See *Lifeline and Link Up Reform and Modernization*, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, WC Docket No. 11-42, FCC 15-71 (rel. June 22, 2015).

210. For an overview of how effective public-private partnerships have been structured to address issues on both the supply side and demand side, see *Understanding the Debate*, *supra* note 197, at 109–137.

million dollars in grant funding to further broadband in rural areas of Iowa<sup>211</sup> to a five-hundred-million-dollar grant program for similar purposes in New York.<sup>212</sup> These programs are typically administered by economic development agencies. In some cases, these allocations require legislative approval as part of the budget process.<sup>213</sup>

In addition, legislatures are increasingly focused on modernizing regulatory frameworks in order to support broadband connectivity efforts. These efforts have encompassed the repeal of many outdated requirements tied to basic telephone service; clarification of PUC jurisdiction over advanced communications services like wireless, VoIP, and broadband; and the removal of barriers impacting more robust usage of broadband in key sectors (e.g., healthcare).<sup>214</sup> Oftentimes, legislative activity results in the reallocation of authority over certain aspects of communications service. For example, some states have shifted responsibility for receiving and processing consumer complaints for certain services away from PUCs.<sup>215</sup> In other cases, state attorneys general are using laws of general applicability to police nefarious activity in the communications space.<sup>216</sup>

In sum, there are many options for impacting broadband in a state that do not stem from or hinge on expansive interpretations of section 706 by PUCs. Indeed, the totality of state level authority to influence broadband outcomes is very robust, providing additional support for limiting PUC activity in this space to targeted nonregulatory interventions that further a state's general vision for high-speed Internet access.

***Identify the least intrusive options available to address the problem.***

Even though section 706 contains the affirmative direction to “encourage the deployment” of broadband, the clause is nevertheless limiting in terms of the means available for achieving this end. However, such limitations are not impervious to liberal readings. Indeed, the FCC has interpreted the range of

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211. *Iowa Broadband Initiative*, *supra* note 196.

212. *Statewide Broadband Access for Every New Yorker*, *supra* note 196.

213. *See, e.g., id.*

214. *See, e.g.,* Completing the Process, *supra* note 44; Examining the Role, *supra* note 44; Federalism in Transition, *supra* note 11.

215. *Id.*

216. *See, e.g.,* Jim Puzzanghera, *AT&T to Pay \$105 Million to Settle ‘Mobile Cramming’ Cases*, L.A. TIMES (Oct. 8, 2014) available at <http://www.latimes.com/business/la-fi-att-cramming-20141009-story.html> (reporting on a settlement between AT&T, the FTC, and 50 state attorneys general to address “cramming” allegations).

“regulating methods” available to them for these purposes very broadly, suggesting that nearly anything could fall under this heading.<sup>217</sup> As previously noted, state PUCs could try to follow this lead when attempting to operationalize section 706. Doing so, however, would ultimately be counterproductive for at least two reasons. First, most regulatory forays into the broadband market would likely be preempted by the FCC or struck down by the courts.<sup>218</sup> Second, as discussed in the previous section, there are numerous other options for realizing broadband imperatives at the state level. PUCs, in other words, should not be seen as the exclusive or even the primary vehicle for achieving broadband goals.

To the extent that PUC action is necessary in the context of addressing a particular broadband problem in a given state, regulators should attempt to identify the least intrusive options available to it for these purposes. Conversely, PUCs should avoid arguing that section 706 unlocks a spate of new regulatory powers because, in the vast majority of instances where state PUC activity might be deemed necessary or desirable vis-à-vis bolstering broadband, there are likely numerous other tools available for this purpose. For example, PUCs might act to relieve certain categories of service providers from legacy regulatory obligations, thus freeing up additional resources that might be better invested in broadband infrastructure.<sup>219</sup>

Equally as important, state regulators should recognize that, even if section 706 does convey some measure of new authority over broadband, it does nothing to alter the resources — jurisdictional, economic, and otherwise — available to PUCs for these purposes. Moreover, section 706 does not allow PUCs to overturn legislative restrictions that might limit their jurisdiction over certain services, nor does it make them agents of the FCC or the federal government for the purposes of realizing national broadband imperatives.<sup>220</sup> To these ends, state PUCs appear best positioned to engage in small regulatory adjustments that might facilitate additional investment in broadband infrastructure. Such efforts would certainly be in keeping with the spirit, if not the letter, of section 706.

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217. *See supra*, section III.

218. *See supra*, section III.D.

219. A leading example is hastening the transition to all-IP networks by relieving telephone providers of the obligation to maintain an increasingly under-utilized communications infrastructure (i.e., the copper-based PSTN). As the FCC observed in 2010, these kinds of regulations “lead to investments in assets that could be stranded” and can result in “siphoning investments away from new networks and services.” *National Broadband Plan* at 59.

220. For further discussion, *see NARUC Comments, supra* note 163.

## V. Conclusion

The pull of history can be intoxicating when charting a hypothetical course forward for telecommunications, especially in a space with roots that extend back to the 19th century. Attempting to align policies around historic ideals is tempting because it is familiar. Indeed, framing a particular decision as nothing more than the inevitable next step in the march of history, or as something that history requires, insulates the decision-maker in the cozy confines of nostalgia. But nostalgia can be misleading, especially in a space that has witnessed developments that transcend anything in its long history. For the many reasons discussed throughout this paper, the most prudent path forward for PUCs attempting to decipher what section 706 actually means in practice is to embrace an interpretation that will yield less regulatory authority but that will nevertheless support more robust gains in broadband connectivity.

The future is now for reenvisioning regulation in the broadband ecosystem. Policymakers in state government are actively exploring the new contours of the modern communications space and considering a range of legal, regulatory, and public policy responses.<sup>221</sup> The outcomes of these activities will set important precedents that will impact every effort by stakeholders in this space going forward. Accordingly, it is critical that state decision-makers calibrate their responses according to the many objective lessons offered by the history of regulation in this space, as well as the realities of operationalizing apparent grants of authority for regulating broadband services. Doing so will yield practical policies and effective approaches for improving broadband connectivity. The analyses in this paper support this approach to interpreting section 706 and establishing a new kind of federalism in the broadband space, one that looks beyond PUCs and embraces the core competencies, resources, and expertise of the many other state actors that are addressing these issues.

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221. As but one example, the PUC in New York launched an inquiry in 2014 to evaluate, among other things, the role of regulators in the 21<sup>st</sup> century telecommunications space. See N.Y. State Dep't of Public Service, *In the Matter of a Study on the State of Telecommunications in New York State*, Staff Assessment of Telecommunications Services, Case 14-C-0370 (Jun. 23, 2015), available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={3DDDC8A5-E94A-4873-886C-3D73F68EC9AB}> (setting forth a detailed study of telephone, video, and broadband service in the state); N.Y. State Dep't of Public Service, *In the Matter of a Study on the State of Telecommunications in New York State*, Notice Seeking Comment, Case 14-C-0370 (Jun. 23, 2015), <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={223DA168-744D-47F6-B9FD-A63DFAs026F27}> (soliciting public feedback on whether and to what extent the role of the PUC might need to change in light of new telecommunications market dynamics). For additional examples of state regulators and legislators engaging in similar reassessments, see generally Examining the Role, *supra* note 44.