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The FCC's Evidentiary Problem

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INTRODUCTION

This essay discusses the Federal Communication Commission's (the "FCC") recent factual record supporting and exercising authority in the Open Internet Order[1] and urges that reviewing courts take a close, and perhaps even a skeptical, look at the Commission's findings.[2] Although much political excitement has been elicited by the recent Open Internet Order, the agency's rulemaking process is designed to be, at least partially insulated from the political process. Administrative agency rulemakings are to be based not primarily on political judgments, but rather on technical expertise. An expert agency, such as the FCC, is tasked to delve deeply into engineering, economics, and other fields implicated by its rulemaking and to defend itself based on the record of its technical findings.

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[1] Section 706 appears in an un-codified section of the 1996 Telecommunications Act, titled, "Miscellaneous Provisions." 47 U.S.C. § 1302(b) (2012) (Section 706 of the Telecommunications Act of 1996, amended by the Broadband Data Improvement Act (BDIA), Pub. L. No. 110-385, 122 Stat. 4096 (2008), codified in Title 47, Chapter 12 of the U.S. Code. It is commonly referred to as "Section 706.").

[2] Protecting and Promoting the Open Internet, FCC, *passim* (Feb. 26, 2015), https://www.fcc.gov/openinternet (follow "Open Internet Order" button; then download the document) [hereinafter the "Open Internet Order" or the "Order"].

It is the very nature of this technical rulemaking process that makes judicial review of agency decisions rather difficult. Legal precedent dictates that a court cannot substitute its own judgment for that of the agency—it is a matter of judicial deference to the agency's congressionally-designated expertise.[3] Nor is a court permitted to place any additional procedural requirements on agency rulemaking beyond those imposed by the Administrative Procedure Act, agency-specific statutes, or an agency's own regulations. Even though its findings are given a great deal of deference, an agency is not permitted to make decisions that are "arbitrary and capricious" under the law.[4] Unless the court is vigilant in the review of the technical record—insistent that the record meet certain minimum standards—the prohibition on arbitrary and capricious decision-making has little meaning.

That brings me to the Open Internet Order. Due to many flaws, vagaries, and questionable factual determinations, I believe the Order is vulnerable to an "arbitrary and capricious" challenge based on the underlying record. To fully substantiate such a conclusion, however, is beyond the scope of this essay. Instead, in this essay, I will focus on a small part of the Open Internet Order—the exercise of section 706 jurisdiction—to examine the ideal role of a reviewing court. In particular, I suggest that when a plaintiff can establish a prima facie case that the agency has ignored substantial issues or mischaracterized the evidence, a reviewing court should move from a deferential to a skeptical review of the agency's evidentiary record. In other words, even an expert agency should be forced to take on the burden of persuasion once a challenger shows the agency has played

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[3] To the extent the organic statute is found ambiguous, the FCC will arguably benefit from the *Chevron* deference, given to agencies in the interpretation of their own statute, even if the ambiguity implicates the agency's own jurisdictional boundaries. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984); *id.* at 843 n.11 (holding that courts will defer to an agency's interpretation of an organic statute if the statute is ambiguous and the agency's interpretation is permissible); *see also* City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1874-75 (2013). Roughly speaking, courts give agencies *Chevron* deference if the agency's statutory conclusions and resulting rulemakings are rational and not arbitrary and capricious. Such deference makes it difficult for a private plaintiff to challenge the decision-making process of an agency.

[4] *See* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *see also* CBS Corp. v. FCC, 663 F.3d 122, 152 (3rd Cir. 2011) (holding that the Commission's changed policy was not supported by a "reasoned explanation" and is, therefore, arbitrary and capricious. Thus, CBS's petition was granted review and the Commission's order was vacated in its entirety.).

fast and loose with findings that are material or, at least, significant to its decision making.

As mentioned above, to demonstrate the need for skeptical review, this essay sets forth a brief examination of the FCC's section 706 evidentiary record. Part I is a quick primer on FCC Internet jurisdiction from Title I (light-touch regulation) to the current section 706 regulation. In Part II, this essay looks at the two key phases of the section 706 evidentiary record: (a) the link between section 706 jurisdiction and the so called "section 706" reports and (b) the evidence provided or ignored to support the exercise of section 706 jurisdiction in the Open Internet Order. Again, because space is limited, rather than fully describe all of the Order's potential shortcomings, this essay concentrates on a few red flags that may indicate the need for a skeptical, rather than deferential, review of the record.

I. FCC INTERNET JURISDICTION

Internet access had been classified as a Title I information service for twenty years.[5] The FCC, based on express Congressional approval, formalized this regulatory classification in separate rulemakings for the various technologies that provide Internet access (wire telephony, wireless, cable, and satellite).[6] Each technology is separately regulated in the 1934 Communications Act, and such separate treatment was deemed necessary to provide clarity to all industry operators.

Section 706 was not part of the jurisdictional calculus. Indeed, the FCC determined that this "Miscellaneous Provision[]" of the 1996

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[5] Some of the following discussion is an update to analyses previously presented. *See* Babette E.L. Boliek, *FCC Regulation Versus Antitrust: How Net Neutrality is Defining the Boundaries*, 52 B.C. L. REV. 1627 (2011).

[6] High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd. 4798, 4802 ¶ 7 (2002) (deciding that cable broadband services are neither Title II "telecommunications services" nor Title VI "cable services"); Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, FCC No. 02-33 at 47 (2005) (classifying wired telephony broadband access as an information service); Appropriate Reg. Treatment for Broadband Access to the Internet Over Wireless Networks, FCC 07-30, WT Dkt. No 07-53, at 19 (2007) (wireless broadband access classified as an "information service").

Telecommunications Act added no authority, but, instead, was only a reporting requirement.[7] The essential test of 706 is as follows:

> (a) IN GENERAL—The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . 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.
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> (b) INQUIRY . . . .[T]he Commission [shall initiate a notice of inquiry to] determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.[8]

The FCC's move to utilize section 706 as a separate basis for independent jurisdiction first began when the D.C. Circuit found that Title I did not empower the FCC to impose certain open Internet or net neutrality principles on Comcast—namely (i) transparency and (ii) no blocking.[9] In Comcast, the FCC did raise the potential of section

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[7] Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 FCC Rcd. 24012, 24044 ¶ 69 (1998) ("[S]ection 706(a) does not constitute an independent grant of forbearance authority *or of authority to employ other regulating methods*.") (emphasis added).

[8] 47 U.S.C. § 1302(b) (2012).

[9] *See* Comcast Corp. v. FCC, 600 F.3d 642, 659 (2010) (declining to extend Section 706 to enforce Formal Comp. of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd. 13028 (2008)).

706 to provide the requisite authority, but the argument did not play a part in the court's final decision.[10]

The uniqueness of the section 706 evidentiary record is that it can be broken down into two phases: The first establishes the FCC's jurisdictional reach; and the second provides the FCC support for the operational tools it utilizes in the Open Internet Order. In other words, to the extent the FCC's desired outcome is to implement the open Internet rules that were struck down largely on jurisdictional grounds by two courts, the FCC laid the evidentiary groundwork early to legitimize its jurisdictional reach in the most recent Open Internet Order. Undeterred, the FCC continued to propose support for section 706 jurisdiction for open Internet rules. This change in the FCC's own legal interpretation of section 706 was given a nod of judicial approval in *Verizon v. FCC*.[11]

The court noted, however, that section 706 jurisdiction is tricky.[12] For example, section 706(b) is a slippery jurisdictional launching pad because it has an "on-off" switch that can be flipped by the factual record.[13] This means that the factual record of the section 706 report may be highly significant to FCC rulemaking powers to the extent it turns "on" section 706(b) jurisdiction.

Arguably, section 706(a) may be found to give independent authority, which creates its own unique problems, and no section

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[10] *Id.*

[11] Verizon v. FCC, 740 F.3d 623, 636-37 (D.C. Cir. 2014). The factual record that established the conclusion of the court is, itself, slim.

[12] For example, the V*erizon* court noted that it "might well hesitate to conclude that Congress intended to grant the Commission substantive authority in section 706(a) if that authority would have no limiting principle." *Id.* at 639.

[13] The "on-off" switch is a metaphor for the FCC's section 706 authority. *See Verizon*, *supra* note 11, at 635 (if the Commission finds that advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion, then section 706 allows the FCC to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market," effectively turning their regulatory authority "on."). Verizon argued that the FCC's determination in the Sixth Broadband Deployment Report—which turned their regulatory authority "on"—was essentially the result of factual manipulation, and the *Verizon* court acknowledged that the timing of the FCC's determination was "certainly suspicious." *Id.* at 642. Justice Silberman expressed concern that "unwarranted government interference in a functioning market" (the "on" period) would be "likely to persist indefinitely, whereas a failure to intervene, even when regulation would be helpful, is likely to be only temporarily harmful because new innovations are constantly undermining entrenched industrial powers." *Id.* at 667 (Silberman, J., dissenting).

706(b) "on switch" will be necessary for its use. For purposes of this essay, however, I will examine section 706(a) and (b) as properly read in tandem. In other words, for either to be an independent source of jurisdiction, the section 706(b) report must find that advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion. Such a reading is consistent, for example, with the FCC's own invocation of section 706 (not section 706(a) independently) as background jurisdiction to its critically important Open Internet Order forbearance decisions.[14] A few snippets of the FCC's record to trigger its section 706 jurisdiction are described below.

II. OUTCOME-DETERMINATIVE FACT FINDING

A. *The Section 706 Report—Triggering 706 Jurisdiction*

Given the importance of section 706 in the recent Open Internet Order,[15] it is worthwhile to take a look at the evidentiary record behind it. Reading section 706 holistically, to trigger its jurisdictional power, the FCC must show that (1) advanced telecommunication services are not being deployed in a timely and reasonable manner, and (2) its proposed regulation will "encourage the deployment . . . of advanced telecommunications capability," arguably, by removing barriers to infrastructure investment and promoting competition.[16] The first showing is found in the "INQUIRY" required by section 706(b)—the so-called section 706 report—and is discussed below in Part II (a). The second part of the FCC's evidentiary record examined is the Open

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[14] *See, e.g.*, Order ¶ 495 ("We note in this regard that when exercising its section 10 forbearance authority '[g]uided by section 706,' the Commission permissibly may 'decide[] to balance the future benefits' of encouraging broadband deployment 'against [the] short term impact' from a grant of forbearance.") (quoting EarthLink, Inc. v. FCC, 462 F.3d 1, 9 (D.C. Cir. 2006)).

[15] The FCC, itself, asserts that the Title II provisions adopted in the Order are redundant given the Commission's assertion of authority under section 706. Order ¶ 448; *cf* Order ¶ 446.

[16] Section 706 (a) and (b) are viewed by some to give two separate, and, perhaps, mutually exclusive, lists of potential powers to the FCC. The final legal interpretation of section 706 is yet to be decided. This essay assumes that the list of potential mechanisms of applying the authority includes those listed in both subsections (a) and (b). "[O]verlay of section 706 of the [Telecommunications] Act and our desire to proceed incrementally" enable the Commission to forbear from large swaths of the Communications Act, including its economic regulations, without a finding of sufficient competition." Order ¶ 458.

Internet Order itself, which has questionable support for implementing the regulatory mechanisms described in section 706.

Therefore, the FCC can affect its own authority under section 706 in one of two ways. First, the FCC can toughen the definition of "advanced communications services" (make the standard higher than currently found in the market) so that it becomes tautological that such services are not being reasonably and timely deployed.[17] Specifically, because high speed broadband falls under that definition of "advanced communications services," the grant of power under section 706 expands as the FCC discovers only lower speed broadband in the market place. Likewise, the FCC has some leeway to find that advanced communications services are not being deployed in a "*reasonable* and *timely* manner" (emphasis added). Therefore, if the FCC applies an unattainable yardstick to the statute's malleable terminology, the FCC will have increased jurisdiction. The FCC's definitions, findings, and conclusions are then set forth in the section 706 reports.

Yet again, in line with my original premise, to assure that the FCC's decisions are not ultimately found "arbitrary and capricious," there is only so much leeway the FCC should be given. The FCC's

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[17] *Compare* 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, 14 FCC Rcd. 2398, ¶¶ 20-30 (1999) (defining broadband as services providing download and upload speeds in excess of 200 kilobits per second ("kbps"), and measuring "reasonable and timely" by evaluating actual or probable availability of broadband to all Americans "by considering the state of investment in broadband facilities, the extent to which last mile facilities have actually been deployed, deployment to 'all Americans,' and the state of demand"), *with* 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; A National Broadband Plant for Our Future, 25 FCC Rcd. 9556, 9558-60 (2010), https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-129A1_Rcd.pdf (redefining broadband as services providing download speeds in excess of 4 Megabits per second ("Mbps") and upload speeds in excess of 1 Mbps, and reevaluating "reasonable and timely" based on the new broadband definition, the current state of availability—rather than the rate of deployment—and rates of subscription) *and* 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, GN No. 14-126, FCC, 3-4 (Feb. 4, 2015), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-10A1.pdf (redefining, yet again, broadband as services providing download speeds in excess of 25 Mbps and upload speeds in excess of 3 Mbps, and reevaluating "reasonable and timely" based on the new speed).

analysis cannot be so expansive or untethered to current accepted methodologies as to be mere conjecture. Under the Administrative Procedures Act, the court "will set aside agency action that [fails to show that]... the agency has 'examine[d] the relevant data and articulated[d] a satisfactory explanation for its action including a rational connection between the facts found and the choices made.'"[18] The most recent section 706 report arguably skirts the mandate for a "rational connection between the facts found and the choices made" on both the definitions of advanced communication services and of what constitutes "reasonable and timely" deployment.

In its first five section 706 reports, the FCC found that the advanced communications service (as then defined) was growing at a reasonable and timely pace.[19] Shortly before asserting additional net neutrality rules under the never-before-tested section 706 jurisdiction theory, the FCC suddenly determined that the high-speed broadband market was in trouble.[20]

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[18] Bus. Roundtable v. Sec. and Exch. Comm'n, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

[19] 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, 23 FCC Rcd. 9615, 9616 (2008); Availability of Advanced Telecommunications Capability in the United States, GN No. 04-54, FCC 2 (Sept. 9, 2004) (Statement of Chairman Michael K. Powell), https://apps.fcc.gov/edocs_public/attachmatch/FCC-04-208A1.pdf; Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in Reasonable and Timely Fashion, Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of Telecommunications Act of 1996, 17 FCC Rcd. 2844, 2845 (2002); 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, 15 FCC Rcd. 20913, 20914 (2000); 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, 14 FCC Rcd. 2398, ¶ 7 (1999).

[20] *See* 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: A National Broadband Plan for Our Future, 25 FCC Rcd. 9556, 9557 (2010) (finding that deployment of broadband to all Americans is unreasonable and untimely); Preserving the Open Internet Broadband Industry Practices, 25 FCC Rcd. 17905, 17968-72 (2010) (asserting on December 21, 2010, that section 706 provides independent authority for the FCC to pass three net neutrality principles: (i) transparency, (ii) no blocking, and (iii) no unreasonable discrimination).

The problems the FCC identified correlated in great part with the FCC's redefinition of advanced communication services. Arguably, the FCC found that, under the current definitions, there was reasonable and timely deployment of such services, so they decided to simply move the goal line.[21] The redefinition of advanced communication services was based almost solely on speed. Arguably, this is a highly linear and one-dimensional interpretation as many commentators have noted the importance of other characteristics such as latency and jitter.[22] The speed at which a service was determined to be "advanced" was increased twentyfold for download speeds and fivefold for upload speeds.[23] Suddenly, what had been advanced communication services one night was obsolete the next. In addition, the FCC did not include mobile in its advanced communication

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[21] Arguably, moving the goal line is occurring in the Eleventh Broadband Report as the FCC inserts new rules and tests. *See, e.g.*, 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 WL 4741030 at ¶ 8 (new condition that an area is unserved unless it has "both fixed and mobile broadband"); *id.* at ¶¶ 41–46 (new test for broadband "consistency"); *id.* at ¶¶ 50–52 (qualifying objective test by listing "additional factors" the FCC will consider, such as "access to multiple service providers"). No doubt, the nature of an industry changes and surveys of its progress must likewise adapt. However, the problem with any change in the section 706 report is that it will affect the time series analysis of "progress" that is, arguably, called for in the report. Again, this speaks to the need for more scrupulous fact finding (trying to control for these changes), as well as aggressive review by the courts.

[22] *See* Babette E.L. Boliek, *FCC Regulation versus Antitrust: How Net Neutrality Is Defining the Boundaries*, 52 B.C. L. REV. 1627, 1680 (2011); Jonathan E. Nuechterlein, *Antitrust Oversight of an Antitrust Dispute: An Institutional Perspective on the Net Neutrality Debate*, 7 J. TELECOMM. & HIGH TECH. L. 19, 31-32 (2008); Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141, 148 (2003).

[23] The definition changed from 200 kbps/200 kbps to 4Mbps/1Mbps. 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: A National Broadband Plan for Our Future, GN Nos. 09-137, 09-51, Sixth Broadband Deployment Report, 25 FCC Rcd. 9556, 9559 (2010). That the definition should change from time to time (or, better yet, that data is gathered for several different speeds as well as latency, jitter rates, and other important quality demarcations) is not at issue here. The timing, magnitude of change with limited data, and the lack of inclusion of mobile connectivity are what make a skeptical look at these changes appropriate. *See* Verizon v. FCC, 740 F.3d at 642 (D.C. Cir. 2014) ("The timing of the Commission's determination is certainly suspicious, coming as it did closely on the heels of our rejection in *Comcast* of the legal theory on which the Commission had until then relied to establish its authority over broadband providers.").

services calculus, even though some of those services would have met the new definition. This of course exacerbated the finding that there were relatively few advanced communication services deployed.[24] The determination was particularly odd given the FCC's later finding in the Open Internet Order that mobile must be included in the definition of Internet Service Providers because of mobile's central importance to the communications ecosystem.[25]

The FCC repeated this process in later reports, laying the groundwork for extensive regulation by drastically changing the definition of advanced communication services on the eve of adopting new rules.[26] First, the FCC suddenly, and without consumer demand analysis (not even an examination of prices and willingness to pay for higher speeds), changed the definition of what constitutes advanced communication services.[27] The new definition (again, concentrating

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[24] *See* 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: In re A National Broadband Plan for Our Future, 25 FCC Rcd. 9556, 9696-97 (Dissenting Statement of Commissioner Meredith A. Baker) ("First, the [Sixth] Report focuses almost exclusively on terrestrial broadband options. Section 706 is not technology specific, yet [the Sixth] Report limits its findings to terrestrial solutions."); *see also id*. at 9560 n.19 (concluding that 14 to 24 million Americans lack broadband accessibility based on the finding that 14 million people do not have access to terrestrial connectivity that meets the 4Mbps/1Mbps definition).

[25] Preserving the Open Internet Broadband Industry Practices, 25 FCC Rcd. 17905, 17956 ¶¶ 93-95 (2010).

[26] *Compare* 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, 27 FCC Rcd. 10342, 10403 n.364 (concluding that 14 million Americans lack access to either fixed or mobile broadband by electing to ignore SBI mobile deployment data in Table 15—a finding that only 5.5 million Americans lack access to either fixed or mobile broadband—in favor of Mosaik mobile deployment data because the SBI data possibly over reports and includes technologies that do not meet the 4Mbps/1Mbps definition) *with id*. at 10383 ¶ 89 (acknowledging that Mosaik Data may also overstate mobile deployment) *and id*. at 10383 n.241 (admitting that Mosaik Data is flawed because Mosaik estimates deployment based on the type of technology, rather than the speed of the technology; the Commission has to infer speeds from the type of technology reported; and because various technologies included in Mosaik's data may not meet the 4Mbps/1Mbps definition).

[27] *See* Inquiry Concerning the Development 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, 30 FCC Rcd. 1375, 18 ¶ 45 (Feb. 24, 2015).

on speeds only) was an advanced service that would provide 25 Mbps/down and 5 Mbps/up. Based on the dearth of market analysis, not only does this number appear random, it is also inconsistent with the FCC's definition of high-speed broadband for its own rural subsidy program.[28] Most recently, the FCC again set 10 Mbps broadband availability for the economically disadvantaged as a laudable accomplishment when it approved the AT&T merger with DirectTV.[29] It is difficult to square the two different standards—a 25 Mbps standard for broadband to trigger FCC jurisdiction and a 10 Mbps standard for rural and the underprivileged—as consistent with the requirements of even-handed fact finding.[30]

B. *The Open Internet Order—Triggering 706 Action*

The Open Internet Order is a long, involved rulemaking that makes many determinations to support its ultimate rules. This essay examines only one grouping of economic determinations that exemplify the FCC's problematic evidentiary record: the

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[28] *See* Connect America Fund; ETC Annual Reports and Certifications; Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Obsolete ILEC Regulatory Obligations that Inhibit Deployment of Next-Generation Networks, WC Nos. 10-90, 14-58, 14-192; Report and Order, FCC 14-190 ¶¶ 15-16 (rel. Dec. 18, 2014) (CAF Phase II Order) (adopting a minimum speed requirement of 10 Mbps download and 1 Mbps upload for an order allocating billions of dollars to deploying broadband to rural and high-cost areas). This Report and Order was adopted only one month prior to the adoption of the tenth section 706 report, which defined advanced telecommunications services as 25/3 Mbps. *See infra* note 33.

See also Inquiry Concerning the Development 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, GN No. 14-126, FCC 111-13 (Feb. 4, 2015) https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-10A1.pdf (Dissenting Statement of Commissioner Ajit Pai).

[29] Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations, MB No. 14-90, Memorandum Opinion and Order, FCC 15-94, Appendix B at Condition VI.2.a–b (July 28, 2015).

[30] 47 U.S.C. § 1302(b) (Section 706 of the Telecommunications Act of 1996, amended by the Broadband Data Improvement Act (BDIA), Pub. L. No. 110-385, 122 Stat. 4096 (2008), codified in Title 47, Chapter 12 of the U.S. Code (Commission to collect data for "geographical areas that are not served by any provider of advanced telecommunications capability")).

determinations made with respect to the No Paid Prioritization[31] rule—based largely on section 706(b) jurisdiction.[32]

Although there are many examples of questionable fact finding in the Open Internet Order,[33] I find this to be an instructive example of the record's fact-finding problems because the exercise of rulemaking jurisdiction in the Open Internet Order is dependent on the adequacy of fact finding in a distinct section 706 report. How exactly should the court set its standard for review? It could be that if each record-building moment (the report and the rulemaking) is reviewed independently, each might be found sufficient to meet the highly deferential standard afforded an expert agency. Given the unique "on/off" nature of section 706 jurisdiction, however, I would argue that the record should be viewed in its totality (the triggering report and the rulemaking order) to assure that flimsy, but acceptable, rulemaking is not built upon a flimsy, but acceptable, jurisdictional platform.

To build the record in a rulemaking is similar to the process by which the FCC builds the record for its reports. First, the FCC will set out a proposed rule, invite comments, and then decide, through its own studies or with reference to the comments, which conclusions to make and with which rules to proceed. For this process, the Supreme Court has "insist[ed] that an agency examine the relevant data."[34] Indeed, under review, "it most emphatically remains the duty of th[e] court to ensure that an agency engage the arguments raised before it."[35] In particular, an agency's judgments about the "likely economic

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[31] Protecting and Promoting the Open Internet, GN No. 14-28, FCC 15-24 (Feb. 26, 2015) No Paid Prioritization, Order ¶ 18.

[32] This issue was briefed extensively in Brief of International Center for Law & Economics and Administrative Law Scholars in Support of Petitioners United States Telecom Ass'n, et al. at 28-31; United States Telecom Ass'n v. FCC, No. 15-1063 (D.C. Cir. filed Mar. 23, 2015) 2015 WL 4698404, at *29-*31. I am not associated with the brief, but I raise its arguments as an example of some of the red flags raised in the FCC's Open Internet Order.

[33] For me, particularly poignant was the complete disregard of empirical evidence that Title II would have a negative impact on broadband investment. Already, it appears that the mere reclassification to Title II, regardless of the FCC's forbearance, has started the anticipated decline in investment. *See* Hal Singer, *Does the Tumble in Broadband Investment Spell Doom for the FCC's Open Internet Order?*, FORBES (Aug. 25, 2015, 8:50 PM), http://www.forbes.com/site/halsinger/2015/08/25/does-the-tumble-in-broadband-investment-spell-doom-for-the-fccs-open-internet-order/.

[34] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

[35] Elec. Power Supply Ass'n v. FERC, 753 F.3d 216, 224 (D.C. Cir. 2014).

effects of a rule . . . must be based on some logic and evidence, not sheer speculation."[36]

When the Commission lays out its No Paid Prioritization rule, it asserts that "[t]he record reflects the view that paid arrangements for priority . . . likely damage the open Internet, harming competition and consumer choice."[37] An examination of the comments cited as support for this principle is troubling. There is evidence that comments have actually been mischaracterized—cited for a principle they do not support—and contrary comments that contain rigorous economic study are completely disregarded in the record.

For example, the Commission cites to a comment by Sandvine for the principle that paid prioritization will harm consumers,[38] but Sandvine's comment actually argues for the exact opposite conclusion. The comment states that the Commission's theory against paid prioritization—that it would lead to "fast" and "slow" lanes—is likely "technically unsound." Moreover, Sandvine characterizes paid prioritization as an "innovative service plan[]" that will likely "increase[] adoption of the Internet around the world, enhance[] competition, and give[] consumers more (and more affordable) choice."[39]

As commenters have noted, more disturbing, still, is that the great deal of economic literature on the issue of paid prioritization (and other net neutrality proposals) was largely ignored.[40] That literature consistently concludes that paid prioritization may have positive or negative effects on consumers, and that it is extremely difficult to determine those effects ex ante.[41] This literature is not noted or

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[36] Sorencoson Commc'ns Inc. v. FCC, 755 F.3d 702, 708 (D.C. Cir. 2014).

[37] Order ¶ 103; *see also* Order ¶¶ 126, 127.

[38] Order ¶ 126 n.287.

[39] Promoting and Protecting the Open Internet, Comments of Sandvine, Inc., GN 14-28, at 2; *see also* Amicus Curiae Brief of International Center for Law & Economics and Administrative Law Scholars in Support of Petitioners United States Telecom Ass'n, et al. at 29-30, United States Telecom Ass'n v. FCC, No. 15-1063 (D.C. Cir. filed Mar. 23, 2015) 2015 WL 4698404, at *29.

[40] *See* Amicus Curiae Brief of International Center for Law & Economics and Administrative Law Scholars in Support of Petitioners United States Telecom Ass'n, et al., at 30, United States Telecom Ass'n v. FCC, No. 15-1063 (D.C. Cir. filed Mar. 23, 2015) 2015 WL 4698404, at *30.

[41] *Id.*

engaged by the Commission. Rather, as critiqued in court filings, the Commission relies on a supposedly "well-established body of economic literature," which consists of four articles from the 1980s on price discrimination, one unpublished article, and a 2000 article that is barely relevant.[42]

Such bravado with regard to the facts and comments runs through other sections of the Open Internet Order. This includes, most centrally, a dismal discussion of impact on infrastructure investment—a key component of section 706(b)—where the Commission relies heavily, if not exclusively, on comments from an advocacy group and hearsay, rather than empirical data.[43] No doubt, these few examples and the totality of the factual infirmities point to an exercise of section 706 jurisdiction that fails to live up to Congress's goals. The FCC is making policy based on an insufficient record, which, at the very least, threatens to find its rules vacated and remanded.

CONCLUSION

The Open Internet Order is a massive and, therefore, worthy event study of the important role of agency rulemaking. In today's modern administrative state, we ask much of our expert agencies, but we should demand much as well. If an agency does not act in accordance with expert principles—if it is shown that the agency has not built its rulemaking upon consistent and respected methodologies of evidence gathering—then that agency should be forced to defend itself with greater vigor. That is not to say that a rulemaking order with questionable data or evidence should automatically be voided, but, rather, that greater judicial scrutiny of a faulty evidentiary record will ultimately lead to better policy choices.

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[42] *Id.*; *see* Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5655 n.296 (2015).

[43] See citations to Free Press at Order ¶ 420. The ignored findings have come quickly and, shockingly, true as infrastructure investment has plummeted since the Order was enacted. *See also* Hal Singer, *Does the Tumble in Broadband Investment Spell Doom for the FCC's Open Internet Order?*, FORBES, Aug. 25, 2015, http://www.forbes.com/site/halsinger/2015/08/25/does-the-tumble-in-broadband-investment-spell-doom-for-the-fccs-open-internet-order/.