

706 of the Telecommunications Act as a grant of authority to regulate broadband Internet access service providers, and suggested that no-blocking and no-unreasonable-discrimination rules might be permissible if Internet service providers could engage in individualized bargaining.⁴²

17. Later that year, the Commission embarked yet again down the path of rulemaking, proposing to rely on section 706 of the 1996 Act to adopt enforceable rules using the D.C. Circuit’s “roadmap.”⁴³ But in November 2014, then-President Obama called on the FCC to “reclassify consumer broadband service under Title II of the Telecommunications Act.”⁴⁴ Three months later, the Commission shifted course and adopted the *Title II Order*, reclassifying broadband Internet access service from an information service to a telecommunications service,⁴⁵ and reclassifying mobile broadband Internet access service as a commercial mobile service.⁴⁶ The Commission also adopted three bright-line rules prohibiting blocking, throttling, and paid-prioritization, as well as a general Internet conduct standard and “enhancements” to the transparency rule.⁴⁷ In 2016, a divided panel of the D.C. Circuit upheld the *Title II Order* in *United States Telecom Association v. FCC*, concluding that the Commission’s classification of broadband Internet access service was permissible under *Chevron* step two.⁴⁸ The D.C. Circuit denied petitions for rehearing of the case *en banc*,⁴⁹ and petitions for *certiorari* remain pending with the Supreme Court.⁵⁰

18. In May 2017, we adopted a *Notice of Proposed Rulemaking (Internet Freedom NPRM)*,⁵¹ in which we proposed to return to the successful light-touch bipartisan framework that promoted a free and open Internet and, for almost twenty years, saw it flourish. Specifically, the *Internet Freedom NPRM* proposed to reinstate the information service classification of broadband Internet access service. The *Internet Freedom NPRM* also proposed to reinstate the determination that mobile broadband Internet access service is not a commercial mobile service.⁵² To determine how to best honor the Commission’s commitment to ensuring the free and open Internet, the *Internet Freedom NPRM* also proposed to re-evaluate the Commission’s existing rules and enforcement regime to analyze whether *ex ante* regulatory

⁴² See, e.g., *id.* at 657 (quoting *Cellco Partnership v. FCC*, 700 F.3d 534, 549 (D.C. Cir. 2012)).

⁴³ *Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014) (*2014 Notice*).

⁴⁴ President Obama, Statement on Net Neutrality (Nov. 10, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/10/statement-president-net-neutrality>.

⁴⁵ *Title II Order*, 30 FCC Rcd 5601.

⁴⁶ *Id.* at 5778, para. 388.

⁴⁷ *Id.* at 5607-09, paras. 15-24.

⁴⁸ *United States Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (*USTelecom*).

⁴⁹ *United States Telecom Ass’n v. FCC*, 855 F.3d 381, 382 (D.C. Cir. 2017) (Srinivasan, J., and Tatel, J., concurring in the denial of rehearing *en banc*) (stating that “[e]n banc review would be particularly unwarranted at this point in light of the uncertainty surrounding the fate of the FCC’s Order”).

⁵⁰ See Petition for Writ of Certiorari, *Berninger v. FCC*, 825 F.3d 674 (No. 17-498); Petition for Writ of Certiorari, *AT&T v. FCC*, 825 F.3d 674 (No. 17-499); Petition for Writ of Certiorari, *American Cable Ass’n v. FCC*, 825 F.3d 674 (No. 17-500); Petition for Writ of Certiorari, *CTIA-The Wireless Ass’n v. FCC*, 825 F.3d 674 (No. 17-501); Petition for Writ of Certiorari, *NCTA-The Internet & Television Ass’n v. FCC*, 825 F.3d 674 (No. 17-502); Petition for Writ of Certiorari, *TechFreedom v. FCC*, 825 F.3d 674 (No. 17-503); Petition for Writ of Certiorari, *United States Telecom Ass’n v. FCC*, 825 F.3d 674 (No. 17-504)..

⁵¹ *Restoring Internet Freedom*, Notice of Proposed Rulemaking, 32 FCC Rcd 4434 (2017) (*Internet Freedom NPRM*).

⁵² *Id.* at 4453, para. 55.