



Regulating Internet Access: Lessons from COVID-19

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As some [states and localities](#) have paused re-opening efforts in response to recent increases in COVID-19 cases, internet access continues to serve a critical role to help many individuals work, learn, and receive healthcare from home. The Federal Communications Commission (FCC or Commission) has encouraged internet service providers to expand internet access and [ensure that networks can support increased traffic](#). A centerpiece of the FCC’s approach in the early stages of the COVID-19 emergency was the [Keep Americans Connected Pledge](#). Internet providers who took the voluntary pledge promised to waive late fees and not disconnect a customer’s service through June 30. With the expiration of the pledge, FCC Chairman Ajit Pai has called on internet providers to [offer](#) continuing support to customers affected by COVID-19.

Beyond encouraging voluntary efforts—either through direct entreaties like the Keep Americans Connected Pledge or through [financial incentives](#)—it is unclear what steps the Commission can take to regulate internet providers to continue to provide service to customers. While the FCC possesses authority under Title II of the [Communications Act of 1934](#) to regulate providers of “telecommunications services,” the Commission has [classified](#) broadband internet service as an “information service” subject to lesser regulation. The FCC may thus lack authority to compel any action from broadband providers.

This Legal Sidebar discusses how the FCC’s statutory authority under the Communications Act applies to broadband internet access. The Sidebar concludes with a brief discussion of how the FCC’s interpretation of its statutory authority has shaped the Commission’s response to COVID-19 and the congressional role in regulating broadband access.

FCC Authority Under the Communications Act

The FCC’s regulatory authority under the [Communications Act of 1934](#) extends over communications made by wire or radio in interstate or foreign commerce. However, the scope of the Commission’s authority varies depending on the service being regulated. The Act grants the Commission affirmative authority to regulate “common carriers,” radio, and cable communications. The common carrier provisions of the Communications Act, grouped under [Title II](#) of the Act, permit the Commission to regulate the “[charges, practices, classifications, and regulations](#)” associated with the provision of “[telecommunications service](#).” Title II requires common carriers [to](#) (1) “furnish . . . communication

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service upon reasonable request,” (2) [refrain](#) from “unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services,” and (3) charge only “just and reasonable” rates. In 1996, Congress [amended](#) the Communications Act to [clarify](#) that Title II’s regulations do not extend to *information services*, which the Act [defines](#) as the “offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,” with limited exceptions.

Since 1982, the Act’s radio regulations have included specific provisions for *mobile service*—two-way communications by radio initiated or received by a mobile device. In the current Communications Act, [Section 332](#) sets forth the FCC’s authority to regulate mobile services. The section distinguishes between two types of mobile service, subject to different types of regulation. A *commercial mobile service*—defined in Section 332 as a for-profit mobile service that makes interconnected service available to the public—is subject to more stringent regulation under Title II of the Communications Act. On the other hand, a *private mobile service*—defined in Section 332 as a mobile service that is not a commercial mobile service or the “functional equivalent” of a commercial mobile service—is subject only to the requirements of Title III, including Section 332’s specific mobile service requirements.

Application to Broadband Access

The FCC first addressed the Communications Act’s applicability to broadband in a 1998 [Order](#) classifying broadband service provided by digital subscriber line, or DSL, as a telecommunications service. In 2002, the Commission classified broadband service provided over cable television lines as an information service. The Supreme Court [upheld](#) the FCC’s classification, [noting](#) that whether broadband service is an information service or a telecommunications service “turns not on the language of the Act, but on the factual particulars of how Internet technology works and how it is provided.” The Court determined that the Communications Act had not conclusively answered this question, which was therefore the Commission’s to resolve. Following the Supreme Court’s decision, the FCC classified other types of broadband service as “information services,” including [mobile](#) and [wireline](#) broadband.

Despite the FCC’s classification of broadband service as an “information service,” the Commission has often sought to regulate broadband service in some capacity. The U.S. Court of Appeals for the D.C. Circuit vacated the earliest of these attempts. In its 2010 decision in *Comcast Corp. v. FCC*, the court held that the Commission [could not rely](#) on a [provision](#) of the Communications Act that permits the Commission to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Communications Act], as may be necessary in its functions.” After the D.C. Circuit’s decision, the Commission promulgated an [order](#) applying several [open internet rules](#) to internet providers. Among the Commission’s rules were an [anti-blocking](#) rule prohibiting internet providers from blocking access to lawful content and an [anti-discrimination](#) rule prohibiting internet providers from discriminating in their treatment of internet traffic. As authority to issue these rules, the FCC [relied on](#) [Section 706 of the Communications Act](#), which directs the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.” On review, the D.C. Circuit [upheld](#) portions of the FCC’s order but vacated the order’s [anti-discrimination](#) and [anti-blocking](#) rules as *per se* common carrier regulations that could not be supported by Section 706 alone.

Seeking to reinstate its anti-discrimination and anti-blocking rules, the FCC [issued](#) an order in 2015 reclassifying broadband service as a “telecommunications service” and mobile broadband service as a “commercial mobile service,” therefore subjecting both to common carrier regulation. In response, [several broadband providers and trade associations](#) challenged the order, arguing that the Commission lacked statutory authority to re-classify these services. In its third opinion on the topic, the D.C. Circuit [upheld](#) the Commission’s order. Relying on [Supreme Court precedent](#) upholding the FCC’s original classification of cable broadband, the court [held](#) that the Commission’s reclassification was proper.

The latest action undertaken by the Commission in the realm of broadband access was its order, which it released on January 4, 2018, [reinstating](#) its earlier “information service” and “private mobile service” classifications for broadband service and mobile broadband service, respectively. Additionally, the 2018 order [rejected](#) Section 706 as a source of regulatory authority, instead concluding that the provision was “better interpreted as hortatory.” The D.C. Circuit largely [upheld](#) the Commission’s 2018 order but remanded it to the FCC for further consideration on three issues, including the order’s effect on [public safety](#). Using the COVID-19 outbreak as a backdrop, commenters have alternately argued that classifying broadband as an information service either [promotes](#) public safety or [threatens](#) it. The Commission is reviewing comments, having [extended](#) the deadline for comments because of COVID-19.

Current Issues

The FCC’s response to the COVID-19 outbreak has largely focused on addressing network capacity issues. To address mobile broadband capacity, the Commission has granted mobile providers [special temporary authority](#) to operate their networks on unused radio spectrum, allowing the providers to accommodate a greater amount of internet traffic. The FCC has received such a high volume of applications for this authority since the beginning of the COVID-19 outbreak that it has published a [guide](#) for the application process. The Commission has also waived regulatory requirements based on the need for, among others, [increased telehealth resources](#) and [high teleconference call volumes](#). Its foremost consumer-targeted measure was its [Keep Americans Connected](#) pledge, which entailed an internet provider’s promise to refrain from disconnecting service due to an inability to pay, waive any late fees, and open Wi-Fi hotspots to “any American who needs them.” The Commission has largely avoided imposing direct requirements on communications providers in response to the pandemic, as FCC Chairman Ajit Pai has [emphasized](#) the use of market solutions rather than stringent regulation.

In reclassifying broadband service as an information service and rejecting Section 706 as a source of regulatory authority, the Commission’s 2018 order left broadband service largely outside the scope of its regulatory jurisdiction. Indeed, the commitments comprising the Commission’s [Keep Americans Connected](#) pledge might have been imposed by regulation if broadband service were classified as a telecommunications service. For example, the promises in the Pledge to waive late fees and not to terminate service might have been treated as prohibitions against “unjust or unreasonable” charges or practices.

Considerations for Congress

The FCC’s approach to broadband regulation presents obstacles for proponents of greater Commission intervention, but it creates difficulties for advocates of deregulation as well. The D.C. Circuit has upheld the Commission’s classifications of broadband service as both a telecommunications service and an information service, and it has similarly upheld the Commission’s exercise of (and subsequent disclaimer of) regulatory authority under Section 706 of the Communications Act. Thus, current and future commissions could pursue re-classifying broadband service to align with their regulatory priorities. The power to classify and re-classify broadband service stems largely from the fact that the Communications Act does not consistently define “broadband service” or subject broadband service to particular regulatory requirements.

Defining Broadband

The Communications Act provides few definitions relating to broadband service. Section 706 uses the term “[advanced telecommunications capability](#),” but the definition of this term is itself ambiguous, referring to “high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any

technology.” The challenges of specifying a definition of broadband service are apparent in the Commission’s [broadband progress reports](#), which section 706 [requires](#) the Commission to produce. The Commission’s [first report](#), issued in 1999, defined *broadband* as a data service capable of supporting speeds greater than 200 kilobits per second. The Commission’s [2019 report](#), issued 20 years later, sets the benchmark download speeds for broadband as [25 megabits per second](#) for fixed broadband service and [5 megabits per second](#) for mobile broadband service—25 to 125 times the rate in its first report. While the underlying statutory language remains unchanged, the Commission’s evolving interpretations reflect its [judgment](#) that what was “high-speed” by 1999’s standards is no longer high-speed today. A more precise definition of “broadband” may provide clarity but could also frustrate the Commission’s ability to account for evolving technological standards.

Several other portions of the Communications Act define terms related to broadband service, but the regulatory reach of these sections is limited. [Section 6001](#) of the [Middle Class Tax Relief and Job Creation Act of 2012](#) provides a definition for “commercial mobile data service,” which includes mobile broadband, but the term only defines another term in the same section and appears nowhere else in the Act. The recently enacted [Broadband DATA Act](#) adopts the Commission’s [definition](#) of “broadband internet access service,” which [originated](#) in the FCC’s 2018 order, and uses the term mainly in directing the FCC to gather information relating to the deployment of broadband.

Regulating Broadband

Without statutory provisions directing particular regulatory treatment of broadband, the FCC has classified broadband as both a telecommunications service and an information service at various times. Although the Commission may re-classify broadband as a telecommunications service, the current Commission—which issued the 2018 order classifying broadband as an information service—is viewed as unlikely to do so. Congress could restrict the Commission’s exercise of this authority in one of two ways: either by (1) amending the Communications Act to classify broadband service as either a telecommunications service or information service; or (2) directing the FCC to subject broadband providers to specific regulations. Members have [introduced](#) legislation adopting [both](#) approaches.

The tradeoff with any such legislation is that a legislative mandate will limit the Commission’s flexibility to adapt its regulatory program to changes in technology or market conditions. As the Supreme Court has [observed](#), regulating broadband service involves “subject matter that is technical, complex, and dynamic.” Preserving the FCC’s discretion to set policy in the realm of broadband regulation would allow it, in its “[expert policy judgment](#),” to act without waiting for congressional direction.

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