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## Press Release

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### PHOENIX CENTER ANALYZES LEGAL RAMIFICATIONS OF D.C. CIRCUIT'S RULING IN *USTELECOM V. FCC* ON CURRENT OPEN INTERNET DEBATE

#### *FCC Open Internet Rules Regulate Rates Without Due Process Protections*

WASHINGTON, D.C. – In 2015, the Federal Communications Commission made the controversial decision to reclassify broadband Internet access as a common carrier “telecommunications” service under Title II of the Communications Act. While much of the debate has focused on the legality of reclassification, little attention has been paid to actual implementation.

In a new POLICY BULLETIN released today entitled *USTelecom and its Aftermath*, Phoenix Center President Lawrence J. Spiwak explains that because Net Neutrality is unambiguously rate regulation, a proper implementation of Title II would have precluded the Commission’s approach. To get around this legal inconvenience, the Commission’s admitted that it ignored the “vast majority of rules adopted under Title II” and so that it could “tailor[] [Title II] for the 21st Century.” Surprisingly, the D.C. Circuit found in *United States Telecom Association v. FCC* that the agency had wide latitude to interpret the Communications Act and not only upheld the agency’s decision to reclassify but also its gross distortion of Title II. In so doing, the D.C. Circuit has extended *Chevron* deference beyond any reasonable limit, greatly expanding the Commission’s authority well beyond its statutory mandate.

To explore this important issue in detail, Spiwak’s paper first presents several examples of how the *2015 Open Internet Order* ignores both the plain language of Title II and the extensive case law to achieve select political objectives, followed by a discussion of the D.C. Circuit’s acceptance of such legal perversions. Spiwak also discusses how the FCC attempted to use the same theory of the case found in *USTelecom* to regulate the prices of Business Data Services.

“Properly viewed, the current iteration of the net neutrality debate is not really about an ‘Open Internet,’ free speech, or even who has the biggest Reese’s Peanut Butter mug; it’s about *power*. An administrative agency should not be permitted on its own initiative to expand its power beyond its statutory mandate at the expense of private actors’ Fifth Amendment due process protections” said study author and Phoenix Center President Lawrence J. Spiwak. “*USTelecom* has greatly expanded the Commission’s authority well beyond its statutory mandate. The statutory construct of Title II now has no meaning; it is some bizarre legal hybrid that the FCC made up and the D.C. Circuit has sanctioned.”

A full copy of PHOENIX CENTER POLICY BULLETIN NO. 42, *USTelecom and its Aftermath*, may be downloaded free from the Phoenix Center's web page at: <http://www.phoenix-center.org/PolicyBulletin/PCPB42Final.pdf>.

*The Phoenix Center is a non-profit 501(c)(3) organization that studies broad public-policy issues related to governance, social and economic conditions, with a particular emphasis on the law and economics of the digital age.*