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Press Release

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NEW PHOENIX CENTER STUDY EXPLAINS WHY THE FCC HAS NO JUSTIFICATION TO INVOKE SECTION 706 TO SUPPORT OPEN INTERNET RULES

*Open Internet Rules will do nothing to remove barriers to entry to promote broadband
deployment to unserved areas*

WASHINGTON, D.C. — Section 706 of the Telecommunications Act of 1996 has played a recurring supplemental role in the Federal Communication Commission’s (“FCC”) efforts to reclassify Broadband Internet Access Services as a Title II common carrier telecommunications service under the auspices of Net Neutrality. Section 706 instructs the Commission to encourage the “reasonable and timely” deployment of broadband services to all Americans. Whether Section 706 is an independent grant of authority (and, if so, what are the bounds of that authority) or is merely hortatory has been subject to great debate over the years.

In December 2023, the FCC issued a *Notice of Proposed Rulemaking* that seeks, once again, to apply legacy Title II common carrier regulation to broadband services. And, once again, the Commission plans to rely on Section 706 “as part of our authority for open Internet rules.” Taking the FCC’s view that Section 706 is an independent grant of authority at face value, in a new analysis released today by Phoenix Center Chief Economist Dr. George S. Ford entitled *The Federal Communications Commission’s Section 706 Problem*, Dr. Ford describes a problem with the Commission’s proposed reliance on Section 706 to support the regulation of broadband services under Title II.

As Dr. Ford explains, Section 706 is singular in its intent: that is, Congress wants the Commission to remove barriers to entry to promote broadband deployment to unserved areas. No other purpose justifies the use of Section 706. In its 2023 *NPRM*, the Commission makes no claim that Title II regulation removes barriers to infrastructure investment in unserved areas, and it would be nearly impossible to craft a plausible argument that it would. In fact, the Commission’s justification for Title II regulation is to reduce the broadband providers’ degrees of freedom in maximizing profit, so the regulations at best are neutral and are more likely a barrier to network deployment in unserved areas.

To demonstrate the point, Dr. Ford conducts a counterfactual analysis of the Commission’s broadband data which shows that the application of Title II regulation during 2015 through 2017 did not improve the rate of broadband deployment to unserved areas, and in fact may have slowed progress. Title II regulation, therefore, did not serve the sole aim of Section 706, and there is no reason to believe a second effort would do any better.

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Equally as important, Dr. Ford argues that it is time to have an honest conversation about whether the goals of Section 706—a law enacted in 1996—are finally satisfied given current market conditions. At present, federal and state governments are spending billions of subsidy dollars to finally close the availability gap, forcing questions about the need for regulatory intervention to do the same. Also, modern satellite-based services will soon make quality broadband services readily available to nearly every nook and cranny of the nation. While these networks are relatively new, both the number of and capabilities of these networks is rapidly advancing. If “all Americans” may obtain quality broadband services, then there is no economic basis for the Commission to invoke Section 706.

“Section 706 authorizes regulatory actions, including forbearance, that remove barriers to infrastructure deployment in unserved areas,” says Study author Phoenix Center Chief Economist Dr. George S. Ford. “Nothing in Section 706 permits regulations that serve other purposes, whether those purposes be openness, national security, or any other speculative benefit of Title II regulation.”

A full copy of PHOENIX CENTER POLICY PERSPECTIVE NO. 24-01, *The Federal Communications Commission's Section 706 Problem*, may be downloaded free from the Phoenix Center's web page at: <http://www.phoenix-center.org/perspectives/Perspective24-01Final.pdf>.

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