Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Delete, Delete, Delete	)	GN Docket No. 25-133
	)	

Comments of TechFreedom

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Summary

TechFreedom supports the FCC's goal of efficiency and modernization of outdated regulations as outlined in the "Delete, Delete, Delete" proceeding. However, TechFreedom cautions the FCC to adhere to the Administrative Procedure Act (APA) and emphasizes the limited deference the FCC will receive post-*Loper Bright*.

These comments address the procedural requirements for changing or repealing rules, highlighting three categories of FCC rules: non-legislative rules (i.e., policy statements and procedural rules), substantive rules based on discretionary statutory authority, and substantive rules based on specific statutory authority. The FCC can modify or eliminate policy statements and internal organization rules without notice and comment. However, substantive rules generally require notice and comment rulemaking, including repeals, subject to the "good cause" exception.

The FCC's authority to forbear from applying Title II regulations (for telecommunications services) does not extend to other titles of the Communications Act. The FCC must also ensure it has statutory authority to act, especially given the post-*Chevron* Deference landscape. The FCC should be wary of overreach, as it may not survive appellate scrutiny under the Major Questions Doctrine.

These comments draw parallels to Chairman Fowler's "Regulatory Underbrush" proceedings in the 1980s, where the FCC differentiated between eliminating internal policies and regulations codified in the Code of Federal Regulations. Chairman Fowler followed the APA's public comment requirement when eliminating regulations in the CFR, and the courts upheld the FCC's actions. Similarly, the Pai FCC approached deregulation in a coherent and

stepwise fashion, using the Modernization of Media Regulation Initiative to eliminate outdated rules.

The APA's "good cause" exception to the rulemaking requirement should be applied narrowly. Courts have recognized "good cause" in limited circumstances, such as emergencies or where prior notice would subvert the statutory scheme. The FCC should be cautious in using this exception, especially when repealing regulations where it believes them to be "facially unlawful." When in doubt, the agency should seek public comments to ensure that it accounts for potential reliance interests upon the existing rule.

The level of deference FCC orders will receive on appeal is uncertain post-*Loper Bright*. Courts will follow *Skidmore*, considering factors such as the agency's expertness, formality, consistency, thoroughness, and logic.

In proceeding with its deregulatory agenda, the FCC should prioritize outdated policies and duplicative policies. The FCC should then address codified regulations based on broad statutory language and, lastly, consider new regulations cautiously. Each rule change should be addressed in a separate rulemaking proceeding, with careful adherence to the APA.

In conclusion, TechFreedom emphasizes the importance of this docket for realigning FCC regulations to better fit market forces and congressional intent. However, it cautions against hasty decisions and urges the FCC to respect the APA and consider the implications of *Loper Bright*.

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Pursuant to the Public Notice ("Notice") released by the Commission on March 12, 2025,[1] TechFreedom submits the following comments as the FCC seeks to "alleviat[e] unnecessary regulatory burdens"[2] in its "Delete, Delete, Delete" Docket.[3]

I. About TechFreedom

TechFreedom is a non-partisan think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity.

The FCC is taking an important, and much needed, step in opening the Delete Docket. TechFreedom has long advocated for efficiency in government and for modernizing outdated

[1] In re Delete, Delete, Delete, DA 25-219, released Mar. 12, 2025 ("Delete Docket Public Notice" or "Public Notice"). The Public Notice called for comments to be filed by April 11, 2025. These comments are timely filed.

[2] *Id.*

[3] GN Docket No. 25-133 (hereinafter "the Delete Docket").

regulation wherever possible.[4] For example, we have supported changes to the FCC's media ownership rules in light of the evolving radio and video markets, in both comments to the FCC,[5] and in court amicus briefs.[6] But we have also repeatedly warned the FCC, under leadership of both parties, not to cut corners procedurally,[7] but to follow the strictures of the

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[4] *See, e.g.,* TechFreedom, Comments on the Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion (Sept. 6, 2016), http://docs.techfreedom.org/Comments_FCC_2016_706(b)_NOI.pdf (urging the FCC to rethink its broadband annual deployment assessment methodology in a way that will actually make the deployment easier);TechFreedom, Comments on the Petition for Rulemaking of the U.S. Chamber of Commerce (Oct. 26, 2023), https://techfreedom.org/wp-content/uploads/2023/10/Chamber-FTC-Disqualification-Rulemaking-Petition.pdf (urging the FTC to adopt a better disqualification process to prevent wasting staff resources).

[5] Comments of the Competitive Enterprise Institute and TechFreedom in Modernization of Media Regulation Initiative, MB Docket No. 17-105 (July 5, 2017), http://docs.techfreedom.org/TF_CEI_Comments_FCC_Media_Modernization.pdf.

[6] Brief for TechFreedom as Amicus Curiae Supporting Petitioners at 3, Fed. Commc'ns Comm'n v. Prometheus Radio Project, 592 U.S. 414 (2021) (No. 19-1231), https://www.supremecourt.gov/DocketPDF/19/19-1231/161496/20201123101413222_tsac%20TechFreedom%2019-1231%2019-1241.pdf ("The FCC has tried, in short, to repeal rules that are hurting broadcasters' ability to compete in a media and information age wholly different from the one in which the rules were created.").

[7] *See* Comments of TechFreedom in IB Docket No. 21-456, filed Aug. 7, 2023, ("This FNPRM has all the hallmarks of an NOI, not an FNPRM. It (and accompanying Commissioner statements) asks more than two dozen distinct questions about how the Commission should approach spectrum sharing for satellite systems, but it proposes no draft rule."); TechFreedom and the International Center for Law & Economics, Reply Comments on Modernizing the E-rate Program for Schools and Libraries at 4, n.8 (Nov. 7, 2013), http://docs.techfreedom.org/E_Rate_Reply_Comments.pdf ("Indeed, the FCC should have issued a Notice of Inquiry before issuing this NPRM for precisely this reason—a mistake the FCC all too often makes, frequently putting the Commission in the awkward position of being on the verge of rulemaking without first properly exploring the facts on the ground. This is the worst kind of putting the cart before the horse."); TechFreedom Comments on Expanding Flexible Use of the 12.2-12.7 GHz Band at 3 (May 7, 2021), https://techfreedom.org/wp-content/uploads/2021/05/TF-Comments-12-GHz-NPRM-4-7-21.pdf ("The Commission Should Have Issued a Notice of Inquiry (NOI), not a Notice of Proposed Rulemaking"); TechFreedom Comments on Petition for Rulemaking of FUSE, LLC To Establish a New Content Vendor Diversity Report at 5 (July 22, 2022), https://techfreedom.org/wp-content/uploads/2022/07/TechFreedom-Comments-7-22-22.pdf ("If the Commission moves forward at all, it should begin a proceeding by issuing a broad Notice of Inquiry (NOI) rather than an NPRM").

Administrative Procedure Act (APA) in changing any rules.[8] Post *Loper Bright,*[9] the deference the FCC will receive for any action taken in this docket will be limited, as we discuss below.

It is not Christmas (or even Festivus).[10] Unlike so many other commenters, we're not making a pilgrimage to the FCC mall to sit on Santa's lap to ask for the deregulatory equivalent of Air Jordans. Instead, we take this opportunity to outline the process and the manner in which the Commission should conduct this, and follow-on, proceedings to reach rational decisions to change or repeal outdated rules, and how these changes can be defended on the inevitable appeal. It is within this context that we file these comments.

II. Process Matters: You Can't DOGE the APA

If nothing else, the speed with which this Administration has moved to change the status quo is astonishing.[11] From signing 112 Executive Orders as of the submission of these comments,[12] to DOGE's alleged savings of $150 billion in the first 72 days of the

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[8] Administrative Procedure Act, 5 U.S.C. § 551 (2006).

[9] Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

[10] *See* Comments of TechFreedom in GN Docket No. 24-286 (T-Mobile/U.S. Cellular merger) (Jan. 8, 2025), https://techfreedom.org/wp-content/uploads/2025/01/TechFreedom-Comments-TMobile-1-8-25.pdf ("With the pleading cycle for this transaction coming at the end of the year (and with a change in administrations looming), some petitioners are treating this like Festivus, the fictitious holiday where the airing of grievances are heard. Others view this proceeding as an opportunity to ask the FCC for the gift of conditions that have little to do with the transaction, instead a wish-list of how petitioners would like the marketplace to operate.") (footnotes omitted.).

[11] *See, e.g.*, Karen Yourish et al., *All of the Trump Administration's Major Moves in the First 80 Days*, N.Y. TIMES (Apr. 10, 2025), https://www.nytimes.com/interactive/2025/us/trump-agenda-2025.html (listing all of the changes (e.g. agency directives, executive orders, lawsuits, and social media posts) promulgated since the inauguration).

[12] *See 2025 Donald J. Trump Executive Orders*, FED. REGISTER, https://www.federalregister.gov/presidential-documents/executive-orders/donald-trump/2025 (last visited Apr. 11, 2025).

administration,[13] to the deportation of over approximately 100,000 non-U.S. citizens,[14] President Trump and his team are moving fast—and, no doubt, breaking more than they intend or perhaps even realize.[15] Chairman Carr seeks to capitalize on this national momentum[16] through the Delete Docket:

> For too long, administrative agencies have added new regulatory requirements in excess of their authority or kept lawful regulations in place long after their shelf life had expires. This only creates headwinds and slows down our country's innovators, entrepreneurs, and small businesses. The FCC is committed to ending all of the rules and regulations that are no longer necessary. And we welcome the public's participation and feedback throughout this process.[17]

In general, we agree, but rushing may be counterproductive. While the Executive Branch has substantial powers in certain areas, those powers are not unlimited and are subject to certain procedural safeguards that protect fundamental due process. As it relates to the activities of the FCC, those safeguards are encapsulated in the APA, which requires

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[13] *See Savings*, DEP'T OF GOV'T EFFICIENCY, https://doge.gov/savings (last visited Apr. 11, 2025).

[14] Jannie Taer & Anna Young, *Trump administration has arrested 113K migrants, deported over 100K since taking office*, N.Y. POST (Mar. 31, 2025), https://nypost.com/2025/03/31/us-news/ice-arrested-113k-deported-over-100k-since-trumps-return-as-prez-maintains-promise-to-boot-illegal-migrants-alleged-gangbangers-sources/.

[15] How many of the Trump Administration's actions will survive appeal, of course, is yet to be determined.

[16] *See* Brendan Carr (@BrendanCarrFCC), X (Mar. 27, 2025), https://x.com/BrendanCarrFCC/status/1905371317441826831 ("We're moving on Trump Time at the FCC & running a fast-paced agenda. ⏱ ").

[17] Press Release, Office of Chairman Brendan Carr, FCC Chairman Carr Launches Massive Deregulation Initiative (Mar. 13, 2025), https://docs.fcc.gov/public/attachments/DOC-410147A1.docx.

notice and comment rulemaking before regulations are changed.[18] As inconvenient (and time consuming) as the APA may be, the FCC's ability to alter its public-facing rules is limited.

A. Three Categories of FCC "Rules"

As the FCC embarks on this proceeding, which hopefully will not become a misguided "voyage of discovery" of the outer bounds of its statutory authority,[19] the agency should categorize each "rule" it proposes to change as follows: (1) non-legislative rules, including "interpretive" rules (*e.g.*, policy statements) and internal organizational rules;[20] (2) "substantive" or "legislative" rules[21] based on discretionary statutory authority; and (3) such rules based on specific statutory authority. Each is subject to different procedural requirements, and will be analyzed differently on appeal.

1. The FCC May Modify or Eliminate Policy Statements or Internal Organization Rules Without Notice and Comment

The FCC regularly issues policy statements and other internal organizational "rules."[22] These provide informal guidance for the Commission's approach on certain issues, and the way it operates. For example, the FCC recently issued a policy statement containing nine principles related to future spectrum use, but disclaiming any regulatory effect:

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[18] *See, e.g.*, Time Warner Cable Inc. v. Fed. Commc'ns Comm'n, 729 F.3d 137, 169-71 (2d Cir. 2013) (holding that the FCC violated the APA by issuing a rule without directly connecting it to a prior NPRM); Administrative Procedure Act, 5 U.S.C. § 551 (2006).

[19] Util. Air Regul. Grp. v. Envtl. Prot. Agency, 573 U.S. 302, 328 (2014).

[20] The APA's rulemaking requirement "does not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(4)(A).

[21] "Rules issued through the notice-and-comment process are often referred to as "legislative rules" because they have the 'force and effect of law.'" Perez v. Mortgage Bankers Ass'n, 575 U.S. 92, 92 (2015) (quoting Chrysler Corp. v. Brown, 441 U. S. 281, 302–303 (1979)).

[22] *See Policy Statement*, FED. COMMC'NS COMM'N, https://www.fcc.gov/documents/policy-statement (listing policy statements issued between 1945 and 2023).

> This Policy Statement is intended to help guide Commission decision-making and stakeholder action as the RF environment evolves and does not constitute rules. Accordingly, this Policy Statement is not binding on the Commission or other parties, and it will not prevent the Commission from making a different decision in any matter that comes to its attention for resolution. This Policy Statement does not intend to prejudge considerations in any particular proceeding regarding receiver performance, including the nature of the particular services involved, the requirements for effective performance of receivers for their intended uses, and how to address legacy receivers or the costs associated with replacing legacy receivers with more interference-resilient receivers. Furthermore, this Policy Statement relates to the Commission's management of non-Federal spectrum; it does not address issues relating to Federal spectrum. This Policy Statement provides guidance primarily on spectrum-management considerations for spectrally proximate services. Although this Policy Statement does not directly address co-channel spectrum sharing, we note that many of the technical and policy principles could be applied in those situations as well.[23]

In practice, disclaiming regulatory effect may mean little. The "net neutrality" war of the last two decades was launched with a policy statement that included a similar disclaimer.[24]

Such policy statements are generally not published in the Code of Federal Regulations (CFR); issuing, amending, or repealing them, or internal procedural rules, does not require APA notice and comment rulemaking.[25] Nonetheless, the FCC has often, wisely, sought

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[23] In re Principles for Promoting Efficient Use of Spectrum, FCC 23-27, ET Docket 23-122, at 1(Apr. 21, 2023), https://docs.fcc.gov/public/attachments/FCC-23-27A1.pdf.

[24] *See* In re Appropriate Framework for Broadband Access to the Internet, FCC 05-151, 20 FCC Rcd 14986 (Sept. 23, 2005), https://docs.fcc.gov/public/attachments/FCC-05-151A1.pdf ("The Commission has a duty to preserve and promote the vibrant and open character of the Internet as the telecommunications marketplace enters the broadband age. To foster creation, adoption and use of Internet broadband content, applications, services and attachments, and to ensure consumers benefit from the innovation that comes from competition, the Commission will incorporate the above principles into its ongoing policymaking activities." *See also* n. 15, "Accordingly, we are not adopting rules in this policy statement. The principles we adopt are subject to reasonable network management."). Note that this Policy Statement was issued within the context of five separate proceedings, at least one of which dated back ten years (CC Docket No. 95-20, the "*Computer III*" proceeding).

[25] 5 U.S.C. § 553(b)(4) ("Except when notice or hearing is required by statute, this subsection does not apply . . . to general statements of policy."). *See* Telecomm. Rsch. & Action Ctr. v. Fed. Commc'ns

comment to better inform itself and the public of upcoming changes.[26] If the FCC wants to make rapid progress on clearing the regulatory thicket, this is where it should focus first, as it has significant discretion to move quickly.[27]

2. The APA Generally Requires Notice and Comment Rulemakings for Changes to Substantive Rules

"Before an agency may adopt a substantive rule, it must publish a notice of the proposed rule and provide interested persons an opportunity to comment."[28] This requirement applies to any "rule making," which the APA defines to include not only to "formulating" or "amending" a rule but also "repealing" it.[29] Thus, "deletion" generally requires notice and comment—subject to the "good cause" exception discussed below.[30]

Comm'n, 800 F.2d 1181, 1186-87 (D.C. Cir. 1986) (elimination of six FCC policies related to broadcast stations upheld as "general statement of policy, exempt from the APA's general rulemaking requirements."). "The real dividing line between regulations and general statements of policy is publication in the Code of Federal Regulations." *Id.* at 1186 (quoting Brock v. Cathedral Buffs Shale Oil Co., 796 F.2d 533, 539 (D.C. Cir. 1986)). In the latter case, then-Judge Antonin Scalia was not referring to internal rules of organization, which are clearly excluded from the APA's rulemaking requirement. 5 U.S.C. § 553(b)(4)(A) (the requirement "does not apply to … rules of agency organization, procedure, or practice.").

[26] *See e.g.*, Policy Statement and Notice of Proposed Rulemaking, In the Matters of 911 Governance and Accountability, 80 Fed. Reg. 3191(proposed Jan. 22, 2015) (to be codified at 47 C.F.R. pt. 12) ("affirm[ing] the core principles that have guided and will continue to guide the Commission's approach to ensuring reliable and resilient 911 service . . . [and] propos[ing] specific rules designed to address failures leading to recent multi-state 911 outages").

[27] As discussed *infra* section II.B, this is how the Fowler FCC proceeded with its "underbrush" deregulatory campaign.

[28] *Telecomm. Rsch. & Action Ctr*, 800 F.2d at 1186.

[29] 5 U.S.C. § 551(5).

[30] *See infra* at Section III.

Courts have recognized that the Communications Act gives the FCC broad discretion in many areas.[31] Especially as it related to media ownership rules, Congress specifically required the FCC to review these regulations every four years with a directive that the Commission "must repeal or modify any ownership rules that the agency determines are no longer in the public interest."[32] Assuming that APA requirements are met, courts may block rule changes only when they are "arbitrary and capricious."[33] This is true even if the data on which the Commission relies is not perfect.[34]

As to telecommunications services, Congress gave the FCC broad authority to:

> forbear from applying any regulation or any provision of [Title II of the Communications Act] … if the Commission determines that—
>
> > (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
> >
> > (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
> >
> > (3) forbearance from applying such provision or regulation is consistent with the public interest.[35]

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[31] Fed. Commc'ns Comm'n v. Prometheus Radio Project, 592 U.S. 414, 414 (2021) ("Under the Communications Act of 1934, the Federal Communications Commission possesses broad authority to regulate broadcast media in the public interest.").

[32] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202(h) (1996) (1996 Act).

[33] *Id.* (citing 5 U.S.C. § 706(2)(A)).

[34] *Id.* ("To be sure, in assessing the effects on minority and female ownership, the FCC did not have perfect empirical or statistical data. Far from it. But that is not unusual in day-to-day agency decisionmaking within the Executive Branch. The APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies.").

[35] 47 U.S.C. § 160.

In 2009, the FCC issued procedural rules for forbearance petitions, including requiring public notice.[36] But the agency made clear that it did not consider notice and comment on forbearance petitions to be required by the APA: "Our adoption of filing requirements used for rulemakings in no way implies that we consider a forbearance petitions to be, or fundamentally to resemble, rulemakings."[37] Indeed, the Commission had previously declared that "a petition for forbearance is resolved under the usual standards for agency adjudication," not rulemaking.[38] The APA clearly distinguishes between rulemakings and adjudications; only the former are subject to notice and comment.[39]

Thus, because the APA does not apply, the FCC could, in principle, change its existing procedural rule so that not all petitions would have to be put out for public notice. Because changing procedural rules is not subject to the APA, the FCC could make this change without seeking public notice. Further, the FCC's existing rule applies only to petitions for public notice, not to forbearance decisions initiated by the FCC sua sponte; these, the FCC could, legally, simply pronounce ex cathedra. But that any of this would be legal does not make it wise; what the Commission said in issuing its forbearance rules in 2009 remains true today: "We disagree with comments to the effect that public notice and comment cycles for forbearance petitions … may not always be appropriate. We find public comment necessary to identify issues and to help the Commission understand the policy ramifications of a

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[36] 47 C.F.R. § 1.55; Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, WC Docket No. 07-267, Report and Order ¶ 29 (June 29, 2009), https://docs.fcc.gov/public/attachments/FCC-09-56A1.pdf.

[37] *Id.* at n. 72.

[38] Order, Petition for Forbearance From E911 Accuracy Standards Imposed On Tier III Carriers For Locating Wireless Subscribers Under Rule Section 20.18(h), 18 FCC Rcd. 24648, ¶ 12 (2003).

[39] *Compare* 5 U.S.C. §§ 553 and 554.

petition from varying points of view."[40] Public comment does not merely help the FCC make better decisions; it will help the agency defend its actions in court.

However the FCC decides to wield its forbearance power in this proceeding, that power is limited to Title II; it does not apply to other titles of the Communications Act, including Title III (mass media), and Title V (cable).[41] Former FCC Commissioner Micheal O'Reilly proposes that Congress should "expand the Federal Communications Commission's (FCC) existing forbearance authority – which currently only applies to telecommunications carriers and services. Video forbearance could give the FCC a valuable tool to quickly and efficiently peel away video obligations that no longer make sense in the modern marketplace."[42] But for now, changes to media and cable rules remain subject to the APA.

3. The FCC is Not Empowered to Rewrite the Statute and Clear Congressional Intent

In considering any changes to its regulations (be they deregulatory or new regulations), the FCC must first ask whether it has statutory authority to act. With *Chevron* Deference now gone (see discussion below), the FCC must consider whether it has statutory authority to act at all.[43] Bemoaning the decades-long ping pong match over Title II regulation

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[40] Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, WC Docket No. 07-267, Report and Order ¶ 29 (June 29, 2009), https://docs.fcc.gov/public/attachments/FCC-09-56A1.pdf.

[41] Michael O'Rielly, *Bringing Forbearance to Video Services*, The Media Institute (Mar. 21, 2025), https://www.mediacompolicy.org/2025/03/21/bringing-forbearance-to-video-services/.

[42] *Id.*

[43] Indeed, one of the fastest ways the FCC could lean out its regulatory approach to its licensees would be to conclude that certain regulations, even some that may have existed on the books for decades, were promulgated by the FCC without proper delegation from Congress. While the Supreme Court in *Loper Bright* did not wipe out all regulations on which the FCC received *Chevron*

of broadband services, for example, the Sixth Circuit declared: "Applying *Loper Bright* means we can end the FCC's vacillations."[44] That court framed its independent analysis as such:

> "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175 (2009) (citation omitted). We give the text its "ordinary meaning at the time Congress adopted" the statute, Niz-Chavez v. Garland, 593 U.S. 155, 160 (2021), reading it not in isolation but rather "in context," Loper Bright, 144 S. Ct. at 2261 n.4 (citation omitted).[45]

The FCC should engage in a similar analysis of all regulations it considers changing. Looming over all of this, but left unanswered by *Ohio Telecom Assoc.*, is what future appellate courts will do with the Major Questions Doctrine issues that remain outstanding in administrative law.[46] In 2015, TechFreedom was perhaps the first to raise that doctrine in objecting to the reclassification of Broadband Internet Access Service under Title II: as intervenors in the challenge to that order, we represented Voice over Internet Protocol pioneers who reasonably feared that "The madness of applying Title II means declaring everything telecom."[47] We objected to Title II reclassification because it "presumes that Congress delegated to the FCC power to unilaterally decide a question of utmost 'economic

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Deference, it nevertheless indicated that agencies might wish to reconsider those regulations. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024).

[44] In Re: MCP No.185, No. 24-7000, 2024 WL 3650468, at * 7 (6th Cir. Aug. 1, 2024) (hereinafter Ohio Telecom Assoc. v. Fed. Commc'ns Comm'n).

[45] *Id.* at * 9.

[46] *Id.* at * 20 ("Given our conclusion that the FCC's reading is inconsistent with the plain language of the Communications Act, we see no need to address whether the major questions doctrine also bars the FCC's action here.").

[47] Motion of TechFreedom to Intervene at 12, U.S. Telecomm. Ass'n v. Fed. Commc'n Comm'n, 825 F.3d 674 (D.C. Cir. 2016) (No. 15-1063) (quoting Jeff Pulver, *Fear and Loathing as Telecom* Policy, HUFFINGTON POST (Aug. 6, 2014), https://www.huffpost.com/entry/fear-and-loathing-as-tele_b_5654881), http://docs.techfreedom.org/TF_FCC_OIO_Motion_to_Intevene_6.8.15.pdf.

and political significance,' despite the lack of clearly expressed statutory authorization and despite subsequent legislative history indicating that Congress did not intend the FCC to regulate broadband Internet services."[48] We have repeatedly voiced this view for the last decade, long before the Supreme Court made unequivocally clear that decisions of "economic and political significance" must come from Congress, and not agencies.[49] Especially if the Commission seeks to pivot from "delete, delete, delete" to "regulate, regulate, regulate," as appears to be the case in some instances,[50] the FCC should be wary that such overreach will not survive appellate scrutiny under the Major Questions Doctrine.[51] Knowing that the FCC

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[48] Brief for Intervenors at 11, U.S. Telecomm. Ass'n v. Fed. Commc'n Comm'n, 825 F.3d 674 (D.C. Cir. 2016) (No. 15-1063), http://docs.techfreedom.org/TF_Intervenor_Brief_8.6.15.pdf

[49] West Virginia v. Envtl. Prot. Agency, 142 S. Ct. 2587, 2605 (2022). *See* Reply Comments of TechFreedom in Safeguarding and Securing the Open Internet, WC Docket No. 23-320 (Jan. 17, 2023), https://techfreedom.org/wp-content/uploads/2024/01/TechFreedom-reply-comments-Safeguarding-and-Securing-the-Open-Internet-January-17-2024.pdf; Brief of Amicus Curiae TechFreedom Supporting Petitioners, Minn. Telecom Alliance v. Fed. Commc'ns Comm'n, No. 24-7000) (6th Cir. 2025), https://techfreedom.org/wp-content/uploads/2024/04/TechFreedom-Digital-Discrimination-Amicus-Brief.pdf. *See also Major Questions About Major* Questions, TECH POLICY PODCAST (Oct. 3, 2024), https://podcast.techfreedom.org/episodes/386-major-questions-about-major-questions.

[50] *See, e.g.*, Gopal Ratnam, *Carr's FCC plan heading for 'buzz saw' of Big Tech Opposition*, Roll Call (Nov. 19, 2024), https://rollcall.com/2024/11/19/carrs-fcc-plan-heading-for-buzz-saw-of-big-tech-opposition/. *See also* Comments of TechFreedom in WT Docket 21-476 (Jan. 18, 2022) (in responding to then-Commissioner Carr's call for USF contributions to be expanded to include "Big Tech," *see* Press Release, Office of Commissioner Brendan Carr, Carr Calls for Ending Big Tech's Free Ride on the Internet (May 24, 2021), https://docs.fcc.gov/public/attachments/DOC-372688A1.pdf, we pointed to the fact that the FCC has zero jurisdiction over the edge providers that would be swept into such a regime—a clear overreach of Commission authority).

[51] *See, e.g.*, Adam Crews, *How* Loper Bright *and the End to the Chevron Doctrine Impact the FCC*, PRO-MARKET (Aug. 23, 2024), https://www.promarket.org/2024/08/23/how-loper-bright-and-the-end-to-the-chevron-doctrine-impact-the-fcc/ ("Precisely because the FCC has such broad regulatory power under the Communications Act, its biggest threats might come not from Chevron's fall but from the rise of the major questions and nondelegation doctrines."). *See generally* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1023-48 (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4165724.

will face such questions makes it all the more essential that the FCC seek public comment, even when it may not be required to do so by the APA.

B. Much Can be Learned from Chairman Fowler's "Regulatory Underbrush" Proceedings in the 1980s

This is not the first time an FCC Chair has put forth a deregulatory agenda. In his first inaugural address in January 1981, Ronald Reagan famously said, "government is not the solution to the problem: government is the problem."[52] When Mark Fowler became Chair of the FCC on May 18, 1981,[53] he moved swiftly to propose changes to Title II media services, seeking to eliminate the "underbrush" of regulations which were outdated or no longer necessary.[54] Many of these rules seem quaint today: "matters such as the broadcasting of astrology material, foreign language programs, and even a policy which looks askance at the repetitious broadcasting of a single record."[55]

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[52] President Ronald Reagan, Inaugural Address 1981, https://www.reaganlibrary.gov/archives/speech/inaugural-address-1981.

[53] The move toward a more deregulatory environment for media services began a few years before. In January 1981, The FCC eliminated certain reporting requirements deemed nonessential. Deregulation of Radio, 84 FCC 2d 968 (1981), *recon. denied*, 87 FCC 2d 797 (1981) (eliminating consideration of precise amounts of nonentertainment programming, specific requirements for ascertainment of community needs, limitations on the amount of commercial time aired, and certain program log requirements).

[54] The FCC described "underbrush" as "the accumulation of Commission policies, doctrines, declaratory rulings, rules, informal rulings and interpretive statements – sometimes minor in nature – that have grown up around major regulations (and licensees) over the years. Regulatory 'underbrush' has arisen in various forms and sizes but has often gone relatively unnoticed. Yet these 'underbrush' matters have the potential to impede the competitive functioning of the marketplace by imposing unnecessary restraints upon licensee discretion." Elimination of Unnecessary Broadcast Regulation and Subscription Agreements Between Radio Broadcast Stations and Music Format Service Companies, 48 Fed. Reg. 49852, 49853 (Oct. 28, 1983).

[55] *Id.*

It took the Fowler FCC approximately two years to issue its first Policy Statement and Order, in July of 1983.[56] There, partly without the public's input, the FCC eliminated its policy on distortion of ratings,[57] and misstatements of a station's coverage.[58] Three months later, the FCC's Second Policy Statement and Memorandum Opinion and Order eliminated ten more policies, again without seeking public comment, but held back three additional issues related to horse racing for consideration in a separate NPRM, seeking public comment because these policies had been promulgated into the CFR.[59] To underscore the difference between changing internal policies and regulations, the FCC said:

> It is important to recognize that all matters considered herein are *statements of policy,* not formal commission rules. Section 553(b)(3)(A) of the Administrative Procedure Act provides that the ordinary notice and comment rule making requirements do not apply 'to interpretive rules, *general statements of policy*, or rules of agency organization, procedure or practice.' Further the listing of many of the Commission's policies in § 73.4000 *et seq.* of the Commission's Rules does not affect the need, or lack thereof, for a notice and comment proceeding: § 73.4000 expressly states that the policies are listed and relevant citations provided in the Rules 'solely for the purpose of reference and convenience . . ..'[60]

The FCC continued to remove the underbrush of outdated policies in early 1985 by eliminating policies concerning scare announcements and disruptive contests—again, without seeking public comment. Here, the FCC stated that the 1966 Policy Statement,

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[56] Elimination of Unnecessary Broadcast Regulation, Policy Statement & Order, 94 FCC 2d 619 (1983).

[57] *Id.* at 621 ("[w]e no longer are persuaded that the Commission's limited resources are well spent by continuing to investigate and adjudicate complaints of this nature in the first instance.").

[58] *Id.* at 622.

[59] Elimination of Unnecessary Broadcast Regulation and Subscription Agreements Between Radio Broadcast Stations and Music Format Service Companies, 48 Fed. Reg. 49852 (Oct. 28, 1983). The horse racing rule (§ 73.4125) was deleted in Elimination of Unnecessary Broadcast Regulation, 49 Fed. Reg. 33269 (Aug. 22, 1984).

[60] *Id.* at 49854-5 (emphasis in original).

Contests and Promotions Which Adversely Affect the Public Interest,[61] "unnecessarily restricts the editorial discretion of licensees to develop innovative programming generally without the requisite showing that the public interest requires governmental intervention."[62] This was followed shortly by an order eliminating six additional policies.[63] Finally, in 1986, the FCC deleted its policies related to fraudulent billing practices, network clippings, and combination advertising rates and joint sale practices.[64] Chair Fowler also used the "underbrush" proceedings as a way to reorganize certain FCC offices, such as eliminating the Private Radio Bureau, again without going through formal notice and comment rulemaking under the APA.[65] Altogether, despite skipping public comment, this process took almost five years to complete.

But when it came to eliminating (deleting) regulations that were in the CFR, Chair Fowler followed the APA's public comment requirement. The horse racing proceeding is a

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[61] *Public Notice*, 2 FCC 2d 464, 1966, 31 Fed. Reg. 25688 (Feb. 9, 1966).

[62] Elimination of Unnecessary Broadcast Policies, 50 Fed. Reg. 6247 (Feb. 14, 1985).

[63] Elimination of Unnecessary Broadcast Regulation, 50 Fed. Reg. 5583 (Feb. 11, 1985). The six policy areas deleted are: § 73.4040 Audience ratings and license distortions; § 73.4085 and § 73.4245: Conflictions of interest and sports announcer selection; § 73.4225: Promotion of non-broadcast business of a station and using a station for personal advantage; Concert promotion announcements; § 73.4230: Failure to perform sales contracts; and § 73.4070: False, misleading and deceptive commercials. In issuing this change, the FCC once again reiterated that "[n]one of the matters considered in this Policy Statement and Order was established by Commission rule. Therefore, pursuant to Section 553(b)(3)(A) of the Administrative Procedure Act, the ordinary notice and comment rule making requirements do not apply, and we are exercising our discretion to announce changes in the subject policies." *Id.* at 5585.

[64] Radio Broadcasting; Elimination of Unnecessary Broadcast Regulation, 51 Fed. Reg. 11914 (Apr. 8, 1986). The FCC reasoned that the fraudulent billing and network clipping rules are preempted by other remedies "already in place which are more appropriate for resolving such private actions." For the remaining rule, the FCC decided that the Commission should not ban conduct which is allowed under antitrust laws. *Id.*

[65] 49 Fed. Reg. 33263 (Aug. 22, 1984).

prime example of this approach. As part of the August 4, 1983, Order, the FCC opened a new docket, 83-842, seeking specific comment on eliminating Sections 73.1425-30 related to horse racing and betting information.[66] After taking comment, the FCC issued an order a year later deleting those rules.[67] For Fowler, holding rulemaking proceedings following the APA was not unique. For example, he followed this in the Deregulation of Mobile Customer Premises Equipment proceedings[68] and the Television Commercialization and Programming proceedings.[69]

The FCC's careful adherence to procedural norms paid rich dividends. While courts questioned the substantial changes to the FCC's approach to its licensees, they uniformly upheld the FCC's actions.[70] Courts agreed that the FCC could eliminate policies without going through full APA notice and comment.[71] The deference the courts provided the FCC was

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[66] Elimination of Unnecessary Broadcast Regulation, 48 Fed. Reg. 49879 (proposed Aug. 4, 1983) (to be codified at 47 C.F.R. pt. 73).

[67] Elimination of Unnecessary Broadcast Regulation, 49 Fed. Reg. 33269 (Aug. 22, 1984).

[68] Deregulation of Mobile Customer Premises Equipment, 48 Fed. Reg. 54619 (Dec. 6, 1983) (to be codified at 47 C.F.R. pt. 22) (issuing a rule to deregulate mobile customer premises equipment after soliciting comments from a NPRM).

[69] Revision of Programming and Commercialization Policies, 49 Fed. Reg. 33588 (Aug. 23, 1984) (to be codified at 47 C.F.R. pts. 0 & 73) (issuing a rule which eliminates various programming requirements and "existing regulations which limit the amount of commercial programming that may be presented" after following the NPRM process).

[70] *See* Off. of Commc'n of the United Church of Christ v. Fed. Commc'ns Comm'n, 707 F.2d 1413, 1425, 1443 (D.C. Cir. 1983) (upholding the FCC's order under a hard look review, even though the court expressed "serious reservations" about the FCC's rationale for eliminating programming logs and its abrupt policy shift).

[71] Telecomm. Rsch. & Action Ctr. v. Fed. Commc'ns Comm'n, 800 F.2d 1181, 1186 (D.C. Cir. 1986). *See also* Action for Children's Television v. Fed. Commc'ns Comm'n, 756 F.2d 899, 901 (D.C. Cir. 1985) (upholding the FCC's change in approach to children's programming). Note, however, that Congress effectively overruled this change of policy in enacting the Children's Television Act of 1990 [CTA], which explicitly requires the FCC to limit commercial content in programming aimed

similar to what the Carr FCC can expect, given that they were decided either before, or shortly after *Chevron* was decided, and before *Chevron* deference evolved.[72]

C. The PAI FCC Approached Deregulation in a Coherent and Stepwise Fashion

Like Chair Fowler, Ajit Pai took over at the helm of the FCC during the first Trump Administration with a deregulatory mandate. President Trump issued two executive orders aimed at reducing federal regulations. Executive Order 13771 required agencies to eliminate two existing rules for every new one proposed.[73] Executive Order 13777, *Enforcing the Regulatory Reform Agenda*, directed agencies to appoint Regulatory Reform Officers to oversee compliance.[74] Although the FCC wasn't required to follow EO 13771 because it was then understood to be an independent agency,[75] the Commission echoed the order's goals in its Modernization of Media Regulation Initiative, which aimed to "eliminate or modify regulations that are outdated, unnecessary, or unduly burdensome."[76] This closely mirrored EO 13777, which directed agencies to target rules that are "outdated, unnecessary, or

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children 12 years or younger, and requires the FCC to determine, at license renewal, whether stations are providing sufficient educational/informational programming to all children 16 years or younger.

[72] Press Release, TechFreedom, Ditch the Chevron Doctrine, Not the Chevron Decision (July 20, 2023), https://techfreedom.org/ditch-the-chevron-doctrine-not-the-chevron-decision-techfreedom-tells-supreme-court/.

[73] Executive Order No. 13771, 82 Fed. Reg. 9339 (Feb. 3, 2017).

[74] Executive Order No. 13777, 82 Fed. Reg. 12285 (Mar. 1, 2017).

[75] *See* Memorandum from the Off. of Mgmt. & Budget, Off. of Info. & Regul. Aff. to Regul. Pol'y Officers at Exec. Dep'ts & Agencies (Apr. 5, 2017), https://web.archive.org/web/20210116080646/https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf (stating independent agencies were not required to comply with E.O. 13771).

[76] Public Notice, Commission Launches Modernization of Media Regulation Initiative, MB Docket No. 17-105 (Apr. 27, 2017), https://docs.fcc.gov/public/attachments/DOC-344618A1.pdf.

ineffective."[77] While the wording differs slightly, Chair Pai's initiative appeared to align with the broader deregulatory agenda set by the executive orders.

Chair Pai used the Modernization Initiative to advance deregulation, issuing comment requests, proposed rules, and thirteen final rules which deleted or revised FCC regulations. This included updating the methodology for determining whether a station is "significantly viewed," concluding that the current approach may be "outdated or overly burdensome... given changes in the marketplace."[78] In these instances, the Commission eliminated rules following the NPRM process—including eliminating the requirement for cable operators to maintain records of ownership interests in video programming, citing NPRM comments that the obligations were "outdated and unnecessary."[79] If the revisions were "non-substantive" edits to remove obsolete rules that no longer had practical applicability, the Commission only skipped the NPRM process if it "found good cause to conclude that notice and comment procedures are unnecessary and would not serve any useful purpose."[80] In each instance, the Pai FCC followed the same path as the Fowler FCC, eliminating outdated policies through policy statement changes, but changing regulations only after opening a specific docket and

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[77] Executive Order No. 13777, 82 Fed. Reg. 12285 (Mar. 1, 2017).

[78] Significantly Viewed Stations; Modernization of Media Regulation Initiative, 85 Fed. Reg. 20649 (proposed Apr. 14, 2020) (to be codified at 47 C.F.R. pt. 76).

[79] Requiring Records of Cable Operator Interests in Video Programming; Modernization of Media Regulation Initiative, 85 Fed. Reg. 73425 (Nov. 18, 2020).

[80] Modernization of Media Regulation Initiative and Revisions to Broadcast Licensee Obligations, 85 Fed. Reg. 21076 (Apr. 16, 2020) (to be codified at 47 C.F.R. pts. 73 & 76). *See also* Deletion of Rules Made Obsolete by the Digital Television Transition, 83 Fed. Reg. 5543 (Feb. 8, 2018) (declining to follow notice and comment); Cable Service Change Notifications, 85 Fed. Reg. 71848 (Nov. 12, 2020) (to be codified at 47 C.F.R. pt. 76) (noting that the substantive rule was promulgated after notice and comment, but that it also "adopts several non-substantive revisions that clarify the rules and eliminate [redundancy])."

going through full notice and comment rulemaking. Again, even though the APA did not require this process, the FCC recognized that it was wise to consult the public.

III. The FCC Should Make Careful Use of the APA's "Good Cause" Exception to the Rulemaking Requirement

The APA allows agencies to waive the notice and comment requirement "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[81] Courts have applied this exception narrowly, finding "good cause" in four categories: (1) emergencies; (2) situations where prior notice would subvert the statutory scheme; (3) situations where Congress intends to waive the requirements of Section 553; and (4) situations where advance notice might harm the public.[82] President Trump has directed all agencies—including agencies long understood, until recently, to be independent, including the FCC to make use of this exception "[i]n effectuating repeals of facially unlawful regulations."[83]

The primary problem with a "good cause" approach to repealing "unlawful" regulations is that it's a simple category error. Legal invalidity might present a superficially plausible ground for "good cause" omission of notice and comment. But on second thought, why should that be so? The general rule is that what is done with notice and comment must be undone with notice and comment. If an agency adopts a regulation after notice and

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[81] 5 U.S.C. § 553(b)(3)(B).

[82] JARED P. COLE, CONG. RESEARCH SERV., R44356, THE GOOD CAUSE EXCEPTION TO NOTICE AND COMMENT RULEMAKING: JUDICIAL REVIEW OF AGENCY ACTION at ii, 8 (Jan. 29, 2016).

[83] Presidential Memoranda, Donald J. Trump, Directing the Repeal of Unlawful Regulations (Apr. 9, 2025), https://www.whitehouse.gov/presidential-actions/2025/04/directing-the-repeal-of-unlawful-regulations/.

comment, it can safely be presumed that the agency *believed that regulation to be lawful*. Later, an agency can no more repeal that regulation without notice and comment because it thinks the regulation "really illegal," than it can repeal the regulation without notice and comment because it thinks the regulation "a really bad idea." There is no hack for avoiding notice and comment when the objection to the regulation goes to the merits—*i.e.*, the prior agency "got it wrong" in some way. (*Loper Bright* does not change things in this regard. The Supreme Court did "not call into question prior cases that relied on the *Chevron* framework."[84] It is far from obvious, therefore, that agencies have a blank check to ditch *their* prior regulations that relied on that framework. To sweep aside all such regulations without notice and comment would be question-begging.

At bottom, "good cause" under Section 553 is about factors *external* to legal substance. Would the very function of the rule be defeated by notice and comment? Is the change so small that notice and comment would be an extravagance? Would waiting for notice and comment somehow make the problem the agency is trying to address worse? "Good cause" is the province of emergencies, national security, trade secrets, de minimis changes, and avoiding redundancy. If the Commission tries to stretch "good cause" to the legal merits, it can expect its gambit to be shot down in court.

There might be a handful of situations in which "good cause" repeal can occur on legal grounds—but the exception would be very narrow. The main example is that a court may already have ruled that a specific FCC rule is unlawful. For example, the Sixth Circuit has

[84] Loper Bright Enters. v. Raimondo, 603 U.S. 368, 412 (2024).

declared unlawful the FCC's 2024 reclassification of broadband under Title II.[85] Here, it might be appropriate for the FCC to waive the notice and comment process—though, again, it might be wiser *not* to do so, lest the agency miss some important dimension of the issue that could cause it to stumble in court just when its victory seems assured.

But absent such a court decision, it is exceedingly hard to see how "good cause" can be used "on the merits" of a regulation. One possibility is evident from the Supreme Court's recent decision in *Bondi v. Vanderstok* (2025), which holds that a firearm regulation was not facially inconsistent with a federal statute because "at least some weapon parts kits satisfy both of [the statute]'s tests."[86] If this is the standard, it is a high bar: the FCC would have to consider all applications of a rule and proceed without notice and comment only if it is reasonably certain that *no* application of the rule would be lawful. (This, again, assuming that it's *at all* possible to ditch notice and comment for reasons going to the merits of a regulation—which we doubt.)

And even were this "no applications" standard satisfied, yet other problems might arise. In particular, the FCC would need to take account of those who have reasonably relied upon the rule. For example, in 2017, the first Trump Administration delayed implementation, without seeking notice and comment, of a rule issued under the Obama administration allowing "foreign entrepreneurs to obtain immigration 'parole'—that is, to temporarily enter the United States despite lacking a visa or green card."[87] Affected parties,

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[85] Ohio Telecom Assoc. v. Fed. Commc'ns Comm'n, No. 24-7000, 2024 WL 3650468 (6th Cir. Aug. 1, 2024).

[86] No. 23-852, slip op. at 13.

[87] Nat'l Venture Capital Assn. v. Duke, 291 F.Supp.3d 5, 8 (D.D.C. 2017).

both foreign nationals and U.S. businesses, sued. The court vacated the delay rule, in part, because the agency:

> gave little thought to those foreign entrepreneurs who may have already relied on the impending IE Final Rule, set to take effect just six days before the agency suspended it. Without notice to the contrary, aliens would have fairly expected the Rule to take place as scheduled and therefore already "expended] significant effort and resources in order to establish eligibility." The Delay Rule prejudices any reliance interest they had in the IE Final Rule.[88]

The FCC's rules could be the basis for significant reliance interests, particularly as they often undergird significant investments in infrastructure. It may be difficult, or even impossible, to know what reliance interests may hinge on an existing rule without taking public comment. Repealing a regulation may, in the end, be the right decision, but failing to allow affected parties to comment on the rule, or even to adjust their plans, may cause courts to block otherwise beneficial deregulation.

IV. What Kind of Deference Will the FCC Receive upon Appeal of Actions Taken Pursuant to the Delete Agenda?

In the post-*Loper Bright* world of agency appellate review, it is yet unclear exactly what degree of deference FCC orders in the Delete Docket will receive. Will *Skidmore* deference[89] become the new *Chevron* deference? Will courts piece together a revised *Skidmore* deference based on Justice Robert's opinion in *Loper Bright,*[90] or is *Skidmore*, as

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[88] *Id.* at 19.

[89] Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[90] *See* Kristin E. Hickman*, Anticipating A New Modern* Skidmore *Standard*, 74 DUKE L. J. 111, 114-5 (2025), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1123&context=dlj_online.

Justice Scalia once wrote, "an empty truism and a trifling statement of the obvious"[91] requiring the creation of an entirely new review standard?

Most scholars assume that courts will craft a new deference standard based on the key language of *Skidmore*:

> The rulings, interpretations and opinions of the [agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may property resort for guidance. The weight of such a judgement in a particular case will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[92]

Courts have developed these factors even as they have applied *Chevron*. In *United States v. Mead Corp.,* for example, the Supreme Court listed "the degree of the agency's care, its consistency, formality, and relative expertness," the "thoroughness, logic, and expertness" of the agency's action, as well as its "fit with prior interpretations"[93] as key to *Skidmore.*

But whether courts will exercise "independent judgment" in assessing whether an agency's action is consistent with its statutory mandate or use a "sliding scale" deference

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[91] United States v. Mead Corp., 533 U.S. 218, 250 (2001) (Scalia, J., dissenting).

[92] *Skidmore*, 323 U.S. at 140. *See* Christopher J. Walker, *What* Loper Bright Enterprises v. Raimondo *Mean for the Future of Chevron Deference*, YALE J. ON REGUL. (June 28, 2024), https://www.yalejreg.com/nc/what-loper-bright-enterprises-v-raimondo-means-for-the-future-of-chevron-deference/ (" 6/29/2024 Update: On the administrative law professor listserv, the growing consensus seems to be that the Court preserved some form of *Skidmore* deference. I'm still not entirely convinced, but perhaps my view is not the conventional one."). *See also* Jack M. Beerman, Chevron *Deference is Dead, Long Live Deference*, 23 CATO SUP. CT. REV. 31, 41 (2023-2024) ("No matter how theoretically attractive agency primacy in regulatory decisionmaking may be, the *Chevron* doctrine as it developed was too unclear, manipulable, and ineffective to realize the potential it may have initially borne. In my view, *Skidmore* provides a simpler and at bottom clearer roadmap for reviewing courts to follow."); Jim Sandy & Kasey Davis, *This is the End of Chevron Deference: What it Means, What Comes Next, and Why it Matters*, 77 CONSUMER FIN. L. Q. REP. 187, 200 (2023) (noting that "*Skidmore* [d]eference and the '[p]ower to [p]ersuade [r]emain [a]live and [w]ell" after *Chevron's* overruling).

[93] *Mead Corp.*, 533 U.S. at 228, 235.

model to determine whether the agency should receive "a lot, a little, or no extra weight based on presence or absence of the various contextual factors,"[94] must await future court decision. As Prof. Hickman concludes:

> [I]n the absence of clearly contradictory statutory language, a longstanding, contemporaneously-adopted, and consistently-applied interpretation adopted after a thorough vetting by high-level agency officials simply would fare better than a recently-announced interpretive flip-flop in reaction to current events.[95]

In summary, on future appeal of actions in the Delete Docket (or follow-on proceedings), the FCC must be prepared to examine and defend the following factors and questions:

1) **Expertness**: Does FCC, as compared to other agencies, have the special expertise most relevant to issuing this regulation?

2) **Formality**: Has the FCC followed proper procedures (including adherence to the APA where required) in reaching its decision?

3) **Consistency (and Expertness)**: Has the FCC acted in this area previously?

4) **Consistency (and Prior Interpretations)**: Is the FCC's actions consistent with its prior actions in this area?[96]

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[94] Hickman, *supra* note 90, at 118-19.

[95] *Id.* at 119.

[96] *See* United Church of Christ v. Fed. Commc'ns Comm'n, 707 F.2d 1413, 1425 (1983) ("While we do not then challenge the Commission's theoretical right to modify, or even overrule, long-standing precedents, such abrupt shifts in policy do constitute 'danger signals' that the Commission may be acting inconsistently with its statutory mandate. We will require therefore that the Commission provide a 'reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.'") (citing Greater Boston Television Corp. v. Fed. Commc'ns Comm'n, 444 F.2d 841, 852 (D.C.Cir.1970), *cert. denied*, 403 U.S. 923 (1971) (footnotes omitted)).

5) **Thoroughness (and Logic)**: Has the FCC adequately considered all comments, and to the extent that its decision differs from prior precedence, has this departure been adequately explained?[97]

V. How the FCC Should Proceed with its Deregulatory Agenda

In assessing how it should prioritize the hundreds (maybe thousands) of requests for rule changes, the Commission should remain mindful of how it will defend its actions on appeal under the factors listed above. As the Fowler FCC did in the "underbrush" proceeding, the Commission should look first to old and outdated policies and move those forward for decision first. Following a similar path of the 1980s FCC, the agency should identify which policies are duplicative of other agencies' jurisdiction, especially where the other agency is more expert.[98] Next, the FCC should identify existing policy statements which are within its regulatory purview, but which are outdated or can, demonstrably, best be left to market forces.

After that, the Commission should look to codified regulations that are based on broad—some would argue vague[99]—statutory language. In each of those instances, separate

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[97] Baltimore & Annapolis R. Co. v. WMATC, 642 F.2d 1365, 1370 (D.C. Cir. 1980) ("[I]t is vital that an agency justify a departure from its prior determinations. * * * [T]he requirement of reasons imposes a measure of discipline on the agency, discouraging arbitrary or capricious action by demanding a rational and considered discussion of the need for a new agency standard. The process of providing a rationale that can withstand public and judicial scrutiny compels the agency to take rule changes seriously. The agency will be less likely to make changes that are not supported by the relevant law and facts.").

[98] *See supra* section II.B (explaining Fowler's underbrush rulemaking approach).

[99] The *United Church of Christ* court described the FCC's mandate under the Communications Act as follows: "[T]he Commission is not the typical agency, nor is the Act a model of statutory clarity. Congress' clear intent in 1934 was to confer upon the Commission sweeping authority to regulate in 'a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding.' Nat'l Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943). In lieu of specific legislative directives,

dockets should be opened, with NPRMs issued which clearly specify the rule to be changed, and specific wording for the proposed changes.[100] Next, the FCC could consider regulation changes which are based on clear statutory language where the FCC's ability to modify the regulations are more limited by congressional intent. Again, each of these rules should be addressed in a separate rulemaking proceeding—unless they can logically be lumped together because they related to the same CFR subsection and/or subject matter.

Finally, and with great caution, the FCC might consider new regulations or interpretations in areas where it has previously not attempted to regulate.[101] These new "voyages" will face the harshest *Skidmore* headwinds on appeal, and we predict, will likely fail. Jumping into these areas before the more defensible deregulatory changes are finalized may derail this entire process; an appellate rebuke of the FCC in one of these new areas might

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the Commission was provided with a broad mandate to regulate broadcasting in the 'public interest, convenience, and necessity.' Early on, this 'public interest standard' was characterized as 'a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.' Fed. Commc'ns Comm'n v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940)." 707 F.2d at 1423.

[100] One of the things that bothered the appellate court in the initial appeal of the "underbrush" proceeding was the fact that the Commission attempted to eliminated multiple policies in a single proceeding. "The repudiation in this one rulemaking proceeding of so many long-standing policies and rules necessitates close judicial scrutiny to ensure that the Commission has remained faithful to the pertinent directives of both the Communications Act and the Administrative Procedure Act." *United Church of Christ v. FCC*, 707 F.2d at 1418.

[101] *Cf.* Yaron Dori & Andrew Longhi, *FCC Reportedly Considering Advisory Opinion on Section 230*, GLOBAL POLICY WATCH (Mar. 3, 2025), https://www.globalpolicywatch.com/2025/03/fcc-reportedly-considering-advisory-opinion-on-section-230/ (quoting FCC Commissioner Anna Gomez as saying that the FCC "knows . . . . it has little authority to weigh in on this complex issue" in reference to Chairman Carr's interview statement that "Section 230 reform is something that is very much on the table at the FCC"); *Securing the Future of Universal Service*, USTELECOM (Feb. 21, 2025), https://ustelecom.org/securing-the-future-of-universal-service/ (advocating for changes the Universal Service funding mechanism that would require Big Tech's contributions).

cross-contaminate the entire process and heighten risk of reversal of other, better founded, regulatory reforms.[102]

[102] One such proceeding where the FCC's entire deregulatory agenda can go off the rails would be for the FCC to prioritize trying to "interpret" Section 230, as it began to do in 2020 (RM-11862). The FCC has already received nearly 21,500 comments in response to the petition for rulemaking the National Telecommunications and Information Agency (NTIA) filed on July 27, 2020. As we pointed out in our comments on the Petition for Rulemaking to Clarify Provisions of Section 230 of the Communications Act of 1934, RM-11862 (Sept. 2, 2020), https://www.fcc.gov/ecfs/document/10903920204512/1, and reply comments (https://www.fcc.gov/ecfs/document/10917114884764/1), the FCC lacks the statutory authority to do anything regarding Section 230, since it is a stand-alone section that Congress dropped into the Communications Act without providing the FCC with any authority to administer or enforce its provisions. Indeed, no FCC for 25 years ever thought that it had jurisdiction over Section 230, until the Trump 45 NTIA suddenly argued that the FCC should interpret its provisions, provisions that the courts have interpreted in a consistent manner in hundreds of cases. Our comments were filed well before the Supreme Court issued its *Loper Bright* decision, which makes the FCC's argument that it is free to issue an interpretation of that statutory section even weaker. As Lawrence Spiwak pointed out in *Sauce for the Goose: The FCC Lacks Authority to Interpret Section 230 Post*-Loper Bright (Nov. 21, 2024), https://fedsoc.org/commentary/fedsoc-blog/sauce-for-the-goose-the-fcc-lacks-authority-to-interpret-section-230-post-loper-bright, the Pai FCC took comment based on the memo of its then-General Counsel, who concluded that *Chevron* deference would support the FCC's ability to use Section 201(b) broad rulemaking language to allow it to issue "reasonable interpretations of all ambiguous terms in the Communications Act." With *Loper Bright* now having explicitly overruled *Chevron*, the entire foundation for that proceeding has crumbled. Does the FCC really want to expend the resources necessary to fight this fight, when those resources could be better be focused on actually deregulating the communications industry for the benefit of all Americans?

VI. Conclusion

This is an important docket, and the best chance in a generation to realign FCC regulations with the best meaning of the Communications Act and congressional intent. But speed kills, and making hasty decisions without careful adherence to the APA, when required, will tie up the FCC's actions for years, if not decades, in the courts. Most important, now is not the time for a Magellan-like "voyage of discovery" to seek the outermost limits of the FCC's ability to interpret its statutory authority. Those waters are dangerous after the legal tsunami of *Loper Bright*. The command from the bridge should be "proceed with caution," not "full steam ahead."

Respectfully submitted,

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