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Instability of Broadband Policies in the U.S. Compared to Canada

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1. Introduction

Since the early 2000's, telecommunications policies in the U.S. have been less stable than in Canada, notwithstanding similarities in these nations' common law and statutory law histories. This is particularly true for policies related to providers of broadband Internet access services, such as network neutrality and privacy. This paper discusses reasons for the instability of these policies in the U.S. relative to those in Canada based on an understanding of their respective *systems* of governance.

The U.S. and Canada have many similarities in their systems of governance. Both systems are based on federalism, with shared sovereignty between a federal government and state/provincial governments, and are common law jurisdictions that share the same English common law history. They also share similar historical trajectories of statutory regulation of telecommunications carriers and services, including the creation of federal and state/provincial commissions with regulatory oversight.

Yet, there are some key differences as to how these governance systems have been applied to telecommunication regulation (Cherry 2015). One is greater federal preemption of telecommunications regulation in Canada. Another is the existence of differing administrative procedures used by the U.S. Federal Communications Commission (FCC) and the Canadian Radio-television Telecommunications Commission (CRTC). There are also some important early differences

in policy choices under the respective governance structures in the context of telecommunications carriers.

Building upon the analysis in Cherry (2015), this paper discusses how the differences in the U.S. and Canadian systems of governance and their historical evolution help to explain the recent relative instability of U.S. policies affecting providers of broadband Internet access services and why such instability is likely to continue.

2. Recent Divergence in Telecommunications Policy Between the U.S. and Canada Before the FCC's *Open Internet Order* (2015)

Cherry (2015) examines *why* telecommunications policy outcomes have been diverging between the U.S. and Canada since the early 2000's, notwithstanding the similarities in their common law and statutory law histories. When the article was written, the FCC had not yet reclassified broadband Internet access service as a telecommunications service subject to federal common carriage regulation in its 2015 *Open Internet Order*. Therefore, the analysis focuses on the state of affairs whereby the U.S. imposes fewer obligations on broadband and Internet service providers and provides a much-diminished level of consumer protection to that in Canada. In particular, the FCC had classified BIAS service as an information service as defined in the Telecommunications Act of 1996 and thereby not subject to common carriage regulation when offered by cable modem companies and telecommunications carriers, in *Cable Modem Declaratory Ruling (2002)* and *Wireline Broadband Order (2005)*, respectively; whereas BIAS has consistently been deemed as a common carriage service under Canadian federal law.

The analysis in Cherry (2015) stresses the role of differing administrative procedures and policymaking forums as an important factor contributing to this recent policy divergence, as well as the

role of path dependence from some early differences in U.S. and Canadian policy choices made in the late 19th and early 20th centuries. These differences in early policy choices emerged from (1) differences in federalism structures between the U.S. and Canada; (2) negation of Bell patents in Canada that triggered an earlier era of telephony competition as well as both federal and provincial policy experimentation; and (3) AT&T's unique public relations campaign of regulated monopoly developed in the U.S. in response to this earlier policy experimentation in Canada.

AT&T's public relations campaign in the early 20th century has induced a false memory in the U.S. – not found in Canada – as to the origins of regulated monopoly for telephony. This false memory, in turn, has contributed to the efficacy of telecommunications carriers' *false monopoly theory argument* – that their historical duties have been based on the existence of monopoly and thus are not applicable in a competitive environment – which has and continues to distort telecommunications policy development in the U.S. Yet, although some telecommunications carriers have asserted a similar false monopoly theory argument in Canada, the analysis explains how this argument is more readily corrected in Canada. Importantly, the CRTC uses administrative procedures of a litigated proceeding, including the appearance of witnesses and experts in hearings before the full panel of Commissioners, that better enable direct confrontation and assessment of parties' arguments, unlike the FCC's heavy reliance on written comments and *ex parte* presentations. Moreover, Canada has no comparable, historical public relations campaign of regulated monopoly for proponents of deregulation to leverage.

3. Adoption of the *FCC's Open Internet Order (2015) and Privacy Order (2016)*

After *Cherry (2015)* was written, the FCC adopted its 2015 *Open Internet Order*. As will be explained, a critical component of this Order is a declaratory ruling that reclassifies BIAS as a Title II

telecommunications service. Based on Title II jurisdiction, the Order also adopts a set of Open Internet Rules, which lays the legal foundation for a subsequent report by the FCC's Wireless Telecommunications Bureau that examines certain zero-rating and sponsored data plans. In 2016, based on Title II jurisdiction, the FCC also adopted a *Privacy Order* that imposes certain privacy rules on Internet service providers (ISPs). As a result of these FCC orders and actions, customers have greater protections with the regard to the practices of BIAS/ISP providers. Moreover, the divergence in telecommunications policy between U.S. and Canada has been narrowed.

3.1 The FCC's *Open Internet Order* (2015)

In the portion of the *Open Internet Order* referred to as a declaratory ruling, the FCC reclassified BIAS service as a telecommunications service under Title II.¹ Under federal statute, classification of a service as a telecommunications service or information service is based on the functionality of the service offered to the customer. A telecommunications service consists of two types of functionality: (1) the technical functionality of providing “the transmission, between or among points specified by the use, of information of the user’s choosing, without change in the form or content of the information sent and received” (47 U.S.C. §153(43)); and (2) the commercial functionality of offering telecommunications “for a fee directly to the public, or to such classes of users as to be effectively available directly to the public regardless of the facilities used (47 U.S.C. §153(46)).²

¹ The *Open Internet Order*, FCC 15-24, includes a declaratory ruling that broadband Internet access service (BIAS) is a common carriage, “telecommunications service” under Title II of the Communications Act of 1934, as amended by the Telecommunications Act of 1996. Therefore, similar to the CRTC, the FCC established its rules based on its jurisdiction over telecommunications services and common carriers. Other portions of the order then establish Open Internet Rules based on the FCC’s Title II jurisdiction.

² The functional approach to classification for classification of a telecommunications services is explained in Cherry and Peha (2014), upon which the FCC relied in its *Open Internet Order*.

Having classified BIAS as a Title II service, the FCC then adopted a set of Open Internet Rules on the basis of its Title II jurisdiction. In its *Open Internet Order*, the FCC found that “broadband providers (including mobile broadband providers) have the economic incentives and technical ability to engage in practices that pose a threat to Internet openness by harming other network providers, edge providers, and end users” (par. 78). The FCC discussed numerous types of practices and associated harms, and found that strong rules are necessary to promote innovation, investment, and competition (par. 94), and to protect consumers from practices that can threaten the open Internet (par. 104). For this reason, the FCC adopted a framework consisting of conduct-based rules.³ A brief review of the relevant rules facilitates understanding of how various ISP practices are addressed under this framework.

In the provision of broadband Internet access services (BIAS), the FCC found that three practices are inherently unjust and unreasonable, in violation of section 201(b) of the Communications Act of 1934 (par. 110).⁴ These practices are blocking, throttling, and paid prioritization; and each is specifically banned under the following rules.

§ 8.5 No Blocking.

A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.

§ 8.6 No Throttling.

A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management.

³ The relevant FCC rules amend 47 C.F.R., parts 1, 8 and 20.

⁴ Sec. 201(b) provides in relevant part: “All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable”.

§ 8.9 No paid prioritization.

(a) A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not engage in paid prioritization.

(b) “Paid prioritization” refers to the management of a broadband provider’s network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.

(c) The Commission may waive the ban on paid prioritization only if the petitioner demonstrates that the practice would provide some significant public interest benefit and would not harm the open nature of the Internet.

In addition, the FCC “believe[d] that there may exist other current or future practices that cause the type of harms our rules are intended to address” (par. 135). For this reason, the FCC adopted a no unreasonable interference or unreasonable disadvantage standard, under which it can prohibit practices on a case-by-case basis. This standard, referred to as the General Conduct Rule, considers the impact of practices on end-users and edge providers.

§ 8.11 No unreasonable interference or unreasonable disadvantage standard for Internet conduct.

A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users’ ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers’ ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.

The no-unreasonable interference/disadvantage standard of conduct rule is not assessed ex ante, in that a BIAS provider does not have to obtain prior FCC approval in order to engage in a practice. Rather, the FCC has the authority to prohibit a practice on a case-by-case basis upon receipt of an informal or formal complaint or upon its own motion. The complainant needs to provide a prima facie case, and then the burden shifts to the BIAS provider to show compliance with the standard. The FCC also does

provide the opportunity for a BIAS provider to obtain an advisory opinion from the FCC for a prospective or proposed practice.

As stated in the above rules, bans of the practices of blocking and throttling—but not paid prioritization⁵—are subject to reasonable network management. Moreover, as for other practices, reasonable network management shall not be considered a violation of the no unreasonable interference or unreasonable advantage standard. Therefore, the definition of “reasonable network management” is critical for determining whether a given practice is violative of some of these rules.

In June 2016, the D.C. Circuit Court of Appeals upheld the *Open Internet Order* upon judicial review in *US Telecom Association v. FCC (2016)*. Shortly thereafter, in late July 2016, some opponents of the FCC order filed petitions for rehearing en banc with the D.C. Circuit Court of Appeals.⁶

On January 11, 2017 the FCC’s Wireless Telecommunications Bureau (WTC) issued a report titled “Policy Review of Mobile Broadband Operators’ Sponsored Data Offerings for Zero Rated Content and Services” (hereinafter “*Policy Review Report*”). In this report, the WTC found the AT&T Sponsored Data and Verizon FreeBee Data 360 plans as likely violating the General Conduct rule established in the *Open Internet Order*.

3.2 The FCC’s *Privacy Order* (2016)

Having reclassified BIAS as a telecommunications service, the FCC then exercised its Title II power in adopting a *Privacy Order* in October 2016 (later released in Nov. 2016). Building on widely

⁵ The ban on paid prioritization is subject to a waiver under subsection § 8.9(c) that establishes a balancing test, which “make[s] clear the very limited circumstances in which the Commission would be willing to allow paid prioritization” (par. 130).

⁶ A petition for rehearing en banc is a petition seeking reconsideration of a decision by a panel of the appellate court (consisting of only three judges) by all the judges of that court, on that basis that the case concerns a matter of exceptional public importance or the panel’s decision appears to conflict with a prior decision of the court. Such petitions are rarely granted.

accepted privacy principles, the Order adopted rules that require Internet service providers (ISPs) to provide their customers with meaningful choice and keep consumer data secure while giving ISPs the flexibility they need to continue to innovate. The rules do not prohibit ISPs from using or sharing their customers' information, but they do require giving customers greater power in those decisions. The rules consist of: (1) requiring ISPs to notify customers about the collection, use and sharing of their information; (2) requiring customers' opt-in consent to use and share sensitive information; requiring that use and sharing of non-sensitive information be subject to customers' opt-out consent in most cases; imposing a three-part test, first articulated by the Federal Trade Commission (FTC) to ensure that consumer information is not re-identified;⁷ and determining the legitimacy of ISP programs that relate service price to privacy protections on a case-by-case basis by the FCC; and imposing common-sense data breach notification requirements.

4. Retrenchment from the FCC's *Open Internet Order* and *Privacy Order*

In November 2016, after adoption of the FCC's *Open Internet Order* and *Privacy Order*, the U.S. Presidential and Congressional elections were held. Republican candidate Donald Trump was elected President, and the Republican Party retained majority control of both chambers of Congress, the House of Representatives and the Senate. Donald Trump was inaugurated as President on Jan. 20, 2017. Soon thereafter, retrenchment from the FCC's *Open Internet Order* and *Privacy Order* began, and divergence in telecommunications policy outcomes between Canada and the U.S. is reemerging.

On Feb. 3, 2017, the FCC, now under a Republican majority, retracted the *Policy Review Report* of the Wireless Telecommunications Bureau. In early April 2017, President Trump signed

⁷ When data is altered so that they are no longer associated with individual consumers or devices, such data is referred to as de-identified information. If an ISP want to rely on de-identification in its use or sharing of information outside of the new consent framework, it must meet a strong, three-part test first articulated by the FTC in 2012 to ensure that consumer information is not re-identified.

Congressional legislation exercising authority, provided under the Congressional Review Act enacted in 1996, to overturn federal agency regulations within 60 *legislative* days. Moreover, having repealed the FCC's privacy rules, under the Congressional Review Act the FCC is prohibited from reissuing a rule in substantially the same form or issuing a new rule that is substantially the same "unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving of the original rule" (5 U.S.C. §801(b)(2)).

In May 2017, the FCC then adopted and released a new Notice of Proposed Rulemaking, In the Matter of Restoring Internet Freedom (hereinafter "*2017 NPRM*"), proposing to reverse the FCC's actions in the *Open Internet Order*. The NPRM proposes classifying BIAS as an information service under Title I, which would result in weaker FCC jurisdictional authority than that over telecommunications services under Title II, and repealing the 2015 Open Internet Rules. As a result, given past litigation over FCC Internet rules previously adopted under Title I classification, any remaining authority to impose an alternative set of Internet rules would be greatly constrained.

Moreover, in anticipation of the FCC's adoption of the *2017 NPRM* (given press releases), the D.C. Circuit Court of Appeals denied the petitions for rehearing en banc as to the *2015 Open Internet Order*. "En banc review would be particularly unwarranted at this point in light of the uncertainty surrounding the fate of the FCC's Order", *US Telecom v. FCC, denial of rehearing en banc* (concurring opinion, slip op. p. 1). US Telecom and others are considering filing a petition for appeal, known as a petition for a writ of certiorari, with the U.S. Supreme Court, which the Court has complete discretion to grant or deny. Petitions are due by July 31, 2017, although an extension has been sought until Sept. 28, 2017, which the Court is considered likely to grant.

6. Governance Structure and Political Dysfunction Underlying Policy Instability in the U.S.

What explains this instability since the early 2000's in telecommunications policy in the U.S.? As for the divergence in U.S. and Canadian policy outcomes (resulting from the FCC's classification of BIAS as an information service under Title I while the same services were considered common carriage services in Canada), Cherry (2015) stresses some key differences in the nations' respective governance systems. These include the role of differing administrative procedures and policymaking forums as well as path dependence of some early differences in policy choices.

However, further explanation is required to explain the shift in U.S. policy resulting in the adoption of the FCC's *Open Internet Order* and *Privacy Order* described in Section 3, thereby narrowing the policy divergence with Canada, and then the swift retrenchment from these orders described in Section 4, thereby reopening the divergence. Such explanation lies in further examining differences in the U.S. and Canadian systems of governance, and particularly during the recent period of political dysfunction in the U.S.

Dating from the 1980's, the U.S. governance system has been in a period of political dysfunction, resulting from divided government and severe political party polarization.⁸ This period of dysfunction also coincides with the deregulatory era in the U.S. During this period, given the political gridlock blocking Congressional legislation, corporations have increasingly sought deregulatory outcomes through agency and judicial litigation, while federal regulatory agency and judicial appointments have become more partisan.

For telecommunications policy, the resulting dynamic has been a legal battle over the classification of broadband Internet access service as a telecommunications service or as an information service. In turn, the legal classification of the service has changed, depending upon which

⁸ When the same political party does not have the majority of both the House of Representatives and Senate in Congress as well as the Presidency, it is referred to as divided government.

political party has the majority of FCC commissioners. Thus, the instability of the classification of BIAS service in the U.S. is an emergent property of this period of political dysfunction. This explanation is exemplified by a review of the shifting service classifications of BIAS during this period of political dysfunction.

Beginning in 2002, under a Republican majority of FCC commissioners (during the Republican President George W. Bush Administration) classified BIAS provided by cable companies as an information service in the *Cable Modem Declaratory Ruling*. This classification was narrowly upheld by the U.S. Supreme Court in *NCTA v. Brand X* (2005) based on the *Chevron* judicial doctrine of agency deference, which requires a federal court to defer to an agency's construction – even if it differs from what the court believes to be the best interpretation – of a statute that is ambiguous on the point at issue, and the agency's construction is reasonable. As stated by Justice Breyer in his concurring opinion: “I join the Court's opinion because I believe that the Federal Communications Commission's decision falls within the scope of its statutorily delegated authority – *though perhaps just barely*” (545 U.S. at 1003, emphasis added).

Having had its 2002 Order upheld in *NCTA v. Brand X*, a Republican majority of FCC commissioners then classified BIAS service offered by telephony companies as an information service under Title I in the *Wireline Broadband Order* (2005). This classification reversed the FCC's prior finding that DSL service is a telecommunications service in its *Report to Congress on Universal Service Report* (1998) during the Democratic Administration of President Clinton. In conjunction with this 2005 order, the FCC adopted an Internet policy statement of, albeit legally unenforceable, policy principles.

After Democratic Party candidate, Barack Obama, was elected President, there were several failed attempts by a Democratic majority of FCC commissioners to enforce network neutrality

principles while BIAS was classified as an information service under Title I. In this regard, the FCC attempted to rely on section 706 authority to impose obligations on BIAS providers.⁹ In *Comcast v. FCC* (2010), the D.C. Circuit Court of Appeals held that the FCC failed to cite any statutory authority that would justify its order compelling a broadband provider, Comcast, to adhere to open network management practices. In particular, the FCC could not rely on section 706 at that time because the Commission had previously determined that section 706 does not constitute an independent grant of authority.

Given the decision in *Comcast v. FCC*, the FCC later changed its understanding of section 706 in its *Open Internet Order* (2010), concluding that section 706(a) does constitute an affirmative grant of regulatory authority, and imposing open Internet rules while maintaining classification of BIAs as a Title I information service. Upon appeal, in *Verizon v. FCC* (2014), the D.C. Circuit Court found that “the Commission has offered a reasoned explanation for its changed understanding of section 706(a)” (740 F.3d at 636), and that this understanding was a reasonable interpretation of an ambiguous statute under the *Chevron* doctrine of deference to agency interpretation. The court then found that the disclosure rules were permissible under section 706, but vacated the anti-discrimination and anti-blocking rules because they constituted common carriage *per se*. More specifically, the court held that the FCC cannot impose rules that in essence constitute common carriage regulation while maintaining classification of BIAS as a non-common carriage, information service under Title I.

In response, the FCC opened a new proceeding, *Open Internet Access NPRM* (2014), to consider how the FCC should proceed in light of the court’s guidance in *Verizon v. FCC*. It is upon culmination of this proceeding that a Democratic majority of FCC commissioner adopted the *Open*

⁹ Section 706(a) of the Telecommunications Act of 1996 provides that the FCC “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ... by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”

Internet Order (2015) described in Section 3.1, reclassifying all BIAS service as a telecommunications service and adopting open Internet rules. The FCC also adopted its *Privacy Order* in 2016.

As discussed in Section 4, the regulation of BIAS service is again in flux as a result of the 2016 federal elections – under which the Republican Party controls the Presidency, a majority in both the House and Senate of Congress, and a majority of the FCC commissioners. The first step occurred with an act of non-enforcement of the 2015 *Open Internet* rules. On Feb. 3, 2017, now under a Republican majority, the FCC retracted the January 2017 report of the Wireless Telecommunications Bureau’s *Policy Review Report*. The second step occurred in March and April of 2017, when both the U.S. House and Senate voted along party lines to block enforcement of the broadband privacy rules established in the FCC’s *Privacy Order* (2016) under the Congressional Review Act, and President Trump signed the bill. A third step has already been initiated, with a Republican majority of FCC Commissioners adopting the *2017 NPRM* to reverse the *2015 Open Internet Order*.

By contrast, throughout the period of policy turbulence in the U.S., in Canada the regulatory framework applied to BIAS service has been much more stable, retaining its classification under Canadian law as a common carriage telecommunications service under CRTC jurisdiction. Differing governance structures contribute to this greater policy stability in Canada. The parliamentary system of Canadian federal governance is not subject to the same dysfunction of divided government and party polarization that have arisen under the U.S. system. Moreover, unlike the FCC in the U.S., the CRTC uses procedures of a litigated proceeding, including hearings at which the Commissioners preside, that better enable direct confrontation of conflicting assertions. Importantly, CRTC procedures also provide funding through assessment of fees on regulated entities to help cover the costs of counsel and experts representing consumer interests. In the U.S., the FCC does not hold such hearings, does not provide a funding mechanism to enable representation of consumer interests, and

permits extensive use of ex parte presentations (that do not permit real-time presence or rebuttal of other parties) that systemically favor parties with greater financial resources.

These differences in CRTC procedures contributed to the CRTC rejecting a false monopoly theory argument as to the scope of a common carrier's obligation to serve in *Telecom Regulatory Policy CRTC 2011-291* (2011) (Cherry 2015). Yet, the false monopoly theory argument still has resonance in the U.S., and is being yet raised again in the FCC's *2017 NPRM* to reverse the *2015 Open Internet Order*. In this respect, the path dependence of early policy choices described in Cherry (2015) still persists.

More recently, the differences in CRTC procedures also contributed to more direct confrontation as to common carriage obligations of BIAS providers in *Telecom Notice of Consultation CRTC 2016-192* (2016), a proceeding examining differential pricing practices, including zero-rating. This is illustrated, procedurally, by direct question and answer exchange between the CRTC Chairman and various parties during the oral hearing with regard to the legal status and obligations of common carriers. The resultant outcome consisted of two CRTC decisions in 2017. In *Telecom Regulatory Policy CRTC 2017-104*, the CRTC adopted a framework for assessing the differential pricing practices of Internet service providers. In *Telecom Decision CRTC 2017-105*, the CRTC found that Quebecor Media Inc., Videotron Ltd., and Videtron G.P. were acting in violation of subsection 27(2) of the Telecommunications Act by exempting the Unlimited Music program from data charges. Subsection 27(2) prohibits Canadian carriers from giving an undue or unreasonable preference to themselves or any other person, or subjecting any person to an undue or unreasonable disadvantage.

Political dysfunction in the U.S. appears to be intensifying, rather than abating, during the Pres. Trump administration. Although there is no longer divided government (given Republican majorities in the House and Senate as well as a Republican Party President), party polarization remains severe

within the Republican Party as well as between the Republican and Democratic Parties. The inter-party polarization has also contributed to increasing partisanship of federal judicial appointments, an extraordinary example of which is confirmation of Neil Gorsuch to the U.S. Supreme Court under Pres. Trump after the U.S. Senate refused to bring Pres. Obama's nominee, Merrick Garland, to the floor for a vote. For these reasons, legislative gridlock remains, and corporations – such as broadband Internet access providers – continue to seek deregulatory outcomes through agency and judicial litigation.

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