Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the Matter of )

)

Restoring Internet Freedom ) WC Docket No. 17-108

To: The Commission

**JOINT COMMENTS OF NTCH, INC.**

**AND**

**FLAT WIRELESS, LLC**

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**SUMMARY**

Joint Commenters NTCH, Inc. and Flat Wireless, LLC strongly urge the Commission not to deregulate broadband Internet access completely by classifying it as an information service. Such an action is not needed to stimulate investment in the Internet, and, indeed, may even be counter-productive by continuing the uncertainty in regulatory treatment which has left this service in regulatory limbo for decades.

Light touch Title II regulation is by far the preferable approach for many reasons:

1. Other non-Title II statutory bases for imposing any regulation on the Internet are suspect and would leave the situation subject to continual on-going judicial review as to what degree of regulation is permissible.
2. If classified as information services, ISPs would be entitled to First Amendment rights to control, throttle and block content – something which most providers, regulators, and all consumers decry.
3. In key submarkets like data roaming, mobile broadband access providers are abusing their market dominance to charge unreasonable and discriminatory rates. Without Title II, the practice would be lawful and would likely expand.
4. Light touch Title II regulation has been applied for three decades to the cellular industry with no discouragement of investment. Disputes about rates, preferred access and discrimination rarely arise, and when they do, the Title II framework is there to address the issue.
5. Broadband Lifeline service would be ineligible for support if such access is not a “telecommunications service.” This would cut off millions of low income people from access to the Internet.
6. Privacy concerns could be addressed by coordinating the appropriate standards with the FTC so that all providers have a level playing field.
7. Broadband CMRS is not as a factual matter a private mobile service. The interconnection to the public switched network offered by VoIP applications certainly renders the service at a minimum the functional equivalent of a commercial mobile service.

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NTCH, Inc. and Flat Wireless, LLC, by their attorneys, offer these comments on the matters raised by the Commission in the captioned Docket. As will be set forth more fully below, the Joint Commenters believe that a light touch form of Title II regulation is needed in the absence of any reform by Congress of the definitions of “information service” and “telecommunications service.” Such a light touch approach would avoid the First Amendment issues that would otherwise necessarily impact the throttling, blocking or other control of Internet content. Title II intervention into pricing and discrimination under the light touch approach would not be necessary unless market abuses occur. But when those abuses do occur, as they have in the past, the Commission must have a tool available to redress the problem. Joint Commenters do not believe that the current Net Neutrality rules have actually had a significant effect on investment in the Internet. In fact, it is more likely that the continuing uncertainty about the governing regulatory paradigm is in itself discouraging investment. It is high time that the Commission bring this matter to final closure.

1. **Background**

Joint Commenters are past and present CMRS providers who have both provided Internet access services and relied on other CMRS carriers for Internet access when their customers are roaming. Both Commenters are affected by Internet transparency rules, throttling or blocking actions, paid priority issues and the availability of just and reasonable rates for Internet access. Whether broadband Internet access is subject to Title II will directly impact their ability to compete and survive in the years ahead.

Almost since the beginning of the information service/telecommunications service framework established by the ‘96 Act, the Commission, the courts and the Internet industry itself have been vexed by the fundamental question of how to categorize Internet access. The breadth of the language used to characterize information services on the one hand and telecommunications services on the other is consummately and maddeningly imprecise. The definition of telecommunications to mean “the transmission, between or among points specified by the user, of information of the user’s choosing without change in the form or content of the information as sent and received” seems straightforward enough. 47 U.S.C. Section 153 (43). Phone calls, faxes, telegrams, and channels used to distribute video, audio and other data had always been deemed to be information of a customer’s choosing sent without change in form or content and therefore comfortably within the “common carrier” province of telecommunications. Yet the Commission has opined that email is not telecommunications but rather an information service. *In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798, 4822-23 (2002) How can one distinguish an email that contains a written verbal message to a recipient from a phone call to that same recipient in which the exact same words are spoken rather than typed? Yet an email is not a transmission of information but rather “the offering of a capability of for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available, information, via communications,” 47 U.S.C. Section 153 (20), and hence an information service.

This makes no sense either intuitively or in the ways that users perceive their transmission and reception of information. While email is the easiest example, virtually any particular transmission of information (a telecom service) could just as easily and accurately be described as “making information available,” which is an information service. This fundamental ambiguity at the heart of the statutory construct has left courts and the FCC in a hopeless quandary. Calling a service one thing or the other has enormous consequences for the provider of the service; sometimes the difference can be as great as the difference between no regulation at all and the full panoply of monopoly-era rate regulation. Yet one can quite justifiably place any transmission of information in either category. At paras. 6 - 22 of the NPRM, the Commission outlined the constant zigzagging in the legal treatment of Internet data offerings as differently constituted Commissions, different Circuit Courts, and even the Supreme Court tried to make sense of the mess left by the ’96 Act. The instant proceeding is merely the latest zig to the Wheeler Commission’s zag.

To adopt the proposal in the NPRM[[1]](#footnote-1) to reclassify Internet access as an information service would simply prolong this destructive pattern of having different Commissions under different chairmen reverse the determinations made by their opposite-party predecessors, with no principled justification for the change. The best solution to the regulatory quagmire would, of course, be for Congress to amend the Act to establish a regulatory regime that addresses the Internet as we know it. It is apparent to all that while no one wants the creativity, productivity and innovation which the Internet has fostered to be stifled, there are also elements of the Internet that necessitate regulation. These include truth-in-billing, child pornography, protections of intellectual property rights, transparency of billing, law enforcement access, and other basic elements of a civil society. The Internet is not now, and never should be, a realm where all restraints on our normal commercial and social interactions are abandoned. A “free and open” Internet need not be anarchy. The Internet has thrived over the last two decades despite the presence of such restraints, and it can and would survive the imposition of broad boundaries that define what conduct is or is not permissible. Congress should erase the artificial and demonstrably unworkable paradigm adopted in the ’96 Act and replace it with a 21st Century paradigm that addresses the Internet as a unique telecommunications creation with its own hybrid nature, part telecommunications, part information service, and maybe part a marketplace of ideas and commerce. It would be subject to a regulatory framework that is not constrained by the model of 1930’s monopolies or even by 1996 views about how information can be transformed and shared, but rather by the competing imperatives of letting the best potentialities of the Internet thrive while keeping the worst abuses in check.

1. **Light Touch Title II Regulation is the Best Approach**

In the absence of relief from Congress, the Commission needs to forge the best path forward with the statutory tools at its disposal. Joint Commenters believe that light touch Title II regulation is essential to maintaining the largely unfettered ethic of today’s Internet. Title II should apply to all entities defined as “broadband Internet access service” under Section 8.2 of 47 C.F.R. Under light touch regulation, nothing would change about the current situation, but freedom from content control and freedom from oppressive or discriminatory pricing would be ensured.

1. **Sections 706 and 230 of the Act Are Not a Sound Basis for Regulation**

In examining statutory foundations for regulation of the Internet outside of Title II, the Commission has in the past looked to Sections 706 (47 U.S.C. Section 1302) and 230 (47 U.S.C. Section 230) of the Act as grants of Congressional authority. Section 706, as many commentators have recognized, is largely hortatory. But more importantly, the section by its terms is limited to situations where “telecommunications services” are being regulated.

The Commission and each State commission with regulatory jurisdiction over *telecommunications services* 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. (Emph. added)

The section also gives examples of regulatory methods that could be applied, all of which are forms of common carrier regulation – not abandonment of Title II regulation altogether. In Section 706, Congress plainly contemplated that Title II regulation would apply to advanced “telecommunications services” but that the Commission should use appropriate measures to reduce the burdens that might be created by such regulation. That is exactly what light touch Title II regulation is intended to accomplish. Reliance on Section 706 alone for regulation of the Internet without Title II backing is too slender a reed to support the kind of regulation that is needed.

Similarly, Section 230 simply expresses aspirational policy objectives without giving the Commission any additional specific authority to accomplish those objectives. As will be set forth below, a light touch Title II approach best accomplishes the important polices enunciated by Congress, including maximizing user control over what is received over the Internet. The Commission should simply use the tools that have been provide it by Title II but configure them to the unique requirements of the Internet.

1. **Absent Title II Regulation, Internet Content is Subject to Provider Control**

One of the essential elements of common carrier or telecommunications service provision is that the provider may not control the content of what is transmitted. This feature of common carrier service has two benefits: it frees users from the possibility that the pipeline provider could control, censor, limit or deny carriage of content that the provider does not agree with. Secondly, it relieves the service provider from liability for the content delivered precisely because it has no control over it. Characterization of Internet access service as an information service undermines those twin pillars of the way the Internet now functions.

Virtually every party who has chimed in on the issue of content-based throttling or blocking has decried the practice and promised not to employ such techniques. Based on these “nothing to worry about” promises, some commentators have called the current Net Neutrality rules a solution in search of a problem. But as the Internet increasingly becomes our most important source of news and information, it is critical that providers of Internet access not have the power to decide what their customers see and hear. In this regard, it is curious that the very companies who most loudly insist that they do not need to be prevented from throttling or blocking content of a customer’s choosing because they would never do such a thing are the ones who most loudly resist the imposition of a legal obligation not to do so. It has to make one wonder. If they would never do it, why not have a rule that confirms that obligation for the benefit of all concerned, including both users and competitors?

It has also been suggested that this issue can be handled by arm-twisting major ISPs to commit not to throttle or block as part of their terms of service. Once such terms were promulgated, users would have recourse to the FTC to complain about the breach of terms of service. That cumbersome process not only assumes that all ISPs will voluntarily sign on to such terms (despite their ardent opposition to a rule requiring those terms), but also requires consumers to parse through the fine print of terms and conditions which may be changed at any timer by the ISP, and then file a complaint with the FTC when the terms are violated. The FTC would then have to open an individualized investigation into the charges, hold a hearing and find the particular ISP guilty of not heeding its own terms and conditions. Then it would have to do the same thing for any other ISP that also violated its terms and conditions. This is a clumsy, inefficient and ultimately ineffective way to ensure what almost everyone agrees is a fundamental right of Internet use: that one’s choice of content will not be controlled by the ISP based on the ISP’s commercial or other content preferences. A straightforward, bright line rule like the one now guaranteeing no throttling or blocking (other than as required by network considerations) and full transparency of terms and conditions should remain in place. These fundamental truths should be engraved in stone, not left to the voluntary goodwill of self-interested ISPs.

First Amendment considerations also apply to this situation. The Court in *United States Telecom Ass’n. v. FCC*, 825 F. 3d 674 (D.C. Cir. (2016) expressly considered arguments that classifying ISPs as common carriers would infringe their First Amendment rights to free speech. The Court correctly recognized that the broadband access providers covered by the current rules are only those that hold themselves out as offering a “mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service.” 47 C.F.R. Section 8.1. Such ISPs, the Court found, have the characteristic of traditional common carriers which hold themselves out to all as conduits for information not of their own choosing. The Commission therefore reasonably and correctly deemed such providers to be telecommunications service providers. Once characterized in this way, ISPs assume the statutory and regulatory obligation to deliver information of the user’s choosing without editing, censoring, modifying, selecting, throttling or blocking content with which the ISP does not agree. This feature of the Internet is a critical one for which the Commission and most commenters express full support.

But if the Commission were to reclassify ISPs as “information service providers,” the First Amendment would preclude the Commission or anyone else from preventing them from using their editorial discretion to block or throttle anything they didn’t like, including content that competes with their own proprietary content. From a First Amendment perspective, ISPs would be no different from cable operators who maintain constitutional rights to select the material (other than “must carry” TV stations) which are or are not carried on their systems. *National Cable and Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967 (2005) Simply stated, ISPs cannot be subject to the non-throttling, non-blocking rules under the First Amendment if they are information service providers, i.e., speakers, rather than common carriers who are simply conducting the content of others. They would all take on the character of a “curated” ISP that intentionally limits content based on its own editorial discretion, except that the public would not know whether they were curated or not. *U.S. Telecom Ass’n*, supra, at 743.

1. **Absent Title II Regulation, Service Providers Which Hold Market Dominance Could Charge Unreasonable and Discriminatory Rates and Impose Unreasonable Conditions**

While it is fashionable these days to derogate Title II of the Act as an obsolete and heavy-handed throw-back to 1930’s monopoly-era regulation, the Section continues to chug along doing its basic job in the background of the broad and complex matrix of the telecommunications marketplace. The Commission, in our view, has rightly eschewed rate prescription, tariffs, and other forms of monopoly regulation for much of the telecommunications activity in the market. Competitive forces generally serve to keep prices in check and to deter service providers from imposing harmful and discriminatory terms and conditions. A customer, in most cases, can simply turn to another provider to get a better rate or a less onerous condition. The competitive market neatly and efficiently does the work of regulation. But there are nevertheless still some market segments where monopoly or near-monopoly power prevails, and in those instances there must be a regulatory mechanism to prevent or punish abuse of that power.

The primary example of such a situation is the submarket of data roaming. Because this market, prior to the Net Neutrality rules, was deemed an information service, the Commission could not require the normal “just and reasonable” and “not unreasonably discriminatory” rates that would otherwise be mandated by Section 201 and 202 of the Act. It was nevertheless clear, as a host of smaller carriers pointed out to the Commission in the context of the 2011 Data Roaming proceeding,[[2]](#footnote-2) that rates charged by some carriers for access to data roaming were unconscionably high. The Commission’s solution was to impose a Title III-based standard of “commercial reasonableness” on data roaming rates. Because the Commission had to disavow any intent to impose Title II-type regulation in defending this standard before the Court of Appeals, the Commission has effectively neutered its own ability to impose any restraints at all on data roaming rates. Unlike the “just and reasonable” standard that has decades of Title II jurisprudence to guide it, the “commercially reasonable” standard has proven toothless and ineffective as a tool for disciplining data roaming rates.

Despite the urging of NTCH that the Commission require such rates to be made publicly available,[[3]](#footnote-3) these rates are universally subject to confidentiality agreements that preclude their public disclosure. Until recently, the Commission itself could not be aware of how seriously distorted the data roaming rate structure has become. The Commission currently has under review, however, a complaint which demonstrates the huge and unjustified discrepancy between the data rates offered by one carrier to its own subscribers and the rates it offers other carriers for access to the same data roaming services. The undisputed numbers provided in the record of the complaint establish that there remains a crying need for Title II regulation where one carrier has dominant power to set rates and terms in a particular submarket. Competition itself is harmed when there is no effective control over monopoly-like rates and terms, and indirect access by the public to data roaming is blocked. This is the opposite of what the Commission professes to be trying to accomplish through its Internet policies. This is in no way “a solution in search of a problem;” it is, rather, a vitally serious and present problem in desperate and immediate need of a solution which only Title II can supply.

Data roaming is only one particularly egregious instance of circumstances where Title II intervention is warranted. The Commission recently concluded a far-ranging inquiry into the broadband data services market, ultimately determining that there are in fact submarkets in which commercial users have such limited options when it comes to broadband data links that they are at the mercy of the providers.[[4]](#footnote-4) The new Commission is revisiting some of the findings of the Wheeler Commission in this regard, but there is little doubt that there remain circumstances in which monopoly or duopoly broadband providers are in a position to, and do, charge excessive rates for cellular backhaul and other purposes. NTCH itself has been a victim of such charges. Here again, therefore, is a situation in which regulatory intervention is not only appropriate but necessary. Again, Title II, with its old but trusty “just and reasonable” and “non-discrimination” standards is there to handle the problem. Unfortunately, although the Commission had expressly disclaimed any intention to forbear from Sections 201 and 202 of the Act in the Net Neutrality NPRM[[5]](#footnote-5), it did so in the case of the commercial mobile radio services. *In re Preserving and protecting the Open Internet*, 30 FCC Rcd. 5601 (2015) at paras. 523-526. And it did so without making any of the findings which are a prerequisite to forbearance. *Id*. This left the CMRS service in a regulatory limbo which the Wheeler Commission promised to rectify but never did. The current Commission should not make that same mistake.

Joint Commenters emphasize that these circumstances are relatively rare exceptions to the general rule that competitive forces normally serve to protect the market. However, Title II regulation and the foundational principle that rates must be just and reasonable and nondiscriminatory stands as a necessary backdrop to the functioning of the market. As long as we live in an imperfect world where markets are not perfectly competitive, we must maintain the ability of the Commission to intervene when abuses occur.

1. **The CMRS Regulatory Model Should Apply**

Opponents of the current Net Neutrality rules repeatedly raise the straw man of heavy-handed, monopoly era, tariff-based rate regulation as an argument against imposition of Title II regulation on Internet access. This is, not to put too fine appoint on it, ridiculous. No one, including the Wheeler Commission, was or is proposing or intending any such approach. In fact, the Wheeler Commission bent over backwards (in some cases too far) in assuring the industry that almost all Title II regulations would be forborne from. It does a disservice to the debate about how to regulate the Internet to manufacture regulatory bogeymen that are entirely imaginary in order that limited forms of appropriate regulation can be lumped in and discarded as well.

Rather than looking to the regulatory framework that applied to the monolithic Bell System in the 1930’s, a better model would be the approach taken by the Commission to the cellular industry. Since its inception, the Commission has consistently eschewed almost all forms of common carrier regulation of CMRS carriers. They have always been exempt from filing state and federal tariffs, do not file interlocking director reports, need not file their contracts with other carriers, are largely free from most state regulation, including entry barriers, and generally conduct their day to day operations relatively free from federal regulations as common carriers. To be sure, they must comply with radio license-related obligations such as filing periodic reports, offering a certain number of hearing aid compatible phones, offering 911 access, and building out their licensed areas to prescribed levels, but this is a function of being a licensee, not a common carrier. The CMRS industry has grown spectacularly during its 35 year existence and has attracted hundreds of billions of dollars of capital investment for infrastructure building and license acquisition. In all those years, the undersigned has never seen or heard a single complaint from an industry participant that he or she was reluctant to invest money in a CMRS service because of its Title II status. Clearly, the burden of complying with the relatively few Title II provisions that apply to it lie lightly on the industry’s shoulders. Complaints to the Commission under Section 208 of the Act have been rare. Only in recent years as industry consolidation has eliminated many competitors from the field have serious issues regarding roaming rates arisen, because previously the competitive marketplace itself obviated that problem. In short, the CMRS industry has thrived and prospered beyond anyone’s wildest expectations, despite the fact that there were obligations to offer just and reasonable rates and to not unreasonably discriminate. There is no reason why that model cannot be equally successful at letting the Internet industry develop without pervasive government oversight while also maintaining a basic framework of reasonableness of rates and terms that will discourage abuses when market anomalies allow them to occur.

1. **Investment Will Not Be Discouraged by Title II Status**

Numerous stakeholders in the Internet ecosystem have insisted to the Commission that their investment in the Internet has been stunted by the prospect of light touch Title II regulation. Joint Commenters do not believe this. Several public interest groups have gathered data showing that the same companies who say investment has been discouraged have in fact *increased* their investment in the Internet field since the Net Neutrality rules were adopted. Nor have they reported to the SEC that their investment or prospects in the Internet have been hampered by Title II regulation. There is a large disconnect between their money and their mouths. This of course makes sense. The Internet offers one of the single greatest opportunities for growth of sales and productivity in commercial history. For a company to stand back and refuse that opportunity because it would have to behave justly, reasonably and non-discriminatorily would be prima facie grounds to cashier the executive who took such a position. As noted above, the cellular industry has thrived under Title II regulation, and the Internet would thrive as well -- as indeed it has in the two years since the Net Neutrality rules were adopted. The Internet is like a tidal wave, and the thought that its development could be daunted by the application of the short seawall of Title II standards is unrealistic.

1. **Support for Broadband Lifeline is Threatened by its Conversion to an Information Service**

The NPRM proposed at Para. 68 to leave Lifeline service as a supported service under Section 254 of the Act without even cursorily addressing the potential problem posed by converting broadband Internet access from a telecommunications service back into an information service. In the Lifeline Order extending Lifeline support to low income people needing broadband service, the Commission correctly observed that in this age, access to broadband is as crucially important as access to voice service was twenty years ago.[[6]](#footnote-6) Indeed, all Commissioners have repeatedly stressed the importance of ensuring broadband access to Indian tribes, rural areas, and low income areas as one of the basic essentials of modern life. The Lifeline Order attempted to implement that objective by deeming broadband to be a telecommunications service supported by the Universal Service Fund. Recognition of broadband Internet access as a “telecommunications service” was a key prerequisite for taking that step. For while the FCC has occasionally suggested that a supported service need not be a telecommunications service, Section 254(c)(1) of the Act provides otherwise. There the Act defines “universal service” expressly as an “evolving level of telecommunications service” and provides that the Commission may revise its roster of supported “telecommunications services.” The Act nowhere suggests that support may be available for non-telecommunications services other than the ones enumerated in Section 254(c)(3): schools, libraries and health care providers. Conversion of broadband Internet access to an information service would wholly undercut the ability of the Commission to ensure that this critical service is universally available.

1. **Privacy**

Maintaining broadband Internet access as a telecommunications service obviously maintains the curious disconnect in privacy regulation between telecom common carriers, who are regulated by the FCC, and everyone else, who are regulated by the FTC. Joint Commenters agree with those who believe that there is no principled reason to treat carrier-based ISPs any differently from non-carrier ISPs for purposes of privacy protections. A level playing field is only fair. In the absence of Congressional action to redress this regulatory anomaly (and we note that Congresswoman Blackburn has introduced a bill for just this purpose), the FCC could handle the matter by coordinating with its colleagues on the FTC. Their object would be to reach a universal standard for privacy protections, opt-in/opt-out choices, and size categories to which these rules would apply. The FCC and FTC would still have to retain separate enforcement mechanisms, but at least they would be enforcing the same rules, much as they now enforce the same anti-trust laws when competitive issues arise.

1. **Converting CMRS to a Private Mobile Service is Unlawful and Bad Policy**

The Commission’s proposal to treat mobile broadband Internet service as a private mobile service rather than CMRS raises a serious issue at the outset. The Commission acknowledges that there have been no technological changes which would justify a reversal from the findings of the Wheeler Commission just two years ago that mobile broadband access is sufficiently like commercial mobile service as to be “functionally equivalent.” Those findings were upheld by the Court. The Pai Commission now proposes to reverse the Commission’s earlier findings simply on the basis that it disagrees with them. Just as courts are bound by the earlier decisions of the same court, the Commission cannot discard its prior determinations just because it disagrees with them. This is not to say that the law cannot change, but change must start from the principle that the existing law is entitled to deference, and change requires more than simple disagreement. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 981 (2005) (an agency may not change its own precedent arbitrarily and without explaining the change). And any change in interpretation must obviously be supported by the facts of record. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29 (1983) (agencies must provide a satisfactory explanation for their rules based on a “rational connection between the facts found and the choice made”).

Here, if anything, the vector of technology supports even more strongly the findings of the Wheeler Commission. As the D.C. Circuit understood, a person making a phone call on her cell phone neither knows nor cares whether the call is connected through a WiFi router or a cellular network. Sometimes a call is carried on both. And by using VoIP services, a user can connect to any phone in the world over the Internet. Even wired services now use Internet protocols for delivery of their traffic. The efficiency of Internet-driven technology is rapidly rendering virtually all interconnected telecommunications Internet-based. Not only is this the reality of interconnected service today, but the statute at 332(d)(3) expressly permits the Commission to specify that a particular service is functionally equivalent to interconnected service. The statute sets no bounds on the Commission’s discretion in that regard, so its findings are simply subject to the usual rational and not arbitrary and capricious metrics. The existing rules plainly meet that test, as the Court found. The Commission’s proposal to relegate mobile broadband Internet access to a 1950’s-style private service category flies in the face of the clear current and future direction of communications.

It also guarantees that the abuses described in Section C, above, will continue and expand. Reclassifying CMRS as a private service would permanently authorize and validate the ability of dominant carriers to charge excessive data roaming rates to other carriers as they do now. Rather than legitimizing this kind of highly anti-competitive activity, the Commission should act on NTCH’s long pending petition for reconsideration[[7]](#footnote-7) which challenged the Commission’s flatly erroneous and unlawful decision to forbear from application of Sections 201 and 202 of the Act as applied to data roaming providers. The disastrous consequences of that approach are set forth in detail in the Section 208 complaints which the Commission has chosen not to act on.

1. **Conclusion**

The Commission lop off the portions of the current rules that call for intrusive regulatory intervention (such as the Internet Conduct Standard and the procedures for getting pre-approval for Internet activity) and reduce Internet regulation to basic Title II principles just as CMRS has been regulated for decades. To make this regulatory regime effective, the Commission should not forbear from application of Sections 201, 202 and 208 of the Act, because these are the necessary backdrop for Title II conduct and enforcement. Specifically, the Commission should rescind the unlawful forbearance which the current rules applied to data roaming without any attempt to meet the statutory forbearance standards.

Respectfully submitted,

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1. In the Matter of Restoring Internet Freedom, WC Docket 17-108, rel. May 23, 2107. (“NPRM”) [↑](#footnote-ref-1)
2. WT Docket No. 05-265 [↑](#footnote-ref-2)
3. Petition to Rescind Forbearance and Initiate Rulemaking, filed July 2, 2014. [↑](#footnote-ref-3)
4. Business Data Services in an Internet Protocol Environment, WC Docket No. 16-143, WC Docket No. 05-25, Gen. Docket No. 13-5, RM-10593, 32 FCC Rcd. (3459) 2017 [↑](#footnote-ref-4)
5. *In re Preserving and Protecting the Open Internet*, 29 FCC Rcd. 5561, 5616, para. 154. (2014) [↑](#footnote-ref-5)
6. Lifeline and Linkup Reform and Modernization, 31 FCC Rcd. 3962, Para. 39 (2016). [↑](#footnote-ref-6)
7. Petition for Reconsideration filed by several petitioners on May 13, 2015 in GN Docket No. 14-28. [↑](#footnote-ref-7)