

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
) WC Docket No. 17-108
Restoring Internet Freedom)

COMMENTS OF CENTURYLINK

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INTRODUCTION AND SUMMARY

Under the core, bifurcated regulatory framework established by the Communications Act (as amended), communications services must fall into one of two mutually exclusive categories – information service or telecommunications service.¹

In 2002, in the *Cable Modem Order*,² the Commission, examined the characteristics of broadband Internet access (BIA) service and concluded that it was properly classified as an information service. This ruling was consistent with the regulatory treatment of BIA that preceded it.

Under this light touch approach, investment in broadband networks and competition thrived and there was virtually no evidence of the type of harmful conduct by network providers that would justify onerous regulatory treatment of BIA service.

In the 2010 *Open Internet Order*,³ the Commission attempted to impose more onerous regulation on BIA service in the form of no blocking and no unreasonable nondiscrimination rules, while leaving the information classification of BIA service in place. The rules imposed by the 2010 *Open Internet Order* were ultimately invalidated by the DC Circuit Court of Appeals in

¹ 47 U.S.C. §§ 153(24), 153(53).

² *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (*Cable Modem Order*).

³ *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905 (2010) (*2010 Open Internet Order*).

the January 2014 *Verizon v. FCC* decision – with the exception of that order’s limited transparency requirements.⁴

It was in this context that the 2014 *Open Internet Notice of Proposed Rulemaking* (2014 *Open Internet NPRM*)⁵ was launched. And, the 2014 *Open Internet NPRM* proposed, as the proper response to *Verizon v. FCC*, retaining the information service classification for BIA service and imposing a lighter touch nondiscrimination rule that would permit “commercially reasonable” discrimination.⁶

However, in November 2014, President Obama released a highly publicized statement contending that BIA service should be re-classified as a telecommunications service and thereby brought under the Title II common carrier framework whose origins date back to monopoly era utility-based regulatory principles of the early twentieth century.⁷

Shortly thereafter, the Commission adopted the *Title II Order*.⁸

That order, without conducting any competition analysis and while fully acknowledging the robust investment that had occurred since BIA service was initially classified as an information service in the early 2000’s,⁹ implemented Title II regulation of BIA. It did so by imposing a broad and vague new nondiscrimination rule (the Internet conduct standard) and

⁴ *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014; reissued Jan. 15, 2014).

⁵ *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014).

⁶ *Id.*, at 5565 ¶ 10.

⁷ Statement on Net Neutrality by President Obama, Nov. 10, 2014, <https://obamawhitehouse.archives.gov/the-press-office/2014/11/10/statement-president-net-neutrality>

⁸ *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015).

⁹ *Id.*, at 5603 ¶¶ 1-2, 5724-25 ¶¶ 283-84.

other Title-II based regulation on BIA service. It also found that its classification of BIA as a Title II telecommunications service gave the Commission the authority to regulate private Internet traffic exchange arrangements under Title II as well. And, the *Title II Order* adopted broad expansions to the Open Internet transparency requirements.

The *Title II Order* did not base this action on any record of anti-competitive conduct that might warrant such an aggressive expansion of federal regulation into this crucial component of the country's economic infrastructure. Rather, the Commission based its actions on findings that BIA service providers had "incentives" or potential "ability" to engage in some type of harmful conduct in the future¹⁰ and on tenuous rationalizations that explained away the fundamental information service functionality inherent in BIA service as either "not integral to," or "separate and distinct from," BIA service.¹¹

In the aftermath of the *Title II Order*, it has become clear that competition continues to thrive. There is also still no evidence in the marketplace of harmful Internet Service Provider (ISP) behavior. Moreover, the capacity and other network management challenges faced by broadband network providers have only increased as the historic dramatic growth in large-bandwidth consuming applications has continued. But, it has also become clear that the utility regulation put in place by the *Title II Order* has constrained investment in those networks and has imposed unnecessary costs on network providers.

¹⁰ See, e.g., *id.*, at 5608 ¶ 20.

¹¹ See, e.g., *id.*, at 5776 ¶ 385.

In light of the above, the Commission correctly proposes “to reinstate the information service classification of broadband Internet access service and return to the light-touch regulatory framework first established on a bipartisan basis during the Clinton Administration.”¹²

As discussed more fully below, the Commission can and should reinstate the classification of BIA service as an information service. And, in doing so, it can and should adopt the tentative conclusion of the *NPRM* that this is the proper conclusion based on a straightforward application of the Act’s definition of an information service due to the technical and other details of how BIA service works and is offered. It can and should also adopt the *NPRM*’s tentative conclusions that the text, structure and history of the Act, the Commission’s precedents, and good policy all dictate an information service classification for BIA service.

Classification of BIA service as an information service will necessarily lead to a light touch regulatory framework going-forward for BIA service. To accomplish this, the Commission should, as the *NPRM* also proposes, eliminate the three existing Open Internet bright line rules, the Internet conduct standard, and the Title II traffic exchange rule and return the transparency rules to the scope that existed prior to the *Title II Order*. To the extent it retains any *ex ante* substantive rules, the Commission should reinstate the 2010 versions of the reasonable network management exception and the non-BIA service exclusion, apply the same regulatory framework to fixed and mobile broadband, and eliminate the broad delegated authority grants and other procedural trappings of the *Title II Order*. But, to be clear, its policy goals would be best served by foregoing any *ex ante* regulation at this time.

This approach will also be most consistent with the Commission’s limited legal authority over BIA service as a Title I information service. The proper reading of Sections 230 and 706 of

¹² *Restoring Internet Freedom*, WC Docket No. 17-108, Notice of Proposed Rulemaking, FCC 17-60, at ¶ 24 (rel. May 23, 2017).

the Act is that they confer no delegation of authority upon the Commission and, instead, operate more as rules of interpretation. Therefore, any extension of regulation to BIA service under Title I, beyond limited transparency requirements, can only be done based upon the Commission's Title I ancillary jurisdiction. And, the Commission's ancillary authority is constrained in this context by the prohibition against common carriage regulation imposed by Section 153(51) and by the First and Fifth Amendments.

A Title I approach leaves the Commission with some conceivable authority to act in important areas. For example, as discussed below, the Commission likely could adopt a limited transparency requirement, apply public safety requirements and regulate to provide universal service support for broadband.

The Commission should not adopt its tentative conclusion that it has no legal authority whatsoever with respect to Internet traffic exchange arrangements. Such a conclusion appears inconsistent with the concept of ancillary jurisdiction.

And, as discussed below, it's conceivable the Commission could establish the ability to act in the future in other areas via its ancillary jurisdiction. But, its ancillary jurisdiction authority is generally limited to action on an *ex post* basis, and to narrowly tailored action in specific factual contexts where an adequate record has been developed to show that the predicates for ancillary jurisdiction have been met (i.e. that the Commission has Title I subject matter jurisdiction over the service to be regulated and that the assertion of jurisdiction is "reasonably ancillary to the effective performance of [its] various responsibilities.")

In light of the above, a Title I approach will require that the Commission seek Congressional action before establishing more substantial *ex ante* regulation to BIA service. Indeed, this is the strength of the Title I approach – as it will prevent the type of regulatory

overreach wrought by the *Title II Order*. And, only Congressional action further codifying the appropriate light touch treatment of BIA service can eliminate the potential for an endless game of regulatory ping pong whereby the regulatory treatment of these important services is redefined every time a new party gains control of the White House.

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CenturyLink, Inc.¹ submits these comments in the above referenced matter in response to the Commission's *Protecting Internet Freedom* Notice of Proposed Rulemaking (*NPRM*).²

I. THE FACTUAL RECORD DEMONSTRATES CONTINUED ROBUST COMPETITION AND AN ABSENCE OF HARMFUL ISP BEHAVIOR; BUT, UTILITY REGULATION CONSTRAINS NECESSARY NETWORK INVESTMENT.

A. Competition Is Thriving And Ever-Increasing.

In the mass market broadband Internet access (BIA) services market, regulated wireline telephone companies like CenturyLink compete vigorously with cable providers, wireless companies and other types of Internet Service Providers (ISPs).

One need look no further than the Commission's latest report on Internet access deployment to see that competition in this market is thriving and ever-increasing. The Commission's latest Internet Access Services report, released in April 2017 (providing status as of June 30, 2016), demonstrates that approximately 90% of US households are located in census tracts where 3 or more fixed broadband providers report that they provide services with speeds of at least 3 Mbps downstream and at least 768 kbps upstream and approximately 80% are located

¹ This submission is made by and on behalf of CenturyLink, Inc. and its wholly owned subsidiaries.

² *Restoring Internet Freedom*, WC Docket No. 17-108, Notice of Proposed Rulemaking, FCC 17-60 (rel. May 23, 2017).

in census tracts where 3 or more fixed broadband providers report that they provide services with speeds of at least 10 Mbps downstream and over 1 Mbps upstream.³

Additionally, the report demonstrates that fixed broadband providers are deploying higher and higher broadband speeds and providers continue to compete vigorously on price and other terms. For example, the percentage of fixed connections with a downstream speed of at least 25 Mbps has grown from 24% (or 23 million connections) in June 2013 to 57% (or 59 million connections) in June 2016.

Of course, these numbers above do not account for satellite or mobile broadband services. There, the Commission also reports that satellite service providers report offering Internet access at bandwidths of at least 10 Mbps downstream and 1 Mbps upstream in 99.1% of developed census blocks.⁴

Adding mobile broadband to the picture,⁵ the Commission reports that the number of BIA connections, combining both fixed and mobile technologies, with over 200 kbps in at least

³ “Internet Access Services: Status as of June 30, 2016, Figure 4, Industry Analysis and Technology Division, Wireline Competition Bureau, Rel. April 2017. While the Commission cautions in the report against construing its results as proof of competition (*see* p. 8), the data undeniably provides evidence of competition.

⁴ *Id.*, p. 6 & n. *.

⁵ It is also clear that wireless broadband services are adequate substitutes for wireline broadband services for purposes of determining levels of competition. As has occurred in the voice market, more and more broadband customers “cut the cord” each year. Moreover, wireless broadband does not need to be a perfect substitute for wireline broadband service in order for it to serve as a competitive constraint on wireline services from both a pricing and quality of service perspective. As long as there are enough customers willing to consider “cutting the cord” (often called customers “at the margin”), this constrains the pricing and service quality of wireline broadband providers. The bottom line is that, if a wireline broadband provider were to raise prices to a supracompetitive level or provide unacceptable service quality, it would be subject to losing customers to both wireline and wireless rivals.

one direction grew year over year from June of 2015 to 2016 by over 8% to 369 million.⁶ Additionally, the Commission's most recent wireless competition report estimated that over 98% of Americans have a choice of 3 or more wireless providers, alone, and 93% have a choice of four or more wireless providers. According to a Pew study, "The vast majority of Americans – 95% - now own a cellphone of some kind. The share of Americans that own smartphones is now 77%, up from just 35% in Pew Research Center's first survey of smartphone ownership conducted in 2011."⁷ Smart phone users generated 13.4 times more traffic on average⁸ than those with a basic mobile phone device due to among other things the availability of faster wireless networks.⁹ CTIA reports that mobile speeds are increasing and driving data usage:

Today's 4G LTE mobile data speeds increased nearly 40 times since 3G speeds in 2007, and download speeds for all mobile phones have grown by almost 40 percent since 2015. Today, Americans benefit from average 4G LTE speeds of nearly 17 Mbps.¹⁰

The National Center for Health Statistics reported that over 50% of U.S. households are wireless only with no fixed broadband connection.¹¹

⁶ *Id.*, p. 12.

⁷ See Pew Research Center Mobile Fact Sheet, (Jan 2017), available at: <http://www.pewinternet.org/fact-sheet/mobile/>

⁸ See Cisco, "VNI Mobile Forecast Highlights, 2016-2021, available at: http://www.cisco.com/assets/sol/sp/vni/forecast_highlights_mobile/ (United States – Device Growth Traffic Profiles, Smartphones).

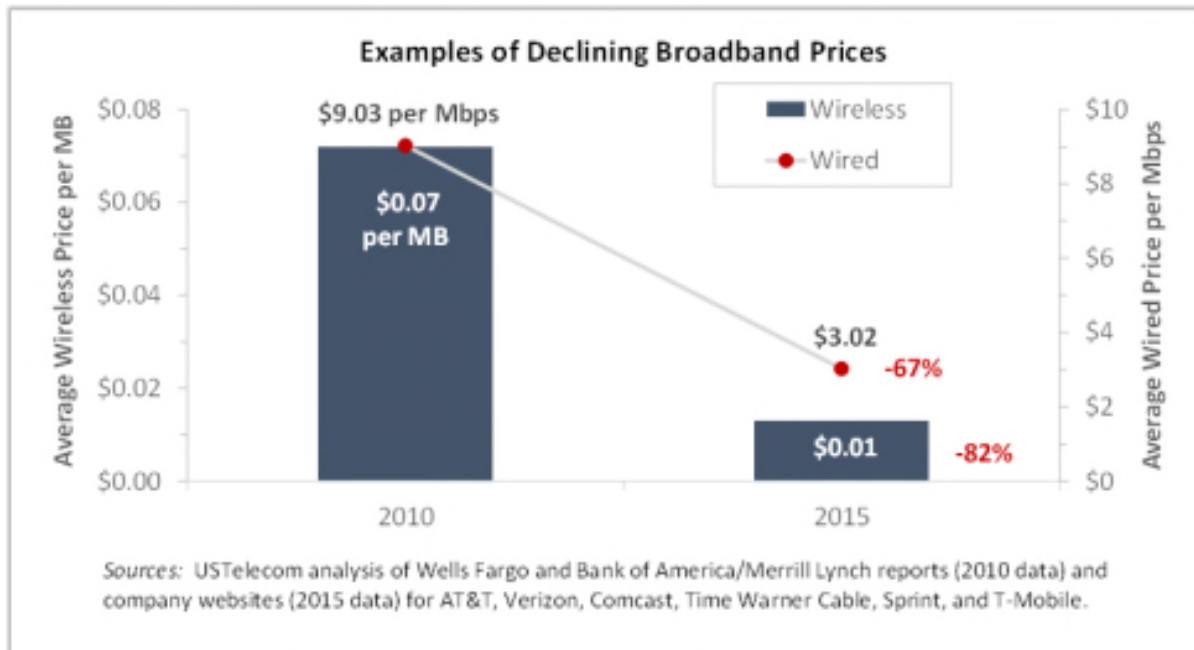
⁹ See *Wireless Snapshot 2017, More Devices, More Smartphones, and More Applications Contribute to our Mobile-First Lives*, CTIA, available at: <https://www.ctia.org/docs/default-source/default-document-library/ctia-wireless-snapshot.pdf> ("On average last year, a smartphone generated 3.87 GB of data every month. This represents an over 1,400 percent increase since 2010, due to the rise of faster networks, more sophisticated phones, and new applications and services.")

¹⁰ *Id.* (citations omitted).

¹¹ Stephen J. Blumberg, Ph.D., and Julian V. Luke "Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2016", Centers for

Broadband prices have also generally been declining in terms of the price per megabit across the board.¹²

THE BROADBAND ASSOCIATION



Disease Control and Prevention, National Center for Health Statistics. *Available at:* <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf> (“The second 6 months of 2016 was the first time that a majority of American homes had only wireless telephones. Preliminary results from the July-December 2016 National Health Interview Survey (NHIS) indicate that 50.8% of American homes did not have a landline telephone but did have at least one wireless telephone (also known as cellular telephones, cell phones, or mobile phones) – an increase of 2.5 percentage points since the second 6 months of 2015. More than 70% of all adults aged 25-34 and of adults renting their homes were living in wireless-only households”).

¹² “The Broadband Internet Economy is Thriving,” p. 6, 7 Feb 2016 <https://www.ustelecom.org/sites/default/files/files/USTelecom-White-Paper-1.pdf> (“When an input market is failing, prices for these inputs typically rise, causing concomitant rises in prices for downstream products that use those inputs, which in turn constrict demand. Here [in the United States], by contrast, demand is surging and prices have been falling. The average price per megabit per second for wired and per megabyte for wireless broadband has fallen dramatically, by approximately 67% and 82%, respectively, over the past five years.” (citation omitted)).

In other words, broadband speeds are increasing and prices are declining.¹³

And, broadband providers are otherwise competing vigorously, differentiating their services based on attributes such as data speed and price. Virtually all providers offer bundles of services at a discount, and offer promotional rates to attract customers.¹⁴ These providers also engage in comparative advertising, seeking to attract customers based on these attributes.¹⁵ This is all characteristic of a competitive market.

¹³ Will Rinehart, "FCC Data Suggests Broadband Inequality Has Decreased", American Action Forum, (May 11, 2017), available at: <https://www.americanactionforum.org/research/fcc-data-suggests-broadband-inequality-decreased/> ("For one, the broadband market is not stagnant as many regulatory advocates often suggest. In just one year, the average speed increased by 24 percent, while the median service level increased by 25 percent. Simultaneously, the Consumer Price Index (CPI) during this time period declined for Internet service by 2.5 percent. Since the CPI for Internet is not indexed to quality changes, speeds increased as prices declined."); *The Price per Megabit per Second has Gone Down 90 Percent*, NCTA, (March 17, 2017) <https://www.ncta.com/platform/broadband-internet/the-price-per-megabit-per-second-has-gone-down-90-percent/> ("Over the past decade, internet speeds have increased more than 125 times over. In 2007, for instance, it took 45 minutes to download a 5 GB HD movie, and today it takes 21 seconds. The huge increase in broadband speeds reflects the tremendous investment and upgrades to our networks in just ten short years. And because of the exponential growth in speeds, the average price per megabit has decreased a staggering 90 percent.").

¹⁴ See MyRatePlan Compare High Speed Internet Providers, available at: http://www.myrateplan.com/bundles/compare_high_speed_internet ("An ever-increasing number of technologies (cable, DSL, satellite, Wi-Fi, cellular 3G, 4G) are available to deliver high-speed Internet access. This is making the market more competitive, leading to a nice combination of lower prices and ever increasing download speeds....On this page, we display high-speed Internet promotions from phone (DSL) and cable companies. The phone companies tend to offer multiple DSL plans, with higher prices associated with more download speed. If your Internet needs aren't as intensive (e.g., checking e-mail and web browsing as opposed to gaming), you may find that a lower-end DSL offering can save you quite a bit of money, while still delivering a satisfying high-speed experience."). See also AT&T U-Verse Offers & Packages: <http://www.att.com/u-verse/shop/#fbid=tQ-8E9iNRc6>; Comcast Cable TV and Internet packages: <http://www.comcast.com/cable-internet-packages.html>; Charter package options: <https://www.spectrum.com/packages.html> ; Verizon FIOS bundle options: <http://www.verizon.com/home/bundles/fios/> ; CenturyLink® Bundled Services: <http://www.centurylink.com/home/bundles/> ; Frontier Communications Bundles: <http://west.frontier.com/bundles> ; Windstream High Speed Internet Bundles: <http://www.windstream.com>.

¹⁵ See, e.g., American Enterprise Studies Broadband Competition in the Internet Ecosystem, Jeffrey A. Eisenach. October 2012 available at: <http://www.aei.org/papers/economics/broadband-competition-in-the-internet-ecosystem/> , p. 12

It is clear that no broadband provider is currently capable of exercising undue “market power.” Market power is typically defined as the ability of a firm to profitably raise prices above competitive levels for more than a transitory period of time.¹⁶ In the competitive environment described above, broadband providers are not able to sustain broadband price increases above competitive levels. If they did so, customers would simply opt for another option. While a broadband provider may be able to engage in a *short term* increase in price (for a comparable service), such increases would not be sustainable in the long term, as exhibited by the declining price per megabit over time. Moreover, even if you believe the broadband provider market to be a duopoly, there is no evidence that broadband providers are earning supra-normal rates of return.¹⁷

Additionally, providers’ ability to raise broadband prices or degrade service quality levels are also constrained, and market power limited, by a variety of other factors. For example,

(“[C]ompetition in the broadband industry is shaped by the same forces as in the rest of the Internet ecosystem, like the markets for computers, content, applications, software, and so forth.” “...[B]ecause broadband markets are dynamic, the primary focal points of competition are innovation and product differentiation. Broadband ISPs, like other Internet firms, seek to outpace their rivals, and earn economic rents by developing superior products and services. To do so, they make large, nonrecoverable investments in R&D, equipment, and other fixed assets. To recover these costs (which must be recovered, at least in expectation, or the investment would not be made), ISPs must charge at least some customers prices in excess of marginal cost, which is to say they must price discriminate or, as some prefer to say, engage in ‘differential pricing.’ [footnote omitted] To price discriminate, they must differentiate their products. This causal chain (or, more accurately, causal circle) – invest, innovate, differentiate, price discriminate, invest, and so forth – is central to the competitive dynamics of all IT markets, including broadband.”)

¹⁶ See e.g., U.S. Department of Justice and the Federal Trade Commission. *Horizontal Merger Guidelines*, 1992 [Inclusive of April 8, 1997 Revisions], Section 0.1. (A firm possesses market power when it has “the ability profitably to maintain prices above competitive levels for a significant period of time.”)

¹⁷ See, e.g., *Market Power in U.S. Broadband Services*, Thomas W. Hazlett and Dennis L. Weisman, George Mason University Law and Economics Research Paper Series, 09-69, November 2009, p. 6.

broadband providers generally operate with high price-cost margins due to scale and scope economies.

Any potential for individual broadband providers to exert market power is limited by the nature of service bundling. Many broadband customers purchase broadband service as a component of a service bundle, *i.e.*, they purchase along with voice service, video service and/or wireless service at a “bundle discount.” If a broadband provider sets prices too high, reduces service quality too low, or engages in any other activity that displeases customers, the broadband provider would lose not only a broadband customer, but a customer who purchases other services. For example, if a CenturyLink customer purchases a bundle of broadband, voice, video and wireless, and they become dissatisfied with CenturyLink broadband service, they may switch to a bundle provided by another provider such as Comcast. In that case, CenturyLink would lose not only a broadband bundle customer, but a voice, video and wireless customer as well. The potential loss of these revenues constrains broadband prices and any decline in service quality.

Nor is there evidence that switching costs are a significant factor when it comes to BIA customers changing from one provider of BIA to another. Clearly, each provider seeks to offer a “sticky” service to stave off defections and reduce churn. Thus, providers offer bundles, promotions, “price for life” guarantees, discounts for a longer term contract, etc. And, providers would obviously like to retain existing customers and attract new ones. However, no customer is “locked in” to a broadband provider.

Moreover, as the attached Declaration of Dane Folster, CenturyLink’s Vice President of Consumer Segment Marketing (hereafter Folster Declaration, attached as Appendix 1 hereto), demonstrates, as the BIA service market matures, the opportunity for incremental subscriber and associated revenue growth is declining and the opportunity for customers to move to alternative

providers is growing. (Folster Declaration, ¶ 5). Additionally, recent declining market shares nationally of telco providers relative to cable providers shows that switching costs are not significant. (*Id.*) And, changing practices with regard to modems and robust Internet Service Provider (ISP) promotional service offerings focused on winning customers contribute to only lowered switching costs in today's market. (*Id.*)

B. There Continues To Be No Evidence In The Marketplace of Harmful ISP Behavior.

There is also no evidence that substantive rules, particularly heavy-handed rules such as an outright ban on paid prioritization, are needed to protect and promote an open Internet. The function of the Internet as a vehicle of innovation and growth, expression, and civic engagement, and the valuable contributions of broadband providers in the “virtuous cycle,” preceded the Open Internet rules and will continue regardless of whether the Commission decides to maintain *ex ante* rules of any kind. In other words, not only is it clear that there are substantial costs maintaining the Title II rules, there is no evidence that there are offsetting benefits. Preceding and following the effective dates of the rules adopted in the *2010 Open Internet Order* and the *Title II Order*, respectively, there was/is no evidence of the types of behavior proponents of heavy-handed regulation fear – such as exclusive affiliated deals for paid prioritization.

The high level of competition described above ensures that broadband providers have every incentive to design and maintain broadband networks that meet or exceed end user expectations of openness. It is, thus, not surprising that there have been few complaints about lack of openness and no evidence of the types of broadband provider practices the proponents of heavy-handed regulation describe (exclusive preferences for an broadband provider's competitive services, “pay-to-play,” etc.). In this environment, broadband providers have every incentive to design, maintain and manage their networks in a way that meets end user

expectations for openness. If they do not, switching costs are still adequately low that customers will not hesitate to switch to a competitor.¹⁸

Finally, what often continues to be overlooked is the harmful conduct of non-ISP actors in the Internet ecosystem – such as large edge providers.¹⁹

C. Capacity Demand On ISP Networks Continues to Grow At A Robust Pace, But Utility Regulation Has Constrained The Investment Needed To Keep Up.

1. The historic dramatic growth in large-bandwidth consuming applications continues.

As was the case before the *Title II Order*, the usage of large-bandwidth consuming content and applications (particularly video) has continued to grow dramatically in recent years and the pace of growth has continued to increase every year. Cisco reports that global IP traffic “will increase nearly threefold over the next 5 years, and will have increased 127-fold from 2005 to 2021” and, overall, “IP traffic will grow at a compound annual growth rate (CAGR) of 24 percent from 2016 to 2021.”²⁰ Cisco also reports that global Internet traffic in 2021 will be equivalent to 127 times the volume of the entire global Internet in 2005.²¹

¹⁸ See e.g., “Assessing the Network Neutrality Debate in the United States,” J. Gregory Sidak, http://www.iscr.org.nz/f571,16443/Sidak_New_Zealand_Net_Neutrality_paper.pdf, p. 17 (“Consumers value choice, and, if a provider were to block competing content on its network, it would risk losing customers to providers that offered greater choice.”)

¹⁹ See e.g., Debunking Edge Competition Premises in FCC 2015 Title II Broadband Order – FCC Comments,” Scott Cleland, <http://precursorblog.com/?q=content/debunking-edge-competition-premises-fcc-2015-title-ii-broadband-order-%E2%80%93-fcc-comments> (“The evidence below shows that the three most powerful edge providers, Google, Amazon, and Facebook, operate non-neutral networks and discriminate against competitors.”)

²⁰ See “Cisco Visual Networking Index: Forecast and Methodology, 2016–2021,” p. 2 (June 6, 2017) available at: <http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/complete-white-paper-c11-481360.pdf>.

²¹ *Id.*

Each year, video represents a greater and greater portion of this growing traffic volume. According to Cisco: “[g]lobally, IP video traffic will be 82 percent of all consumer Internet traffic by 2021, up from 73 percent in 2016.”²² It also reports that “Internet video to TV grew 50% in 2016” and will “continue to grow at a rapid pace, increasing 2.6-fold by 2021,” and that “consumer Video-on-Demand (VoD) traffic will double by 2021.”²³

According to Sandvine, Real-Time Entertainment is the dominant traffic category in North America and the key driver of network growth. “Real-Time Entertainment is responsible for over 71% of downstream bytes during the peak period” and “as streaming audio and video adoption continues to expand, and emerging video technologies such as 4k, High-dynamic-range (HDR) video, and virtual reality increase in adoption, Sandvine expects North America will be the first region to surpass the 80% of downstream traffic streaming threshold, which should occur by the end of 2020.”²⁴

Finally, it is noteworthy, of course, that, given the nature of the activity driving it, this dramatic traffic growth is being driven by only a subset of BIA customers.

2. Significant capital investment is required to meet the capacity demands of this consumption.

It is self-evident that significant capital investment is required to meet the capacity demands of this growing consumption. By way of example, a recent AT Kearney report describes in great detail the anticipated deficiencies in capital investment based on similar trends

²² Cisco report, *supra*, n. 4, p. 3.

²³ *Id.*

²⁴ See Sandvine Intelligent Broadband Networks 2016 Global Internet Phenomena Report (p. 4) available at: <https://www.sandvine.com/downloads/general/global-internet-phenomena/2016/global-internet-phenomena-report-latin-america-and-north-america.pdf>.

in Europe.²⁵ A 2011 MIT study discussed possible ways to quantify these costs and, among other things, concludes that “[the] costs are not so great as to destroy the viability of the service, but they are large enough that we can expect access networks to take explicit steps to recover” them.²⁶

3. Title II utility regulation has harmed and will continue to harm investment.

There is strong evidence that Open Internet regulation, and particularly Title II reclassification and the more onerous rules adopted in the *Title II Order*, have hampered broadband competition and investment/deployment.

Numerous studies document the negative impact to capital investment. By way of example, in 2016, Hal Singer conducted a domestic broadband capex survey of twelve BIA service providers and identified a \$3.6 billion decline in broadband investment among ISPs.²⁷ Similarly, the Free State Foundation (FSF) estimates that reclassifying BIA service as a Title II telecommunications service resulted in a forgone capital investment by broadband providers of ~\$5.6 billion during the period the reclassification went into effect (2015 and 2016).²⁸ In a

²⁵ See e.g., “A Viable Future Model for the Internet,” AT Kearney, pp. 17-21 and Figure 10.

²⁶ “Interconnection in the Internet: the policy challenge,” David Clark, William Lehr, Steven Bauer, Massachusetts Institute of Technology, August 9, 2011, pp. 9-10.

²⁷ Hal Singer, *2016 Broadband Capex Survey: Tracking Investment in the Title II Era*, (2016) available at: <https://haljsinger.wordpress.com/2017/03/01/2016-broadband-capex-survey-tracking-investment-in-the-title-ii-era/> (“Of the twelve firms in the survey, eight experienced a decline in domestic broadband [capital expenditures] relative to 2014 – the last year in which ISPs were not subject to common carrier regulations. Across all twelve firms, domestic broadband capex declined by \$3.6 billion, a 5.6 percent decline relative to 2014 levels. The biggest drops occurred at AT&T (down \$3.4 billion or 16.2 percent relative to 2014 levels) and at Sprint (down \$2.4 billion or 62.7 percent relative to 2014 level).”.)

²⁸ Michael Horney, “Broadband Investment Slowed by \$5.6 Billion Since Open Internet Order”, The Free State Foundation, (May 5, 2017), available at: <http://freestatefoundation.blogspot.com/2017/05/broadband-investment-slowed-by-56.html> (“Just two years after the FCC adopted the Open Internet Order, I estimate that broadband

separate article, FSF concludes that heavy-handed regulation over the broadcast and telecommunications sector has decreased the incentive for capital investment within this sector and that decreased investment has a ripple effect for other firms and entrepreneurs that rely on telecommunications for their own business and innovation.²⁹

Other studies document this impact to investment in terms of jobs lost³⁰ and reductions to business innovation and other negative impacts from regulatory uncertainty.³¹

providers significantly slowed investment, despite the claims by the FCC that the opposite would occur. Taking into account the latest USTelecom investment data, I now estimate that forgone investment in 2015 and 2016 was about \$5.6 billion, an amount providers likely would have invested in a business climate without Title II public utility regulation... For 2016, I estimated total broadband capex to be \$72.7 billion, but the trend estimated that the market should have invested \$78 billion. That is a different of \$5.3 billion in foregone investment. Summing that with 2015, broadband providers invested \$5.6 billion less than what we could have expected before the Open Internet Order.”)

²⁹ Theodore R. Bolema, “*Too Much Unnecessary Regulation is Impeding Telecom Investment*”, The Free State Foundation, pp. 2, 4 (April 17, 2017), available at: http://www.freestatefoundation.org/images/Too_Much_Unnecessary_Regulation_Is_Impeding_Telecom_Investment_041717.pdf (“Slow capital investment in advanced broadband facilities is particularly a problem because of broadband’s increasing importance to the economy as a whole. The broadcast and telecommunications sector of the U.S. economy is an important part of the U.S. economy in and of itself, accounting for 2.3% of the U.S. GDP in the first three quarters of 2016. This sector is growing more slowly than the rest of the U.S. economy since the end of the last recession, with its share of GDP dropping from 2.6% of GDP in 2008 and 2009. The impact of telecommunication investment spreads far beyond its own sector, affecting many other sectors of the economy. Telecommunications is used by firms in other sectors as a crucial part of their production process, for marketing their products, and for placing orders and credit validation to facilitate business transactions.”)

³⁰ See, e.g., Dr. George S. Ford, “*Regulatory Revival*” and *Employment in Telecommunications*, Phoenix Center for Advanced Legal & Economic Public Policy Studies, p. 2, (June 12, 2017), available at: <http://www.phoenix-center.org/perspectives/Perspective17-05Final.pdf> (“I find that over the period 2010-2016, the telecommunications sector lost approximately 100,000 jobs per year—many of them high-paying union jobs. This loss is the pay-equivalent of about 130,000 “average” U.S. jobs.”)

³¹ See, e.g., Doug Brake, Information Technology & Innovation Foundation, “*What Financial Data Shows About the Impact to Title II on ISP Investment*,” (June 2, 2017) available at: <https://itif.org/publications/2017/06/02/broadband-myth-series-part-1-what-financial-data-shows-about-impact-title-ii> (“Not only did the Open Internet Order take potential business models off the table, and throw others into uncertainty under the Internet Conduct Standard, it

And, the comparison to the interplay of the lighter touch regulatory approach and investment levels prior to the *Title II Order* is dramatic. US Telecom conducted a separate study comparing capital investment in BIA service in the European Union (EU) and the U.S.³² The EU has taken a heavy handed approach in regulating BIA service by imposing rules that would, among other things, require open access and unbundling requirements. Whereas, until the *2015 Open Internet Order*, the U.S. had allowed the BIA service market to flourish through a lighter touch regulatory approach that encouraged investment and innovation. US Telecom compared EU and US investment data from 2002 through 2013 and concluded that the “U.S. generated significantly more broadband investment per capita under Title I than Europe did under a Title II-like public utility regulatory model.”³³

Finally, the impact of the *Title II Order* to stock ratings and prices is well documented. For example, Multichannel News reported in 2015 that Craig Moffett, Principal and Senior Analyst at MoffettNathanson lowered his stock ratings for Comcast, Charter, and Time Warner

represents the first step down the slippery slope to more onerous utility regulations, such as network unbundling requirements or price regulation.”); Kevin Hassett and Robert Shapiro, Georgetown Center for Business and Public Policy and NDN “Regulation and Investment: A Note on Policy Evaluation Under Uncertainty, With an Application to FCC Title II Regulation of the Internet,” p. 21 (July 14, 2015) *available at*:

<http://cbpp.georgetown.edu/sites/cbpp.georgetown.edu/files/Shapiro-regulation-investment-note-policy-evaluation-FCC-titleII-regulation-internet.pdf> (“...we found that the negative effects on investment may well be significantly understated by these factors because the new regulation’s threshold effect will maximize the negative effects of uncertainty.”)

³² Patrick Brogan, *Utility Regulation and Broadband Network Investment: The EU and US Divide*, US Telecom, U.S. Telecom the Broadband Association (April 25, 2017), *available at*: <https://www.ustelecom.org/sites/default/files/documents/Utility%20Regulation%20and%20Broadband%20Investment.pdf>.

³³ *Id.*, at 3 (“The gap is stark: Europe-wide investment is 51% less, or \$141 less per capita, than the U.S. If we take this \$141 per person and multiply it by the U.S. population of approximately 315 million in 2013, we would have had \$44.3 billion less investment in U.S. broadband. Instead of about \$86.6 billion in U.S. broadband investment for 2013 as reported by the OECD, we would have had about \$42.3 billion.”)

Cable due to, in part, the threat of price regulation under Title II reclassification.³⁴ This downgrade resulted in a lower stock price for each company with Comcast closing at \$58.80, down about 1.1% (67 cents each).³⁵ Charter finished down 0.8% (\$1.43) to \$176.45 and Time Warner Cable fell 1.4% (\$2.06) to \$147.68.³⁶

II. A LIGHT REGULATORY TOUCH STRIKES THE RIGHT POLICY BALANCE.

A. The Commission Can and Should Reinstate the Classification of BIA Service as an Information Service

The above discussion makes abundantly clear that the *NPRM* is correct when it states that the *Title II Order* “has put at risk online investment and innovation, threatening the very open Internet it purported to preserve” and that it is time to “restore the market-based policies necessary to preserve the future of Internet Freedom, and to reverse the decline in infrastructure investment, innovation, and options for consumers put into motion by the FCC in 2015.”³⁷ The first step is to reinstate the classification of BIA service as an information service. As discussed below, the *NPRM* is also correct in concluding, tentatively, that a straight-forward application of the Act’s definition of an information service to the technical and other details of how BIA service works and is offered leads inevitably to the conclusion that BIA service should be classified as an “information service.”³⁸ The *NPRM* is also correct in concluding, tentatively,

³⁴ Mike Farrell, “Moffett Downgrades Cable Sector on Title II Woes”. Multichannel News, (Feb. 17, 2015), available at: <http://www.multichannel.com/news/news-articles/moffett-downgrades-cable-sector-title-ii-woes/388046> (quoting Moffett as saying: “It would be naïve to suggest that the implication of Title II, particularly when viewed in the context of the FCC’s repeated findings that the broadband market is non-competitive, doesn’t introduce a real risk of price regulation,” and “Not tomorrow, of course, so yes, near term numbers won’t change. But terminal growth rate assumptions need to be lowered. Multiples will have to come down.”).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *NPRM*, ¶¶ 4-5.

³⁸ *NPRM*, ¶¶ 25-54.

that the text, structure and history of the Act, the Commission's precedents, and good policy all dictate an information service classification for BIA service.

1. An objective examination of how BIA service works demonstrate that it is an information service

An objective examination of the technical details of how BIA service works demonstrates that it falls, unambiguously, within the Act's definition of an information service classification.

In 2002, in the *Cable Modem Order*, the Commission examined the characteristics of BIA service for the purpose of determining whether it constituted an information service or a telecommunications service.³⁹ In doing so, it applied the definitions of information service⁴⁰ and telecommunications service⁴¹ from the Act in a straight-forward manner to the technical characteristics of BIA service as it existed at the time and concluded that it was properly characterized as an information service.⁴² Underlying its information service classification were the Commission's key supporting conclusions that: (1) BIA service's fundamental purpose was to provide a capability for subscribers to "generate, acquire, store, transform, process, retrieve, utilize, or make available information via telecommunications" simply because it fundamentally

³⁹ *Cable Modem Order*, 17 FCC Rcd at 4820-32 ¶¶ 34-59.

⁴⁰ The Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(24).

⁴¹ The 1996 Act defines "telecommunications service" as "the offering of 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(53). "Telecommunications" is, in turn, defined as "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." 47 U.S.C. § 153(50).

⁴² *Cable Modem Order*, ¶ 7.

enables access to the Internet and all that the Internet entails;⁴³ (2) the underlying ISP functionality that enabled that capability was in and of itself information processing, etc.;⁴⁴ and (3) BIA service typically included a variety of services within the offering that also constituted information service characteristics – and offered access to still other such services provided by third parties.”⁴⁵ And, as to the second and third characteristics, as the *NPRM* acknowledges, the Commission also found the information service classification appropriate “regardless of whether subscribers use all of the functions provided as part of the service, such as e-mail or web-hosting,

⁴³ See, e.g., *id.*, ¶ 10 (“Cable modem service typically includes many and sometimes all of the functions made available through dial-up Internet access service, including content, e-mail accounts, access to news groups, the ability to create a personal web page, and the ability to retrieve information from the Internet, including access to the World Wide Web. Because of the broadband capability of the cable plant, however, cable modem service subscribers can access the Internet at speeds that are significantly faster than telephone dial-up service. As a result of that faster access, subscribers can often send and view content with much less transmission delay than would be possible with dial-up access, utilize more sophisticated “real-time” applications, and view streaming video at a higher resolution and on a larger portion of their screens than is available via narrowband. Some cable operators also provide subscribers with access to content that the operators have created or aggregated on an Intranet specifically for the benefit of their subscribers. For example, cable operators sometimes provide content targeted to a specific locality, much as cable operators do in their video service offerings.”)

⁴⁴ See, e.g., *id.*, ¶ 11 (“Subscribers typically have “click-through” access to any and all content and services available on the Internet. That is, a subscriber can access the service or content of his choice by typing in the Uniform Resource Locator (“URL”) of, or clicking on a hyperlink to, the desired service or content, using the web browser chosen by the subscriber or included with the subscriber’s cable modem service.”)

⁴⁵ See, e.g., *id.*, ¶ 11 (“Cable operators often include in their cable modem service offerings all of the services typically provided by Internet access providers, so that subscribers usually do not need to contract separately with another Internet access provider to obtain discrete services or applications, such as an e-mail account or connectivity to the Internet, including access to the World Wide Web. Accessing the services or content of entities not affiliated with the cable operator, such as those provided by an unaffiliated Internet service provider (“ISP”), however, may require the subscriber to pay those entities an additional fee over and above the monthly subscription charge for cable modem service.”)

and regardless of whether every cable modem service provider offers each function that could be included in the service.”⁴⁶

The *Title II Order* largely ignored these practical realities, and, as the *NPRM* also notes, instead found that the fact that BIA service customers are likely to use their service to take advantage of third party offerings was indicative of the fact that BIA service “is useful to consumers today primarily as a conduit for reaching modular content, applications, and services that are provided by unaffiliated third parties.”⁴⁷ Extending this rationalization further, the *Title II Order* further found that BIA service was really an offering of two separate things: “both ‘high-speed access to the Internet’ and other ‘applications and functions.’”⁴⁸ Extending this logic further, any information service characteristics that were entailed in BIA service were explained away as either independent information service offerings or, to the extent such functionality was integrated with BIA service, as being merely part of the telecommunications systems management exception to the definition of “information service” and therefore something that did not convert BIA service into an information service.⁴⁹ On this latter point, the Commission suggested that such functionality is the equivalent of what the Commission has historically called “adjunct to basic,” which the Commission has historically held: (1) must be “incidental” to an underlying telecommunications service—i.e., “‘basic’ in purpose and use” in the sense that they facilitate use of the network; and (2) must “not alter the fundamental character of [the

⁴⁶ *Id.*, ¶ 11.

⁴⁷ *Title II Order*, 30 FCC Rcd at 5753 ¶ 347, 5755 ¶ 350; *NPRM*, ¶ 28.

⁴⁸ *Title II Order*, 30 FCC Rcd at 5757 ¶ 356 (quoting dissent from *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (Brand X)).

⁴⁹ *Id.*

telecommunications service].”⁵⁰ Finally, the *Title II Order* found that “offering a service to the public does not necessarily require holding it out to all end users” and that “[s]ome individualization in pricing or terms is not a barrier to finding that a service is a telecommunications service.”⁵¹

These rationalizations, which, as the *NPRM* recites, were part of a last minute u-turn by the Commission just before adopting the *Title II Order*,⁵² do not pass legal muster. The findings of the *Cable Modem Order* regarding the proper classification of BIA service were correct and nothing has materially changed since 2002 regarding BIA service relative to its use for access to third party services or anything else that warrants a change in regulatory classification. The results-oriented approach of the *Title II Order* ignored the plain meaning of the definitions of information service and telecommunications service in the Act and the Commission’s historical findings that the categories of telecommunications service and information service are mutually exclusive.⁵³ It also ignored two other fundamental principles at play when determining the proper regulatory classification of BIA service:

⁵⁰ *Id.* at ¶ 367.

⁵¹ *Id.* at ¶ 367.

⁵² *NPRM*, ¶¶ 21-22 (recounting that the Commission initially, in 2014, proposed to rely on section 706 of the Telecommunications Act to adopt enforceable rules using the *Verizon* court’s (*Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014; reissued Jan. 15, 2014)) “roadmap,” but instead adopted the *Title II Order* shortly after then-President Obama called on the FCC to reclassify BIA service under Title II).

⁵³ *NPRM*, ¶¶ 39-40. *See also*, *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45, 13 FCC Rcd 11501, 11516-26 ¶¶ 33-48, 11530 ¶ 59 (1998) (*Report to Congress*); *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, CC Docket No. 98-147, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24011, 24029 ¶¶ 35-37 (1998); *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Order on Remand, 15 FCC Rcd 385, 394-95 ¶ 21 (1999); *In the Matter of Communications Assistance for Law Enforcement*

- As recognized by both the Commission in its various classification orders and by the Supreme Court in *Brand X*, “[i]t is common usage to describe what a company ‘offers’ to a consumer as what the consumer perceives to be the integrated finished product.”⁵⁴
- The term “offer” in the definition of “telecommunications service” means a stand-alone offering of telecommunications that transparently transmits information chosen by the user, which, from the user’s perspective, is different in kind from the provision of data processing capabilities integrated with transmission capability that is the hallmark of an “information service.”⁵⁵

Applying these principles, it is clear that, when it comes to BIA service, the consumer perceives the finished product to be an integrated BIA access product and not a separate transmission service. As the Supreme Court found in *Brand X*, the service that CenturyLink and

Act, CC Docket No. 97-213, Second Report and Order, 15 FCC Rcd 7105, 7120 ¶ 27 (1999); *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, CC Docket No. 96-61; CC Docket No. 98-183, Report and Order, 16 FCC Rcd 7418, 7447 ¶¶ 49-50 (2001).

⁵⁴ See *National Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 990 (2005) (*Brand X*); see also, *Amendment of Section 64.702 of the Comm’n’s Rules & Regulations, Second Computer Inquiry*, Docket No. 20828, Final Decision, 77 FCC 2d 384 (1980) (*Computer II Final Decision*), *aff’d sub nom. Computer & Commc’ns Indus. Ass’n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982); *Amendment of Section 64.702 of the Comm’n’s Rules & Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, Phase I, Report and Order, 104 F.C.C. 2d 958 (1986) (*Computer III Phase I Order*) (subsequent history omitted); *Cable Modem Order*, 17 FCC Rcd 4798; *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005); *In the Matter of United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006); *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007); and see also *Framework for Broadband Internet Service*, GN Docket No. 10-127, Notice of Inquiry, 25 FCC Rcd 7866, 7870-75 ¶¶ 12-21 (2010) (*Broadband Framework NOI*).

⁵⁵ See 1998 Report to Congress, 13 FCC Rcd at 11507-78 ¶ 13, 11516-526 ¶¶ 33-48. See also, *Brand X*, 545 U.S. at 990 (“One might well say that a car dealership “offers” cars, but does not “offer” the integrated major inputs that make purchasing the car valuable, such as the engine or the chassis. It would, in fact, be odd to describe a car dealership as “offering” consumers the car’s components in addition to the car itself.”).

other providers offer to members of the public “is Internet access, not a transparent ability (from the end user’s perspective) to transmit information.”⁵⁶

Indeed, if anything, BIA services are even more clearly characterized today as the provision of information processing (as opposed to transmission) than they were in 2002. As the Supreme Court found in the *Brand X* decision, CenturyLink’s BIA service can only be characterized as an integrated service that “provides consumers with a comprehensive capability for manipulating information using the Internet[.]”⁵⁷ Every aspect of this service entails information processing. Whether a consumer is using the service to browse web pages, to download or upload files, or for any other function, the consumer is generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.

This conclusion that BIA service constitutes an information service is borne out by the public record regarding BIA customer usage and activities, including:

- According to a the 2016 Global Internet Phenomena Report published by Sandvine, **the top five online traffic categories accessed by North American BIA customers in 2016 during peak-periods using fixed BIA service included Real-Time Entertainment (streaming video and audio) (67.35%), Marketplaces (7.17%), web browsing, (4.98%), Gaming (4.3%), and Social Networking (3.89%).**⁵⁸
- **Subscribers acquire and retrieve information via BIA service using online streaming and audio applications.** In fact, streaming video and audio is the largest

⁵⁶ *Brand X*, 545 U.S. at 999-1000 (finding that “subscribers can reach third-party Web sites via “the World Wide Web, and browse their contents, [only] because their service provider offers the ‘capability for ... acquiring, [storing] ... retrieving [and] utilizing ... information.’”).

⁵⁷ *Id.*, 545 U.S. at 987.

⁵⁸ See Sandvine Intelligent Broadband Networks 2016 Global Internet Phenomena Report (p. 4) available at: <https://www.sandvine.com/downloads/general/global-internet-phenomena/2016/global-internet-phenomena-report-latin-america-and-north-america.pdf>.

traffic category accounting for more than 35% of total traffic consumption during peak-periods.⁵⁹

Sandvine attributes the dominance of the category first to the high consumption of Netflix online video service.⁶⁰ But other video applications are included in this category, such as YouTube, Amazon Video, BitTorrent, iTunes, Hulu, Xbox One Games Download, and Facebook. Tom's Guide,⁶¹ which provides online recommendations for the "top streaming applications" lists Sling Orange, Funny or Die, Twitch, and Vevo among the Best Streaming Video Services for 2017. Other online video applications include HBOGO, HBONOW, Sling TV, Showtime, Starz, CBS All Access, and DirecTV Now.⁶²

It is no surprise that a separate report from Cisco estimates that global IP video traffic will increase from 73% in 2016 to 82% by 2021 and that live internet video will account for 13% of internet video traffic by 2021.⁶³

According to the Sandvine report, among the top music applications accessed by mobile broadband consumers include Pandora, Spotify, SoundCloud, Apple Music, and Google Music.⁶⁴ In a May 2017 article, PC Magazine lists SiriusXM Internet Radio, Slacker Radio, Amazon Music Unlimited, Microsoft Groove Music, and *iHeart* Radio as other streaming music services that are "worth a listen."⁶⁵

- **Subscribers also acquire, retrieve, process and utilize content via BIA service using online market places to either purchase or sell goods and services.** According to a 2016 report by the Pew Research Center, approximately "8-in-10 Americans are now online shoppers: 79% of Americans have made an online purchase of any type, while 51% have bought something using a cellphone, and 15%

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Marshall Honorof, "*Best Streaming Video Services 2017*", (June 26, 2017), available at <http://www.tomsguide.com/us/best-streaming-video-services,review-2625.html>.

⁶² *Id.*

⁶³ See "Cisco Visual Networking Index: Forecast and Methodology, 2016-2021", p. 3 (June 6, 2017) available at: <http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/complete-white-paper-c11-481360.pdf>.

⁶⁴ *Id.*

⁶⁵ Jeffrey L. Wilson, "*The Best Online Streaming Music Services of 2017*" (May 2017) available at <http://www.pcmag.com/article2/0,2817,2380776,00.asp>.

have made purchases by following a link from social media sites.”⁶⁶ This is a sharp change from 2000 when it was estimated that only 22% of Americans had made an online purchase.⁶⁷ Examples of popular online marketplaces include Alibaba, ebay, Amazon, Walmart, HGTV, Overstock, Sears, and Shop.com.

- **Subscribers also increasingly use BIA service to acquire and retrieve information via gaming applications, and thereafter transform, utilize and process information via BIA using online gaming use that depends upon BIA.** For example, newzoo, a market intelligence agency, estimates that there are slightly over 160 million gamers in the U.S. that will generate over \$25 billion in revenue making the U.S. the second largest gaming market in the world.⁶⁸
- **Subscribers also use BIA to retrieve, generate, process and make available information on social networking sites.** The Pew Research Center estimates that nearly 65% of American adults use social networking sites.⁶⁹ Of those, Pew estimates that ~90% of young adults aged between 18-29 use social media while 35% of all those 65 and older use social media.⁷⁰ With almost 7 in 10 online users accessing Facebook, Twitter, Pinterest, Instagram, and LinkedIn, they are among the top social media applications accessed by American adults.⁷¹
- **Subscribers also use their BIA service to store, acquire, retrieve and make available content stored on file sharing applications.** Cisco estimates that global traffic associated with file sharing, including P2P applications and web-based file sharing will increase 8% for fixed (0%) and mobile (8%) network providers from 2016 to 2021.⁷²

⁶⁶ Aaron Smith and Monica Anderson, “*Online Shopping and E-Commerce*”, Pew Research Institute, p. 2 (Dec. 19, 2016), available at: http://assets.pewresearch.org/wp-content/uploads/sites/14/2016/12/16113209/PI_2016.12.19_Online-Shopping_FINAL.pdf.

⁶⁷ *Id.*

⁶⁸ See “*The American Gamer 2017*”, newzoo, (June 14, 2017), available at: <https://newzoo.com/insights/infographics/the-american-gamer-2017/>.

⁶⁹ See “*Social Media Usage: 2005-2015*”, Pew Research Center, Internet and Technology, p.1 (Oct.8, 2016) available at: http://www.pewinternet.org/files/2015/10/PI_2015-10-08_Social-Networking-Usage-2005-2015_FINAL.pdf.

⁷⁰ *Id.*, 3.

⁷¹ See “*Social Media Fact Sheet*”, Pew Research Center Internet and Technology, (Jan 2017) available at: <http://www.pewinternet.org/fact-sheet/social-media/>.

⁷² Cisco Visual Networking Index: Forecast and Methodology, 2016-2021, p. 12 (June 6, 2017) available at: <http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/complete-white-paper-c11-481360.pdf>.

- **BIA also allows subscribers to retrieve, generate, store and make available content in other ways – for example, by uploading pictures and videos and live streaming and by participating in blogging and online rating activity.** For example, applications such as Facebook, Youtube, Twitter, Google Drive, Vimeo, and Twitch allow users to upload videos. Facebook, Google Drive, Instagram, Shutterfly, and Photobucket allow users to publish their pictures online. A variety of Internet sites allow users to broadcast live video online.⁷³ Among those applications listed include Facebook Live, IBM Cloud Video, Instagram Live Video, YouTube Live and Livestream. The Pew Research Institute estimates that about 39% of Americans have shared their experience about a commercial transaction using a social media platform.⁷⁴
- **BIA service is also increasingly utilized to enable users to store content on the Internet.** Consumers and businesses alike are moving away from storing content on their home networks and, instead, are storing content in remote server based storage systems sometimes the cloud. File-sharing applications are cloud based solutions that allow users to store content on servers located on the internet. PC Magazine recently provided a list of the best cloud storage and file-sharing services of 2017 that included providers such as iDrive, SugarSync, Microsoft OneDrive, SpiderOakeOne, Google Drive, Apple iCloud Drive, and Dropbox.⁷⁵ CenturyLink offers online data storage solutions, which include automatic cloud backup solutions to consumer BIA service customers, through its CenturyLink@ease portfolio.⁷⁶
- **BIA service also allows customers to process content on the Internet through applications that offer the ability to send and receive email, cloud computing and machine learning capabilities.** Email services use a network of computer servers that process and store messages for those users that establish an account with any email provider. The more predominant examples of email providers include Gmail, Outlook, Yahoo Mail, GMX, AOL Mail, Zoho Mail, Lycos Mail, inbox.com, and Hushmail.⁷⁷ Cloud computing applications allow online users to access and process

⁷³ Elise Morequ, “10 Popular Tools for Broadcasting Live Video Online”, Lifewire, (June 2017) available at: <https://www.lifewire.com/tools-for-broadcasting-live-video-3486110>.

⁷⁴ See “Online Shopping and E-Commerce”, Pew Research Center, p.4 (Dec 2016) available at: http://assets.pewresearch.org/wp-content/uploads/sites/14/2016/12/16113209/PI_2016.12.19_Online-Shopping_FINAL.pdf.

⁷⁵ Michael Muchmore and Julia Duffy, “The Best Cloud Storage and File Sharing Services of 2017”, PC Magazine, (March 31, 2017), available at: <http://www.pcmag.com/roundup/306323/the-best-cloud-storage-providers-and-file-syncing-services>.

⁷⁶ Additional information regarding CenturyLink’s @ease service is available on our website at: <http://www.centurylink.com/home/ease/>

⁷⁷ See “Best Free Email Services of 2017”, 10TopTenReviews™, available at: <http://www.toptenreviews.com/services/internet/best-free-email-services/>.

data on a server that is located on the network rather than a server located on the customer's computer. PC Magazine describes a number of consumer online cloud applications such as Microsoft Office Online, Google Drive, and Apple iCloud.⁷⁸ Microsoft Office Online allows users to access online versions of its Word, Excel, Powerpoint, and One Note applications.⁷⁹ Google Drive is a cloud computing service that allows any data stored online by the user to also work with Google Docs, Google Sheets, and Google Slides.⁸⁰ Apple iCloud allows users to access their data on any iPhone Operating System (iOS), Mac operating system, or Windows device for online storage, backup and synchronizing mail, contacts, and calendars.⁸¹ Finally, online users may access applications that use machine learning protocols. For example, Forbes reports that Google has launched a machine learning algorithm called RankBrain for use in responding to online search queries.⁸²

The conclusion that BIA service constitutes an information service is also borne out by the fact that all of the information processing, etc. activities detailed above are ultimately enabled by underlying ISP network functionality that, in and of itself, entails a broad variety of integrated information processing - just as it did at the time of the Commission's prior orders. As the attached Declaration of Phillip Bronsdon, CenturyLink's Senior Vice President of Product Development (attached as Appendix 2 hereto), demonstrates, this functionality includes:

- A host of information service features and capabilities that are included as part of practical operational and customer service functions that must be installed in order for subscribers to utilize BIA service. (Bronsdon Declaration, ¶ 8(a).)

⁷⁸ Eric Griffith, "What is Cloud Computing", PC Magazine, (May 2016), available at: <http://www.pcmag.com/article2/0,2817,2372163,00.asp>.

⁷⁹ See Microsoft website (last accessed on July 12, 2017) available at: <https://products.office.com/en-us/office-online/documents-spreadsheets-presentations-office-online>.

⁸⁰ See Google Drive website (last accessed on July 12, 2017) available at: <https://www.google.com/drive/>.

⁸¹ See Apple website (last accessed on July 12, 2017) available at: <https://www.apple.com/icloud/>.

⁸² Jason DeMeyers, "What is Google Rankbrain and Why Does it Matter?", Forbes, (Nov 12, 2015), available at: <https://www.forbes.com/sites/jaysondemers/2015/11/12/what-is-google-rankbrain-and-why-does-it-matter/#4c997759536b>.

- Integrated IP addressing, routing, and DNS functionality that is essential to providing the stable and interactive connectivity that enables the various capabilities offered by BIA service and used by subscribers as described above. (*Id.*, ¶ 8(b).)
- Transmission Control Protocol (TCP)/Internet Protocol (IP) processing, including routing, packet fragmentation & re-assembly, and transport layer delivery between application endpoints – all equally essential to establishing and maintaining the internetworking functionality that is critical to subscriber BIA activities. (*Id.*, ¶ 8(c).)
- The underlying network topography of interconnected computers, servers and other information processing equipment that forms the BIA service architecture. (*Id.*, ¶ 8(d).)
- Integrated network security systems and network management systems and engineering work that constantly monitoring Internet traffic flows to protect broadband customers from denial of service attacks, alert customers of possible malware, worms, and viruses that may be on their computers and otherwise continually process a variety of information as need to ensure a safe, high performance Internet experience for customers. (*Id.*, ¶ 8(e).)
- Network infrastructure related to cached content that allows network providers to access content such as documents, web pages, images, gaming technology, IP addresses, videos, etc. that are stored at locations more proximate to BIA service subscribers. These enable a more efficient delivery mechanism to reduce congestion on the network and help maintain the highest possible customer experience - but they must be facilitated by the information processing and storage capabilities of the Internet service provider's network infrastructure. (*Id.*, ¶ 8(f))
- Network monitoring, capacity engineering and management, fault management, and troubleshooting that are also critical to ensuring a steady and accurate flow of BIA information processing. (*Id.*, ¶ 8(g).)

While some end users may choose to obtain some limited portion of this functionality from a third party (e.g. some DNS services), all of this technical functionality is still provided, and must be provided to enable BIA service, and is fully integrated with the BIA service offering.⁸³ And, much of this functionality is, in fact, exclusively provided by CenturyLink.⁸⁴

⁸³ See e.g., Bronsdon Declaration, ¶ 11 (explaining the extensive sophistication of CenturyLink DNS capabilities as compared to third party alternatives, the criticality of DNS functionality to

The dynamic network functionality enabling the Internet connectivity provided by BIA service is fundamentally different from the largely static one dimensional, transmission oriented Time Division Multiplexing (TDM) voice network. (*Id.*, ¶ 11.)

Moreover, in addition to these integrated information processing functionalities inherent to BIA service, BIA offerings often also include a variety of additional features that, themselves, undeniably consist of information processing functionality. Mr. Bronsdon's declaration provides details regarding several of these functionalities, including email, the CenturyLink landing page, CenturyLink's geolocation based advertising, Web Helper and speed test servers, CenturyLink @Ease® (providing a package of security, backup and support) and CenturyLink® Stream (over the top video) – some of which (e.g. the landing page, location based advertising, web helper, and speed servers) are included with CTL BIA service and some of which (e.g. CenturyLink @Ease® and CenturyLink® Stream) must be purchased as an add-on to their CTL BIA service. (*Id.*, ¶ 9.)

Moreover, CenturyLink and other broadband providers compete based on these various service functionalities and features, just as they compete based on speed and price. Providers use these aspects of BIA service to market their services.⁸⁵ Providers also compete based on differentiations in speed and price and these have also always been significant drivers of

BIA service capabilities regardless of who provides it, and the minimal use of third party DNS services by CenturyLink BIA service customers on CenturyLink DNS).

⁸⁴ *Id.*

⁸⁵ See, e.g., Comcast https://www.xfinity.com/learn/internet-service_nHSI&pos=Nav; Cox <https://www.cox.com/residential/internet.html> ; Charter: <https://www.spectrum.com/internet.html> ; Mediacom: <https://mediacomcable.com/products/internet> ; Cableone: <http://www.cableone.net/residential/internet/> ; CenturyLink <http://www.centurylink.com/home/internet/> ; AT&T <https://www.att.com/internet/> ; Verizon: <https://www.verizon.com/home/highspeedinternet/> .

competitive differentiation. However, as Mr. Folster's declaration demonstrates, while some of the specific focuses have changed and involved over time, the relative prominence of speed as a focus in CenturyLink marketing efforts has not changed materially over time since 2000.

(Folster Declaration, ¶ 4)⁸⁶

In summary, just as when the Commission first examined the question in 2002, an objective examination of the technical details of how BIA service works demonstrates that it is still properly classified as falling within the Act's definition of an information service. As the picture painted above plainly depicts, BIA service is, and always has been, an offering of a single, integrated finished product whose primary purpose is to create a capability for customers to engage in the various data processing activities enumerated in the definition of an information service. BIA service is clearly *not*, as must be the case to classify it as a telecommunications service, a stand-alone offering of telecommunications that transparently transmits information chosen by the user, which, from the user's perspective, is different in kind from the provision of data processing capabilities integrated with transmission capability that is the hallmark of an information service. And, it is simply not credible to explain away the data processing

⁸⁶ Therefore, the Commission can and should discard the claim of the *Title II Order* that a telecommunications service classification is suggested for BIA service because there has been, since the *Cable Modem Order*, a change in "broadband providers' marketing and pricing strategies, which emphasize speed and reliability of transmission separately from and over the extra features of the service packages they offer" which "leaves a reasonable consumer with the impression that a certain level of transmission capability—measured in terms of 'speed' or 'reliability'—is being offered in exchange for the subscription fee, even if complementary services are also included as part of the offer." *NPRM*, ¶ 36 (citing *Title II Order*, 30 FCC Rcd at 5743 ¶ 330, 5756 ¶ 352, 5757 ¶ 354).

capabilities of BIA service as separate and distinct information service offerings or mere incidental processing functionality to what is fundamentally an offering of transmission.⁸⁷

2. The remainder of the text, structure and history of the Act, as well as the Commission's own precedents, also dictate an information service classification.

The remainder of the text, structure, and history of the Communications Act and the Telecommunications Act – together with the Commission's own precedents - also all dictate that BIA service should be classified as an “information service” and not a “telecommunications service.” At its inception, as the *NPRM* notes, the Telecommunications Act was expressly intended to incorporate the pre-existing *Computer Inquiry* concepts of basic telephone services and enhanced services – and there is no question that BIA service was always considered to fall within the latter.⁸⁸ And, the *NPRM* correctly observes that the *Stevens Report*,⁸⁹ Section 230's express policy to “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation[,]”⁹⁰ and the need for extensive forbearance following the Title II classification

⁸⁷ The Commission, thus, should find that neither DNS nor caching have a merely incidental effect on broadband Internet users. Absent either, the nature of BIA service would be fundamentally changed. *See, e.g., NPRM*, ¶ 37.

⁸⁸ *NPRM*, ¶ 34 (citing Brown, J., dissenting statement from denial of rehearing *en banc*, *United States Telecom Association v. FCC*, No. 15-1063 (D.C. Cir. May 1, 2017), 41. For discussions concerning the pre-1996 regulatory treatment of services analogous to BIA service, *see also, e.g., Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Final Decision, 77 FCC 2d 384, 420-21 ¶¶ 97-98 (1980); *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, Tentative Decision of the Commission*, 28 FCC 2d 291, 297 ¶ 20 (1970).

⁸⁹ *NPRM*, ¶ 34.

⁹⁰ *NPRM*, ¶ 34. *See also Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11546 n. 196 (citations omitted) (1998).

established in the *Title II Order*⁹¹ all provide further evidence that BIA service was *not* intended to be subject to Title II obligations.

The best evidence is Section 231, which plainly states that BIA service is not intended to be a telecommunications service.⁹² Moreover, this is the status BIA service was always accorded – through the course of the Commission’s decisions in the *Cable Modem Order* and, thereafter, in the *Wireline Broadband Classification Order*,⁹³ the *BPL-Enabled Broadband Order*,⁹⁴ and the *Wireless Broadband Internet Access Order*⁹⁵ – that is, in all the Commission decisions other than its last-minute course reversal in the *Title II Order*.

3. This approach will also best serve the public policy issues at stake.

It is also self-evident that restoring the “information service” classification to BIA service will best serve the public policy interests at stake here.

The *NPRM* itself documents the negative impact of Title II regulation on broadband investment⁹⁶ and this demonstrated further in great detail in the discussion above.⁹⁷

The *NPRM* is also correct to note that “Internet service providers have finite resources” and that “requiring providers to divert some of those resources to newly imposed regulatory requirements adopted under Title II will, unsurprisingly, reduce expenditures that benefit consumers.”⁹⁸ As the attached Declaration of Jeff Glover, CenturyLink Vice President of

⁹¹ *NPRM*, ¶ 33; *see also Title II Order*, 30 FCC Rcd at 5616-18 ¶¶ 51-59.

⁹² *NPRM*, ¶ 32.

⁹³ *Wireline Broadband Classification Order*, 20 FCC Rcd 14853.

⁹⁴ *BPL-Enabled Broadband Order*, 21 FCC Rcd 13281.

⁹⁵ *Wireless Broadband Internet Access Order*, 22 FCC Rcd 5901.

⁹⁶ *NPRM*, ¶ 45.

⁹⁷ *See infra*, Section I.C.3.

⁹⁸ *NPRM*, ¶ 46.

Regulatory Operations, attached as Appendix 3 hereto, demonstrates, CenturyLink estimates, conservatively, that it, alone, was required to engage approximately 150 unique employees who incurred in excess of 2,500 hours to complete the compliance work necessitated by the Open Internet requirements imposed by the *Title II Order* – during the time period February 2015 through February 2017 alone. (Glover, Declaration, ¶ 1) This is an ongoing effort and amounts to the devotion of well in excess of the entirety of an employee’s annual work effort. Approximately 1650 hours of this related solely to the enhanced disclosure requirements (*id.*) – a far cry from the 31.2 hours that the Commission, in the end, estimated would be the compliance burden imposed by these requirements.⁹⁹ While a large company such as CenturyLink might be able to take on such an expense, such a burden will be damaging to the smaller providers (both ISPs and edge providers) that the *Title II Order* purportedly attempted to protect. And, even for large ISPs, it is a significant and unnecessary burden.

Nor does the *NPRM* overestimate the negative impact on business planning of the new burdens and regulatory uncertainty created by the *Title II Order*.¹⁰⁰

There has also not been a countervailing benefit from the *Title II Order*. As discussed above, there is no evidence that the new rules were/are needed to protect and promote an open

⁹⁹ See Supporting Statement for Transparency Rule Disclosures and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28, FCC 15-24 (Fixed Broadband Disclosures), Dec. 15, 2016, p. 19 (“**Annual Number of Burden Hours:** 3,188 respondents x 1 notification to consumers of relevant information at required places and times/respondent x 31.2 hours/year = **99,466 hours**”) (emphasis in original). A discussion regarding the hours required for related information collection in a pre-2015 Open Internet Order context is found on page 10 of the Supporting Statement.

¹⁰⁰ *NPRM*, ¶ 48. See also, *infra*, Section 1.C.

Internet and there is still no evidence, as of this date, of the types of harmful practices predicted as justification for that decision.¹⁰¹

4. The Commission has legal authority to classify BIA service as an “information service.”

The *NPRM* correctly notes that the analysis reflected above and in the *NPRM* more faithfully adheres to the Act and reflects the better reading of the relevant provisions than the views adopted in the *Title II Order*.¹⁰²

B. Reclassifying BIA service As An Information Service Will Result In The Appropriate Regulatory Structure for BIA service - But The Commission Should Also Extend the *Title II Order*’s Forbearance Rulings As A Prophylactic Measure.

Reclassifying BIA service as an “information service” will largely moot the *Title II Order*’s forbearance rulings and leave it subject to the Commission’s limited Title I legal authority. But, the Commission should, as the *NPRM* suggests, maintain and extend those forbearance rulings as a prophylactic measure to ensure certainty.¹⁰³ Doing so will help prevent future attempts to reinstate onerous regulatory obligations either via Title II or via Title I ancillary jurisdiction. It will also further fortify the Commission’s authority to take the de-regulatory steps regarding pole attachments and barriers to entry more generally when it comes to wireline infrastructure – as proposed in the *Wireline Infrastructure NPRM*.¹⁰⁴ Reclassifying BIA service as an “information service” will largely moot the *Title II Order*’s forbearance

¹⁰¹ See, *infra*, Section 1.B.

¹⁰² *NPRM*, ¶ 54.

¹⁰³ *NPRM*, ¶ 65.

¹⁰⁴ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266 (2017) (*Wireline Infrastructure NPRM*).

rulings, but reinstate the FTC’s authority to regulate privacy.¹⁰⁵ Finally, as discussed more fully below, doing so will not prevent the Commission from continuing to use USF to support broadband.¹⁰⁶

C. The Commission Should Adopt A Light Touch Regulatory Framework for BIA Service.

1. The Commission should eliminate the Internet conduct standard.

Having reinstated the information service classification for BIA Service, the Commission should adopt the proposal in the *NPRM* to eliminate the Internet conduct standard adopted in the *Title II Order* and the non-exhaustive list of factors intended to guide application of the rule.¹⁰⁷ It is unlawful due to the unlawfulness of the underlying decision to classify BIA service as a telecommunications service.¹⁰⁸ It is also an obligation that cannot be lawfully imposed on an information service – as it clearly constitutes impermissible common carriage regulation.¹⁰⁹ Additionally, it is unlawfully vague because it “fails to provide a person of ordinary intelligence fair notice of what is prohibited.”¹¹⁰ The key language of the rule, prohibiting ISP practices that “unreasonably interfere with or unreasonably disadvantage” either subscriber access to content and applications or edge provider ability to make content and applications available, provides ISPs with no basis for determining whether a given practice would violate the rule.¹¹¹ If the Commission is to adopt an alternative discrimination standard, a “commercially reasonable”

¹⁰⁵ *NPRM*, ¶ 66.

¹⁰⁶ *See, supra*, Section II.D.4.

¹⁰⁷ *NPRM*, ¶ 73.

¹⁰⁸ *See, e.g., NPRM*, ¶¶ 73-74.

¹⁰⁹ *See, supra*, Section II.D.2.

¹¹⁰ *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). *See also, Timpinaro v. SEC*, 2 F.3d 453, 460 (D.C. Cir. 1993).

¹¹¹ *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-49 (1991). *See also*, 47 C.F.R. § 8.11.

standard would be preferable – but, even that standard may require Congressional action – as discussed more fully below.¹¹²

2. The Commission should eliminate the three Open Internet bright line rules.

The Commission should also eliminate the three current Open Internet bright line rules created by the *Title II Order* – the no blocking, no throttling and no paid prioritization rules.¹¹³ As with the Internet conduct standard, these rules are also unlawful both because of the unlawfulness of the underlying reclassification decision and because they constitute common carriage regulation that cannot be lawfully imposed on an information service. Therefore, Congressional action would likely be required to impose such obligations. As the *NPRM* notes, the DC Circuit’s *Verizon* decision previously ruled that a no blocking rule impermissibly subjected Internet service providers to common-carriage regulation.¹¹⁴ Similarly, should the Commission seek to establish a no throttling rule or a no paid prioritization rule under its Title I authority, that too would constitute impermissible common carriage regulation. Each would, like

¹¹² See *supra*, Section II.D.4.

¹¹³ 47 C.F.R. §§ 8.5 (“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.”), 8.7 (“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.”), 8.9 (“(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;...(1) In exchange for consideration (monetary or otherwise) from a third party, or...(2) 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.”)

¹¹⁴ *NPRM*, ¶ 82; *Verizon v. FCC*, 740 F.3d at 653-54, 658-59.

a no blocking rule, impose a “service for free” obligation on providers and, therefore, fall for the same reasons relied upon by the DC Circuit in overturning a no blocking rule. No throttling and no paid prioritization rules also suffer the same unlawful vagueness flaws described above in connection with the current Internet conduct standard. They, too, rely on vague terminology such as “impair,” “degrade,” and “directly or indirectly favor,” which fail to give providers adequate notice of where the line lies between permissible and impermissible behavior.¹¹⁵ Additionally, given the voluntary pledges of providers to not engage in harmful blocking and the presence of antitrust constraints as an already-existing backstop against truly harmful provider behavior, there is no policy need for any of the bright line rules at this time.¹¹⁶

3. The Commission should return the transparency rules to the scope that existed prior to the 2015 Order.

As discussed below, the imposition, under the *Title II Order*, of onerous “enhanced” disclosure requirements exceeds any authority the Commission possesses outside of Title II to impose data collection and reporting obligation. They are also not justified as a policy matter. Those requirements included new disclosure obligations to disclose unnecessarily granular information regarding performance characteristics of BIA service (e.g. separate disclosures for each speed tier and technology and based on geography) and commercial terms.¹¹⁷ These new obligations imposed significant and ongoing compliance costs on providers without providing any corresponding benefit to consumers. Arguably, even the more onerous aspects of the transparency rules adopted by the 2010 Open Internet Order went too far, from both a legal and a

¹¹⁵ See *supra*, Section II.C.1.

¹¹⁶ *NPRM*, ¶¶ 82, 84, 85.

¹¹⁷ *Title II Order*, 30 FCC Rcd at 5669-82 ¶¶ 154-85; Public Notice, Guidance on Open Internet Transparency Rule Requirements, GN Docket No. 14-28, 31 FCC Rcd 5330 (2016).

policy perspective. However, the Commission should, at the very least, eliminate the enhanced requirements that became effective in January of 2017.

4. To the extent it maintains any *ex ante* rules, the Commission should reinstate the 2010 versions of the reasonable network management exception and the non-BIA service exclusion

To the extent it maintains any *ex ante* rules, the Commission should reinstate the 2010 versions of the reasonable network management exception and the non-BIA service exclusion. Each of these concepts were “clarified” in the *Title II Order* in a manner that had the effect of making each less clear – thus creating regulatory uncertainty contributing to the negative impacts discussed above. For example, the added restriction imposed by the *Title II Order* that the reasonable network management exception will only be considered if used for a “technical management justification rather than other business justifications[]” created vagueness given the difficulty of predicting when the Commission might deem something to be a technical management justification versus a business justification.¹¹⁸ Similarly, for non-BIA services, the Commission should return to the more simplified articulation of that concept in the *2010 Open Internet Order* and eliminate the “guidance” that suggested the Commission might undermine that exclusion if it determined that those services “are undermining investment, innovation, competition, and end-user benefits” or that “over-the-top services offered over the Internet are not impeded in their ability to compete with other data services?”¹¹⁹ This is another broad, vague articulation of a rule that leave ISPs without adequate guidance as to what conduct would trigger regulatory consequences.

¹¹⁸ *NPRM*, ¶ 93; see also *2010 Open Internet Order*, 25 FCC Rcd at 17951-56 ¶¶ 80-92; *Title II Order*, 30 FCC Rcd at 5699-5704 ¶¶ 214-24.

¹¹⁹ *NPRM*, ¶ 94; see also *2010 Open Internet Order*, 25 FCC Rcd at 17965-66 ¶¶ 112-14; *Title II Order*, 30 FCC Rcd at 5696-99 ¶¶ 207-13.

5. The Commission should apply the same regulatory framework to fixed and mobile broadband.

Mobile broadband should not be treated differently from fixed broadband for purposes of either regulatory classification or the imposition of any rules. There are no legal, technical, economic, and/or policy reasons to distinguish mobile and fixed broadband in this context. The potential concerns identified in the *2010 Open Internet Order* as a purported basis for treating wireless networks differently from wireline networks, upon closer examination, simply do not justify different treatment in this context.¹²⁰ By way of example, both wireless and wireline networks are shared networks that are dynamic in nature.¹²¹ Similarly, while wireless networks may require steps to address radio interference or propagation effects such as signaling loss with increasing distance,¹²² wireline networks face similar dynamic challenges. Large bandwidth-gobbling applications regularly interfere with normal network engineering assumptions in unpredictable ways on both types of platforms. Signaling loss with distance is common to both mobile technologies and wireline technologies such as DSL.

Similarly, capacity issues impact wireless and wireline networks alike. While wireless providers have finite spectrum, wireline providers face capacity limitations that are only solved by costly network build-out. Nor does the mobility of wireless broadband end users distinguish wireline networks for purposes of these proposed obligations. Wireline networks must also deal with bandwidth demand swings due to certain applications (*e.g.*, P2P), certain content (*e.g.*, video), and user dynamics (*e.g.*, sudden usage increases due to a major snowstorm). Finally, there is no basis for distinguishing between mobile and fixed BIA services based on the state of

¹²⁰ *2010 Open Internet Order*, 25 FCC Rcd at 17956-62 ¶¶ 93-106.

¹²¹ *Id.*, *e.g.*, 25 FCC Rcd at 17956-57 ¶¶ 93-95.

¹²² *Id.*, 25 FCC Rcd at 17957 ¶ 95.

competition with respect to either type of service.¹²³ Accordingly, it would be arbitrary and capricious to regulate one platform differently from another. There are simply no differences between mobile wireless broadband platforms and wireline platforms that would justify differences in how any Internet openness principles are applied.

6. The Commission should eliminate the ombudsman, advisory opinions and the broad delegated authority grant created by the Title II Order - as well as the Open Internet complaint procedures.

Having reclassified BIA service as an information service, the Commission should also adopt the suggestions in the *NPRM* that it eliminate the delegated authority established under the prior Open Internet orders and the authority granted to the Enforcement Bureau to issue advisory opinions and enforcement advisories - and eliminate the ombudsperson position.¹²⁴ These procedures have not been utilized and only create another layer of unnecessary regulatory overhang. It should also eliminate the Open Internet complaint procedures, which have virtually never been used.¹²⁵ Instead, it should rely on standard Commission practices to address any concerns that may be raised in this area going forward.¹²⁶ Having reclassified BIA service as an information service, the rights and obligations imposed on Title II complainants would no longer apply.¹²⁷

D. Light Touch Regulation Is Consistent With An Information Service/Title I Classification

¹²³ *NPRM*, ¶ 95.

¹²⁴ *NPRM*, ¶¶ 97, 99; *see also 2010 Open Internet Order*, 25 FCC Rcd at 17986-89 ¶¶ 151-63; *Title II Order*, 30 FCC Rcd at 5612 ¶ 36, 5704-20 ¶¶ 225-72.

¹²⁵ *NPRM*, ¶ 98; *see also 2010 Open Internet Order*, 25 FCC Rcd at 17986-89 ¶¶ 151-60; *Title II Order*, 30 FCC Rcd at 5715-20 ¶¶ 257-72; 47 C.F.R. §§ 8.12, *et seq.*

¹²⁶ *See, e.g.*, 47 C.F.R. § 1.41.

¹²⁷ *See, e.g.*, 47 U.S.C. § 208. *See also Title II Order*, 30 FCC Rcd at 5815 ¶ 453; *2010 Open Internet Order*, 25 FCC Rcd at 17988 ¶ 157, 17989 ¶ 160.

In paragraphs 100 through 104 of the *NPRM*, the Commission seeks comment as to the legal authority that the Commission would have in this area if it adopted its proposal to classify BIA service as an information service.¹²⁸ The *NPRM* specifically seeks comment as to the prospect that Sections 230 or 706 of the Act contain any legal authority and asks whether the Communications Act authority cited by the Commission in the *2010 Open Internet Order* provide any independent legal authority.¹²⁹ Conversely, the *NPRM* also asks whether there are constraints upon its potential legal authority that must be weighed.¹³⁰

As discussed below, Sections 230 and 706 do not provide independent legal authority to the Commission. Moreover, both the Act itself (e.g. via Section 153(51)) and the First and Fifth Amendments impose significant constraints upon the Commission's Title I authority in this area.

On the other hand, the Commission does have potential authority to adopt limited regulations pursuant to its ancillary Title I authority – for example, limited transparency and public safety requirements, and universal service support for broadband. The Commission also has conceivable authority to act in a limited fashion with respect to certain other important areas.

However, given the significant limitations on its authority in this area, the Commission should limit new regulation to its existing Title I authority and seek Congressional action before taking action not clearly within that authority. And, it would have to do so before establishing more substantial *ex ante* regulation to BIA service.

1. The Commission should clarify that Sections 706 and 230 contain no delegation of legal authority to the Commission

¹²⁸ *NPRM*, ¶¶ 100-104.

¹²⁹ *NPRM*, ¶ 103 (citing *Open Internet Order*, 25 FCC Rcd at 17972–80, 17981, paras. 124–35, 137 – which, in turn, suggested that the Commission may find potential authority under certain provisions in Title II, Title III, or Title VI of the Act.)

¹³⁰ *NPRM*, ¶ 104.

Neither Section 706 nor Section 230 contains an independent grant of legal authority to the Commission.

CenturyLink respectfully disagrees with the previous assertions in certain Commission orders and with the conclusions of the DC Circuit in *Verizon*¹³¹ that Section 706 contains an independent grant of authority that can support the imposition of regulations on BIA service. A cursory review of the statutory language in Section 706 confirms this is not the case. Section 706(a) states:

(a) In general. 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 (including, in particular, elementary and secondary schools and classrooms) 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.¹³²

And, Section 706(b) states:

The Commission . . . 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.¹³³

The plain language of both Section 706(a) and Section 706(b) clearly demonstrate that those provisions do not confer independent authority to regulate. Section 706(a) contains no grant of independent regulatory authority of any kind. It directs the FCC to take action “by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to

¹³¹ *Verizon v. FCC*, 740 F.3d at 623, 637.

¹³² 47 U.S.C. § 1302(a).

¹³³ 47 U.S.C. § 1302(b).

infrastructure investment.”¹³⁴ In other words, it directs that Commission to utilize its existing authority found in other statutory grants of authority to pursue certain policies. Indeed, based on this text, the Commission, in 1998 concluded that “section 706(a) does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods,” but rather “directs the Commission to use the authority granted in other provisions.”¹³⁵ While the Commission, in the *2010 Open Internet Order* and the *Title II Order* sought to disavow this reading, its 1998 interpretation continues to be correct.

Similarly, Section 706(b) does not grant the FCC independent authority to impose regulatory obligations on BIA service. That provision authorizes the FCC to act only “by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”¹³⁶ It is impossible to construe this language as giving the Commission authority to involuntarily impose regulatory mandates. Even the authority it does confer applies only in geographic areas where deployment has been deemed inadequate, not nationwide. Instead, it is best read as a “rule of construction” directing the Commission to interpret the rest of the Communications Act in a manner that removes barriers to investment and promotes competition.

Section 230(b) also does not contain a grant of independent legal authority to the Commission and, instead, contains de-regulatory policies that must be attended-to in connection with any effort by the Commission to exert legal authority to regulate BIA service under any other purported grant of authority. Indeed, Section 230(b) and other, similar provisions in the

¹³⁴ 47 U.S.C. § 1302(a).

¹³⁵ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24044 (1998) (“*Advanced Services Order*”).

¹³⁶ 47 U.S.C. § 1302(b).

1996 Act¹³⁷ only further disprove any claim that Congress intended to vest the Commission with authority to regulate the Internet or BIA service. Section 230(b) (“Protection for private blocking and screening of offensive material”) states:

- (b) Policy. It is the policy of the United States -- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
- (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
- (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
- (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material; and
- (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.¹³⁸

The only reasonable reading of this language is that it mandates that the Commission ensure that the Internet remain “unfettered by Federal or State regulation.”

Thus, a reading of Section 706 or any other provision of the Act as granting the Commission direct authority to regulate BIA service cannot be squared with either the text of those provisions or with Section 230(b) – or, at the very least, any such regulation must by definition be *extremely* limited and de-regulatory in focus. In this light, even assuming Section 706 provides a grant of Commission authority to begin with, it provides only a narrow grant and the rules adopted under the *Title II Order* (e.g. the three bright line rules, the Internet conduct standard, the Title II traffic exchange rule, and the enhanced transparency requirements) exceed

¹³⁷ See e.g., The Act’s preamble, Pub L. No. 104-104, Preamble (stating that its purpose was “[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”)

¹³⁸ 47 U.S.C. § 230(b).

that authority. At most, Section 706 permits the Commission to take actions that have the effect of promoting broadband deployment. Section 706(a) only authorizes the FCC to “encourage the deployment” of broadband services “by utilizing ... regulating methods that remove barriers to infrastructure investment.”¹³⁹ Section 706(b) directs the FCC, upon finding that broadband is not “being deployed to all Americans in a reasonable and timely fashion,” to “take immediate action to accelerate deployment of such capability” in areas lacking deployment.¹⁴⁰

Bottom line, any proposed regulation of BIA service, in order to comply with Section 706 and 230, must promote deployment and encourage investment – in short, must be reconciled with the clear expression in both Section 706 and 230(b) of a pro-competition, de-regulatory policy guidance.

2. Section 153(51) of the Act provides a significant constraint on the Commission’s legal authority in this area.

Even if one or more proposed statutory basis for legal authority existed to regulate BIA service as an information service, the Commission lacks adequate authority to adopt many forms of regulation for BIA service, and certainly most of those discussed specifically in the *NPRM* (no blocking, no throttling, no paid prioritization, Internet conduct standard, Title II traffic exchange rule) as they would constitute common carrier regulation prohibited by Section 153(51) of the Act.¹⁴¹ Section 153(51) precludes the Commission from regulating BIA service in any way that would treat broadband providers as common carriers.¹⁴²

¹³⁹ 47 U.S.C. § 1302(a).

¹⁴⁰ 47 U.S.C. § 1302(b).

¹⁴¹ 47 U.S.C. § 153(51).

¹⁴² *Id.*

The DC Circuit, in *Verizon*, has already found that the adoption of a no blocking rule that effectively requires that broadband providers provide a service for free to Edge Providers would constitute impermissible common carrier regulation.¹⁴³

The no blocking and no throttling rules discussed in the *NPRM* similarly impose a service for free and purport to extend the benefit of that requirement to Edge Providers.¹⁴⁴ As such, they constitute impermissible common carrier regulation.

Similarly, the court, in *Verizon*, correctly found that application of an unreasonable discrimination standard would constitute impermissible common carrier regulation.¹⁴⁵ Moreover, the court's discussion of the nondiscrimination standard adopted in the Commission's *2010 Open Internet Order* makes clear that any nondiscrimination standard, even a "commercially reasonable" non-discrimination obligation that effected a ban on pay-for-priority or similar arrangements between broadband providers, or otherwise was so proscriptive as to excessively limit broadband providers to determine who they would deal with and the terms of those dealings, would constitute impermissible common carrier regulation.¹⁴⁶ This clearly prohibits the imposition of either the *Title II Order's* Internet conduct standard, Title-II traffic exchange rule or another version of an unreasonable discrimination obligation on BIA service as an information service. A commercially reasonable non-discrimination requirement stands a better chance of satisfying Section 153(51) but that determination as well as the determination of whether such a requirement could be founded to begin with on the Commission's Title I ancillary jurisdiction

¹⁴³ *Verizon v. FCC*, 740 F.3d 623, 654 (D.C. Cir. 2014).

¹⁴⁴ *NPRM*, ¶¶ 80-84.

¹⁴⁵ *Verizon v. FCC*, 740 F.3d 623, 657 (D.C. Cir. 2014).

¹⁴⁶ *Id.*, at 658.

depend upon the specifics of the context in which it is being applied and the specifics of the proposed regulatory action to impose it – none of which are known at this point in time.¹⁴⁷

3. The Commission’s legal authority is also constrained by the First and Fifth Amendment, as the *NPRM* suggests

As the *NPRM* suggests, the Commission’s legal authority is also constrained by the First and Fifth Amendments in this area.¹⁴⁸

a. Any disclosure requirements must satisfy applicable First Amendment requirements.

To begin with, any disclosure/transparency rule adopted in connection with BIA service must satisfy applicable First Amendment requirements. And, notably, highly detailed and overly rigid new disclosure mandates (for example, a standardized BIA disclosure requirements), in addition to being less desirable as a policy matter, would also violate the First Amendment. This is clearly the case for the enhanced disclosure requirements imposed by the *Title II Order*.

The Supreme Court has made clear that disclosure requirements trigger First Amendment scrutiny every bit as much as prohibitions on speech. The Court has opined that “[t]here is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what *not* to say.”¹⁴⁹

On the basis of the current record, it does not appear that more detailed end-user disclosure mandates such as those imposed by the enhanced disclosure requirements adopted in

¹⁴⁷ See *supra*, Section II.D.4.

¹⁴⁸ *NPRM*, ¶ 104.

¹⁴⁹ *Riley v. National Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988) (emphasis in original).

the *Title II Order* would survive First Amendment scrutiny – or even, potentially, some of the more onerous aspects of the disclosure requirements adopted in the *2010 Open Internet Order*.¹⁵⁰ As noted above,¹⁵¹ there is no factual predicate for a sweeping new information disclosure mandate because there is no evidence of a systematic or enduring problem.

The Supreme Court has never upheld the constitutionality of a governmentally-imposed disclosure requirement in the absence of evidence that the regulation was reasonably necessary to address a potential problem. In *Riley v. National Fed’n of the Blind of N.C., Inc.*,¹⁵² for example, the Supreme Court invalidated a mandatory disclosure provision that required professional fundraisers to disclose to potential donors the percentage of charitable contributions collected during the preceding year that were actually given to the charities for whom the fundraisers worked, even though certain donors might have an abstract interest in learning such information.

Similarly, in *Ibanez v. Florida*, the Court invalidated the punishment of a Certified Financial Planner (CFP) under a state rule requiring CFPs to disclose in their advertisements that CFP status was conferred by an unofficial private organization. The Court explained that the State’s “concern about the possibility of deception in hypothetical cases is not sufficient” and demanded actual evidence of harm.¹⁵³

¹⁵⁰ See, e.g., *2010 Open Internet Order*, 25 FCC Rcd at 17936-41 ¶¶ 53-61; *Title II Order*, 30 FCC Rcd at 5669-82 ¶¶ 154-85.

¹⁵¹ See, *infra*, Section I.B.

¹⁵² See *Riley v. National Fed’n of the Blind of N.C.*, 487 U.S. at 797-98.

¹⁵³ *Ibanez v. Fla. Dept. of Bus. and Professional Regulation*, 512 U.S. 136, 145 n.10 (“Neither the witnesses, nor the Board in its submissions to this Court, offered evidence that any member of the public has been misled” in the absence of the disclosure.). “Given the state of this record – the failure of the Board to point to any harm that is potentially real, not purely hypothetical -- we are satisfied that the Board’s action is unjustified.” *Id.* at 146.

In *Int'l Dairy Foods Ass'n v. Amestoy*,¹⁵⁴ the Second Circuit invalidated a Vermont statute requiring dairy manufacturers who used a synthetic growth hormone to disclose that fact in the label of their milk. The court of appeals held that the State's asserted justifications for the statute -- "strong consumer interest and the public's 'right to know'" -- were "insufficient to justify compromising protected constitutional rights."¹⁵⁵

Mandated information-disclosure requirements are, therefore, unconstitutional in the absence of a documented governmental justification. "The First Amendment does not permit a remedy broader than that which is necessary to prevent deception, or correct the effects of past deception."¹⁵⁶

b. The First Amendment also constrains the Commission's ability to impose substantive rules such as those imposed by the *Title II Order*.

Regardless of the supporting legal theory, the substantive rules adopted in the *Title II Order* (i.e. three bright line rules, the Internet conduct standard and the Title II traffic exchange rules) would also displace access service providers' editorial control over their networks and would therefore violate the First Amendment rights of free speech and free press.¹⁵⁷

The First Amendment protects the process of editorial control and selection of information, as well as the transmission of content of one's own creation. In *Hurley v. Irish-*

¹⁵⁴ *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996).

¹⁵⁵ *Id.* at 73.

¹⁵⁶ *National Committee on Egg Nutrition v. FTC*, 570 F.2d 157, 164 (7th Cir. 1977).

¹⁵⁷ *NPRM*, ¶ 104. See also *Comcast Cable Communs., LLC v. FCC*, 717 F.3d 982, 994 (D.C. Cir. 2013) (Kavanaugh, Edwards, J.J., concurring), *reh'g denied & reh'g en banc denied* (D.C. Cir. Sep. 4, 2013), *cert. denied sub nom., Tennis Channel, Inc. v. Comcast Cable Communs., LLC*, 134 S. Ct. 1287 (2014); Kavanaugh, J., dissenting statement from denial of rehearing *en banc*, *United States Telecom Association v. FCC*, No. 15-1063 (D.C. Cir. May 1, 2017), 855, F.3d 381, 418.

American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 570 (1995), for example, the Supreme Court made clear that the process of choosing among messages was itself an act of expression. *Id.* at 570.

Similarly, in *Turner I*, 512 U.S. 622 and *Turner II*, 520 U.S. 180, the Supreme Court held that the First Amendment protects the right of cable operators to decide what channels to carry, whether or not the programming involved is produced by the cable operator or an affiliate. The Court held that mandatory carriage rules interfered with a provider's editorial control and therefore abridged "speech" within the meaning of the First Amendment.¹⁵⁸ A bare majority of the Supreme Court upheld this must-carry regime even though all agreed that it substantially infringed the First Amendment rights of both cable operators and cable programmers.¹⁵⁹

These vital First Amendment principles apply to the Internet as well. The Supreme Court has made clear that Internet speech enjoys full First Amendment protection.¹⁶⁰

¹⁵⁸ *Turner I*, 512 U.S. at 636-37.

¹⁵⁹ In the wake of *Turner Broadcasting*, lower courts have continued to apply the same principle. In *Time Warner Ent't Co. v. FCC*, 240 F.3d 1126, 1133-34 (D.C. Cir. 2001), for example, the court of appeals held that the Commission's 30% subscriber cap on cable operators did not satisfy intermediate scrutiny under the First Amendment because it limited the ability of cable companies to speak with their customers. In *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009), the D.C. Circuit vacated the subscriber cap limit without the opportunity for further proceedings because of the substantial First Amendment principles involved. *See also Cablevisions Sys. Corp. v. FCC*, 597 F.3d 1306, 1322 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) ("As to the cable operators, the exclusivity ban dampens their incentives to invest in new or existing programming networks. They might not take the risk and spend the money if they cannot fully reap the fruits of their investment. Similarly, competitors of cable operators may feel less need to invest in new programming networks because they can piggyback on the cable-affiliated networks. As a result, there may be fewer new video programming networks than there otherwise would be. As this Court has explained, the resulting reduction in speech (compared to what otherwise would occur) implicates First Amendment interests.")

¹⁶⁰ *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868-69 (1997) ("Neither before nor after the enactment of the CDA have the vast democratic fora of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry"); *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) ("While in the past there may have

Whether based on a Title II reclassification rationale or any other legal authority theory, the substantive rules adopted in the *Title II Order* discussed above and in the *NPRM* would strip the ability of BIA service providers to exercise editorial control over their networks by transforming them into common carriers. Although CenturyLink and other providers have heretofore chosen to disseminate speech on an open and equal basis, their voluntary choice to do so cannot be replaced by a government mandate that effectively eliminates their right to exercise editorial control. Thus, these Title-II based rules, and any similar rules to these extent imposed on a different basis, are like a rule requiring a cable operator to carry all broadcast stations, but see *Turner I* and *II*, or a parade organizer to admit all applicants on a lottery basis, but see *Hurley*, or a newspaper to carry replies to its editorials, but see, *Miami Herald Publishing Co. Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 258 (1974); *Ampersand Pub., LLC v. N.L.R.B.*, 702 F.3d 51, 56 (D.C. Cir. 2012) (affirming right of editorial control).

Such regulations therefore would trigger First Amendment scrutiny because they would eliminate broadband providers' editorial control over their networks. A regulation need not explicitly silence speech in order to violate the First Amendment.¹⁶¹ At a minimum, the intermediate scrutiny standard applied in *Turner Broadcasting* requires the Government to demonstrate that a content-neutral regulation "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests."¹⁶² As is demonstrated throughout these comments, it is

been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular.") (citation omitted).

¹⁶¹ See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) ("Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content.")

¹⁶² *Turner II* at 189.

clear that the requirements of intermediate scrutiny could not be satisfied here. These heavy-handed regulatory requirements would not advance important governmental interests -- in fact, it would discourage broadband deployment, reduce innovation, and harm consumers. Moreover, they are not necessary in light of other regulatory alternatives available to the Commission. Just as the Commission has recognized the importance of technological change in the original cable must-carry rules, with the approval of the D.C. Circuit, *see Agape Church, Inc. v. F.C.C.*, 738 F.3d 397 (D.C. Cir. 2013), it should do the same here.

Accordingly, the rules would violate the First Amendment. At a minimum, the Commission should construe its authority to avoid raising such questions.¹⁶³

c. The Title II bright line rules and other substantive rules like those imposed by the *Title II Order* would also violate the Fifth Amendment.

Substantive rules like those adopted in the *Title II Order* would also appropriate private property and therefore also constitute a taking within the meaning of the Fifth Amendment. Such rules would effectively grant third-party content providers the use of a portion of an access provider's network and thereby represent an occupation of that property. The government-compelled occupation and use of access provider property would strip the provider of its right to exclude others -- perhaps the most fundamental element of the bundle of rights known as "property." *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 n.9, 436 (1982) (holding that state law compelling apartment building owners to permit cable operators to place a small cable box and about 30 feet of one-half inch cable on their apartment buildings was

¹⁶³ *See Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *see also Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of congress").

a “per se” compensable taking and that “without regard to whether the State, or instead a party authorized by the State, is the occupant”).

In the related context of the cable must-carry rules, the courts in *Turner Broadcasting*¹⁶⁴ noted the potential Fifth Amendment question even though the issue of a taking was not before them.¹⁶⁵ Judge Williams raised the Fifth Amendment issue in the three-judge district court and opined that “[t]he creation of an entitlement in some parties to use the facilities of another, *gratis*, would seem on its face to implicate *Loretto*.”¹⁶⁶ Similarly, in *Turner I*, four Justices noted “possible Takings Clause issues” from a hypothetical government mandate to transform cable systems into common carriers.¹⁶⁷ And in *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994), the D.C. Circuit invalidated the FCC’s physical co-location rules, which granted competitive telephone providers “the right to exclusive use of a portion of the [local exchange carrier’s] central offices.” The FCC’s rules “directly implicate[d] the Just Compensation Clause of the Fifth Amendment, under which a ‘permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.’”¹⁶⁸

By the same token, the no blocking/no throttling/ no paid prioritization rules, the Internet conduct standard and other versions of Title II non-discrimination obligations such as the traffic

¹⁶⁴ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*), and *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*).

¹⁶⁵ See *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 56 (D.D.C. 1993) (Sporkin, J., concurring) (“No challenge has been made under the taking provision of the Fifth Amendment or any other legal provision.”).

¹⁶⁶ *Id.* at 67 n.10 (Williams, J., dissenting) (internal citation omitted).

¹⁶⁷ 512 U.S. at 684 (O’Connor, J., concurring in part and dissenting in part, joined by Scalia, Thomas, and Ginsburg, JJ.).

¹⁶⁸ *Id.* at 1445 (quoting *Loretto*, 458 U.S. at 426). The court had no occasion to consider the FCC’s virtual co-location rules because it deemed them a mere exception to the physical co-location requirement; it therefore vacated the virtual co-location rules as a matter of severability and did not consider their constitutionality.

exchange rule adopted in the *Title II Order* all mandate that a broadband access service provider accept the intrusion of all network traffic onto the provider's property -- its transmission equipment, computers, and cables -- and are not a mere *regulation* of the provider's property. A minimum level of service requirement, a vague Internet conduct standard, and an overly proscriptive nondiscrimination requirement all lead to a physical invasion of a cable operator's transmission facilities and a "practical ouster of [its] possession."¹⁶⁹ They compel "an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it."¹⁷⁰ Indeed, given the level of competition demonstrated above, these prohibitions may serve to preclude a reasonable opportunity to recover their costs. Hence, the restrictions themselves constitute a taking, particularly in light of empirical evidence that supra-normal returns are not being earned.

The taking cannot be avoided by describing the invasion as "electronic" rather than "physical."¹⁷¹ Just as the law recognizes many forms of property (such as real, personal, intellectual), so the forms of physical encroachment are equally varied.¹⁷² In the case of a communications network, an electronic invasion or occupation is every bit as real as a physical one.

¹⁶⁹ *Loretto*, 458 U.S. at 428 (citation and quotation marks omitted).

¹⁷⁰ *Id.* at 431 (citation and quotation marks omitted).

¹⁷¹ See *Arkansas Game and Fish Com'n v. U.S.*, 133 S. Ct. 511, 518 (2012) (holding that government-induced flooding could constitute a "taking" because "no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking," "[i]n view of the nearly infinite variety of ways in which government actions or regulations can affect property interests," and that "most takings claims turn on situation-specific factual inquiries.")

¹⁷² *Loretto*, 458 U.S. at 430; see also *id.* at 422 (intruding cable company wires were suspended above rooftop of plaintiff's building); *id.* at 429-30 ("construct[ing] and operat[ing] telegraph lines over a railroad's right of way" would "be a compensable taking").

Thus, these rules qualify as a *per se* taking.¹⁷³ Further, these rules would violate the Fifth Amendment even if they were analyzed not under *Loretto* but as a regulatory taking. Although the Supreme Court has “been unable to develop any ‘set formula’” for such regulatory takings, *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), it has “identified several factors -- such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action -- that have particular significance.”¹⁷⁴

Those factors militate in favor of finding a compensable taking here. Starting with the character of the government action, here -- as in *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) -- the challenged action is the government’s imposition on the property owner of a servitude or easement allowing others to use the property and preventing the owner from exercising the right to exclude. The economic impact of the government-licensed invasion imposed by these rules would be far greater than that of the navigational servitude at issue in *Kaiser Aetna*, which essentially deprived the owner only of an annual \$72 fee.¹⁷⁵ The instant rules implicate property rights worth considerably more.

Finally, there are the access service provider’s reasonable, investment-backed expectations. Broadband access service providers have invested billions of dollars to upgrade their systems to handle increased capacity and to offer a host of innovative services, all to the end of offering their customers a better product. For the government to take advantage of the

¹⁷³ See *Horne v. Dep’t of Agriculture*, 135 S. Ct. 2419, 2429 (2015) (holding that a regulatory reserve requirement imposed by the government as part of a raisin marketing program was an appropriation of private property that triggered the right to just compensation regardless of its economic impact on raisin growers).

¹⁷⁴ *Kaiser Aetna*, 444 U.S. at 175.

¹⁷⁵ 444 U.S. at 180.

access service providers' own market-driven improvements to their property to impose these onerous rules in order to subsidize and encourage "a budding entrepreneur in a dorm room"¹⁷⁶ would upset reasonable, investment-backed expectations and violate basic norms of fairness.¹⁷⁷

4. **The Commission does have authority to adopt limited regulations pursuant to its Title I ancillary jurisdiction authority – for example, limited transparency and public safety requirements and universal service support for broadband – but the predicates to such authority must be established on a case by case basis.**

Despite the significant constraints on the Commission's legal authority in this area, the Commission does have authority to adopt limited regulations pursuant to its ancillary Title I authority.

The Commission's ancillary authority "may be employed, in the Commission's discretion, when [(1)] Title I of the Act gives the Commission subject matter jurisdiction over the service to be regulated and [(2)] the assertion of jurisdiction is 'reasonably ancillary to the effective performance of [its] various responsibilities.'"¹⁷⁸

¹⁷⁶ *NPRM*, 24 FCC Rcd at 13065-66 ¶ 4.

¹⁷⁷ Investments have been made on the basis of a belief that the Internet was free from the very sort of regulation that the government proposes here. Gregory J. Sidak and Daniel F. Spulber, *Deregulatory Takings and the Regulatory Contract*. Cambridge University Press: Cambridge MA, 1997, pp. 12, 224-226 and 275-276. ("The utility placed the assets in service in expectation of the earnings that would be received. The expected returns of the firm constitute *investment-backed expectations*." p. 276.)

¹⁷⁸ *In the Matter of Universal Service Contribution Methodology; Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size; Number Resource Optimization; Telephone Number Portability; Truth-in-Billing and Billing Format; IP-Enabled Services*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7541-42 ¶ 46 (2006) (*VoIP Contribution Order*), citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968).

Under this standard, the Commission likely has authority to impose limited transparency requirements. This is supported by Sections 154(k) and 257(a) and (c) of the Act. Specifically, Section 154(k) provides for an annual report to Congress that “shall contain . . . such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of interstate . . . wire and radio communication” and provide “recommendations to Congress as to additional legislation which the Commission deems necessary or desirable.” And, Section 257 of the Act directs the Commission to report to Congress every three years on “market entry barriers” that the Commission recommends be eliminated, including “barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services.” In other words, as for the context of establishing limited transparency requirements providing subsidies for BIA service, both of the ancillary jurisdiction predicates are likely met. First, the Commission has subject matter jurisdiction over broadband services. Broadband services are ‘wire communications’ or ‘radio communications,’ as defined in sections 3(52) and 3(33) of the Act,¹⁷⁹ and section 2(a) of the Communications Act gives the Commission subject matter jurisdiction over ‘all interstate and foreign communications by wire or radio.’”¹⁸⁰ Second, such requirements could be “reasonably ancillary” to the effective performance of the Commission’s responsibilities under Sections 154(k) and 257(a) and (c).

Public safety is another area where some Commission action under Title I ancillary authority is conceivable. Only general impressions concerning the Commission’s potential ancillary jurisdiction as to public safety can be given based on the current record. But, the

¹⁷⁹ 47 U.S.C. §§ 153(33), (52).

¹⁸⁰ *Broadband Industry Practices*, WC Docket No. 07-52, Notice of Inquiry, 22 FCC Rcd 7894, 7896 ¶ 6 (citing 47 U.S.C. § 152(a)) (2007) (*Broadband NOI*).

Commission has historically played a significant role in the public safety area and has had the responsibility to encourage and support efforts by States to deploy comprehensive end-to-end emergency communications infrastructures and programs.¹⁸¹ Congress gave the Commission the responsibility, on its own or through an entity to which it delegated the responsibility, to “designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance.”¹⁸² The Commission also has responsibility for the regulatory oversight of the National Security/Emergency Preparedness (NS/EP) Telecommunications Service Priority (TSP) System,¹⁸³ which includes authority to enforce the TSP System’s rules and regulations.¹⁸⁴ Whether providing support to States for the deployment of emergency communications infrastructures, ensuring the use of 9-1-1 as the universal emergency telephone number within the U.S., or providing regulatory oversight for the TSP System, it is apparent that the Commission has a well entrenched, statutorily-based role in the public safety area. It would be imprudent to conclude, without qualification or a specific proposal to consider, that the Commission could assert ancillary jurisdiction over BIA service to ensure the continuation of vital public safety communications infrastructures, systems and programs. But, accomplishment of this policy objective is also not excluded without Title II authority - particularly if the Commission acts in a measured way and its actions are designed to ensure the continuation of public safety programs and services that the nation has come to rely on.

¹⁸¹ See 47 U.S.C. § 615.

¹⁸² 47 U.S.C. § 251(e)(3).

¹⁸³ Under the TSP program, designated NS/EP entities receive priority treatment for vital telecommunications services. There is an analogous Wireless Priority Service program.

¹⁸⁴ See 47 C.F.R. Part 64, Appendix A, §§ 6(a)(1) and (2).

The Commission also has adequate authority to implement the central goal of accomplishing universal service for broadband. The Commission can use its ancillary authority to accomplish universal service support for BIA service within the existing legal framework. The Commission's ability to exercise its ancillary authority to accomplish universal service for broadband is linked to its express statutory duties to promote universal service pursuant to Section 254 of the Act. This includes its express statutory duty to base its policies for the preservation and advancement of universal service in part on the principle that access to advance telecommunications and information services should be provided in all regions of the Nation.¹⁸⁵ The use of the Commission's ancillary authority is a flexible approach that provides the Commission with the legal authority to reform universal service for BIA service support, without reclassifying broadband services. For the context of providing subsidies for BIA service, both of the ancillary jurisdiction predicates are also met. The subject matter jurisdiction over broadband services is noted above. And, universal service support for BIA service is "reasonably ancillary" to the effective performance of the Commission's various universal service responsibilities. Section 254 requires the Commission to establish "specific, predictable, and sufficient mechanisms . . . to preserve and advance universal service."¹⁸⁶ Under the enumerated principles of section 254(b), the Commission is twice directed to base its universal service policies on providing access to "advanced telecommunications and information services."¹⁸⁷ Thus, even after *Comcast v. FCC*,¹⁸⁸ the "requisite nexus" between the universal service provisions of

¹⁸⁵ See 47 U.S.C. § 254(b)(2).

¹⁸⁶ 47 U.S.C. § 254(d).

¹⁸⁷ 47 U.S.C. §§ 254(b)(2) & (b)(3).

Section 254 and the Commission's ancillary authority exists.¹⁸⁹ Moreover, the Commission's universal service authority in connection with broadband has been established further by the *Transformation Order*¹⁹⁰ and upheld by the Tenth Circuit.¹⁹¹

To the extent the Commission sought to regulate using its ancillary jurisdiction authority in other areas, it must keep in mind the constraints upon and conditions to exercising such authority. Any such exercises must comply with the various constraints discussed above (i.e. under Section 153(51) and the First and Fifth Amendments). By definition, such exercises also generally do not extend to authority to create *ex ante* rules, particularly on the basis of the current record reflecting a dearth of evidence of a problem needing a solution. This is because, ultimately, the question of whether the Commission's ancillary jurisdiction to regulate in any

¹⁸⁸ The D.C. Circuit's opinion in *Rural Telephone Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988), approved the Commission's creation of the universal service program (out of whole cloth) pursuant to its ancillary authority. In *Comcast v. FCC*, the Commission argued that *Rural Telephone Coalition v. FCC* was a case in which the court upheld the Commission's use of ancillary authority on the basis of policy statements alone. *Comcast Corp. v. FCC*, 600 F.3d at 655-56. But, the court distinguished the case on the grounds that the Commission's creation of the Universal Service Fund was in fact ancillary to the Commission's Title II responsibility to set reasonable interstate telephone rates. *Id.* at 656.

¹⁸⁹ See *VoIP Contribution Order*, 21 FCC Rcd at 7542 ¶ 47. The fact that Section 254 establishes a universal service program does not preclude the Commission from using its ancillary authority to provide universal service support for broadband services. As the Commission itself recognized in the *VoIP Contribution Order*, "[w]e do not believe that the grant of permissive authority in section 254(d) precludes us from exercising our ancillary jurisdiction in the universal service context . . . Nothing in the legislative history, text, or structure of the 1996 Act suggests that Congress intended to strip the Commission of its ancillary authority over universal service obligations by adopting section 254." *Id.* at 7543, n. 171. In a similar vein, nothing in Section 254 precludes the Commission from implementing universal service programs for broadband Internet service.

¹⁹⁰ *Connect America Fund, et al.*, WC Docket No. 10-90, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (rel. Nov. 18, 2011) (*Transformation Order*) (subsequent regulatory history omitted), *aff'd sub nom.*, *In re: FCC 11-161*, Nos. 11-9900, *et al.*, 753 F.3d 1015 (10th Cir. 2014), *petitions for rehearing en banc denied*, Orders, Aug. 27, 2014, *cert. denied*, 135 S. Ct. 2072, May 4, 2015 (Nos. 14-610, *et al.*).

¹⁹¹ See *id.*

way is demonstrated will also depend upon that record and the specifics of any proposed regulation.¹⁹² For this reason, CenturyLink cannot comment more definitively at this time on the prospect of founding ancillary jurisdiction regulatory activity on the Title II,¹⁹³ III,¹⁹⁴ or VI¹⁹⁵ sections – each of which were discussed in *2010 Open Internet Order* as potential grounds for regulation in this area. And, for this reason, CenturyLink cannot comment more definitively at

¹⁹² See e.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968)(ruling on appropriateness of ancillary jurisdiction exercise limited to specific circumstances presented; court could not express views “as to the Commission’s authority, if any, to regulate CATV under any other circumstances or for any other purposes.)

¹⁹³ For example, the *2010 Open Internet Order* suggested that Sections 201(b) or Section 251(a) might provide authority because, while they apply only to telecommunication services and telecommunications carriers that provide such services, VoIP relies upon BIA service in some cases. *2010 Open Internet Order*, 25 FCC Rcd at 17972-74 ¶¶ 125-26. And, that order further suggested, VoIP might be classified some day as telecommunications service or, even to the extent VoIP services are information services, activities (e.g. blocking or degrading of a call) taken vis-à-vis VoIP could impact traditional telephone services which are telecommunication services. *Id.*

¹⁹⁴ *2010 Open Internet Order*, 25 FCC Rcd at 17974-78 (with references, for example, from nn. 398, 403 to 47 U.S. C. §§ 303(f) & (h) [“authorizing the Commission to allocate broadcasting zones or areas and to promulgate regulations “as it may deem necessary” to prevent interference among stations” (citation omitted)], 303(g) [“establishing Commission’s duty to ‘generally encourage the larger and more effective use of radio in the public interest’”], 307(b) [“(Commission shall ‘make such distribution of licenses, . . . among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same’) (citation omitted)].

¹⁹⁵ *2010 Open Internet Order*, 25 FCC Rcd at 17974-78 (with references, for example, from ¶¶ 131 [“The open Internet rules will prevent practices by cable operators and telephone companies, in their role as broadband providers, that have the purpose or effect of significantly hindering (or altogether preventing) delivery of video programming protected under Section 628(b).” (footnote omitted) (47 U.S.C. § 548(b))] and [“The Commission therefore is authorized to adopt open Internet rules under Section 628(b), (c)(1), and (j).” (footnote omitted) (47 U.S.C. §§ 548(b), (c)(1), (j)], 132 [“Similarly, open Internet rules enable us to carry out our responsibilities under Section 616(a) of the Act, which confers additional express statutory authority to combat discriminatory network management practices by broadband providers. Section 616(a) directs the Commission to adopt regulations governing program carriage agreements ‘and related practices’ between cable operators or other MVPDs and video programming vendors (footnotes omitted) (47 U.S.C. § 536(a)].

this time on the prospect of utilizing ancillary jurisdiction to regulate BIA in such areas a privacy and disabilities access.

Except to say that clearly any Commission Title I ancillary jurisdiction authority cannot be used to establish the substantive rules or the expanded transparency requirements created by the *Title II Order* – or other rules similar to them in terms of scope, onerousness and rigidity. To begin with, it is unlikely that such requirements could satisfy the predicates to ancillary jurisdiction authority. The Commission and the courts have made clear in the past that there must be a close fit between a proposed regulatory action and the purported Commission responsibility being cited, and the purported responsibility must be one created affirmatively by the Act.¹⁹⁶ Those predicates likely could not be met for those types of regulations. For example, the connection between traditional telephone service and BIA service, by virtue of the fact that some of the many technologies that support VoIP utilize BIA service and some versions of VoIP are interconnected with traditional telephone services, is far too attenuated to justify an imposition of a broad regulatory regime on BIA service based on these referenced Title II provisions. Similarly, the few cited provisions in Titles III and VI, intended to protect and promote competition in the video services space, would also not be a sufficient basis to engage in wholesale regulation of BIA service. Even if they could, such regulation would be, as discussed above, unlawful under the Section 153(51) and First and Fifth Amendment constraints discussed above. And, for any other type of regulation the Commission might want to consider in the future in these or other areas, the same hurdles would have to be cleared. For, example potential

¹⁹⁶ See, e.g., *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979)(Midwest Video II)(while recognizing that, in the prior decision of Midwest Video I, *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972), it had sustained the Commission's authority to regulate cable television with an origination rule, held that access rules at issue in Midwest Video II exceeded the Commission's ancillary jurisdiction).

forms of a “commercially reasonable” non-discrimination obligation. The ability to adopt even those types of requirements would depend upon whether the predicates of Title I ancillary jurisdiction can be met and the above constraints on such authority can be avoided – given the specifics of the context in which it is being applied and the specifics of the proposed regulatory action to impose it – none of which are known at this point in time. And, before acting in any areas, the Commission should always weigh the fact that service providers, industry groups, and manufacturers are all motivated to create products and services that satisfy the types of obligations that might be considered. So, it may well be that a record of any particular regulation might demonstrate that the marketplace is already well equipped to accomplish policy goals than affirmative regulatory action.¹⁹⁷

But, it is noteworthy that the Commission previously extended Section 255-type obligations to VoIP providers¹⁹⁸ as well as Telephone Relay Service (TRS) obligations.¹⁹⁹ The Commission has also already acted at least once to address a harmful ISP practice -- albeit under its Title II authority for the services at issue there -- in the *Madison River* case.²⁰⁰ Again, to be

¹⁹⁷ *Broadband Framework NOI*, 25 FCC Rcd at 7885 n. 123, referencing the Commission’s *Broadband Action Agenda* (April 8, 2010).

¹⁹⁸ *See Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons With Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals With Hearing and Speech Disabilities; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, Report and Order, 22 FCC Rcd 11275, 11286-89 ¶¶ 21-24 (2007) (*VoIP Accessibility Order*).

¹⁹⁹ *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140, 5177-78 ¶ 88 (2000) (finding that “section 225 does not limit relay services to telecommunications services, but . . . reaches enhanced or information services.”)

²⁰⁰ *In the Matter of Madison River Communications, LLC and affiliated companies*, Order, 20 FCC Rcd 4295 (2005).

clear, it is not possible to state whether or not the Commission would have sufficient ancillary authority to support it in these or other areas in the absence of a particular proposal. But it is clear that the absence of a particular authorizing statute might not be an impediment to the Commission's achieving its policy objectives in important areas.

5. **Given the significant limitations on its authority in this area, the Commission should limit new regulation to its existing Title I authority and seek Congressional action before taking action not clearly within that authority.**

In light of the policy and legal concerns detailed above, the Commission should strive to limit any regulation of BIA service to the safe confines of its existing Title I authority, while seeking Congressional action before adopting any regulation not clearly within that authority. This context is one that is particularly well suited for restraint and for pursuit of other approaches before regulatory mandates. Moreover, there have been numerous industry self-regulation efforts initiated. And, in addition to the concerns discussed above, the public record is replete with evidence of the damage that can be caused when the Commission pushes the edge of, or exceeds, its legal authority. Finally, given the significant limitations on its authority in this area, the Commission should limit new regulation to its existing Title I authority and seek Congressional action before taking action not clearly within that authority. And, it would have to do so before establishing more substantial *ex ante* regulation to BIA service.

6. **The Commission should not adopt its tentative conclusion that it has no legal authority with respect to Internet traffic exchange arrangements.**

In paragraph 42, the *NPRM* correctly observes that the *Title II Order* also deviated from Commission precedent to extend its authority to Internet traffic exchange or "interconnection."²⁰¹ The *NPRM* is also correct in observing that the record does not demonstrate a "non-Title II basis

²⁰¹ *NPRM*, ¶ 42.

for the Commission to exercise *ongoing* regulatory oversight over Internet traffic exchange.”²⁰²

However, the NPRM also proposes that the Commission “relinquish any authority over Internet traffic exchange.”²⁰³ The Commission should *not* relinquish any authority it has nor should it conclude that it has no legal authority with respect to Internet traffic exchange arrangements whatsoever. The Commission has subject matter jurisdiction over Internet traffic exchange arrangements as they are ‘wire communications’ or ‘radio communications,’ as defined in sections 3(52) and 3(33) of the Act.²⁰⁴ Accordingly, the Commission’s Title I authority extends to Internet traffic exchange arrangements and those arrangements may well impact the Commission’s rules and policies under other titles. While its legal authority is limited, and while there is no need for ongoing, *ex ante* regulation, a relinquishment of regulatory oversight over Internet traffic exchange altogether would likely be deemed unlawful.

III. LIGHT TOUCH REGULATION IS ALSO THE ONLY APPROACH THAT SATISFIES THE COST/BENEFIT ANALYSIS THAT IS CALLED FOR BY EXECUTIVE ORDER 12866.

The *NPRM* proposes to conduct a cost benefit analysis in this proceeding pursuant to the guidelines in Section E (“Identifying and Measuring Benefits and Costs”) of the Office of Management and Budget’s Circular A-4.²⁰⁵ In doing so, it proposes:

the benefits of maintaining the Commission’s Title II classification are those benefits that exist over and above the “baseline” scenario of FTC jurisdiction (and, at a minimum, FCC Title I protections). Likewise, the costs of maintaining

²⁰² *Id.* (emphasis added)

²⁰³ *Id.*

²⁰⁴ 47 U.S.C. §§ 153(33), (52).

²⁰⁵ *NPRM*, ¶ 42 (citing *Circular A-4*, Section E https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/#e.)

Title II should be estimated as those costs of *ex ante* FCC regulation relative to FTC *ex post* regulation.²⁰⁶

The above discussion makes clear that, from this perspective, the costs of the Title II regime are high and the benefits are non-existent. Accordingly, while it is not completely clear it needs to address the issue, the Commission should find that the imposition of Title II regulations in the Title II Order did not satisfy Circular A-4 and that the elimination of those regulations easily does.

IV. CONCLUSION

For the reason stated above, the Commission should take the action described herein.

Respectfully submitted,

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²⁰⁶ *NPRM*, ¶ 108.